Upper Tribunal
(Immigration and Asylum Chamber)

Sheidu (Further submissions; appealable decision) [2016] UKUT 000412 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on**
On 2 March 2016	
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Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMUDA YUSUF SHEIDU

Respondent

Representation:

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer.
For the Respondent: Ms A Radford, instructed by Wilson Solicitors.

If the SSHD makes a decision that is one of those specified in s 82(1), it carries a right of appeal even if the intention was not to treat the submissions as a fresh claim.

DETERMINATION AND REASONS

1. When is a decision not to treat submissions as a fresh claim not (or not merely) a decision not to treat submissions as a fresh claim? The question is one of many difficult issues arising from the amendment of the Nationality, Immigration and

Asylum Act 2002 by the Immigration Act 2014, the implementation of those amendments, and the context in which they occur.

2. By s. 82(1)(a), as amended by the 2014 Act, and as in force essentially for all purposes from 6 April 2015, there is a right of appeal where the Secretary of State has "decided to refuse" a "protection claim" or a "human rights claim". Sub-section (2) provides the definitions relevant to the first:

> "(2) For the purposes of this Part –
>
> (a) a "protection claim" is a claim made by a person ("P") that removal of P from the United Kingdom –
>
> (i) would breach the United Kingdom's obligations under the Refugee Convention, or
>
> (ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
>
> (b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions –
>
> (i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;
>
> (ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
>
> (c) a person has "protection status" if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection;
>
> (d) "humanitarian protection" is to be construed in accordance with the immigration rules;
>
> (e) "refugee" has the same meaning as in the Refugee Convention."

The definition of "human rights claim" is in s. 113(1):

> "'human rights claim' means 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."

3. Alongside those provisions, although without specific reference in either direction, are paragraphs 353-353A of the Immigration Rules, which, together with paragraph 353B, are found between paragraphs 361 and A362 of the Statement of Changes in Immigration Rules, HC 395 (as amended).

> "Procedure and rights of appeal
>
> Fresh claims
>
> 353. 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:

(i) had not already been considered; and
(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas.

353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise."

4. In the appeals regime from 1993 until the amendments introduced by the 2014 Act, there was no specific right of appeal against the refusal of an asylum or human rights claim. The right of appeal was against the consequent decision, for example to refuse the individual leave, or to remove him. In a line of cases beginning with R v Secretary of State for the Home Department, Ex p Onibiyo [1996] QB 768, it was established that there was no statutory right of appeal against the Secretary of State's decision, under paragraph 353 and its predecessors, not to treat submissions as a "fresh claim", and therefore to make no new appealable immigration decision. Following the amendments introduced by the 2014 Act, a number of decisions, including R (Waqar) v SSHD [2015] UKUT 00169 (permission to appeal to Court of Appeal refused by Beatson LJ on 17 November 2015), R (Robinson) v SSHD [2016] UKUT 00133, R (MG) v First-tier Tribunal (Immigration and Asylum Chamber) [2016] UKUT 00283 and R (Amin Sharif Hussein) v First-tier Tribunal and SSHD [2016] UKUT 00409 (IAC) have considered whether there is still a clear dichotomy between a decision carrying a right of appeal and a decision merely not to treat submissions as a "fresh claim".

5. On the one hand, it appears clear that the procedure under paragraph 353 was intended to continue, despite the change to the appeals regime. If it were otherwise, the removal of any successful claimant could readily be hindered by a succession of repeat claims: even if the resulting decisions were certified, the administrative tasks imposed by a statutory invitation to resist removal in this way would no doubt be insuperable. On the other hand, as is, we think, clear from the decision of the Supreme Court in R (BA (Nigeria)) v SSHD and another [2009] UKSC 7, if the Secretary of State makes a decision which is an appealable decision, paragraph 353 has no further part to play. In that case, the claimant was subject to a deportation order; his further submissions therefore necessarily amounted to a request for revocation of the deportation order, the refusal of which, however expressed, carried a right of appeal under the (then) appeals regime. The decision was primarily concerned with where the right of appeal could be exercised. BA (Nigeria) was examined by the Court of Appeal in R (ZA (Nigeria)) v SSHD [2010] EWCA Civ 926, where Lord Neuberger MR, having examined the competing arguments before him, reasserted the proposition, derived from ZT (Kosovo) v SSHD [2009] UKHL 6, that paragraph 353 has no part to play where there has been an appealable immigration decision.

6. In this context, this Tribunal has, in the cases to which we have referred above, had to determine whether the Onibiyo regime continues to apply in any meaningful sense when, after an unsuccessful asylum claim, an individual again submits to the

Secretary of State that his removal would breach the Refugee Convention. In Waqar the Tribunal concluded that, in the present context, further submissions by an unsuccessful applicant would only be a "claim" within the meaning of s. 82(2)(a) if they were a "fresh claim" within the meaning of paragraph 353. As we have said, permission to appeal was refused in Waqar: Waqar was followed in Robinson. In MG Counsel for the applicant accepted that for the purposes of that application the right of appeal should be read as meaning "a person may appeal to the Tribunal where the Secretary of State has decided to refuse a protection claim (that is a fresh claim within the meaning of paragraph 353) made by P". In MG, the Tribunal rejected the argument that it is for the First-tier Tribunal to decide whether there has been a "fresh claim". Hussein follows all those decisions, in particular deciding that the Secretary of State's power under paragraph 353 to determine whether an adverse response to further submissions carries a right of appeal survives the 2014 amendments. That decision examines the authorities in detail, with extensive citation from them, and will for most purposes provide a more than adequate survey of them.

7. Despite the unanimity thus far, there is clearly room for a modest measure of doubt. There is as yet no authoritative decision of the Court of Appeal on these provisions. Is it really right to treat "claim" in s. 82(2)(a) as meaning "fresh claim within the meaning of paragraph 353"? As has been pointed out on a number of occasions, paragraph 353 does not specify what is to be the result of the consideration of the new submissions. If they are "rejected", the next question is whether they amount to a "fresh claim". May it be that in line with ZT (Kosovo) and ZA (Nigeria), if the Secretary of State does actually refuse the submissions, the decision falls within s. 82? If that is so, the existing "fresh claim" regime could survive, for reasons found in the wording of the paragraph itself. As the Tribunal points out in Hussein, the word "rejected", which is the crucial one in paragraph 353, is not part of the vocabulary of the statute. It may be that, if the Secretary of State communicated a rejection of the submissions, rather than a refusal of the claim, there would be no appealable decision, but on the other hand the decision to reject and the consequential decision that there was not a "fresh claim" could be judicially reviewed, as previously.

8. Although these issues and the question whether the First-tier Tribunal has the task of "classifying" a claim, were the subject of submissions before us, we have concluded that they do not arise for decision on the facts of this case, to which we now belatedly turn. The appellant's nationality is not clear: he claims to be Sudanese but is regarded by the Secretary of State as Nigerian. He arrived in the United Kingdom from Nigeria in 2004 and presented a counterfeit Nigerian passport. He made an asylum application which was refused; an appeal was dismissed and his appeal rights became exhausted on 13 May 2005. He has made a number of subsequent applications. All have been rejected or refused. In 2011 he was sentenced to twenty-seven months imprisonment on each of five counts concurrent for offences of fraud and money laundering. He was then subject to a deportation decision: he appealed; the appeal was dismissed and his appeal rights were exhausted on 22 November 2012. Following the criminal conviction, there is a confiscation order which, on appeal, was reduced to £125,000 and remains outstanding. Further submissions were made on 16 May 2013. They were to the effect that the appellant fears persecution in Sudan, which he says is his country of nationality, and that his removal from the

United Kingdom would be in breach of his rights under the Refugee Convention and articles 2, 3 and 8 of the European Convention on Human Rights because of the ill-treatment that he would suffer on removal to his country of nationality. The article 8 claim is supported also by submissions about his private and family life.

9. The submissions are, as the Secretary of State indicates in paragraph 2k, "considered" in a letter dated 1 June 2015. The letter is headed:

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

10. After introductory paragraphs, above paragraph 4 there is a heading "Consideration of protection claim". Paragraphs 4 to 17 deal in substance with the appellant's assertion that he is a Sudanese national with a well-founded fear of persecution in Sudan. The conclusion notes the previous adverse determinations of Tribunal Judges and concludes that there is no reason to take a different view. The letter then passes to issues arising under article 8 and the related immigration rules. Paragraphs 18 to 57 deal in substance with the various arguments raised by the appellant. There is then a heading "Article 8 conclusion" following which is this:

> "58. Therefore, having considered all available information about Mr Sheidu's circumstances including the best interests of his daughter, it is considered that his deportation would not breach the United Kingdom's obligations under ECHR Article 8 because the public interest in deporting Mr Sheidu outweighs his rights to private and family life".

11. Another short section deals with "other ECHR claims", concluding as follows:

> "60. Careful consideration has been given to whether Mr Sheidu's deportation would breach any other Articles of the ECHR. However, on the basis of information currently available, and for the reasons explained above, it is not accepted that his deportation would breach the ECHR."

12. Paragraphs 61 to 65 consider and reject the application for revocation of the deportation order.

13. Above paragraph 66 is a heading "Paragraph 353 of the Immigration Rules". Paragraphs 66 to 77 work through paragraph 353. The conclusions are as follows:

> "76. Consideration has been given of Mr Sheidu's submissions that have not previously been considered, but that taken together with the previously considered material, do not create a realistic prospect of success before an Immigration Judge in paragraphs 4 to 58 above.
> 77. As Mr Sheidu's submissions do not create a realistic prospect of success before an Immigration Judge, they do not amount to a fresh claim."

14. The conclusions are essentially repeated in paragraphs 78 to 81, and at paragraph 82 the writer of the letter says that "there is no right of appeal against this decision".

15. Undaunted, the appellant put in a notice of appeal to the First-tier Tribunal. In written submissions made preparatory to a hearing to consider the question of jurisdiction, the appellant pointed out that the submissions had been regarded as a "human rights claim", and had been so described in a consent order of 21 May 2015 quashing a previous decision on them. There therefore had been a human rights claim within the meaning of s. 82(2)(a) (as amended): further, Waqar was wrong in applying the paragraph 353 notion of a "fresh claim" to the definition of "claim" in s. 82(2)(a). Judge Russell decided, following Waqar, that there was no appealable decision, and a notice to that effect was sent out. The appellant now appeals, with permission, to this Tribunal. We heard submissions on 2 March 2016 and allowed time for further submissions to be made in writing following that hearing. We then became aware that the Tribunal constituted with Dove J and UTJ Peter Lane were to consider similar issues in Hussein. As is apparent from what is written above, we have considered the decision in Hussein. It does not affect the view we had already reached on the matters before us in this appeal, so we have not invited the parties to make any further submissions based on it.

16. The terms of the decision letter in the present case show, we think, why we expressed the sentiments we did in paragraph 7 above. It is true that the part of the decision beginning at paragraph 66 purports to deal with the submissions made on the basis that they are not a "fresh claim". But it appears to us that the previous 65 paragraphs do something rather different. The heading of the letter, which we have set out, indicates that it contains a decision to refuse a protection claim and a human rights claim; so far as the latter is concerned, paragraph 58 appears to be, in terms, the refusal of a human rights claim. As it seems to us, this is ZT (Kosovo) and ZA (Nigeria) territory: there has been an appealable decision, and once there has been an appealable decision, paragraph 353 has no part to play.

17. Mr Deller's submissions are, effectively, under two heads. The first is that it is not for the First-tier Tribunal to determine whether submissions amount to a "fresh claim" within the meaning of paragraph 353. We entirely agree. Nevertheless, the First-tier Tribunal does have to determine whether the decision before it is one which falls within the definition in s. 82 of the 2002 Act as amended. Mr Deller's second submission is that, because of the way paragraph 353 is considered in the decision letter, and following Waqar, the decision was that the submissions did not amount to a "fresh claim", and so their rejection carried no right of appeal. If those terms were applicable to the decision letter, that submission would certainly be consistent with Waqar; but it does not appear to us that those submissions are open to the Secretary of State in view of the terms of the decision letter. Whatever may have been the terms of the decision letters in the other cases, it appears to us that this decision letter starts with a human rights claim, substantively refuses it, and does so using wording in the heading and in the refusal itself which is so clearly that envisaged by s. 82 that the subsequent consideration under paragraph 353 cannot have the effect of removing the right of appeal engendered by the decision.

18. For these reasons we allow the appellant's appeal against the decision that the First-tier Tribunal had no jurisdiction. The appellant has an outstanding appeal, which will need to be determined in the First-tier Tribunal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 16 August 2016