



IAC-FH-CK-V2

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

Appeal Number: IA/00600/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 14 April 2015**

**Determination Promulgated
On 18 June 2015**

Before

**THE HONOURABLE LORD BANNATYNE
UPPER TRIBUNAL JUDGE ALLEN**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**HAROON RASHID ISMAIL KHALIFA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr A Clarke, Senior Home Office Presenting Officer

For the Respondent: Mr Z Nasim of Milestone Chambers

DETERMINATION AND REASONS

1. We shall refer to the parties as they were before the First-tier Judge rather than as they appear before us. The appellant is a national of India. He appealed to a Judge of the First-tier Tribunal against the respondent's decision of 10 December 2013 refusing to grant him indefinite leave to remain in the United Kingdom. He had arrived in the United Kingdom on 13 September 2002 with entry clearance as a student and obtained subsequent grants of leave to remain as a student in time until

30 June 2009. He was subsequently granted further leave to remain as a Tier 1 (General) Migrant until 12 December 2011 and made a further application as a Tier 1 (General) Migrant which was refused. He lodged an appeal on 16 April 2012. The original decision was withdrawn and he lodged a further in time appeal.

2. His appeal was dismissed by a Judge of the First-tier Tribunal after a hearing on 28 February 2013. His application had been refused on the basis that in the previous application of 24 November 2008 which led to the grant of leave on 12 December 2008 for leave to remain as a Tier 1 Migrant he had submitted an employment letter and payslips and bank statements and the respondent was satisfied that these documents were false because an investigation by the Metropolitan Police had found them not to be genuine. The application was refused under paragraph 322(2) of HC 395. In the application which was considered by the judge in that appeal he had represented that he had not previously used deception when seeking leave to remain and had answered "no" to question D22 and had failed to disclose that he had previously used deception when seeking leave to remain as a Tier 1 Migrant.
3. The appellant was not represented before the judge. There were representatives on file but they were not in attendance. He stated that he wished to proceed with the hearing. The judge noted that in the case of paragraph 322 the burden of proof shifts in the first instance to the respondent. She noted the appellant's evidence both in relation to the appeal before her and in respect of the previous application. She also noted a witness statement from DC Laura Curry which stated that a large number of Tier 1 Highly Skilled Migrant points-based visa applications has been received containing the same bogus documentation including Lloyds Bank statements, bogus bank letters, false employment and educational details, false P60s and payslips. The appellant said that he had sought help from Harish Patel, whose house had been raided by the police and colleagues had advised him to seek help from Harish Patel. He said that that was the only reason why Harish Patel had the documents on his computer. According to DC Curry's witness statement Harish Patel's home address was entered on 3 August 2010 and documents and computer disks were seized. Mr Patel and his associate Ramesh Kumar Patel were arrested and bailed and in addition to bank statements and utility bills there were two documents relating to instructions on how to create bogus documents. The suspects jumped bail and it appeared they had fled to India and extradition proceedings had not been initiated.
4. There was a further witness statement from a Robin Smith, a higher executive officer in the Temporary Migration Department of the UKBA. He said that he had been sent a disk by DC Laura Curry with a statement and on the disk he found payslips from Goldstone Technologies and a salary confirmation letter from that company both confirming the salary of the appellant and also various bank statements bearing his name covering the period of 1 October 2001 to 30 September 2002.
5. The judge said that she was satisfied on the balance of probabilities that the respondent had shown that the appellant had produced false documentation in relation to his application for leave to remain. She said that the applicant submitted by the appellant was submitted by him in his own name and she found no reason

why there should have been documentation included in the possession of Harish Patel, who had been arrested and investigated by the police in connection with fraudulent activity regarding a Tier 1 application. The appellant had said at the oral hearing that he gave the original documents to Harish Patel but the judge commented that this could not be the case as the appellant had made his application. She did not accept that Harish Patel would have had these documents on his computers if the appellant had submitted the application himself and that the appellant would have given him the originals where he claimed that they still were, as the appellant had made his own application. As regards the appellant's claim that he had merely sought help from Harish Patel and had given him the original documentation to submit to the Home Office, as the appellant's address was on the Visa Application Form, she did not accept this. She also noted that there was no further evidence produced by the appellant in connection with his claimed employment with Goldstone Technologies. With reference to contact with Mr Anil Shah, the general manager of Goldstone Technologies, about the appellant's employment, the appellant said the company had now closed down and he had produced no email evidence to show he had contacted Anil Shah.

6. The judge also noted that the appellant had claimed that he had come from India where he was earning a salary of over £55,000 in order to study in the United Kingdom, and said that while this might be the case he had studied for four years on very basic courses when according to his application form he had a computer science degree which he was awarded in the year 2000 and she considered that this rendered his account unbelievable. She did not consider it to be credible that he would come to the United Kingdom and earn £700 to £800 a month and study basic courses if he, as he had claimed, had obtained a computer science degree in India and earned £55,000. She went on to say that on this basis she found that the respondent had discharged the burden of proof in showing that the appellant had produced false documentation in the 2008 application and thus had made false representations in his current application. She had assessed the evidence as a whole and considered that the appellant had produced false documentation in the 2008 application and relied on that false documentation in his present application and the refusal was thus mandatory and the respondent had exercised her discretion correctly in relation to paragraph 322(2).
7. The First-tier Judge who heard the appeal in 2015 noted the appellant's immigration history and the contents of the determination by the first judge, as we shall refer to her. He said at paragraph 42 that the starting point for his decision was the fact that there had to be new evidence or a clear error in the judge's findings of fact in line with the authority of Devaseelan. He noted that it had not been pointed out to the first judge that the £55,000 earnings figure was a consequence of a 5.3 multiplier being applied to the appellant's salary and therefore her assumption that he was earning £55,000 a year literally in India was clearly incorrect. The appellant denied the fact that he had ever used false representations and therefore there was no reason for him to tick the box "yes" in the application form where he was accused of making false or misleading statements.

8. The judge went on to say that there were some difficulties with the logic of the decision of the first judge, namely the fact that having seen the statement from DC Laura Curry as well as the information from the UKBA chief executive officer, there was no evidence that just because the documentation was present on Harish Patel's computer did it necessarily follow that the appellant was party to that deception. He said that he could find no evidential basis that would permit the learned judge to draw the inference that dishonesty by the applicant was a reasonable inference to draw without any other evidence. The appellant's case throughout was that he gave the original documentation to the representative who had a fraudulent and dishonest history and had since fled to India. He said that there was no evidence before him that the appellant was party to the dishonesty or fraud perpetrated by Harish Patel nor that he was party to the creation of false documentation from Goldstone Technologies in his name or the bank account bearing the appellant's name. The fact that his documentation was found on the computer system of a convicted fraudster did not mean he was party to that dishonesty. The appellant had given this information genuinely to Mr Patel and there was no evidence to suggest that the documents on the face of it were not genuine and had not been validly given by the appellant and copied by Mr Patel. He found that the evidence provided by the appellant was persuasive and the first judge's conclusion could not be followed by him. He considered the first judge's finding of adverse credibility was clearly key to her making a finding of fact against the appellant where she clearly had it in mind that he had literally earned £55,000 in India. He considered that the findings of credibility went to the heart of the finding and therefore, following the authority of Devaseelan, he felt able to come to a conclusion that the appellant had not sought to exercise deception previously on the respondent and there was no reason for refusal under paragraph 322(2).
9. The judge having allowed the appeal, the respondent sought and was granted permission to appeal on the basis that the judge had not properly followed the Devaseelan guidance.
10. In his submissions before us Mr Clarke adopted and relied on the grounds.
11. Mr Nasim argued that the judge had correctly applied the Devaseelan guidance. There was new evidence in him saying in a witness statement that he had not been represented at the earlier hearing having been let down by the representative on the day, and there was also the point about the £55,000 earnings and the judge's mistake. There had been no evidence to support the assertion about the use of false statements. The judge had been entitled to make his own assessment after considering the relevant evidence. That was an important change in circumstances and the appellant had not been properly represented before the first judge. The burden of proof had not been discharged as regards fraud.
12. Devaseelan did not say that the second judge was bound by the first judge. It was a question of the fairness of proceedings. The second judge had to make his own independent decision. Devaseelan was not necessarily a relevant case where the burden is on the Secretary of State. The first judge had not said how the detective

constable's evidence assisted. The appellant had not relied on that evidence in his present application. It was accepted that Devaseelan was relevant for immigration appeals as well as asylum and human right appeals. It was argued that the facts were different, and Mr Nasim made reference to the £55,000 point.

13. After consideration we concluded that the respondent's appeal would be allowed and the detailed reasons which we provide below would follow. We also concluded, having heard submissions on the point, that the appropriate course of action would be for the matter to be remitted for a full rehearing at Taylor House by a judge other than Judge Herbert.

Discussion

14. It is important that at the outset we set out the Devaseelan guidance since it is a central issue in this appeal.

“ **d. Our guidelines on procedure in second appeals**

37. We consider that the proper approach lies between that advocated by Mr Lewis and that advocated by Miss Giovanetti, but considerably nearer to the latter. The first Adjudicator's determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the Appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination.
38. The second Adjudicator must, however be careful to recognise that the issue before him is not the issue that was before the first Adjudicator. In particular, time has passed; and the situation at the time of the second Adjudicator's determination may be shown to be different from that which obtained previously. Appellants may want to ask the second Adjudicator to consider arguments on issues that were not - or could not be - raised before the first Adjudicator; or evidence that was not - or could not have been - presented to the first Adjudicator.
39. In our view the second Adjudicator should treat such matters in the following way.
- (1) **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.

- (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.
- (3) **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.
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.)

- (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."

15. In our view the judge did not properly apply the Devaseelan guidance. The only differences before him were the appellant's statement that he had not been represented at the previous hearing and the issue of the £55,000. The former is not a matter of materiality as regards the application of the Devaseelan guidance (see paragraph 39(1) of Devaseelan). Nor do we consider that it was open to the judge to treat the latter, insofar as he did so, as a matter that could properly justify him in coming to a different conclusion. The first judge made it clear, having assessed the evidence as a whole, that the appellant had produced false documentation in the 2008 application and relied on that false documentation in his present application. Although, as a consequence of the matter not having been put before her and therefore not through her fault, she erred as regards the appellant's earnings in India, with regard to that as a relevant issue to the credibility of the claim, it is clear from a proper reading of her determination that the matter that persuaded her that the appellant had produced false documentation was the evidence that had been provided from DC Curry and from Mr Smith of the UKBA and her own assessment of the evidence, applying the correct burden and standard of proof. As is pointed out at paragraph 37 of Devaseelan, it is not the second Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination and he is not hearing an appeal against that earlier determination. It is also pointed out in that paragraph that the first determination as an assessment of the matters that were before the first Adjudicator should simply be regarded as unquestioned though it may be built upon.
16. Also there is the point at paragraph 41 that 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 relitigated before the second Adjudicator if the appellant relies on facts that are not materially different from those put to the first Adjudicator. As set out above, we consider that it was not open to the judge to conclude that the appellant was relying on facts that were materially different from those put to the first judge. The same evidence about the fraud was before him as before the first judge, and on a proper application of the Devaseelan principles he should have followed the earlier determination. It is not a case, as set out under paragraph 42 of Devaseelan, where 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. As the Tribunal pointed out there, 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. In this case it was the absence of a representative that the appellant complains of in the witness statement, that is not a matter that has been linked to the failure to adduce relevant evidence before the first Adjudicator other than with regard to the £55,000 earnings issue which, as set out above, was not a material issue in the first judge's findings. The judge misdescribed the Devaseelan guidance in his brief paragraph 42, and his conclusions at paragraphs 48 to 57 are not in accordance with the Devaseelan guidance. Effectively he allowed the matter to be relitigated when it was not open to him to do so, and as a consequence he came to conclusions that were not open to him to reach. Accordingly we allow the Secretary of State's appeal against the judge's decision and, as set out above, direct that the matter be reheard at Taylor House before a judge other than Judge Herbert OBE.

Notice of Decision

The appeal is allowed under the Immigration Rules.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Allen

TO THE RESPONDENT
FEE AWARD

I have allowed the respondent's appeal and therefore there can be no fee award.

Signed

Date

Upper Tribunal Judge Allen