Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: UI-2021-001661
UI-2021-001662
IA/00567/2021 & IA/06418/2021

THE IMMIGRATION ACTS

Heard at George House Edinburgh	**Decision & Reasons Promulgated**
On 8th June 2022	**On 20th October 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD WAQAS (FIRST RESPONDENT)
MUHAMMAD HANZALAH (SECOND RESPONDENT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr J Mullen, Senior Home Office Presenting Officer
For the Respondents: Mr Martin, Jain, Neil & Ruddy Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Kempton in which she allowed the respondents' appeals against the decision of the Secretary of State made on 7 and 19 May 2021 to refuse their claims for asylum and their human rights claims.

2. Judge Kempton allowed both of the appeals on asylum and human rights grounds after a hearing on 26 November 2021, at which the appellant was not represented.

3. The respondents were born in 1999 and 2000 respectively. They came to the United Kingdom on 12 June 2013 with their parents and siblings and their father claimed asylum with their dependants on arrival. That claim was refused and an appeal against that decision was dismissed on 9 September 2013 in a decision by First-tier Tribunal Judge Mozolowski.

4. The respondents' fear of persecution on account of their imputed political opinion in Pakistan due to their Baloch ethnicity on the basis that the family has been targeted both by the Baloch Liberation Front on account of their perceived support from the government of Pakistan. The family also fears that they would have a lack of protection from the authorities in Pakistan on account of their ethnicity and being perceived supporters of the BLF.

5. It is the respondents' case that there has been past persecution of the family which led to the departure in 2013. Further to the appeal in 2013 the appellant's cousin, Adnan, was murdered by the BLF and the family home was burnt down, also by the BLF. The respondents' sister returned to Pakistan to be with her boyfriend but has since regretted doing so.

6. The Secretary of State's case is set out in the refusal letter of 25 May 2021 and the review. The Secretary of State considered that the appellant had not been credible noting the appellant had not provided a satisfactory explanation to credibility points raised in his witness statement submitting that the determination of Judge Mozolowski was the starting point and the guidance set out in Devaseelan ought to be applied. It was observed that no further evidence had ben provided beyond background evidence.

7. Judge Kempton directed herself as to the burden and standard of proof [6 to 9] and summarised the respondents' and the Secretary of State's cases. She then set out [22] the issues in question and the findings reached in Judge Mozolowski's decision [23], noting that the first determination is the starting point and the factual findings stand in line with Devaseelan [24]. The judge observed that the respondents needed to demonstrate new evidence which would shed a different light on their past claim or at least show that of their father years ago and how they would now be at risk on return [25]. The judge held at [31]:

> "On the other hand, they [the respondents] have been out of the country for eight years, their cousin has been kidnapped and killed, ostensibly by the separatists. The police received the FIR report on the matter from the father of the appellants but did no more about the matter. Would the appellants be viewed on return as persons of interest to the separatists? Quite possibly, but one cannot know for sure what they would be thinking. What would the police make of the appellants if they were to return after an absence of eight years out of the country? Would they be viewed with suspicion and would

> questions be asked as to whether they had been in the intervening years? Again, it is impossible to say."

The judge went on to find that the respondents could not live elsewhere in Pakistan [32] to [35] and that the respondents would come to the attention of the authorities [36]. She concluded that on the basis of the low standard of proof they do run a real risk of persecution from the separatists and of being perceived to be sympathetic to the cause even if they were not.

8. The judge then went on to allow the appeal on an Article 8 basis also.

9. The Secretary of State sought permission to appeal on the grounds that the judge had erred:-

   (i) in misdirecting herself in failing to apply the principles set out in AA (Somalia) v SSHD [2007] EWCA Civ 140 and Devaseelan [2002] UKAIT 00702 when departing from the previous findings that the appellants were not at risk in Pakistan and had at [30] to [38] of the determination speculated as to the risk, not identifying any evidential basis for departing from the previous findings of the Tribunal and failing to identify evidence that indicates that they would be targeted either by the separatists or the authorities on return;

   (ii) in failing to conduct the balancing exercise with respect to Article 8;

   (iii) in failing to provide an evidential basis for finding that the respondents would be at risk of return and in reality what was found at [30] was that the respondents did not fit into the category of people who would be targeted by either side and that the finding that they would be targeted if either side was irrational;

   (iv) that the judge had failed to provide the evidential basis for supporting the finding the appellants would be at risk on return from either the separatist organisation or the Pakistani authorities, simply for being outside of Pakistan for a period of time. Failing to taking into account also the previous findings the appellants would not be risk on return from any individual within Pakistan.

10. Mr Mullen submitted that there had been no proper engagement with the facts and no adequate explanation of how the respondents would be at risk from the separatists. He submitted further that the judge had failed properly to deal with the issue of international relocation and had not addressed whether the family home had been burnt down leaving that open and had failed to take into account the fact that there was no evidence of harm to the sister. He did, however, accept these were not matters addressed directly in the grounds. I

11. In response, Mr Martin relied on his Rule 24 reply, submitting that although these were dependants on the father's appeal and that the factual basis was similar but the judge had directed herself properly recognising the point of their decision but could take account of the facts later arising and

that the judge's decision was rational. There had been a sufficient assessment of the evidence.

12. In what was undoubtedly a generous decision, Judge Kempton directed herself properly as to the law but it needs to be borne in mind what was said in AA (Somalia) which deals with cases where it is not the same appellant as previously, although the events are the subject.

13. At [29] Lord Justice Hooper held:

> 29. In my judgment it is time for the Court of Appeal to adopt the submissions made by Mr Kovats. In cases where the parties are different, the second tribunal should have regard to the factual conclusions of the first tribunal but must evaluate the evidence and submissions as it would in any other case. If, having considered the factual conclusions of the first tribunal, the second tribunal rationally reaches different factual conclusions, then it is those conclusions which it must apply and not those of the first tribunal. In my view *Ocampo* and *LD* do not stand in the way of this simple approach. Both cases make it clear the first decision is not binding and that it is the fundamental obligation of the judge independently to decide the second case on its own individual merits. All that I am doing is simplifying and clarifying the law. Simplification and clarification have the advantages of making it easier for immigration judges for whom the law is already far more complicated than it should be and of making it less likely that there will be appeals on whether the second tribunal was, or was not, bound by the decision of the first. It also has the advantage that the same rule applies whether the previous decision was in favour or against the Secretary of State

14. Carnwath LJ (with whom Ward LJ agreed) held [69] to [70]:

> 69. While I do not think it is open to us to depart from *Ocampo* I would suggest two qualifications, which seem to me consistent with it. First, Auld LJ said that the guidelines are relevant to "cases like the present" where the parties are not the same but "there is a material overlap of evidence". The term "material" in my view requires some elaboration. It recognises I think that exceptions to the ordinary principle that factual decisions do not set precedents (see above) should be closely defined. To extend the principle to cases where there is no more than an "overlap of evidence" would be too wide, and could introduce undesirable uncertainty. In all the cases in which the principle has been applied so far, including *Ocampo*, the claims have not merely involved overlapping evidence, but have arisen out of the same factual matrix, such as the same relationship or the same event or series of events. I would respectfully read Auld LJ's reference to "cases such as the present" as limiting the principle to such cases.
>
> 70. Secondly, in applying the guidelines to cases involving different claimants, there may be a valid distinction depending on whether the previous decision was in favour of or against the Secretary of State. The difference is that the Secretary of State was a direct party to the first decision, whereas the claimant was not. It is one

> thing to restrict a party from relitigating the same issue, but another to impose the same restriction on someone who, although involved in the previous case, perhaps as a witness, was not formally a party. This is particularly relevant to the tribunal's comments, in *Devaseelan*, on what might be "good reasons" for reopening the first decision. It suggested that such cases would be rare. It referred, for example, to the "increasing tendency" to blame representatives for unfavourable decisions by Adjudicators, commenting:
>
> > "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…"
>
> I understand the force of those comments where the second appeal is by the same claimant, but less so where it is by a different party, even if closely connected. Although I would not exclude the *Devaseelan* principles in such cases (for example, the hypothetical series of cases involving the same family, cited in *TK*), the second tribunal may be more readily persuaded that there is "good reason" to revisit the earlier decision.

15. In applying these principles, I note that there is here some overlap of evidence which the judge recognised. I consider that in the content of the postdecision submissions given by both parties that the judge gave a sufficient basis for departing from the previous findings of the Tribunal. She was clearly aware of those findings and it is sufficiently clear, given that both parties accepted the credibility was in issue, that she accepted that the appellants were credible and accepted their evidence that the uncle had told them the full story of what had happened in Pakistan. It may well be that there might have been a fuller examination of this evidence had the Secretary of State chosen to cross-examine the respondents on this.

16. I am satisfied that the decision was one open to the judge and one for which she gave adequate and sustainable reasons for departing from the decision of Judge Mozolowski. It is equally clear that the judge did have sufficient evidence upon which to conclude the respondents would be targeted either by the separatists or the authorities. Whilst the judge did say that she could not know for sure what would be thought [31] that is not a misdirection in law; contrary the use of the word “sure” implies the criminal standard of proof. While she does say that if certain things are impossible to say, it does not mean that there would not be reasonable, that must be understood to mean that she was not sure. But that is not an error of law.

17. The judge gave adequate and sustainable reasons at [32] to [34] as to why there would not be a possibility of internal relocation and gave adequate and sustainable reasons for those based in the evidence before her as to why that is so.

18. In the circumstances it cannot properly be said that the judge’s findings are perverse or irrational. Reference in the grounds at [2(b)] are taken out

of context and the judge has, on the basis of the evidence before her, reached conclusions consistent with the evidence. Whilst the judge has not referred explicitly to any evidential basis for concluding that being outside of Pakistan for a period of time would be a risk factor, that is simply one factor that she took into account; and, further, sudden reappearances of people may result, as a matter of common sense, of particular people coming to notice.

19. Accordingly, for these reasons, I consider that the decision of the judge that the appellants had a well-founded fear of persecution in Pakistan is sustainable. For these reasons, any claimed error with respect to findings in respect of Article 8 is immaterial given that the appeal was allowed on human rights grounds and, having concluded that the appellant had a well-founded fear of persecution, it would almost inevitably follow that they would be at risk of Article 3 breach.

Addendum

20. This decision was typed on 15 June 2022. For reasons which are unclear, it transpires that it was not sent for promulgation until 19 October 2022.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

No anonymity direction is made.

Signed Date 19 October 2022

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul