



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: PA/04974/2018

THE IMMIGRATION ACTS

Heard at Field House, London

On the 19th November 2018

Decision & Reasons Promulgated

On the 29th November 2018

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

Mrs H.T.

(Anonymity Direction made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jones (Counsel)

For the Respondent: Ms Pal (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Sweet promulgated on the 29th May 2018, in which he dismissed the Appellant's asylum appeal. Judge Sweet stated at paragraph 33 that "taking all this further evidence into account and with regard to the country and information guidance report of May 2016, I am not persuaded that the

Appellant has provided any substantive new evidence which will justify my departing from the earlier decision promulgated on the 3rd April 2017”.

2. The Appellant in this case had made a previous asylum appeal that had been heard by First-tier Tribunal Judge Bennett on the 10th March 2017 with a decision promulgated on the 3rd April 2017 in which her asylum appeal had been dismissed. Judge Bennett had previously accepted the Appellant was an Ahmadi by birth, but did not find the Appellant to be a truthful witness and was not satisfied that it was reasonably likely that she engaged in any preaching activities of the sort which she described whilst in Pakistan even within the privacy of her own home or in any other. Judge Bennett had previously not accepted that she had any encounters with KN whilst she was in Pakistan or she left Pakistan for the reason that she gave and that the Appellant was prepared to say whatever she thought would achieve her objective, irrespective of whether it accorded with the truth. Judge Bennett found and accepted that the Appellant engaged in a number of activities with the Ahmadi community since her arrival in the UK as was set out in two letters from the Ahmadiyya Association, but he found that he did not accept that it was reasonably likely that she would wish to continue any of those activities in Pakistan or that she was reasonably likely to engage in any paragraph 2(i) behaviour for the purposes of the country guidance case of MN (Ahmadis - Conditions - Risk) Pakistan CG [2012] UKUT 389 nor did Judge Bennett accept that it was reasonably likely she would have abstained from any paragraph 2(i) behaviour because she feared that she would be persecuted and he was not satisfied that it was reasonably likely that her interest in those activities arose from anything other than a desire to obtain rights of residency in the UK.
3. In the decision under appeal of Judge Sweet, Judge Sweet noted that the previous decision of first-tier Tribunal Judge Bennett was the starting point for the purposes of Devaseelan [2002] UKIAT 00702, and found that the Appellant had given evidence in accordance with the witness statement and noted that the Appellant stated that she had attended different prayers and speeches and sport days and spoke about the Khalifa and that she had

attended and distributed leaflets and stories at paragraph 19. Judge Sweet noted that the Appellant had been referring to the hearing on the 10th March 2017 and the fact that the previous Judge had not found her credible, that she said that she had told the truth and what had changed was that circumstances in Pakistan were getting worse. She said there were no new problems in the UK but there were problems in Pakistan and that she was in contact with her husband and had spoken to him the previous night.

4. Judge Sweet noted that he had now been provided with further evidence from the Ahmadi community in the UK in the form of a further letter dated the 26th September 2017 at paragraph 29 but the first of the three letters in the bundle had been previously considered at the previous determination and Judge Sweet found that the latest letter of the 26th September 2017 did not refer to any religious activities the Appellant participated in whilst in Pakistan, but confirmed that she had engaged in activities in the UK which had previously been accepted. He said that the Appellant had conceded in evidence that she did not carry out any preaching activities, but had handed out leaflets and stories. Judge Sweet then referred to the headnote of the country guidance case of MN and the risk posed to the Ahmadis and in particular set out the guidance at paragraph 2(i). The Judge went on to note and take account of the further evidence provided by the Appellant's family members, but went on at paragraph 33 to find that even taking all of that evidence into account in regard to the country and information guidance report of May 2016 he was not persuaded that the Appellant had provided any substantive new information which would justify his departing from the earlier decision promulgated on the 3rd April 2017. The Judge did therefore not allow that matter to be relitigated and did not make further findings contrary to those of Judge Bennett.
5. Within the Grounds of Appeal it is argued that the First-tier Tribunal Judge failed to provide any reasoning for the decision and simply relied wholly on the decision of the previous Judge and provided no reason as to why he was not prepared to depart from the findings of the previous Judge which is argued to be a strong arguable error of law. It is said that under paragraph

353 the Respondent considered that the further evidence was new and created a realistic prospect of success such that the claim had been considered as a fresh asylum claim which created a realistic prospect of success and that the Judge had gone behind the concessions of the Respondent. It is argued that Devaseelan provided guidance which said that the first decision was a starting point and not binding on the second Judge and that the Judge is required it is argued to conduct a holistic assessment of the new and old evidence and apply the relevant principles of the country guidance case of MN. It is argued within the new Grounds of Appeal that the Judge had not engaged with the new evidence and that the Judge had failed to engage with what was now a sur place claim which the Respondent it is argued conceded creating a realistic prospect of success by providing a right of appeal.

6. In his oral submissions, Mr Jones relied upon the Grounds of Appeal, and further argued that the Judge had failed to appreciate that the claim was on the basis of sur place religious activities, not on the basis that such activities will become known to the authorities in Pakistan, but they were indicatively argued of the importance of those activities to her religious identity. He argued that since the first Judgment further evidence had been provided both in terms of the submissions dated the 5th February 2018 contained within Section A of the Respondent's bundle, but further in addition the evidence of the Appellant herself in terms of her statement and her oral evidence, and the further witness evidence provided and that, together with the additional letter from the Ahmadiyya Association dated the 26th September 2017 he said that that had addressed the activities of the Appellant in the UK since the First-tier Tribunal hearing in March 2017. He argued that the scope and persistence of her religious activities in the UK showed that this was a genuine exercise of her religious faith rather than a simple embellishment of the claim as found by the original First-tier Tribunal Judge, and that Judge Sweet should have properly considered that evidence. He argued that handing out of leaflets is proselytising, even if not face to face. Mr Jones conceded that the activities set out in the latest letter from the Ahmadiyya Association were the same activities as conceded by Judge Bennett but

argued that the length of time the activities had been undertaken for was a factor that the Judge should have taken account of in considering whether or not the activities were a genuine reflection of her faith. He argued that the Respondent had considered the new evidence as a new claim and that Devaseelan had only been taken as a starting point.

7. In her submissions on behalf of the Respondent Ms Pal argued the Judge has not materially erred and had properly considered the new evidence including the evidence from the Ahmadiyya Association and the Appellant's own oral evidence which included the fact that the Appellant had not preached but simply handed out leaflets and the Judge had considered the statements from family members in Pakistan and the fact that her husband had been able to live in Pakistan and had not received threats. She noted that the Judge had referred to the Appellant's statement and asked me to find that the Judge had properly taken account of all the evidence and that there was no substantive new evidence following Judge Bennett's decision such as to justify the Judge departing from that decision. She argued there was no material error and the decision of the First-tier Tribunal should stand.

My Findings on Error of Law and Materiality

8. Although the Respondent had accepted the Appellant's claim was a fresh claim for the purposes of paragraph 353 of the Immigration Rules, and under the wording of that paragraph such submissions will only amount to a fresh claim if they are significantly different from material that was previously being considered and that only to be held to be considered significantly different if the content had not already been considered and taken together with previously considered material created a realistic prospect of success, notwithstanding its rejection.
9. However, the fact that the Respondent allowed a fresh claim to be brought does not amount to a concession that the First-tier Tribunal Judge had to conduct a full analysis of all of the evidence for the purposes of Devaseelan. No concession had been made in that regard, all that had been allowed by

the Respondent was a fresh claim under paragraph 353 of the Immigration Rules. It was not a concession that related to how the Judge should deal with the evidence before him on appeal from the Respondent's decision, when conducting the appeal in the First-tier Tribunal.

10. The established case law of Devaseelan (Second Appeals, ECHR, Extra-Territorial Effect) [2002] UKIAT 702 is still good law regarding how a First-tier Tribunal should conduct an appeal against the decision of the Respondent in circumstances where there is a previous determination by a Judge.

11. It was noted in paragraph 37 of Devaseelan that *"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 on, and, as a result, the outcome of the hearing before the second adjudicator may be quite different from what might have been expected from the 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 same 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 the 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".* It was further stated at paragraph 41(6) that *"if before the second adjudicator the Appellant relies on facts that are not materially different than those put to the first adjudicator; or 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 rely on the matter to be relitigated".

12. Although this case is almost just over a year apart and it is a previous decision of First-tier Tribunal Judge Bennett, Judge Sweet noted and set out the reasons why Judge Bennett had not found the Appellant previously to be a credible witness, and noted at paragraph 29 that the Appellant had provided further evidence from the Ahmadi community in the UK in the form of a further letter dated the 26th September 2017. He noted that the first three of the Association letters had been considered in the previous determination and that the latest letter confirmed that she had been engaging in activities in the UK which had previously been accepted.

13. Mr Jones before me conceded that the activities set out within the latest letter from the Ahmadiyya Association were the same as those referred to in the previous letters considered by Judge Bennett, in respect of her sur place activities within the UK. However, as Mr Jones conceded, he was not seeking to argue that the sur place activities since the date of the previous decision would have come to the light of the authorities in Pakistan, which would give rise to a risk upon return, but was simply arguing that the fact that she had continued with those activities for a year post-dating the decision of Judge Bennett showed the genuineness of those activities as being a true reflection of her religious beliefs.

14. However, in that regard, although time had passed, the evidence sought to be relied upon in that regard was seeking simply to undermine the previous findings of Judge Bennett, that exactly the same activities were not genuine, when he considered the claim in April 2017. Judge Sweet had taken account of the fact that those activities continued, but was entitled to find that the Appellant had not provided any substantive new evidence which would justify him departing from the earlier determination promulgated on the 3rd April 2017 by Judge Bennett. In light of the evidence provided by the Appellant, that was a finding open to him. He was not required to conduct a complete

analysis of all the evidence afresh, simply on the basis that the Respondent had treated the claim as a fresh claim. Clear guidance was given in the case of Devaseelan, which Judge Sweet followed. There were no new activities which were said to put the Appellant at risk, it was the same activities said to be continuing, and quite properly it was open to him to find that that matter should not be relitigated in light of the evidence that had been presented as there was no substantive new evidence which would justify him departing from the previous decision. The Grounds of Appeal in that regard simply amount to a disagreement with those findings, rather than revealing any material error of law.

15. The decision of First-tier Tribunal Judge Sweet does not reveal any material errors of law and is maintained.

Notice of Decision

The decision of First-tier Tribunal Judge Sweet does not reveal any material errors of law and is maintained.

I do order anonymity in this case, given the nature of the protection of the claim. No record or transcript or note of these proceedings may identify the Appellant or any member of her family directly or indirectly. This direction applies to both the Appellant and to the Respondent. Failure to comply with this direction can lead to contempt of court proceedings.

Signed



Deputy Upper Tribunal Judge McGinty

Dated 19th November 2018