



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: - UI-2022-002371

First-tier Tribunal No: EA/05653/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 18 June 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

Gulshan Ara Choudhury
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr A Miah, counsel instructed by Winston Rose Solicitors
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 30 May 2023

DECISION AND REASONS

Introduction

1. The appellant's appeal the decision of First-tier Tribunal Judge Beg promulgated on 10 February 2022 in which her appeal against the refusal of an EEA Family Permit was dismissed.
2. Permission to appeal was granted by First-tier Tribunal Judge Frantzis on 25 April 2022.

Anonymity

3. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

4. The appellant made an unsuccessful application for a visitor's visa on 12 June 2015 as well as an unsuccessful application for an EEA family permit on 24 October 2017, along with her husband. Their appeals were dismissed by First-tier Tribunal Judge Lawrence on 3 April 2019. On 12 August 2020, the appellant and her husband made applications for EEA family permits as the dependant relatives of their daughter, Farzana Kibria Chowdhury, who is a national of the Netherlands residing in the United Kingdom. Those applications were refused by way of decisions dated 15 October 2020 because the remittances by the sponsor were dated in the twelve months immediately before the visa application despite the sponsor having resided in the United Kingdom since 2011. In addition, the respondent remarked that insufficient details had been provided as to the personal and family circumstances to show that the essential living needs of the couple could not be met without the financial support of the sponsor.

The decision of the First-tier Tribunal

5. At the hearing before the First-tier Tribunal on 7 February 2022, the judge was informed that the linked appeal of the appellant's husband had already been determined by First-tier Tribunal Judge Buckwell, following a hearing which took place in November 2021. The judge concluded that there was little evidence of dependency, noting that the appellant's husband with whom she lived, received a pension from his employment at a bank which was used to meet their essential living needs.

The grounds of appeal

6. The grounds of appeal argued that there was a failure to apply the guidance in *Devaseelan* [2002] UKIAT 702, [2003] Imm AR 1, in that the judge did not take the decisions of the previous judges as the starting point and she provided no very good reason to depart from the findings of Judge Buckwell. In addition, the judge made a mistake of fact in finding that the sponsor's father had a pension of 10,000 taka as that was not the evidence of the sponsor. Evidence which was not before the judge was attached to the grounds which showed that the sponsor's father received a one-off pension payment when he retired in 2009, which was prior to the appellant becoming dependent upon the sponsor. It was argued that the inconsistency between the decisions of the mother and father despite being based on the same relevant factual matrix gave rise to an arguably irrational situation.
7. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

For the reasons set out at paragraphs 3, 6 & 8-11 it is at least arguable that the FTTJ has erred in law by failing to give proper consideration to the decision of Judge Buckwell in the Appellant's husband's allowed appeal, which was brought on the same factual matrix.
8. The respondent filed a Rule 24 response dated 10 June 2022 in which the appeal was opposed, without commentary.

The error of law hearing

9. When this matter came before me, Ms Gilmour stated that she did not support the Rule 24 response and she did not oppose the appeal because the appeals of

the appellant and her husband ought to have been linked. Mr Miah relied on the permission to appeal grounds, emphasising that the findings of the previous judge ought to have been the starting point.

10. After hearing from both parties, I announced that the decision of the First-tier Tribunal contained material errors and that it was set aside. I invited submissions on the remaking of the appeal. Ms Gilmour did not wish to make any submissions. Mr Miah drew my attention to the findings of Judge Buckwell which he invited me to adopt. At the end of the hearing, I indicated that the appeal was allowed. I give my reasons below.

Decision on error of law

11. First-tier Tribunal Judge Beg had before her the decisions of Judges Lawrence and Buckwell. At [19] of her decision Judge Beg stated, 'I bear in mind that two previous judges took differing views of the evidence in relation to the appeal of the appellant's husband. My views are based entirely on an independent assessment of the evidence before me, including the evidence given by the sponsor.' As conceded by Ms Gilmour, this was the wrong approach. The correct approach is that set out in *Devaseelan*:

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.

12. Furthermore, in *Patel* [2022] EWCA Civ36, Lord Justice William Davis found as follows in relation to cases where there are different parties,

a) Where there are different parties but with a material overlap of evidence, the *Devaseelan* principles of fairness apply with appropriate modification.

b) What fairness requires will depend on the particular facts of the case. The findings at an earlier FTT hearing will be an important starting point but the second FTT judge cannot avoid the obligation to address the merits of the case on the evidence then available.

c) The second FTT judge necessarily will look for a very good reason to depart from the earlier findings. Whether the evidence could have been adduced at the previous hearing may be relevant to that issue. Equally, a very good reason may be that the new evidence is so cogent and compelling as to justify a different finding.

13. Judge Beg made no reference to *Devaseelan* and nor did she set out the previous judicial findings or take the previous decision as the starting point. There was no recognition in the decision that in Judge Buckwell's decision, he took the

April 2019 decision of Judge Lawrence as a starting point but concluded that the evidence before him was of a 'better quality.' Both the appellant and her husband relied upon the same facts and evidence. The appeal of the appellant's husband was decided just three months before her own. Judge Beg needed to provide a very good reason to depart from the earlier findings of Judge Buckwell on the same evidence but did not do so and instead re-litigated facts which were already established, leading to an irrational outcome.

14. In addition to the failure to engage with *Devaseelan*, Judge Beg erred in making a mistake of fact at [22] and [25] in finding that the appellant's husband was in receipt of a pension which was used to meet the couple's basic living needs. I am satisfied that the sponsor's evidence was that her father received a one-off pension payment in 2009, which he and her mother used to support themselves until the sponsor began supporting her parents, in 2011. The appellant has produced documentary evidence to support that contention with the grounds of appeal.
15. For the foregoing reasons, the decision of the First-tier Tribunal is vitiated by material errors of law and is unsafe. I set that decision aside.

Remaking

16. Ms Gilmour rightly declined to make any submissions on behalf of the respondent. I conclude that the starting point for considering the appellant's appeal can be found in Judge Buckwell's decision and reasons. Those findings were as follows:
 - i. The £10,000 deposit in Bangladesh was made by the sponsor for the benefit of the appellant's husband;
 - ii. the sponsor regularly remits funds for the benefit of both parents;
 - iii. the sponsor is credible in relation to the financial support of her parents;
 - iv. the sponsor pays for her parents' rent and they have been dependent upon her since 2011;
 - v. the sponsor's documents are credible;
 - vi. The appellant's father established his dependency upon the sponsor and is entitled to an EEA family permit.
17. The circumstances of the appellant and her husband are identical, and no good reason has been identified for there to be a departure from Judge Buckwell's findings. It follows, that I conclude, for the same reasons as Judge Buckwell, that the appellant has established that she is dependent upon the sponsor for her essential living needs.

Notice of Decision

The appeal is allowed under the Immigration (European Economic Area) Regulations 2016.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 May 2023

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 May 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **"working day"** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent” is that appearing on the covering letter or covering email