Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/01623/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th August 2017	**On 15th August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS LOVELY BEGUM CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Mr M Hafiz of Counsel

DECISION AND REASONS

1. Although this is an appeal by the Entry Clearance Officer, Dhaka, I refer to the parties as they were in the First-tier Tribunal.

2. The Appellant, a citizen of Bangladesh, appealed to the First-tier Tribunal against the decision of the Entry Clearance Officer of 19th December 2013 to refuse her application for a Certificate of Entitlement to the Right of Abode in the United Kingdom as the child of Gousuddin Ahmed Chowdhury. First-tier Tribunal Judge Adio allowed the appeal and the Secretary of State now appeals to this Tribunal with permission granted by First-tier Tribunal Judge J M Holmes on 20th June 2017.

3. In summary the background is that the Appellant claims that Mr Chowdhury is her father and that he registered as a British citizen on 17 December 1968. He has two daughters with his first wife. It is claimed that he married his second wife (the Appellant's mother) and the Appellant was born on 17th March 1982. Her birth certificate which was issued on 24th June 2008 names Mr Chowdhury as her father. Mr Chowdhury died on 16th August 1995.

4. The Appellant previously applied twice for a Certificate of Entitlement to the Right of Abode. The refusal of the first application was the subject of an appeal to the First-tier Tribunal which was considered by Immigration Judge Sharp who, in a decision promulgated on 6th May 2009, dismissed that appeal.

5. In his decision Immigration Judge Sharp accepted that the Appellant was born around the time claimed and therefore was born after Mr Chowdhury became a British citizen. Judge Sharp considered the history where Mr Chowdhury's family made a fraudulent application to bring in other members of the family and took into account the oral evidence before him which he considered to be inconsistent as well as the documentary evidence and concluded that the Appellant had not established that she was the daughter of Mr Chowdhury.

6. The Appellant made a further application which was refused on 9th February 2010 and an appeal against that decision was considered by Immigration Judge Clayton who, in a decision promulgated on 20th December 2010, considered the documentary evidence before him and concluded that it had not been established that the Appellant was entitled to a Certificate of Entitlement to the Right of Abode in the UK through her claimed father, Mr Chowdhury. The Appellant made a further application which was refused on 19th December 2013. An appeal against that decision was initially dismissed by Judge Fletcher-Hill in the First-tier Tribunal. An appeal against that decision to the Upper Tribunal was successful and Deputy Upper Tribunal Judge Bagral concluded that Judge Fletcher-Hill had made an error of law, set aside the decision and remitted it to the First-tier Tribunal.

7. First-tier Tribunal Judge Adio heard the remitted appeal on 10th November 2016. Judge Adio considered the case of **Devaseelan [2002] UKIAT 00702** and took the findings of Judge Sharp as his starting point. Judge Adio then assessed the evidence of a witness who had not given evidence to Judge Sharp and further evidence not before Judge Sharp and concluded that the Appellant had discharged the burden upon her to show on the balance of probabilities that she is related as claimed to Mr Chowdhury.

Error of Law

8. The Secretary of State challenges that decision on three grounds. It is firstly contended that First-tier Tribunal Judge Adio misdirected himself in the approach taken to the finding that all three witnesses before Judge Sharp were unreliable. It is contended that the judge failed to consider the damage done to the evidence as a whole. It is contended that, if the Appellant's claim is true, the judge failed to consider why there was a necessity for any of the witnesses to fabricate evidence in order to prove the case. It is argued that this issue is further compounded by the

serious discrepancy between the two witnesses in this appeal as to whether they were both present at the birth of the Appellant.

9. Judge Adio set out the evidence of the three witnesses who had previously given evidence to Judge Sharp. He noted that Judge Sharp had pointed out inconsistencies between the evidence and the judge did not go behind the findings of Judge Sharp [17]. The judge found that one of the witnesses who had given evidence before Judge Sharp and before Judge Adio was not reliable [19]. The judge also took into account that there were credibility problems with some of the previous witnesses [21]. The judge explained that he found that the new witness to be credible as cross-examination did not yield any particular inconsistency and she had given detailed evidence of family members and their relationships [19].

10. In my view it is clear that the judge took into account the negative aspects of the other witnesses. I disagree with the assertion by the Secretary of State that inconsistent and unreliable evidence is necessarily fabricated evidence. I find that it was open to the judge to take into account that some of the witnesses previously had credibility problems but, having given reasons for doing so, it was open to the judge to prefer the evidence of the new witness who gave evidence before him. The issue of weight to be attached to the unreliable evidence given by the witnesses before Judge Sharp as opposed to a new witness was a matter for the judge.

11. The second Ground of Appeal contends that much of the evidence produced in the instant appeal could have been produced before Judge Sharp. It is argued that no explanation was given for the failure to produce this evidence earlier or as to why the witness now found credible did not give evidence before Judge Sharp and it is contended that the judge erred in failing to resolve this issue in accordance with the principles of **Devaseelan**.

12. It is clear that the judge took into account the guidance in **Devaseelan** in his approach to the decision of Judge Sharp and the analysis of that evidence at paragraphs 17 and 18. The judge also made his own assessment of the evidence of the witnesses before him at paragraph 19. The judge took into account the history of a fraudulent application and the credibility problems with the witnesses who gave evidence before Judge Sharp [21]. There is no error in the judge's approach to the witnesses.

13. It is further contended in the Grounds of Appeal that the judge erred in failing to consider reasons why evidence had not been tendered before Judge Sharp. At **Devaseelan** the following guidance is given at paragraphs 40 to 42;

> "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.)
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> (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."

14. The new witness explained that she had failed to give evidence before Judge Sharp because she had some difficulties at that time [10]. The judge found the new witness to be credible [19 and 21]. I therefore consider it clear that the judge accepted the reasons why the new witness did not give evidence to Judge Sharp.

15. The judge considered the documentary evidence in paragraph 20. The judge noted, "some of the evidence that is available was not before the previous two judges". This includes a site visit by an independent barrister, DNA evidence, letters from the Sponsor and land documents. It appears from the conclusions at paragraph 22 that the judge accepted that this evidence was not available at the time of the hearing before Judge Sharp. In my view it is clear that the judge was aware that this evidence was not available to Judge Sharp or Judge Clayton. At paragraph 41 of **Devaseelan** the Tribunal said that an Appellant cannot be expected to present evidence of which he has no knowledge. It is clear that some of this evidence arose from the site visit carried out by Mr Shafiuddin. In my view Judge Adio accepted that this evidence was not available to Judge Clayton or Judge Sharp and it was open to the judge to take this new evidence into account in accordance with the guidance in **Devaseelan**.

16. The third ground contends that the judge failed to consider the DNA results holistically. The judge had concluded that, as the Appellant had shown a relationship to one of the claimed half siblings, this is sufficient to show that she has the same father. At the hearing Mr Nath properly accepted that the conclusions reached by the judge in relation to the DNA evidence were open to him on the basis of that evidence. The Appellant claims to have two half-sisters. The DNA report concludes that it is most likely that she is half-sibling with one of those but that in relation to the other claimed half-sister it was concluded that there was 'no relationship determined'. However, in what appears to be a conflict in relation to this matter, the DNA report also concludes that the two half-sisters are most likely to

be full siblings of each other. This at least raises the possibility that the Appellant is a half-sibling to both sisters and, in any event, the conclusion of the judge that one of the siblings is found to be established as a half-sibling is sufficient to add weight to the conclusion that the Appellant is the daughter of her claimed father.

17. In all of these circumstances I am satisfied that the judge reached conclusions open to him on the basis of the evidence before him and he properly followed the guidance in **Devaseelan**.

Notice of Decision

18. The decision of the First-tier Tribunal does not contain a material error of law.

19. The decision of the First-tier Tribunal shall stand.

20. No anonymity direction is made.

Signed Date: 14th August 2017

Deputy Upper Tribunal Judge Grimes

To the Respondent
Fee Award

I maintain the fee award made by the First-tier Tribunal.

Signed Date: 14th August 2017

Deputy Upper Tribunal Judge Grimes