



**Upper Tribunal  
(Immigration and Asylum Chamber)**

R (on the application of Saboun) v Secretary of State for the Home Department IJR [2015]  
UKUT 0269 (IAC)

**Before**

**UPPER TRIBUNAL JUDGE COKER**

**Between**

**THE QUEEN ON THE APPLICATION OF**

**AMINA MAHAMAT SABOUN**

Applicant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Ms V Laughton, Counsel, for the applicant (instructed by Wilson Solicitors LLP)  
Ms C Parry, Counsel, for the respondent (instructed by Government Legal Department)

**JUDGMENT**

**Background**

1. The applicant is a national of Chad. She was granted entry clearance as a spouse on 15<sup>th</sup> August 2011 and arrived in the UK on 11<sup>th</sup> July 2012 and was refused leave to enter. She sought asylum on 17<sup>th</sup> July 2012 based upon an extra marital affair in Chad – she claimed to have had a relationship with MT in Chad prior to her marriage to AB and that after her marriage she recommenced that relationship. She claims that she remained with her husband's family after her marriage but was subjected to bullying and physical violence. She claims she was informed that her husband's family discovered her extra marital affair and so she fled to the UK and MT was subsequently imprisoned by both her family and her husband's family.
2. Her asylum claim was considered in the Fast Track procedure and was refused. Her representatives at that time informed her that they could no longer represent her. At her asylum appeal hearing she requested an

adjournment in order to obtain legal representation and to obtain a document from her sister who, although present in the UK, did not attend the hearing. The application for an adjournment was refused and her appeal was heard by a First-tier Tribunal judge who dismissed the appeal on 8<sup>th</sup> March 2013. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 15<sup>th</sup> March 2015. The grounds in support of that application did not raise issue of her knowledge of the reasons for refusal but did include an assertion that the First-tier Tribunal judge had disregarded the applicant's emotional state in the understanding and answering of questions, disregarded also issues of cultural differences and responsibilities and it was asserted also that proof that the applicant had relatives present in the UK was now available. That unsuccessful application for permission to appeal to the Upper Tribunal was not renewed to the Upper Tribunal.

3. Removal directions were made on 9<sup>th</sup> April 2013 directing removal on 12<sup>th</sup> April 2013. The applicant made further representations on 11<sup>th</sup> April 2013 (a copy of which were not in the documents before me and had not been seen by her current representatives), with the result that the removal directions were postponed. Those further representations were rejected by the respondent on 17<sup>th</sup> April 2013. The applicant lodged an application for permission to judicially review that decision without legal representation.
4. On 19<sup>th</sup> April 2013 further removal directions were issued for removal on 24<sup>th</sup> April 2013; the applicant's current representatives were instructed on 19<sup>th</sup> April 2013 and a fresh claim for asylum was submitted including a witness statement from her sister in the UK and from a cousin in Chad. On 24<sup>th</sup> April 2013 the respondent replied refusing to treat the submissions as a fresh claim for asylum and refusing to stay removal. A stay on removal was then granted by UTJ Allen.
5. Further submissions accompanied by a report from Dr Thomas and a statement from the applicant were refused on 31<sup>st</sup> May 2013. Removal directions were again set for 27<sup>th</sup> June 2013. The applicant's solicitors requested a copy of the record of proceedings from the First-tier Tribunal fast track hearing and, on receipt, forwarded these to the respondent on 17<sup>th</sup> June 2013 requesting reconsideration and a stay on removal. No response being received from the respondent this claim for judicial review was lodged on 24<sup>th</sup> June 2013, a stay on removal was granted by UTJ Southern on 26<sup>th</sup> June 2013 and on 12<sup>th</sup> July 2013 the respondent served her Acknowledgment of service and summary grounds of defence.
6. Further decisions were made by the respondent on 31<sup>st</sup> May 2013 and 7<sup>th</sup> August 2013 refusing to treat the submissions as a fresh claim. On 3<sup>rd</sup> September 2013 UTJ Warr granted permission. The respondent agreed to reconsider the claim and the proceedings were stayed with directions as to the filing of further grounds and grounds of defence in the event that the reconsideration was adverse to the applicant. On 7<sup>th</sup> January

2015 (some 15 months later) the respondent served a further decision refusing to treat the submissions as a fresh claim and withdrawing the decisions dated 31<sup>st</sup> May 2013 and 7<sup>th</sup> August 2013 (the latter of which the applicant states she has not seen).

7. On 30<sup>th</sup> March 2015 the applicant was served with a decision dated 26<sup>th</sup> March 2015 again refusing to treat the submissions as a fresh claim and withdrawing the decision dated 7<sup>th</sup> January 2013 (although this presumably intended to refer to 7<sup>th</sup> January 2015).

### **Summary of issues between the parties**

8. The applicant sought to exclude the respondent from participating in the proceedings: it was asserted that the most recent letter of 26<sup>th</sup> March 2015 was not significantly different to that of 7<sup>th</sup> January 2015 and that it appeared to be an attempt by the respondent to avoid any adverse consequence for failing to comply with directions. The applicant drew attention to Rule 31 Tribunal Procedure (Upper Tribunal) Rules 2008 which she argued were mandatory and it would be “odd” if the same principle did not apply in the Upper Tribunal as applied for a similar provision in the Administrative Court. The suggestion that the recent decision was a tactic to avoid having to comply with directions in order to avoid adverse consequences was disputed by the respondent. The respondent accepted that she could not suggest that she should not have dealt with the proceedings in a more timely fashion but that even if detailed grounds of defence had been served earlier they would have been otiose given the new decision. She referred to the continued involvement of the respondent in the case and that although there had been a failure to comply with directions there was no adverse consequence to the applicant if she did participate.
9. These proceedings have not been dealt with timeously and the order staying the proceedings to await a fresh decision was one that is perhaps surprising given the lengthy delays that can so often ensue. The decision that is now the subject of challenge is significantly different to the decision in respect of which permission was granted. Given the submissions that have been made by the applicant, I consider it is appropriate for the respondent to participate to enable the Tribunal to be given as much assistance as possible.
10. The essence of the issue before the parties is that the respondent took as her starting point for consideration of the issues raised in submissions by the applicant the determination of the First-tier Tribunal as per Devaseelan. The applicant’s premise is that although that is certainly permissible in the generality of cases, in this case that approach is incorrect: this applicant’s case falls within one of the few cases where such an approach is inappropriate because the result is that her lack of credibility as found by the First-tier Tribunal significantly and substantially undermined all subsequent submissions yet those findings on credibility were significantly flawed for the following combination of reasons:

- (a) the applicant had been unrepresented and had sought an adjournment to obtain legal representation;
  - (b) she had to give evidence through an interpreter;
  - (c) the reasons for refusal letter had not been read through to her;
  - (d) there was a significant error in the reasons for refusal letter;
  - (e) significant challenges to her account, which she could have explained and has done so since, were not put to her at the hearing;
  - (f) the further evidence produced, namely the psychiatrist report, the sister's witness statement, the cousin's statement and the social services report were corroborative of persecutory treatment.
11. The respondent's position was that if it were the case that a judge hearing this appeal again would have to ignore the findings of the First-tier Tribunal then the decision letter, based as it is upon those findings cannot stand and the applicant would succeed in her application.
12. The respondent submitted that there was no evidence that the applicant's former solicitors had treated her badly or poorly represented her; that in so far as the applicant alleged procedural unfairness by the First-tier Tribunal then the appropriate manner of redress was by way of an application for permission to appeal, a matter she had not raised in her application for permission and in any event there was no procedural unfairness. She submitted that the instant case was not one of the rare cases identified in Devaseelan such that the findings of the First-tier Tribunal were not to be treated as a starting point; that although the judge had referred to the issue of the applicant's alleged bisexuality (reference to which was accepted to be an error on the part of the respondent) but not put that to her, it had no effect on the outcome or upon the other credibility findings because the reference was additional to the other findings and not substantive.
13. The respondent does not accept that she failed to consider the sister's witness statement, the cousin's statement, the psychiatrist's report and the social services report –and, when considered in the context of the credibility findings by the First-tier Tribunal, the respondent submits that in the decision of 26<sup>th</sup> March 2015 she applied the correct legal test and that the conclusion that the material before her did not amount to a fresh claim was a decision to which she was entitled to come.

### **The Law**

14. The test for a fresh claim as set out in paragraph 353 Immigration Rules HC 395 as amended is well established – see WM [2006] EWCA Civ 1495, AK (Sri Lanka) [2009] EWCA Civ 447. It has been repeatedly confirmed that the respondent's decision on whether a claim amounts to a fresh claim can only be impugned on Wednesbury grounds.
15. Devaseelan [2002] UKIAT 000702 held:

39. In our view the second Adjudicator should treat such matters in the following way.
- (1) **The first Adjudicator's determination should *always* be the starting-point.** It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.
  - (2) **Facts happening since the first Adjudicator's determination can *always* be taken into account by the second Adjudicator.** If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.
  - (3) **Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can *always* be taken into account by the second Adjudicator.** The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.
40. We now pass to matters that could have been before the first Adjudicator but were not.
- (4) **Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection.** An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should *not usually* lead to any reconsideration of the conclusions reached by the first Adjudicator.
  - (5) **Evidence of other facts – for example country evidence – may not suffer from the same concerns as to credibility, but should be treated with caution.** The reason is different from that in (4). Evidence dating from before the determination of the first Adjudicator might well have been relevant if it had been tendered to him: but it was not, and he made his determination without it. The situation in the Appellant's own country at the time of that determination is very unlikely to be relevant in deciding whether the Appellant's removal at the time of the second Adjudicator's determination would breach his human rights. Those representing the Appellant would be better advised to assemble up-to-date evidence than to rely on material that is (ex hypothesi) now rather dated.
41. The final major category of case is where the Appellant claims that his removal would breach Article 3 for the same reason that he claimed to be a refugee.

(6) **If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator**, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, **the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination** rather than allowing the matter to be re-litigated. We draw attention to the phrase 'the same evidence as that available to the Appellant' at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion.

42. We offer two further comments, which are not less important than what precedes then.

(7) **The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him.** We think such reasons will be rare. There is an increasing tendency to suggest that unfavourable decisions by Adjudicators are brought about by error or incompetence on the part of representatives. New representatives blame old representatives; sometimes representatives blame themselves for prolonging the litigation by their inadequacy (without, of course, offering the public any compensation for the wrong from which they have profited by fees). Immigration practitioners come within the supervision of the Immigration Services Commissioner under part V of the 1999 Act. He has power to register, investigate and cancel the registration of any practitioner, and solicitors and counsel are, in addition, subject to their own professional bodies. An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence; and such a finding should *always* be reported (through arrangements made by the Chief Adjudicator) to the Immigration Services Commissioner.

Having said that, we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second Adjudicator to look at the matter as if the first determination had never been made. (We think it unlikely that the second Adjudicator would, in such a case, be able to build very meaningfully on the first Adjudicator's determination; but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)

(8) **We do not suggest that, in the foregoing, we have covered every possibility.** By covering the major categories into which second appeals fall, we intend to indicate the *principles* for dealing with such appeals. It will be for the second Adjudicator to decide which of them is or are appropriate in any given case.

## Conclusion

16. This is not an appeal against the First-tier Tribunal decision. The applicant sought permission to appeal that decision and was refused. No renewed application for permission was sought, out of time, when the record of proceedings was disclosed or the applicant's former solicitors disclosed their attendance note together with a strongly worded email stating that they had read the reasons for refusal letter to her. It is possible, but I say no more than that, that had an application been made out of time, setting out the various matters referred to in the various submissions made in these proceedings, then permission to appeal may have been granted. Although I raised this as a hypothetical possibility in the context that perhaps judicial review was not an appropriate remedy I am satisfied for the purposes of this application that the hypothetical possibility of permission to appeal being granted out of time could not legitimately be said to require such an application to be made when removal is imminent and the submission of such an application would in any event not have the effect of deferring removal pending a decision. I also note that in any event the Record of Proceedings for the First-tier Tribunal hearing was not obtained until after the commencement of the initial proceedings. The theoretical possibility of an out of time application for permission to appeal to the Upper Tribunal being successful is not, in my view, an adequate alternative remedy that must be pursued before bringing judicial review proceedings.
17. I am satisfied therefore that the issue before me is essentially whether the First-tier Tribunal hearing could have been vitiated by procedural unfairness such that the findings could not reasonably stand. If that is the case, as acknowledged by the respondent, the applicant is successful in her judicial review.
18. The consideration by the respondent of the further evidence submitted was undertaken by the respondent through the prism of the credibility findings of the First-tier Tribunal judge, i.e. applying Devaseelan. If that were the correct approach it is plain from the decision of 26<sup>th</sup> March 2015 that the respondent considered the submissions and evidence before her in the appropriate way. She addressed the information submitted and considered it in detail: as regards the report by Andrew Zadel she drew attention to the fact that he had not been provided with all the relevant material; she noted that the applicant had not named the person she was now saying was her sister as a sibling when listing her family in the course of her claim but considered the statement as if she were her sister in any event; she considered the cousin's evidence but reasonably concluded it was of little weight because of when and how it was produced; she referred to a number of inconsistencies and discrepancies in the applicant's various interviews for which she had not provided an explanation at the hearing before the First-tier Tribunal although explanations were now provided in her recent statement; she reasonably concluded that the psychiatrist's report had been prepared on the basis of an acceptance of the applicant's account as being truthful whereas it

had been found on the lower standard not to be; she considered the social services reports submitted in relation to her sister in conjunction with the other material and including the discrepancies in the accounts given. On the basis that there had been no procedural error, the respondent had asked herself the correct questions as regards the material presented and reached conclusions reasonably open to her that the submissions did not amount to a fresh claim.

19. The issue is therefore whether there was such procedural error as to reasonably cause the applicant's case to be one of those rare cases where the credibility findings of the First-tier Tribunal did not stand as the starting point, thus resulting in the consideration of the submissions by the respondent to have been *Wednesbury* unreasonable.
20. The applicant was unrepresented but had been represented up to and including the submission of her appeal to the First-tier Tribunal. Being unrepresented does not of itself render a hearing procedurally unfair; the judge remains under a duty to ensure that the hearing is conducted in a manner that enables an unrepresented litigant to argue her case. The applicant had an interpreter.
21. The applicant sought an adjournment. According to the determination and the Record of Proceedings, this was to enable her to obtain legal representation and to obtain an unspecified document from her sister who was not present although she was in the UK. There is nothing in the papers which indicates that the refusal to grant an adjournment on that basis was procedurally unfair, even allowing for the fact that she was unrepresented at short notice.
22. Of more substance are the assertions that the reasons for refusal letter had not been read through to her, that there were significant errors in the reasons for refusal letter which were not put to her and that significant challenges to her account which she could have explained were not put to her. If that were established then the applicant was being expected to pursue her appeal in person without knowing what was the case she had to answer.

*Reasons for refusal letter*

23. The First-tier Tribunal determination sets out in [12] to [24] the applicant's case. In [13] the judge states:

....As the appellant was unrepresented I went through the matters raised in the reasons for refusal letter and gave the appellant the opportunity to confirm that the facts were accurate or not.
24. The Record of Proceedings states that the judge said he would go through the reasons for refusal letter and the applicant could tell him if it was correct. The judge asked questions of the applicant with regard to her claim framed as, for example, 'who were you living with', but he did



not put the assertions of inconsistencies to her nor did he ask her if she had an explanation. In particular, she was not invited to deal with the asserted inconsistency as to with whom she was living, whether she had recommenced her extra-marital relationship and the claim that she was bi-sexual. The respondent accepts that the applicant had not claimed to be bi-sexual and that the reference to this in the reasons for refusal letter was an error. The First-tier Tribunal judge in his decision refers to the claim of bisexuality as being part of her case and although he had, earlier in the determination reached a conclusion that she was not credible, it is plain that as an experienced judge he would have considered all of the evidence before him in reaching his decision and that evidence, which was not put to her, include the reference to her being bi-sexual. This is cogent evidence to support the assertion that, despite what was written in the record of proceedings, the judge did not in fact go through the refusal letter with the applicant. If he had done so then he would have recorded in the determination a more appropriate response being made by the applicant concerning the erroneous categorization of her sexuality.

25. The applicant's former solicitors, also experienced, state in very strong terms that the reasons for refusal letter was read to her via an interpreter. The attendance note produced by those solicitors of the 2 hour 50 minute conference on 27<sup>th</sup> February 2013 is, unfortunately very short (11 lines) and only records the outcome of the assertion in the reasons for refusal letter that she is bisexual. It records that the applicant states that she is a lesbian but does not want this referred to in the appeal. It does not record her response to the various other significant inconsistencies and discrepancies set out in the reasons for refusal letter or the advice given to her.
26. The hearing of the appeal took place on 7<sup>th</sup> March 2013 – some 8 days after her conference with the solicitors. The reasons for refusal letter is 7 pages long, 3 ½ pages of which deal with the substantive and significant elements of her claim and credibility challenges. It cannot reasonably be concluded that this applicant knew the basis of the refusal of international protection or that she had a reasonable opportunity to put her case to the First-tier Tribunal judge. Given that this international protection claim is based upon the very personal nature of her circumstances, it was incumbent upon the First-tier Tribunal judge to ensure that the applicant was aware of the nature and extent of the challenges to her credibility and not merely restrict her evidence to answering questions on her circumstances. Unless and until she was aware that particular elements of her account were not accepted and the reasons why they were not accepted, the applicant could not address those in her evidence. It may be that the applicant's former solicitors identified those matters to her and obtained her explanation. But that is not apparent from the attendance note. The judge did not ask the applicant whether anyone had read the reasons for refusal letter to her and did not read it to her himself or put the points to her. It is unsafe in a protection claim where the consequences could, if her account were accepted, be such as to result in her being granted protection, to find that the respondent's

reliance on the credibility findings of the First-tier Tribunal was legally sustainable.

27. Accordingly I am satisfied that the fundamental premise upon which the respondent considered the applicant's submissions was unlawful.
28. The applicant succeeds in her application for judicial review of the respondent's decision dated 26<sup>th</sup> March 2015, which therefore cannot stand.
29. Although the respondent did not seek permission to appeal to the Court of Appeal I am however required by rule 44 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to consider whether permission should be granted. I am satisfied that there is no arguable point of law capable of affecting the outcome of this judgment and permission to appeal is therefore refused.



Upper Tribunal Judge Coker