



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05744/2017

THE IMMIGRATION ACTS

Heard at Field House
On 19 February 2019

Decision & Reasons Promulgated
On 6 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

MOURAD CHEKABI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Wass (for Sunrise Solicitors)

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

DECISION AND REASONS

1. This is the appeal of Mourad Chekabi, a citizen of Algeria born 17 April 1970, against the decision of the First-tier Tribunal of 13 August 2018 to dismiss his appeal, itself brought against the Respondent's decision of 30 January 2018 to refuse his application for entry clearance as the Sponsor's spouse, that refusal being treated as a human rights claim.

2. The Appellant's immigration history is lengthy. He originally arrived in the UK and claimed asylum on 10 March 1996. His asylum application was refused and his subsequent appeal was dismissed.
3. On 2 January 2010 he was arrested at Stansted airport and charged for using an identity document which did not belong to him; he was subsequently sentenced to 12 months' imprisonment on 12 January 2010, and informed of his liability to deportation. At this juncture he told the authorities that he was in a relationship with [SC], a British citizen.
4. He was released from detention on 21 July 2010 and married Mrs [C] on 24 September 2011.
5. On 2 September 2011, a deportation order was made against him. On 11 December 2011 his appeal against deportation was heard by the First-tier Tribunal composed of Judge Blackford and Mr Armitage. His appeal was allowed on private and family life grounds. He was granted leave to remain, but was arrested on 14 February 2013 pursuant to a European arrest warrant issued in March 2005. He was extradited to France and held in custody for nine months, before being granted bail. In June 2014 he was convicted of manslaughter and sentenced to a suspended sentence of five years' imprisonment.
6. The Appellant then returned to Algeria. He applied for entry clearance to return to join his wife in the UK but that application was refused on 15 December 2014, and an appeal was dismissed in May 2016 by Judge Higgins, because of a failure to supply specified documents addressing the financial requirements of the Rules.
7. The Appellant next applied for entry clearance on 28 October 2016, the application being refused on 25 January 2017, because of the five-year sentence imposed in France which was not considered spent, as a "persistent offender", and for "Suitability" reasons, because of his character, conduct and associations, due to the UK offence. He appealed on 18 April 2017. Two of those grounds, those relating to persistent offending and the mandatory ban thought to arise from the French conviction, were reversed by the Entry Clearance Manager reviewing the decision, but the Suitability refusal was maintained.

Previous appeal decisions

8. It is appropriate to review the contents of the previous appeal decisions in more detail. The 2011 decision found that the Appellant played a significant part in the family life of his wife and the three children. Mrs [C] clearly had a real aversion to going to Algeria to live, or even perhaps to visit. Her evidence about witnessing a shooting and having to drive around a body on her only trip to the country appeared to be very real to her. The Appellant's departure would have a direct impact on the well-being of the children, both because of his own absence from their lives and because of the effect on their mother; they would face considerable disruption to their education and the rest of their lives in the UK were they forced to leave the country with him. The Appellant had cheated the immigration system on a sustained basis, which was a factor to be taken very seriously; indeed the severity of his offending was highlighted by it falling within the class of case liable

to automatic deportation. Nevertheless, the sentence was low in the possible scale of potential punishments. There was little risk of the Appellant reoffending given his overall history.

9. In the 2016 decision from Judge Higgins, the First-tier Tribunal found that the financial requirements under Appendix FM which made provision for partners had not been met, as the specified evidence to establish the relevant earnings threshold was not provided with the application. In reality the Sponsor's income considerably exceeded £18,600, he would be financially independent given he had previously worked in the UK as a self-employed mechanic, and he clearly spoke good English (given his wife did not speak French or Arabic). However, there were no very compelling circumstances as required by *SS (Congo)* to justify departure from the normal course of refusal under the Rules, whether the failure to meet the Rules was procedural or substantive in nature. The appropriate way forward would be to make a further application under the Rules.
10. Judge Higgins accepted that Mrs [C] visited the Appellant every six to eight weeks and that her children were at that time living in the family home, and thus had not begun independent lives, albeit that they now adults aged 19 and 21; and that her belief that Algeria was too dangerous a place even to visit was heartfelt and genuine. Furthermore documents demonstrating the income requirements stipulated in Appendix FM-SE had been provided at the date of hearing.
11. The Judge concluded that a refusal under Rule S-EC.1.4(b) would have been incompatible with Article 8 ECHR, noting that the Entry Clearance Officer had wrongly considered the Appellant to have been excluded because of the foreign conviction, the ECO having been under the false impression that he had been sentenced to fifteen years' imprisonment by a French court. Once that sentence fell out of consideration, reliance on SC-1.4 would have been untenable given that the sentence was at the bottom end of the range specified by the Rule, and that cohabitation was a cardinal feature of married life, and that the Appellant had already been granted entry clearance of six months following the success of his appeal in 2011, and it would have been highly likely that he would have been granted further leave had he not been extradited to France. His relationship had been established whilst he had been present in the UK on a long-term basis unlawfully, unbeknown to the Sponsor.

The First-tier Tribunal decision now appealed

12. The First-tier Tribunal identified the issues before it. The Appellant was accepted as being in a genuine and subsisting relationship with his wife with whom he had been together with since the late 1990s, the relationship enduring notwithstanding their separation for the last four years. He had been the stepfather of her now adult children (aged 23 and 25), playing an active role in their lives. His wife clearly earned more than the minimum earnings requirements, and all her extended family lived in the UK.

13. The Respondent had sought to raise Rule 320(7B) but without giving any notice or complying with the requirements of the Procedure Rules: accordingly this application was denied.
14. The First-tier Tribunal noted the principles set out in *Devaseelan* that findings of fact should be treated as the starting point in future appeals, though declined to accept that this principle extended to “conclusions” extending beyond such findings. There was no new evidence to justify those findings, which accordingly stood. However, it was necessary to conduct a fresh assessment of private and family life having regard to the further passage of time, which had seen a continuation of the strong relationship notwithstanding the difficult circumstances under which it had to be pursued, albeit that the ties to the children would presumably have slightly lessened given their ages. More time had passed moving the Appellant nearer the date at which his sentence would be “spent” for immigration rules purposes.
15. The fundamental difficulty confronting the Appellant's appeal was the Suitability criteria. He had been convicted of an offence for which he had received a sentence within the relevant range, and it was not a decade since that sentence was passed on him. Accordingly his appeal could succeed only if there were “exceptional circumstances” such that the public interest was outweighed by compelling factors. Even though the offence was at the bottom end of the range of sentences covered by the Rule, his offending related to the use of the false documents to deceive the immigration authorities, a matter going to the heart of immigration control. Given his wife’s understandable stance on moving to Algeria given circumstances there and her own extended family in the UK, this meant that they would remain separated until the full 10 years had passed. However, there was nothing “exceptional” about the case, there being nothing particularly compelling in his relationship with his adult stepchildren.
16. As to the section 117B factors, the correspondence between the couple in English indicated that the Appellant satisfied the English language requirements, and it could be presumed he would not be a burden on public funds given his wife’s salary. However, the relationship was one established whilst he was here unlawfully, and thus had to be afforded little weight. Mrs [C] had not known of the Appellant's offending until long after the relationship had formed, and so this was not her fault.

Onwards appeal to the Upper Tribunal

17. Grounds of appeal contended that
 - (a) It had been irrational and unjustified to refuse to follow the findings made in the earlier Tribunal decisions of 2011 and 2016 on *Devaseelan* grounds;
 - (b) Those findings were binding on the FTT in the sense recognised in *Danaei* [1997] EWCA Civ 2704 and *TB (Jamaica)* [2008] EWCA Civ 977;
 - (c) Relevant matters had been overlooked, in particular the inability of Mrs [C] to visit the Appellant in Algeria, the fact that Judge Higgins had dismissed

the appeal only because the specified evidence grounds were not met (that being a conclusion that would not have survived the decision in *MM (Lebanon)*), and that the deportation order had been successfully appealed on human rights grounds in the 2011 determination, from which Judge Higgins had declined to depart in the 2016 determination.

18. The First-tier Tribunal refused permission to appeal on 9 October 2018, but the Upper Tribunal granted permission on 17 January 2019, on the basis that all the grounds were arguable.
19. Ms Wass submitted that the First-tier Tribunal had materially erred by failing to appreciate that the appellate findings previously made were effectively binding upon it, in so far as it identified no evidence to justify departing from them. Whilst the framework of Rules had moved on in recent years as domestic policy had changed, the 2016 decision had maintained the thinking in the 2011 decision. This represented a modern endorsement of the earlier judicial response, with a full appreciation of the relevant public interest considerations.
20. Ms Jones submitted that any argument that the Entry Clearance Officer was bound by earlier First-tier Tribunal decisions should have been challenged by way of judicial review, not via the statutory appeal process. The legal matrix had moved on and the public interest side of the balance had now been weighted in favour of immigration control considerations, particularly where criminal offending was involved. The findings of fact were fully reasoned and regard was had to the family's circumstances, particularly the greater ages of the adult children.

Decision and reasons

21. The Immigration Rules in so far as relevant provide:

“Grounds on which entry clearance or leave to enter the United Kingdom is to be refused

(7B) where the applicant has previously breached the UK's immigration laws (and was 18 or over at the time of his most recent breach) by:

- (a) Overstaying;
- (b) breaching a condition attached to his leave;
- (c) being an Illegal Entrant;
- (d) using Deception in an application for entry clearance, leave to enter or remain, or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not);

...

S-EC.1.4. The exclusion of the applicant from the UK is conducive to the public good because they have:

- (a) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years; or

- (b) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months but less than 4 years, unless a period of 10 years has passed since the end of the sentence; or
- (c) been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 12 months, unless a period of 5 years has passed since the end of the sentence.

Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors.

S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance."

The italicised passage was revoked by HC 309 with effect from 11 January 2018.

22. Where there has been a prior judicial determination on the issues in the appeal, that assessment represents the starting point for the subsequent appeal as set out in *Devaseelan (D (Tamil))* [2002] UKIAT 00702): in short the prior determination is the authoritative historic resolution of the case. A Judge is entitled to take account of subsequent facts, though they should treat the adduction of further evidence relating to the historic situation with circumspection.
23. *Devaseelan* aside, there is another more fundamental norm governing the ability of a government decision maker to act inconsistently with judicial decisions emanating from proceedings to which they were party. In *Danaei* Simon Brown LJ concluded that the circumstances in which the Secretary of State could depart from the ruling of an independent Tribunal in only limited circumstances.

"On an issue such as this it does not seem to me reasonable for the Secretary of State to disagree with the independent adjudicator who has heard all the evidence unless only:

 1. the adjudicator's factual conclusion was itself demonstrably flawed, as irrational or for failing to have regard to material considerations or for having regard to immaterial ones - none of which is suggested here;
 2. fresh material has since become available to the Secretary of State such as could have realistically have affected the adjudicator's finding - this too was a matter we considered in *Powergen*;
 3. arguably, if the adjudicator has decided the appeal purely on the documents, or if, despite having heard oral evidence, his findings of fact owe nothing whatever to any assessment of the witnesses."
24. Stanley Burnton LJ in *TB (Jamaica)* [2008] EWCA Civ 977 concluded:

“33. The principle that the decision of the Tribunal is binding on the parties, and in particular on the Home Secretary, has been consistently upheld by the Courts. In *R (Mersin) v Home Secretary* [2000] EWHC Admin 348, Elias J said:

‘In my opinion there is a clear duty on the Secretary of State to give effect to the Special Adjudicator's decision. Even if he can refuse to do so in the event of changed circumstances or because there is another country to which the applicant can be sent, there is still a duty unless and until that situation arises. It would wholly undermine the rule of law if he could simply ignore the ruling of the Special Adjudicator without appealing it, and indeed Mr. Catchpole [counsel for the Home Secretary] does not suggest that he can. Nor in my opinion could he deliberately delay giving effect to the ruling in the hope that something might turn up to justify not implementing it. In my judgment, once the adjudicator had determined the application in the applicant's favour, the applicant had a right to be granted refugee status, at least unless and until there was a change in the position.’

34. In *R (Boafo) v Home Secretary* [2002] EWCA Civ, [2002] 1 WLR 44, Auld LJ said at [26] in a judgment with which the other members of the Court of Appeal agreed, "... an unappealed decision of an adjudicator is binding on the parties." In *R (Saribal) v Home Secretary* [2002] EWHC 1542 (Admin), [2002] INLR 596, Moses J said:

‘17. The decision in *ex parte Boafo* demonstrates an important principle at the heart of these proceedings. The Secretary of State is not entitled to disregard the determination of the IAT and refuse a claimant's right to indefinite leave to remain as a refugee unless he can set aside that determination by appropriate procedure founded on appropriate evidence.’

35. Of course, different considerations may apply where there is relevant fresh evidence that was not available at the date of the hearing, or a change in the law, and the principle has no application where there is a change in circumstances or there are new events after the date of the decision ...

25. As summarised above, the First-tier Tribunal essentially found that it was not disproportionate to the Appellant's private and family life to maintain the ban on his return to the UK for which Immigration Rule S-EC.1.4 provides. As he was convicted of on 12 January 2010, the normal ban on his return would run until 12 January 2020. The Tribunal was clearly aware of the different decisions made by earlier Tribunals, but considered itself entitled to depart from them because of the passage of time.
26. The live question on this appeal is whether the First-tier Tribunal was effectively bound by the earlier judicial decisions to find that the Appellant's continued exclusion from the UK was disproportionate.
27. I do not consider that it was so bound, for the reasons that follow.
28. The Appellant draws attention to two norms identified in the authorities, respectively epitomised by *Devaseelan* on the one hand, and by *TB (Jamaica)* and

Danaei on the other. The former addresses the appropriate response of a judicial decision maker to findings made by a predecessor (typically of coordinate jurisdiction), and the latter addresses the circumstances in which a government department may act inconsistently with the outcome of proceedings to which they were party.

29. The right of appeal is given on the basis that the Secretary of State has decided to refuse a human rights claim (section 82(1)(b) NIA 2002) and the relevant ground of appeal here was that that the decision against which the appeal was brought was unlawful under section 6 of the Human Rights Act 1998 (section 84(2) NIA 2002). The relevant human rights claim here was that the immigration decision appealed against was disproportionate to the private and family life with which it interfered.
30. The job of the First-tier Tribunal when faced with an appeal on human rights grounds is to determine whether the present decision is inconsistent with the Human Rights Convention. No doubt historic credibility findings should not be departed from absent good reason, but the compatibility of a decision based on human rights considerations must assess the *present* circumstances against the *present* public interest. As Sedley LJ put it in *AG (Eritrea)* [2007] EWCA Civ 801, the balance is a labile one, i.e. one in which either side of the scales may be weighted differently according to factors that may change over time.
31. The statutory framework also indicates that the question of proportionality must be assessed at the date of the appeal hearing, see section 85(4) of the Nationality Immigration and Asylum Act 2002 providing that:

“(4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.”
32. *Devaseelan* explains the approach to be taken to prior *factual* findings of an appeal. That case arose in the context of asylum claims where an Article 3 case was subsequently brought on similar facts, though understandably the principles therein have been seen as bearing on all immigration appeals where claims based on similar facts require re-assessment, whether that arises in the context of the same legal enquiry or not. The important passages are introduced thus §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.”
33. So *Devaseelan* clearly recognises the possibility that the passage of time may change the outcome of an appeal, notwithstanding that similar factual terrain underlies those consecutive determinations. The critical sub-paragraphs §39-42 which lay down the well known *Devaseelan* principles (themselves numbered (1)-(8)) thus lay emphasis principally on *factual* findings. Those findings may be

highly relevant to any future enquiry into the proportionality of an immigration decision; but they are not dispositive of it.

34. Turning to the other line of authority, *TB (Jamaica)* and *Danaei* are quite expressly decisions which recognise the possibility that “*changed circumstances*” or “*fresh material*” might entitle a future decision maker to act otherwise than the result of a previous appeal might indicate.
35. Here there were several new factors present, ranging from the maturity of the Sponsor’s children (which decreased the force of the family life in play) to the changes in government policy expressed in statute and Rule that had entered force over time. For example, the section 117B factors took effect only from 28 July 2014, and they include express provision that ties established during precarious residence are to receive little weight. Rule S-EC.1.4 is part of the codification of private and family life considerations that took effect via the July 2012 reforms including the introduction of Appendix FM; as has been explained in subsequent cases, particularly *Hesham Ali* [2016] UKSC 60 and *MM (Lebanon)* [2017] UKSC 10, the government is entitled to lay down policies seeking to provide for a consistent approach to the determination of private and family life claims, and a migrant who falls outside the Rules effecting those policies must demonstrate a “*compelling*” claim.
36. When the First-tier Tribunal allowed the appeal in 2011, it did so expressly in the context of its finding that the Appellant’s appalling immigration history (as to which the sentencing judge and the Tribunal both agreed) was outweighed by his involvement with the upbringing of his partner’s two young children. This was not the situation prevailing in August 2018. In fact it is difficult to see how it could have been the case in 2016 when Judge Higgins confronted the appeal, a matter to which I shall shortly return.
37. Rule S-EC.1.4.(b) within Appendix FM was not part of the Immigration Rules when the appeal was heard and allowed in 2011. However, when Judge Higgins came to consider the appeal in 2016, it was part of the relevant legal framework, and thus was relevant to his finding that it would be disproportionate to the Appellant’s Article 8 rights for that Rule to be enforced against him, given the success of his appeal in 2011, which would have put him on a track by which further leave to remain was granted.
38. However, Judge Higgins’s findings were necessarily *obiter*, made in the context of dismissing the appeal, and in any event did not take account of the changes in the legal environment to which I have drawn attention; Tribunals at that time did not have the benefit of the line of Supreme Court authority mentioned above that recognised the need for a “*compelling*” claim to justify departure from the normal consequences of the Rules. Had those findings been challenged by an appeal to the Upper Tribunal, this might well have been detected; but as the Secretary of State had succeeded in defending the decision, no such challenge was brought. So although one can doubtless state with confidence that in general the Secretary of State’s failure to challenge a decision on proportionality on a particular set of facts means that government officials are effectively estopped from making future

decisions inconsistent with the outcome of an appeal to which the Home Office was party, I do not consider that that principle applies here.

39. Accordingly neither the ground of appeal based on *Devaseelan* nor that which relies upon *TB (Jamaica)* and *Danaei* can succeed.
40. The third ground of appeal as I have summarised it above challenges the conclusions of the First-tier Tribunal for failure to take account of relevant considerations. I do not consider that that argument is made out. Firstly, there was significantly more to analyse in relation to the Judge Higgins decision than simply the recognition in *MM (Lebanon)* that cases could succeed outside the Rules based on a broader approach to calculating whether the available funds met the relevant financial requirements, as I have sought to explain above. And there was more to consider vis-à-vis the 2011 decision too, again as I have addressed already. Secondly, the inability of his spouse to visit him in Algeria did not preclude the possibility that they might meet in a third country, nor did it prevent them keeping in touch via modern means of communication, and it was, of course, the normal course of events given the ten-year ban on return. The Judge clearly considered whether there were family ties here that warranted departure from that starting point, but concluded there were not. That was a finding to which the Tribunal was fully entitled to come.
41. I accordingly find that the First-tier Tribunal was entitled to make the findings that it did, and that its decision that the appeal is dismissed should stand.

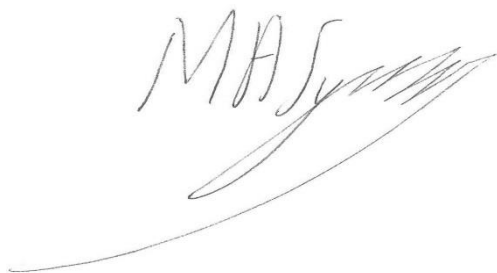
Decision:

The decision of the First-tier Tribunal contains no material error of law.

The appeal is dismissed.

Signed:

Date: 28 February 2019

A handwritten signature in black ink, appearing to read 'M.A.S. Symes', with a long, sweeping underline that extends across the width of the signature.

Deputy Upper Tribunal Judge Symes