



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

Appeal Number: AA000532015
AA000542015
AA000552015

THE IMMIGRATION ACTS

**Heard at Glasgow
On 16 March 2016**

**Determination
Promulgated
On 23rd May 2016**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**AA
SR
JA**

(Anonymity order made)

Respondents

Representation:

For the Appellant: Ms S Saddiq, Home Office Presenting Officer
For the Respondent: Mr K Forrest, Advocate, instructed by Livingstone Brown

DECISION AND REASONS

- 1) This is an appeal by the Secretary of State against a decision by Judge of the First-tier Tribunal Kempton allowing an appeal on asylum and human rights grounds. The appeals were brought before the First-tier Tribunal by the three respondents, who are hereinafter referred to as "the claimants".

- 2) The claimants are a family from Sudan, comprising a mother, father and daughter. The father, who is the first claimant, maintains that he was persecuted in Sudan as a Massaleit from Darfur. His wife, the second claimant, also claims to fear persecution as a member of the Massaleit tribe from Darfur. Both parents consider their daughter will be at risk of FGM if returned to Sudan. In December 2014 all three claimants were given discretionary leave until 17 June 2017 but their asylum claims were rejected. The claimants then appealed under section 83(2) of the Nationality, Immigration and Asylum Act 2002.
- 3) The first and second claimants had previously each had separate and unsuccessful appeals against the refusal of asylum. Neither gave evidence in the other's appeal. At the time of the appeal by the first claimant, his wife was not in the UK. When the appeal by the second claimant was heard, her husband did not give evidence, seemingly because in his appeal his evidence had been found not to be credible.
- 4) In the current appeals the Judge of the First-tier Tribunal heard evidence from both of the first two claimants. The judge referred to the case of Devaseelan (second appeals - ECHR - extra-territorial effect) Sri Lanka *[2002] UKIAT 00702 and the guidelines set out therein. The judge accepted that the determinations in the earlier appeals were the starting point for the assessment of the current appeals. The judge nevertheless considered that there were good reasons to depart from the findings made in the previous appeals because neither claimant had previously given evidence in the other's appeal. The judge considered that she had before her what was effectively new evidence from the other claimant in each of the claimant's appeals. The judge also had an expert report on each claimant by Mr Peter Verney. Mr Verney had given evidence in the case of MM (Darfuris) Sudan CG [2015] UKUT 00010 and this case itself cast a new light on the situation in Sudan for non-Arab Darfuris.
- 5) The Judge of the First-tier Tribunal accepted on the evidence before her that the first claimant would be regarded as a non-Arab Darfuri, because his mother was a Massaleit and he was brought up in a Massaleit village after the death of his father. The second claimant would be at risk as a Massaleit. The third claimant, their daughter, would face a real risk of having to submit to cultural pressures to undergo FGM and might even be kidnapped for this purpose. As a non-Arab Darfuri the third claimant would not receive any state protection.
- 6) In the application for permission to appeal the Secretary of State submitted that the judge had failed to give sufficient reasons for departing from the previous adverse credibility findings in the determinations in the earlier appeals by the first and second claimants. The first claimant had been found in his previous appeal to be a Sudanese Arab. The second claimant was found not to have shown that she was either Massaleit or even Sudanese. The reasons given by the Judge of the First-tier Tribunal in the current appeals for departing from these findings were that the previous

judges did not have the benefit of hearing the evidence of both claimants, and secondly they did not have before them the expert report by Mr Peter Verney.

- 7) The grounds continue that in her decision, at paragraph 29, the judge recorded that according to Mr Verney he could not state that the second claimant was from the Massaleit tribe but she was nevertheless at risk of persecution because she had claimed asylum abroad. This was contrary to the country guideline case of MM. The judge further recorded Mr Verney as stating that there was no simple or absolute way to establish ethnic identity to non-Sudanese outsiders and the matter had to be addressed in the round. The furthest he could state in relation to the first claimant's account was that it was plausible and in keeping with the available evidence. This was not a sufficient basis on which to depart from the findings made in the previous appeals in relation to ethnicity. It was submitted on behalf of the Secretary of State in the current appeals that it was not clear whether Mr Verney had seen the previous determinations and the judge had not taken this into account.
- 8) The Secretary of State contends that there was no reason given by the Judge of the First-tier Tribunal why Mr Verney's report, or the evidence of the second claimant, would have led to a departure made from the findings made in respect of the first claimant by the judge at his previous appeal. It was not sufficient to rely merely on corroboration and consistency for this purpose.
- 9) The Secretary of State further contended that in relation to FGM the judge had failed to have regard to the case of FM (FGM) Sudan CG [2007] UKAIT 00060, although this had been referred to in the Secretary of State's refusal letter and in the submissions made on behalf of the Secretary of State. The judge had relied on Mr Verney's report in relation to the pro-FGM stance taken by the Vice President of Sudan but this did not provide good reasons for departing from the general proposition that the risk of FGM from extended family members would depend on a variety of factors, including the age and vulnerability of the woman concerned, the attitude and whereabouts of her parents, and the location and "reach" of the extended family. The findings made by the judge in respect of FGM were dependent on her findings on ethnicity and therefore could not stand in isolation.
- 10) In the grant of permission to appeal it was accepted that it was arguable that the judge had not given adequate reasons for departing from the findings made by the tribunals in the previous appeals. It was stated in Devaseelan that the Tribunal should treat with caution evidence that could have been made available at the date of an earlier hearing but was not provided. The first claimant was in the UK at the date of the second claimant's first appeal but did not give evidence. It was further arguable that Mr Verney did not have access to the previous determinations and the judge did not address the weight to be given to the submission on behalf of the Secretary of State that this might have affected Mr Verney's report, in

accordance with SS (Sri Lanka) [2012] EWCA Civ 155. It was further arguable that the judge failed to consider the country guideline case of FM in assessing the risk of FGM to the third claimant.

Submissions

- 11) In her submission on behalf of the Secretary of State, Ms Saddiq referred to the issues arising from the Devaseelan decision. The second claimant was not in the UK at the time of her husband's appeal but her husband was in the UK at the time of her appeal hearing and did not give evidence in it. The first claimant had been found in his earlier appeal to be untruthful. The second claimant had been found untruthful in her earlier appeal. It was absurd to suggest that the credibility of the first two claimants was improved because they had now given evidence at the same hearing. The two witnesses appearing at the same hearing did not constitute new evidence. The judge did not give sufficient reasons for departing from the previous decisions. The judge's decision, at paragraph 24, had the hallmarks of disagreement with the previous decision in respect of the first claimant.
- 12) Turning to the report by Mr Peter Verney, Ms Saddiq submitted that the expert witness, although stating that the second claimant was from Sudan, did not state that she was of Massaleit ethnicity. It was beyond his expertise to assess whether the second claimant was from Darfur. Again the reasons given by the judge for departing from the previous findings were not adequate.
- 13) Turning to the issue of FGM, Ms Saddiq submitted that the judge had not found that there were family members in Sudan who would seek to interfere with the parents' wishes. The findings made by the judge in respect of the risk of FGM were not safe. The judge had considered Article 8 at paragraphs 35 and 36 of the decision but this was not competent as the appeal was brought under section 83 of the 2002 Act and was therefore limited to the Refugee Convention.
- 14) Ms Saddiq submitted that she would seek remission of the appeal to the First-tier Tribunal to be heard before a different judge.
- 15) On behalf of the claimants, Mr Forrest helpfully referred to a note that he had prepared and submitted. The previous appeal by the first claimant was in 2005 and that of the second claimant in 2009. At neither of those hearings had evidence been given by the other claimant. Mr Forrest acknowledged that this might mean that six years later the couple had got their stories right. However, there was a continuity in the evidence given. The Judge of the First-tier Tribunal had analysed this at paragraphs 22-24 of her decision.

- 16) Mr Forrest referred to the sixth guideline in Devaseelan, which applies where before the second judge an appellant relies on facts that are not materially different from those before the earlier Tribunal and relies upon the same evidence. According to the guidelines, the second judge should regard the issues as settled and make findings in line with the earlier decision. In the current appeals the judge could not make findings in line because the evidence was presented essentially in a different way. At paragraph 24 the judge had a “light bulb” moment and gave reasons why she was able to look at the evidence differently. As was said in the seventh guideline of Devaseelan, the significance of the sixth guideline was greatly reduced if there was some very good reason why relevant evidence was not adduced before the earlier Tribunal. The second claimant was not to be blamed because her husband was not called as a witness in her appeal. At paragraph 28 of her decision the judge had given cogent reasons for departing from the earlier findings.
- 17) Mr Forrest further submitted that there were facts before the judge in the current appeals that were not before the Tribunals in the earlier appeals. He referred to the second guideline in Devaseelan, stating that facts occurring since the first decision could always be taken into account by the second Tribunal. Mr Forrest submitted that the expert report by Mr Verney fell into this category. This was evidence properly given by an expert who was aware of the limitations on his role. Mr Forrest referred, in particular, to paragraph 81 of Mr Verney’s report in respect of the first claimant, where Mr Verney pointed out that at the time of the first claimant’s previous appeal there was far less information available about the state of affairs in Darfur. He had seen numerous early refusals of asylum applicants from Darfur which were later overturned in the light of more accurate and detailed country information. At paragraph 99 Mr Verney pointed out that the situation had worsened after the failed May 2008 coup in Sudan attempted by the Darfur based Justice and Equality Movement (JEM). This organisation was blamed by the government for street protests in September 2013.
- 18) There was then some discussion of the first claimant’s knowledge of the Massaleit language. Mr Verney recorded at paragraph 28 that the first claimant did not speak this language and at paragraph 29 that although it was a long time since the first claimant heard it spoken he might recognise a few words. In the first claimant’s previous appeal, heard by Judge Dennis, the first claimant was recorded at paragraph 6 as having told the judge that the Massaleit people spoke a peculiarly accented Arabic called Rotana, which he explained meant “mumbling”. The people in his village spoke both Arabic and Massaleit as did his wife. Judge Dennis then stated at paragraph 26 that, although the first claimant said that he had spent 34 years with a Massaleit-speaking mother and wife in a village where Massaleit was the common language, he spoke only Arabic. The judge did not find this plausible. Mr Forrest referred to paragraph 53 of the report by Mr Verney on the first claimant, where it is stated that a person could have Massaleit identity without speaking the indigenous language. In the current appeals

at paragraph 32 of her decision the Judge of the First-tier Tribunal referred to this and added from Mr Verney's report that only a minority of the Massaleits people speak their own language, or Rotana. Mr Forrest submitted that on the basis of the reports by Mr Verney the Judge of the First-tier Tribunal was entitled to depart from the findings previously made.

- 19) Mr Forrest continued that the findings made by the Judge of the First-tier Tribunal in relation to FGM were based on Mr Verney's report and the judge showed this in her findings and reasoning at paragraphs 33 and 34 of the decision.
- 20) In conclusion Mr Forrest submitted that the Judge of the First-tier Tribunal was entitled to rely on the conjunction of the testimony of the 2 claimants and the evidence of Mr Verney, which had not previously been available.
- 21) In her response Ms Saddiq referred to the so called "light bulb" moment Mr Forrest had said the judge had had at paragraph 24 of the decision. Ms Saddiq said the judge's findings in this paragraph were not clear. Turning to the evidence of Mr Verney, Ms Saddiq referred to his comments on what was known about the Massaleit tribe in 2003 but submitted that in referring to this Mr Verney had gone beyond his role as an expert witness. Mr Verney had not addressed the clear negative findings made in the previous appeal in respect of language and ethnicity. The decision by the Judge of the First-tier Tribunal to depart from the previous findings was not justified and amounted to an error of law. In his report Mr Verney should have set out those previous findings then set out any evidence which should be set against these. This had not been done. The judge should not have given Mr Verney's reports the weight she gave them.
- 22) In relation to FGM Ms Saddiq submitted that the judge did not properly engage with the issues. If the parents were against FGM they would not allow it to happen. This matter was not addressed in accordance with the case law.
- 23) Mr Forrest briefly referred to a further case on which he sought to rely, namely AAW (expert evidence - weight) [2015] UKUT 673. He acknowledged that this did not refer to subsequent appeals by the same parties. Ms Saddiq responded by saying that according to paragraph 25 of this decision an unsupported opinion was likely to be afforded little weight.

Decision

- 24) Mr Forrest was right to point out the significance to this appeal of the sixth of the Devaseelan guidelines. This guideline states the following:

"(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 choice as 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 (or the same facts) on this occasion."

25) The relevance of this passage to the second claimant is clear, although perhaps not quite in the way Mr Forrest intended. In her previous appeal the decision was made for the first claimant not to give evidence, although he was available to do so. In the present appeal he did give evidence. It does not follow from this, according to the sixth guideline, that the issues or the available evidence in the second appeal are rendered any different simply by the first claimant's decision to give evidence.

26) Mr Forrest referred me to the seventh guideline in Devaseelan, as qualifying the sixth. This states:

"(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 wrongs 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 will 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 a determination of the first appeal.)"

27) Mr Forrest did appear to suggest at one point that the decision not to call the first claimant as a witness in the earlier appeal by the second claimant would have been a decision by her representatives at the time and the

second claimant should not be prejudiced if the wrong decision had been made then.

- 28) There was some discussion before me about why the first claimant was not called as a witness in the second claimant's previous appeal. The Judge of the First-tier Tribunal in the current appeals seems to have assumed that this was because the first claimant had been found not to be credible in his own previous appeal. There may be some basis for making this assumption but, if that was the reason why the first claimant was not called to give evidence, it was a question of judgment and does not necessarily show any error or incompetence on the part of the second claimant's representatives.
- 29) It seems to me that essentially what Mr Forrest was arguing by relying on the seventh guideline was that there must have been some very good reason why the first claimant did not give evidence in the second claimant's earlier appeal. The only such reason which has been identified is the adverse credibility finding made against the first claimant in his own earlier appeal. This might well be regarded as a good reason why the first claimant did not give evidence in the second claimant's appeal but it does not follow from this that where the first claimant then gives evidence in the later appeal, this earlier adverse credibility finding is not taken fully into account.
- 30) The position here is complicated of course by the fact that there was not one earlier appeal in these proceedings but two earlier appeals, as each of the first and second claimants have had a previous appeal. Each was found not to be credible. It was Ms Saddiq's submission on behalf of the Secretary of State that if each was found not to be credible in his or her previous appeal it was absurd to subsequently find their evidence credible simply because they both gave evidence in their second appeals.
- 31) To be fair to the Judge of the First-tier Tribunal this was not the full extent of her reasoning. She did seek to justify why the evidence of the appellants should be believed when it was given before her, when it had not been believed in the two separate earlier appeals. The issue is whether the justification the judge gave was strong enough.
- 32) In relation to this Mr Forrest submitted that at paragraph 24 of her decision the judge showed that she had had a "light bulb" moment when examining the evidence of both appellants. Paragraph 24 of the decision reads as follows:

"That is very important, as his interview was in 2005 and he describes having a wife and an aunt in Sudan at that time. His wife made her claim in 2009 and flew from Egypt and it has been maintained by the respondent up to this time that she is from Egypt. However, if the appeals had been cross-referenced, it would be clear that the appellant's wife was in fact in Sudan. In addition, he gave an account of his parents' marriage and how he ended up in Massaleit territory in his mother's village after his father died. It had been his father's wish that he learn Arabic, which he did. However, he does also understand Rotana, as spoken by his mother. However, they did speak Arabic in the home. The

appellant's claim in 2005 was refused by the respondent in a short 4 page reasons for refusal letter. The determination refusing his asylum claim goes into some detail about his claim and it was found that it was fundamentally implausible that the appellant would not speak Massaleit having spent 34 years with a Massaleit speaking mother and a wife where that is the common village language (paragraph 21 of Judge Dennis' decision of 2005). This would explain why he was not asked to give evidence in his wife's appeal, as it was not accepted that he came from the village where he said he was from or that he was a Massaleit, which is why he states she is."

- 33) On reading paragraph 24 I find it difficult to ascertain any fresh evidence or particular fact to which the judge refers which justifies her departure from the findings by the earlier tribunals. All that she has done is seek to interpret the evidence in a different way. As Ms Saddiq rightly pointed out, the findings that she makes at paragraph 24 are not themselves clear. She refers to the findings made at paragraph 21 by Judge Dennis in his decision of 2005 but does not state why those findings may be wrong. If she were to find in favour of the first claimant it was incumbent upon her to give sufficient reasons to show why the findings made by Judge Dennis at paragraph 21 of his decision were wrong but she does not do so.
- 34) It was not enough for the Judge of the First-tier Tribunal in the present appeals to say that in accordance with Devaseelan she took the previous decisions as her starting point. She actually had to look at the Devaseelan guidelines and assess the effect they would have on what evidence was before her when compared with the evidence that was available at the previous hearings. She failed to do this and she failed to give adequate reasons for overriding the findings made in the previous appeals. This amounts to an error of law.
- 35) I will now address briefly the question of Mr Verney's expert evidence. Mr Forrest sought to argue that this fell into the second Devaseelan guideline, which states:
- “(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.”
- 36) Of course, in Mr Verney's reports there are facts which have occurred since the first claimant's appeal in 2005 and even since the second claimant's appeal in 2009. These could of course be taken into account. They will not necessarily, justify overturning the adverse credibility findings already made in those earlier appeals but this is a possibility which ought to be considered.
- 37) In the current appeals, the Judge of the First-tier Tribunal did not rely upon Mr Verney's evidence alone as justification for overturning the previous

findings. Had she done so she would have had to address the further point made on behalf of the Secretary of State, namely that it had not been established that Mr Verney had had access to those previous decisions. This was a potentially significant point, which was put to the judge in submissions on behalf of the Secretary of State but which the judge appears to have ignored. It is a point which will have to be borne in mind in any future proceedings in relation to these appeals.

38) Also relevant to the evidence of Mr Verney may be the fifth Devaseelan guideline, which states:

“(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.”

39) In referring to this guideline I do not wish to exclude the possibility that there may be material in Mr Verney’s reports which casts light on claims made by the first claimant at the time of his earlier appeal or by the second claimant at the time of hers. However, in the current appeals the Judge of the First-tier Tribunal ought to have had regard to this guideline in examining Mr Verney’s evidence but she made no reference to it.

40) Overall the position is this. The Judge of the First-tier Tribunal in the present appeals was not entitled to depart from the findings made in the earlier appeals for the reasons which she gave. In particular, she did not give satisfactory reasons why because both the first and second claimants gave evidence at the same hearing before her, the findings made on the basis of evidence they had each given previously at their separate hearings should be overturned. The findings made in the earlier appeals were based on the evidence and supported by proper reasons at that time. They could only be overturned for a good reason and the Judge of the First-tier Tribunal did not supply strong enough reasons.

41) It does not follow from this that the appeals must necessarily fail. There is material in the reports by Mr Verney which may lead to the making of different findings, provided of course the point is addressed as to whether Mr Verney had himself access to the previous decisions, or what significance that might have if he did not. The claimant’s themselves might have explanations to offer which were not fully taken into account by the Judge of the First-tier Tribunal.

42) The appropriate course in these proceedings is for the appeal to be remitted to the First-tier Tribunal, as submitted by Ms Saddiq on behalf of

the Secretary of State. The appeals will be heard before a different judge with no findings made by Judge Kempton preserved.

Conclusions

- 43) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
- 44) I set aside the decision.
- 45) The appeals are remitted to the First-tier Tribunal to be heard before a different judge with no findings made by Judge Kempton preserved.

Anonymity

- 46) The First-tier Tribunal did not make an order for anonymity. Having regard to the continuing nature of these proceedings I consider that such an order should be made in the following terms. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order. Unless the tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellants. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of Court proceedings.

Signed

Date 23 May 2016

Upper Tribunal Judge Deans