Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06594/2015

THE IMMIGRATION ACTS

Heard at North Shield	**Decision & Reasons promulgated**
On 18 March 2016	**On 26 July 2016**

Before

Deputy Upper Tribunal Judge Mandalia

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KHALID ALSHEIKH MOHAMMED OSMAN
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

Appellant: Mr. P Mangion, Senior Home Office Presenting Officer
Respondent: Ms. S Rogers, instructed by IAC Ltd

DECISION

Introduction

1. The appellant is the Secretary of State for the Home Department and the respondent to this appeal, is Mr. Khalid Mohammed Osman. However, for

ease of reference in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to Mr. Khalid Mohammed Osman as the appellant and the Secretary of State as the respondent.

2. The appellant arrived in the UK clandestinely on 9th March 2011 and made an application for international protection as a refugee. The application was refused by the respondent on 8th April 2011. There was an appeal heard against that refusal by First-tier Tribunal Judge Holmes. The appeal was dismissed for the reasons set out in a decision promulgated on 16th June 2011. The appellant appealed to the Upper Tribunal and although permission to appeal was granted, the appeal was ultimately dismissed. By 14th May 2012, the appellant had exhausted his appeal rights. Notwithstanding that, further submissions were made in 2012, which were refused. However, by letter dated 2nd July 2014 still further submissions were made. On 24th March 2015, the respondent concluded that the further submissions made by the appellant amount to a fresh claim. The respondent considered the merits of the fresh claim for asylum and concluded that the appellant had failed to provide sufficient evidence that he is originally from Sudan and that he is of the Zaghawa ethnicity. The claim for asylum was refused, and the respondent made a decision to remove the appellant pursuant to s10 of the Immigration and Asylum Act 1999. The appellant appealed that decision and the appeal was allowed by First-tier Tribunal Judge Griffiths for the reasons set out in a decision promulgated on 6th July 2015. It is that decision that is the subject of the appeal before me.

3. In her decision, First-tier Tribunal Judge Griffiths found that the appellant is a Sudanese national of Zaghawa ethnicity. She found that he does not have any other nationality and that in those circumstances, he would be at risk on return to Sudan and is entitled to international protection as a refugee.

4. The respondent appeals on the ground that in reaching her decision, First-tier Tribunal Judge Griffiths erred in law. The respondent contends that having correctly reminded herself that the previous decision of First-tier Tribunal Judge Holmes is her starting point, the Judge treats the previous decision as a record of evidence, without any proper engagement with the findings previously made by First-tier Tribunal Judge Holmes as to the appellant's nationality or his credibility.

5. Permission to appeal was granted by First-tier Tribunal Judge Ransley on 27th July 2015. The matter comes before me to consider whether or not the determination by First-tier Tribunal Judge Griffiths involved the making of a material error of law.

The hearing on 18th March 2016

6. On behalf of the respondent, Mr Mangian submits that at paragraph [52] of her decision, First-tier Tribunal Judge Griffiths reminds herself that the decision of the previous Judge, is her starting point. She refers to the significant and important evidence of Mr Verney that, she considers, explains the reason for the issue of a naturalisation certificate being raised before Judge Holmes, leading to his finding that the appellant holds another nationality. Mr Mangian submits that in dealing with the matter in that way, the Judge failed to have regard to two important factors. First, at paragraph [36] of his decision, First-tier Tribunal Judge Holmes had already considered, at some length, whether the appellant may have had difficulties in giving his evidence as a result of translation. First-tier Tribunal Judge Holmes recorded that the appellant was asked several times whether he understood the interpreter and the appellant said that he did. Second, Mr Mangian submits that the appellant had appealed the decision of First-tier Tribunal Judge Holmes to the Upper Tribunal. In the course of his decision dismissing the appellant's appeal, Deputy Upper Tribunal Judge Zucker states:

> *"19. ….Ms Brakaj points to paragraph 1.3.1 of the report of Dr Bekalo which refers to an Arabic speaking interpreter being used throughout but that I am afraid does not significantly undermine the Judge's observations because as Ms Brakaj will know, when this matter first came before the Tribunal on 24th May 2011 and was adjourned in order that the curriculum vitae of Dr Bekalo might be obtained, it was also adjourned because the Appellant did not understand the Arabic interpreter provided by the Tribunal. What was required for the further hearing before Judge Holmes was an Arabic Sudanese speaker in other words it was necessary to have the right dialect….."*

7. Mr Mangion submits that in the circumstances, First-tier Tribunal Judge Griffiths fell into error in not having properly considered the decision of First-tier Tribunal Judge Holmes and the decision of Deputy Upper Tribunal Judge Zucker in reaching her decision.

8. In reply, Ms Rogers submits that at paragraph [52] of her decision, First-tier Tribunal Judge Griffiths correctly identifies the task of the Tribunal in an appeal such as this. The previous decision of First-tier Tribunal Judge Holmes is a starting point. The Judge was not reviewing that decision. She submits that the previous decision was not binding upon the Judge and it was open to the Judge, for proper reasons, to depart from the previous decision. Ms Rogers submits that although there is no express reference to the previous findings of First-tier Tribunal Judge Holmes or to the decision of the Upper Tribunal in the decision, that is not to say that the Judge did not have the previous findings of the First-tier Tribunal in mind. Ms Rogers submits that the Judge very carefully analysed the evidence before her. As the Judge noted at paragraph [10] of her decision, the issue in the appeal was the appellant's credibility and whether he had, or has ever had, a naturalisation certificate. In dealing with the latter issue, the Judge records and considers the evidence before her about Arabic languages and the potential problems that can arise during translation. Ms. Rogers submits that at the hearing of the appeal before First-tier Tribunal Judge Griffiths there was further evidence that the Judge

was plainly entitled to rely upon. The Judge was entitled to rely upon the expert evidence in particular, in reaching her decision. The evidence was credible and the Judge was entitled to attach significant weight to it.

Discussion

9. I have carefully read the decisions of First-tier Tribunal Judge Holmes promulgated on 16th June 2011, the decision of Deputy Upper Tribunal Judge Zucker promulgated on 1st March 2012 and the decision of First-tier Tribunal Judge Griffiths. I have taken into account the respondent's grounds of appeal and the submissions made before me at the hearing.

10. As there has been a previous determination by an Immigration Judge, the **Devaseelam** principles, which were approved by the Court of Appeal in **Djebbar v Secretary of State for the Home Department [2004] EWCA Civ 804** apply. The six **Devaseelam** principles can be summarized thus;

(i) 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.

(ii) 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.

(iii) 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.

(iv) 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. 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.

(v) 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)

(vi) 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.

11. First-tier Tribunal Judge Griffiths noted at paragraph [52] of her decision that Judge Holmes found the appellant had not told the truth about his

origins and that the appellant's account was lacking. The Judge reminded herself that the decision of Judge Holmes is her starting point. She goes on to say "... It is not for me to say, whether in the light of the further evidence, there is sufficient effectively to set aside his determination." But that is precisely the effect of her decision. The Judge noted at paragraph [52] that the evidence has not materially changed save for the significant and important evidence of Mr. Verney, who explains the reasons for the issue of a naturalisation certificate being raised before Judge Holmes that led to the Judge finding that the Appellant held another nationality.

12. The appellant failed in the prior proceedings to persuade Judge Holmes that his nationality and identity were as claimed. Judge Holmes was not satisfied that he was being honest about his origins or about his life prior to entry to the UK. Judge Holmes did not accept that the appellant is ethnically Zaghawa as he had claimed, but accepted that if the appellant is in truth a Zaghawa as he claims, then it is more likely that he is a citizen of Chad, where the Zaghawa are politically and economically dominant.

13. First-tier Tribunal Judge Griffiths correctly notes that the decision of Judge Holmes is her starting point. She does not in fact refer to the 'Deevaseelam' principles and how they might apply to this case. She does not refer to the evidence that was before Judge Holmes or the careful evaluation of the appeal that was undertaken by Judge Holmes. There is no reference in the decision of First-tier Tribunal Judge Griffiths to the reasons set out in the decision of Judge Holmes. The failure to address the Deevaseelam guidance and to properly refer to the very clear findings that had previously been made by Judge Homes, in my judgment, amount to a material error of law that is capable of affecting the outcome of the appeal.

14. I accept that the Judge had before her material in the form of the evidence of Mr. Verney that was not available to Judge Holmes, but on any view,

Judge Holmes had carefully considered whether the appellant may have had difficulties in giving his evidence as a result of translation. First-tier Tribunal Judge Griffiths does not refer to that very careful consideration by Judge Holmes of material issues, when considering whether she should depart from the authoritative assessment of the appellant's status by Judge Holmes.

15. In my judgement there is a material error of law in the decision of First-tier Tribunal Judge Griffiths and the decision of the First-tier Tribunal is set aside with no findings preserved.

16. As to disposal, I have taken into account paragraph 7 of the Senior President's Practice Statement of 25th September 2012 and decided that it is appropriate to remit this appeal to the First-tier Tribunal because of the extent of judicial fact-finding which is necessary. The parties will be advised in writing of the date and time of the hearing. The appeal is to be heard de novo and no findings are preserved.

Notice of Decision

17. The appeal is allowed. The decision of the First-tier Tribunal promulgated on 6th July 2015 is set aside and I remit the matter for a de novo hearing in the First-tier Tribunal.

18. No anonymity direction is applied for and none is made.

Signed Date **26 July 2016**

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

No fee is payable and there can be no fee award.

Signed Date **26 July 2016**

Deputy Upper Tribunal Judge Mandalia