Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12673/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 22 March 2018 **On 3 April 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr J Dhanji, Counsel, instructed by Malik & Malik Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (appellant) against the decision of Judge of the First-tier Tribunal Flynn (the judge), promulgated on 20 July 2017, allowing the respondent's appeal against a decision made by the appellant on 16 November 2015 in respect of a human rights application made by the respondent.

2. The principle ground of appeal relates to the judge's conclusion that she had jurisdiction to entertain the appeal. The appellant contends that the decision dated 16 November 2015 was one made pursuant to

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paragraph 353 of the immigration rules and did not therefore constitute a refusal of a human rights claim. The respondent relies on the Upper Tribunal decision in **Sheidu (Further submissions; appealable decision)** [2016] UKUT 000412 (IAC) and contends that the appellant's decision did amount to a refusal of a human rights claim and that the judge was entitled to her conclusions for the reasons given.

3. The respondent is a national of Afghanistan. He has a given date of birth of 1 January 1995. He entered the UK on 11 January 2008 and claimed asylum. This claim was refused but the respondent was granted Discretionary Leave to Remain as an unaccompanied child, valid until 4 March 2011. An application for further leave to remain was refused on 15 August 2013 and a decision was made to remove the respondent to Afghanistan. The respondent's appeal against this decision, which was advanced on Refugee Convention grounds and human rights grounds, including article 8, was dismissed on 22 October 2013. In dismissing the appeal, the First-tier Tribunal considered and applied paragraph 276ADE of the immigration rules as it was at the date of the respondent's decision.

4. On 4 June 2015 the appellant submitted an application for leave to remain on the basis of the private life he had established in the UK. It is important to set out in some detail the decision made by the appellant on 16 November 2015 in response to this application.

5. The decision was headed “Reasons for Decision”. After outlining the reasons why the respondent did not qualify for a grant of leave to remain, the appellant gave details of the respondent's previous applications under the heading “Repeat claim/application”. The appellant set out the requirements of paragraph 353 of the immigration rules and indicated that the application had been considered on all of the evidence available, including evidence previously considered, but that it had been decided that the matters submitted were not significantly different from the material which had previously been considered and therefore did not amount to a fresh claim.

6. The appellant then set out the details of the respondent's previous claim under the heading,

   Below is the list of points that you have raised that have previously been considered:

7. The appellant noted that the respondent had an appeal dismissed on 20 October 2013 and that his application for permission to appeal to the Court of Appeal was refused. The appellant then stated,

   Your submissions are not significantly different from the evidence that has previously be considered. Therefore they do not amount to a fresh claim. <u>Below is consideration of your submissions that have not previously been</u>

> considered, but that taken together with the previously considered material, do not create a realistic prospect of success before and Immigration Judge: [my emphasis]

8. The further consideration dealt with the submissions made in respect of the respondent's family and private life. The appellant noted the length of the respondent's residence and that he had not spent over half his life in UK. The appellant considered whether there were very significant obstacles to the respondent's integration in Afghanistan. The appellant noted that the respondent had spent the majority of his life in Afghanistan, that he spoke the language and understood the culture and social values of the country. His educational qualifications could be used to his advantage if he returned. The respondent would be entitled to a relocation package which would enable him to establish a life in Kabul. The appellant then indicated that the 'application' on the basis of the respondent's private life under the immigration rules was refused. The appellant then went on to consider whether there were any exceptional circumstances which, in line with article 8, might warrant a grant of leave to remain in the UK outside of the immigration rules. The appellant noted the respondent's relationship with his cousin and his cousin's family and that he had established strong friendships in the UK and had an offer of a university place subject to exam results. The appellant also noted evidence relating to the respondent's success in amateur boxing and achievements in the community. Given that the respondent had benefited from an education in the UK and that this would improve his opportunities on return to Afghanistan, the appellant was not satisfied that there were any exceptional circumstances. The appellant then stated,

> As your submissions do not create a realistic prospect of success before and Immigration Judge, they do not amount to a fresh claim.

9. The appellant's decision was not accompanied by any appeal forms. The respondent nevertheless lodged an appeal asserting that the appellant's decision constituted a refusal of the human rights claim. A Notice of Hearing was issued by the First-tier Tribunal on 20 December 2016 listing a hearing for 16 June 2017.

10. At the hearing the judge considered, as a preliminary matter, whether she had jurisdiction to entertain the challenge to the appellant's decision. She noted in her determination that the Presenting Officer could not explain why the appellant had stated that the respondent had no right of appeal since there had been clear engagement with the human rights submissions made on the respondent's behalf. The judge considered submissions by Mr Blundell, the respondent's representative, to the effect that there had been a stark difference in treatment by the appellant in her consideration of the protection and human rights matters, that paragraph 276ADE had been amended since the First-tier Tribunal's decision in 2013, and that there had been no reference to paragraph 353 when the appellant considered

the respondent's private life. The judge referred to the authority of **Secretary of State for the Home Department v VM (Jamaica)** [2017] EWCA Civ 255 and the Upper Tribunal decision in **Sheidu**. While the judge agreed that the respondent had no right of appeal in respect of protection issues she concluded, at [13] and [14], that there was a right of appeal in respect of the human rights claim.

> 13. However, the [appellant] took a completely different approach regarding the fresh submissions in respect of the [respondent's] private and family life. She did not state that she would not consider his submissions, but clearly evaluated them thoroughly, both within the immigration rules and under the wider aspects of Article 8.
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> 14. The [appellant] did not give any reason for her decision to mark the [respondent's] claim as "NRA" nor did her letter discuss this point. I was accordingly satisfied that the [respondent] was legally entitled to a right of appeal against the [appellant's] decision solely in respect of his private and family life, but not protection issues.

11. The judge proceeded to hear evidence and concluded that the decision she regarded as a refusal of a human rights claim would breach the Human Rights Act 1998. The purported appeal was allowed.

12. The grounds contend that the judge erred in law in relying on **Sheidu** which, it was claimed, was clearly distinguishable on its facts. In that case the language of the decision letter in question clearly had the effect of showing that there had been a substantive consideration of the human rights claim. The appellant had to engage with the further submissions through the prism of the immigration rules as this was necessary in order for the appellant to "consider" the further submissions and determine whether they amounted to a fresh claim.

13. At the 'error of law' hearing Mr Bramble relied on the grounds of appeal. Mr Dhanji provided me with a copy of the skeleton argument before the First-tier Tribunal which relied heavily on **Sheidu**. Mr Dhanji accepted that the 2013 First-tier Tribunal decision considered the respondent's article 8 based claims, and he accepted that the appellant's decision dated 16 November 2015 was effectively 'book-ended' at the beginning and end by reference to paragraph 353. He also accepted that the present case was not 'on all fours' with **Sheidu**. He submitted that the judge was nevertheless rationally entitled to conclude that the appellant's decision, despite the references to paragraph 353, amounted to a refusal of a human rights claim and noted that the Presenting Officer in the First-tier Tribunal could not explain the appellant's position that there was no right of appeal.

14. Following the amendments to the Nationality, Immigration and Asylum Act 2002 wrought by the Immigration Act 2014, a person can only appeal to the First-tier Tribunal against a refusal of a protection claim or a refusal of a human rights claim (s.82). Section 113 (1) of

the 2002 Act describes a 'human rights claim' as a claim made by a person to the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful as being incompatible with his Convention rights.

15. Paragraph 353 of the immigration rules reads, so far as material,

> When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
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> (i) had not already been considered; and
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> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

16. In **Sheidu** the Upper Tribunal considered the appeal of a person who had an asylum appeal dismissed in 2005, and who had an appeal against a deportation decision dismissed in 2012. The person made further representations in May 2013 based on protection and article 8 grounds. The Secretary of State's decision in respect of these representations was headed,

> UK BORDERS ACT 2007
>
> CONSIDERATION OF FURTHER SUBMISSIONS
>
> DECISION TO REFUSE A PROTECTION CLAIM AND HUMAN RIGHTS CLAIM

17. Under the heading "Consideration of protection claim" the Secretary of State considered the appellant's protection claim in substance and concluded, given the previous adverse credibility findings by Tribunal judges, that there was no reason to take a different view. The letter then passed to issues arising under article 8 and related immigration rules. Once again, the Secretary of State dealt in substance with the various arguments raised by the appellant before concluding, under a heading "Article 8 conclusion", that the appellant's deportation would not breach the U.K.'s obligations under the ECHR. A further short section dealt with "Other ECHR claims". The Secretary of State finally stated, under a heading "Paragraph 353 of the Immigration Rules", that consideration had been given to the appellant's submissions that had not previously been considered, but taken together with the previously considered material, they did not create a realistic prospect of success before immigration judge.

18. At paragraph 16 the Upper Tribunal observed that the references to paragraph 353 of the immigration rules only appeared at the end of the Secretary of State's decision, and that the heading of the letter indicated that it contained a decision to refuse a protection claim and a human rights claim. The Upper Tribunal concluded, in light of the particular decision before it, that there had indeed been a refusal of a human rights claim and that, as there was an appealable decision, paragraph 353 had no part to play. It is apparent from paragraph 17 that the Upper Tribunal placed great emphasis on the particular terms of the decision letter. The Tribunal noted that the decision letter started with what was described as a human rights claim, which was then substantively refused, and that the Secretary of State did so using wording in the heading and in the refusal itself that was clearly envisaged as a refusal of human rights claim by s.82 of the 2002 Act, and that the subsequent consideration under paragraph 353 could not have the effect of removing the right of appeal.

19. It will be apparent from my description of the decision dated 16 November 2015, at paragraphs 5 to 8 above, that that decision is very different to the one considered in **Sheidu**. The decision of 16 November 2015 did not purport to be a decision to refuse a protection claim or a human rights claim, unlike the decision in **Sheidu**. At the very outset of the decision of November 2015 the appellant set out the provisions of paragraph 353 and made it clear that she was considering the application as a repeat claim. Contrary to the submission made by the respondent's representative as recorded at [11] of the judge's decision, the Secretary of State made specific reference to the fresh claim provisions when she considered article 8 (see paragraphs 7 and 8 above). Moreover, the language used throughout the November 2015 decision spoke of 'applications' rather than 'claims'. It is also apparent that the references to paragraph 353 of the immigration rules were an integral part of the November 2015 decision, and not simply 'tacked on' to the end, unlike the decision in **Sheidu**.

20. I have no hesitation in accepting the appellant's submission that, in order to lawfully "consider" any further representations, it is necessary for the Secretary of State to engage with those further representations, often at length and in great detail, both in the context of the immigration rules and outside the immigration rules in accordance with article 8 principles. Such an assertion would be no surprise to those dealing with 'fresh claim' judicial reviews on a daily basis. The fact that there has been detailed consideration of submissions based on article 8 cannot mean that the rejection of those submissions amounts to a refusal of a human rights claim.

21. Contrary to the judge's observation at [14], there was no need for the appellant to give any further reason why there was no right of appeal. It was abundantly clear, having regard to the structure, content and language of the decision dated 16 November 2015 that the decision

being made was a refusal to consider the further representations as a fresh human rights claim.

22. I am therefore satisfied, for the reasons given, that the judge was not lawfully entitled to conclude that the decision dated 16 November 2015 amounted to a refusal of a human rights claim. As a consequence, the respondent did not have a right of appeal and the First-tier Tribunal did not have jurisdiction to entertain an appeal.

23. I appreciate that the respondent now finds himself in the unusual position of having had a purported appeal allowed despite the fact that appellant's conclusion that his further representations did not create a realistic prospect of success in an appeal. No doubt this will be a relevant factor in any judicial review challenge.

Notice of Decision

The decision is vitiated by material error of law. There is no right of appeal and the First-tier Tribunal and Upper Tribunals have no jurisdiction.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the respondent and to the appellant. Failure to comply with this direction could lead to contempt of court proceedings.

27 March 2018

Signed Date

Upper Tribunal Judge Blum