Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07473/2016

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 19 December 2017	**On 21 December 2017**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TAHA MALEKARI

Respondent

Representation:
For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer
For the Respondent: Ms N Loughran, of Loughran & Co, Solicitors

DETERMINATION AND REASONS

1. The SSHD's grounds of appeal to the UT are set out in her application dated 26 June 2017.

2. The submissions of both parties were based on the following passages from *Devaseelan* [2002] UKIAT 00702:

> 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.
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> 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.
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> 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. Mr Matthews argued along the lines of the grounds that the FtT failed to apply *Devaseelan* correctly, did not take the previous decision as a starting point, failed to approach credibility in light of previous negative findings, and failed to provide adequate reasons for his positive finding on credibility. He said that *Devaseelan* was not to be interpreted to the effect that a finding that an appellant was not a truthful witness on an earlier claim was irrelevant to his truthfulness on a later claim. The FtT was wrong to say at ¶43 that the earlier decision was "not directly relevant"; it was. The appellant had been found untruthful about a *sur place* claim (based on political activity) which was "in the same area" as the present case (based on religious conversion) and showed that the appellant could invent a case. Mr Matthews accepted my observation that these submissions had not been made to the FtT, as the SSHD had not been represented, but he said they were obvious matters of law which the FtT was bound to apply, when the respondent had placed the previous decision before the tribunal. He also said that the judge failed to deal with the several specific credibility matters raised in the refusal letter, but acknowledged that point was not in the grounds.

4. Although not specifically in the grounds, Mr Matthews submitted that there was no justification for expressly not taking it against the appellant that he remained in the UK (¶43). He said the legal position was that the appellant should have left, not that the respondent was to blame for not enforcing removal.

5. The SSHD sought a remit to the FtT, before another judge.

6. Ms Loughran submitted along the lines of her rule 24 response, which is on the file. She said that the previous decision was acknowledged as a starting point at ¶43. The judge then correctly identified that the new claim was made for different reasons, which justified his comment that the previous decision was not directly relevant. This case fell squarely within ¶38 and 39(2) of *Devaseelan*, which was correctly applied. The FtT's conclusions had to be read in the context of the considerable amount of evidence, documentary and oral, led in support of the appellant's case, which amounted to ample justification for the unequivocally positive finding thereon.

7. Mr Matthews in response accepted that the previous decision had been referred to, but pointed out that there was no mention of the fact that the case had failed solely on credibility, on which the present case also turned.

8. I reserved my decision.

9. There is some force in the submission by Mr Matthews recorded at ¶4, but it is not in the grounds, and does not disclose a crucial error on a decisive point.

10. There was also some force in the point that the FtT did not deal with the SSHD's reasoning in the refusal letter, which is quite detailed and specific; and notwithstanding the acknowledgment by Mr Matthews, it is in grounds, at their final paragraph.

11. *Devaseelan* has become well known, and judges are expected to apply it. The principle that lack of truthfulness in one case may be relevant to truthfulness on another is an obvious one. However, I see no error in the phrase "not directly relevant". Error would lie in saying the prior decision was entirely irrelevant, or it was entirely decisive; not at a mid-point.

12. As I observed during submissions, the decision might ideally have included a phrase or a sentence to the effect that it was reached bearing in mind and notwithstanding the previous adverse credibility finding. However, the *Devaseelan* principles are so well known, and the history was so plainly before the judge, that it may readily be presumed that the matter was part of the decision-making process.

13. The ground further loses force on reference to the SSHD's refusal decision. Although referenced at ¶9 and 10, that is on the political aspect. Little, if anything, is based on *Devaseelan* in the rejection of the religious aspect. In absence of representation, there was of course no development of the point at the hearing.

14. The judge heard the appellant and other witnesses about his Christian practice and faith, whom he found convincing, and he found significant documentation in support, including letters from senior members of churches in both Liverpool and Glasgow (¶45).

15. The grounds and submissions for the SSHD do not show that the decision as a whole is vitiated either by failure to follow *Devaseelan* principles or by inadequacy of reasoning. The decision of the First-tier Tribunal shall stand.

16. No anonymity direction has been requested or made.

20 December 2017
Upper Tribunal Judge Macleman