Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01719/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 January 2019	**On 1 February 2019**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MS JUSTINA HANSEN
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Akohene, of Afrifa and Partners Solicitors.
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal against a decision of Judge of the First-tier Tribunal Malone who, in a decision promulgated on 11 October 2018 following a hearing on 21 September 2018, allowed the appeal of Ms Justina Hansen (hereafter the "claimant"), a national of Ghana born on 8 August 1979, against a decision of the Secretary of State of 24 January 2018 to refuse to issue a permanent residence card as confirmation that she had a retained right of residence as the former family member (spouse) of Mr Yaw Amoako, a German national (date of birth: 28 February 1965), said to be exercising Treaty rights in the United Kingdom.

2. The issue in this appeal is whether Judge Malone materially erred in law by departing from a finding made by Judge of the First-tier Tribunal C J Woolley in an earlier appeal by the claimant that the claimant had not established that Mr Amoako exercised Treaty rights from 21 July 2011 until 4 April 2012 (hereafter the "Gap Period").

3. This issue involves consideration of the principles in Devaseelan v SSHD * [2002] UKIAT 702.

4. Whilst Judge Woolley heard oral evidence from the claimant and Mr Amoako, Judge Malone did not hear any oral evidence. The hearing before Judge Malone proceeded on submissions only, although the claimant was present at the hearing (para 7 of Judge Malone's decision). Mr Akohene, who appeared for the claimant at the hearings before both judges, confirmed at the hearing before me that there was no evidence before Judge Malone that was not also before Judge Woolley.

5. Mr Akohene and Mr Avery also agreed that Judge Malone reached his finding that the claimant had established that Mr Amoako exercised Treaty rights for the duration of the Gap Period on the basis of his own interpretation of a letter dated 6 November 2015 from Smith News (hereafter the "SN Letter"), taking a different view from that which had been taken by Judge Woolley.

6. The decision that was the subject of the appeal before Judge Woolley was made under the Immigration (European Economic Area) Regulations 2006 (the "2006 Regulations") whereas the decision that was the subject of the appeal before Judge Malone was made under the Immigration (European Economic Area) Regulations 2016. Both require applicants who claim to have a retained right of residence to establish, inter alia, that their ex-spouse was exercising Treaty rights continuously for a relevant 5-year period.

7. In the appeal before Judge Woolley, the 5-year period relied upon was from 2010-2015 (para 16 of Judge Woolley's decision). Judge Woolley was satisfied that the claimant had established that Mr Amoako exercised Treaty rights from 2010 until 26 2016 save for the duration of the Gap Period. He was also not satisfied that the claimant had established that Mr Amoako exercised Treaty rights after 26 October 2016. Since the hearing before him took place on 8 September 2017, it follows that he was not satisfied that the claimant had established that Mr Amoako exercised Treaty rights from 27 October 2016 until 8 September 2017.

8. Judge Malone found that the claimant had established that Mr Amoako exercised Treaty rights from 2010 until 26 October 2016.

9. It is therefore obvious that, if, pursuant to the principles in Devaseelan, Judge Malone erred in law in departing from the finding of Judge Woolley that the claimant had not established that Mr Amoako exercised Treaty rights of the duration of the Gap Period, the error would be material to the outcome.

10. As recorded in Judge Woolley's decision (para 12) and noted by Judge Malone (para 19), Mr Akohene declined an opportunity offered by Judge Woolley for an adjournment so that the claimant could submit documents from HMRC, because (Mr Akohene said) Mr Amoako has not been paying tax over the period as he should have been and any HMRC documents would therefore have had no probative value (para 19 of Judge Malone's decision).

11. Finally, the Secretary of State's grounds in the instant appeal state that the claimant did not seek to challenge the decision of Judge Woolley. It would therefore appear that she instead chose to make another application to the Secretary of State about 2 months after Judge Woolley's decision was promulgated, i.e. the application lodged on 5 December 2017. This was the application that was the subject of the decision that, in turn, was the subject of the appeal before Judge Malone.

Immigration history

12. The claimant entered the United Kingdom on 30 June 2010 having been issued with an EEA family permit on 15 January 2010 on the basis of her marriage in Ghana on 16 August 2008 to Mr Amoako. She was subsequently issued with a residence card on 23 November 2010. Divorce proceedings were commenced on 15 September 2017. The marriage was terminated on 2 October 2017 (qns 8.16-8.18 of the claimant's application).

Judge Malone's decision

13. At para 16 of his decision, Judge Malone directed himself on Devaseelan. At para 18, he noted that the 5-year period in respect of the exercise by Mr Amoako of Treaty rights relied upon before him was the same 5-year period that had been relied upon before Judge Woolley. At para 19, he noted that Judge Woolley found that no documents were submitted to evidence Mr Amoako's economic activity over the Gap Period.

14. At paras 20-25 onwards, Judge Malone considered Judge Woolley's assessment of the SN Letter. Judge Malone took the view that Judge Woolley's interpretation of the SN Letter was "*an impermissible interpretation or construction of the letter in question*", it being "*inconsistent with the letter's language*" (para 24 of his decision), that Judge Woolley's conclusion as to what the letter meant "*is not a "finding of fact*", that he "*cannot accept [Judge Woolley's] finding that follows from his interpretation of what the [SN Letter] meant*" and that "*I feel compelled to depart from it*" (para 25 of his decision). Judge Malone then interpreted the SN Letter for himself, at paras 26-27 of his decision. At para 29, Judge Malone dealt with the fact that Judge Woolley had found the claimant and Mr Amoako "*unimpressive witnesses".* He took the view that Judge Woolley's doubts did not adversely affect his own positive finding as to Mr Amoako's economic activity.

15. It is worth quoting, in full, Judge Malone's reasoning. He referred to Judge Woolley, at times, as Judge Woolley and at times as the judge. Paras 16-30 of Judge Malone's decision read:

> "16. In accordance with the decision in Devaseelan 2002 UKIAT 702, I must take IJ Woolley's findings of fact as my starting point. I should follow his findings of fact, unless there are good reasons justifying my departing from them.
>
> 17, [The claimant] claims she has permanent residence on the basis that she has resided in the United Kingdom for a continuous period of 5 years in accordance with the Regulations. In the case under consideration, "in accordance with the Regulations" means while Mr. Amoako was a qualified person within the meaning of Regulation 6. [The claimant] claims that, at all material times, Mr. Amoako has been a "worker".
>
> 18. The 5 year period Mr. Akohene sought to rely on before me was the same as that he sought to rely on before IJ Woolley, years 2010-2015. In paragraph 28 of his determination, IJ Woolley stated:
>
> > "The effect of this evidence is that [the claimant] has shown that her sponsor was a qualified person from 2010 until 20 July 2011, and then again from 5 April 2012 until 26 October 2016 (the last date shown on the bank statement for money received from Smiths News)."
>
> 19. He found that there was a gap between 20 July 2011 and 5 April 2012 because no documents had been submitted to evidence his economic activity over that period. The Judge also recorded that he had indicated he would have been amenable to an

application for an adjournment for [the claimant] to obtain documents from HMRC for the period in question. However, Mr. Akohene told me he declined the invitation on [the claimant]'s behalf, as Mr. Amoako had not been paying tax over the period as he should have been and any HMRC documents would therefore have had no probative value. There were documents before the Judge and me to show that [the claimant] *[sic?, Mr Amoako?]* was in tax arrears.

20. To overcome the gap identified by the Judge, Mr. Akohene pointed to a letter from Smiths News dated 6 November 2015. The letter reads:

> "I'm writing to confirm that Mr. Yaw Amoako has been a delivery contractor with our company since 14/10/2010. He works on a contract basis renewable yearly. Mr. Amoako's yearly salary is around 34,000 Pounds.
>
> If I can provide any additional information please contact me on 01793824038.
>
> Yours sincerely
> Kamran Kamm
> Depot Manager Swindon."

21. The Judge found that Mr. Amoako had worked for Smiths News. He had seen his bank statements evidencing payments received from Smiths News. He also had an invoice submitted by Mr. Amoako to Smiths News for fees earned.

22. It is of critical importance that the Smiths News' letter of 6 November 2015 was not in any way challenged, either by the Respondent or by the Judge. The letter was accepted as genuine.

23. The Judge did not rehearse the terms of the Smiths News' letter in his determination. However, he wrote of it as follows:

> "As it [the letter] stands, however, the letter does not show continuity of self-employment - it merely shows that the sponsor began work for Smiths News in that period and not that this work has been carried through without a break."

24. That, with great respect to IJ Woolley, is an impermissible interpretation or construction of the letter in question. It is inconsistent with the letter's language. What the letter says is that Mr. Amoako "has" been a delivery contractor for Smiths News "since" 14 October 2010. That statement connotes a continuous period of engagement (self-employment) from October 2010 to November 2015. The letter states that his engagement was renewed annually by contract. The letter gave his approximate annual earnings.

25. It is with regret that I cannot follow the Judge's conclusion as to the meaning of Smiths News' letter. His conclusion as to what the letter meant is not a "finding of fact". However, I cannot accept the Judge's finding that follows from his interpretation of what the Smiths News' letter meant. I feel compelled to depart from it.

26. As I have recorded above, the Judge accepted Mr. Amoako worked for Smiths News at some stage during the period identified in its letter of 6 November 2015. I had an invoice submitted by Mr. Amoako to Smiths News. His bank statements up to September 2016 showed that Smiths News were making payments to him.

27. Had Mr. Amoako only been contracted to Smiths News for part of the period 14 October 2010 to 6 November 2015, I would have expected the letter of 6 November 2015 to have made that clear. As I say, the language used means that Mr. Amoako has been a delivery contractor for Smiths News since 14 October 2010 and that his engagement has been renewed on a yearly basis since that date and his yearly salary was around £34,000.

28. As one of Smiths News' delivery contractors, Mr. Amoako might well not have worked every day. The bank statements show sizeable payments being made to Mr. Amoako on 23 September 2016 and 30 September 2016. All that he had to show was that he was economically active over the period in question. I find that Smiths News' unchallenged

letter demonstrates, on the balance of probabilities, that Mr. Amoako was economically active on a self-employed basis over the period 14 October 2010 to 6 November 2015. That, in itself, is a period in excess of 5 years. I reiterate that the Judge found Mr. Amoako had been a qualified person from 2010 to 26 October 2016 (the date of the last payment from Smiths News appearing in his bank statements), apart from over the period 20 July 2011 to 5 April 2012.

29. IJ Woolley found [the claimant] and Mr. Amoako to be "unimpressive" witnesses. He based that conclusion essentially on doubts as to the addresses Mr. Amoako had given and the fact that [the claimant] knew little of Mr. Amoako's economic activities generally. None of those doubts adversely affected his positive finding as to Mr. Amoako's economic activity. The Judge also records that, when [the claimant] was asked whether she and Mr. Amoako were living together, she stated that she "had been through a lot of stress". That answer would indicate that she and Mr. Amoako had or were having difficulties. I have no knowledge of whether they were living together at the time of the hearing before IJ Woolley. There was no requirement in law that they should be living together. The parties obtained a decree absolute on 2 October 2017, after IJ Woolley had heard [the claimant]'s appeal.

30. I therefore conclude that [the claimant] has demonstrated, to the requisite standard, that Mr. Amoako was continuously active on a self-employed basis over the period 14 October 2010 to 26 October 2016, the date found by IJ Woolley. I find he was resident in the United Kingdom throughout that period."

Devaseelan

16. Since the Devaseelan principles were referred to in the grounds and in submissions, this is a convenient point at which to quote them. The guidelines are at paras 37-42 which I quote in full. The underlining and italicising is mine. Paras 37-42 of Devaseelan read:

"d. Our guidelines on procedure in second appeals

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.

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.

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.

40. We now pass to matters that could have been before the first Adjudicator but were not.

(4) **Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection.** An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should *not usually* lead to any reconsideration of the conclusions reached by the first Adjudicator.

(5) **Evidence of other facts – for example country evidence – may not suffer from the same concerns as to credibility, but should be treated with caution.** The reason is different from that in (4). Evidence dating from before the determination of the first Adjudicator might well have been relevant if it had been tendered to him: but it was not, and he made his determination without it. The situation in the Appellant's own country at the time of that determination is very unlikely to be relevant in deciding whether the Appellant's removal at the time of the second Adjudicator's determination would breach his human rights. Those representing the Appellant would be better advised to assemble up-to-date evidence than to rely on material that is (ex hypothesi) now rather dated.

41. The final major category of case is where the Appellant claims that his removal would breach Article 3 for the same reason that he claimed to be a refugee.

(6) **If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator,** and 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 allowing the matter to be re-litigated. We draw attention to the phrase 'the same evidence as that *available to the Appellant'* at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion.

42. We offer two further comments, which are not less important than what precedes then.

(7) **The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is *some very good reason* why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him.** We think such reasons will be rare. There is an increasing tendency to suggest that unfavourable decisions by Adjudicators are brought about by error or incompetence on the part of representatives. New representatives blame old representatives; sometimes representatives blame

> themselves for prolonging the litigation by their inadequacy (without, of course, offering the public any compensation for the wrong from which they have profited by fees). Immigration practitioners come within the supervision of the Immigration Services Commissioner under part V of the 1999 Act. He has power to register, investigate and cancel the registration of any practitioner, and solicitors and counsel are, in addition, subject to their own professional bodies. 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; and such a finding should *always* be reported (through arrangements made by the Chief Adjudicator) to the Immigration Services Commissioner.
>
> Having said that, we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second Adjudicator to look at the matter as if the first determination had never been made. (We think it unlikely that the second Adjudicator would, in such a case, be able to build very meaningfully on the first Adjudicator's determination; but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)
>
> (8) **We do not suggest that, in the foregoing, we have covered every possibility.** By covering the major categories into which second appeals fall, we intend to indicate the *principles* for dealing with such appeals. It will be for the second Adjudicator to decide which of them is or are appropriate in any given case."

The grounds

17. The grounds contend that Judge Malone failed to apply Devaseelan and in doing so, he permitted the claimant to re-litigate her appeal on the same arguments that were before Judge Woolley. Judge Malone should have decided that the matter had been settled unless the claimant adduced new evidence. Judge Malone failed to give adequate reasons why the claimant's attempt to re-litigate the same matter did not fall squarely within the circumstance identified at para 41(6) of Devaseelan. As a result, Judge Malone had caused unfairness to the Secretary of State. Judge Malone should have approached the matter with *"greatest scrutiny"* especially in view of the claimant's claims that Mr Amoako was attempting to hide his tax evasion from the HMRC. Judge Malone should have considered the matter as settled and not seek to go behind Judge Woolley's findings by substituting his own assessment of the SN Letter.

Submissions

18. Mr Akohene confirmed that the bank statements mentioned at paras 26 and 28 of Judge Malone's decision were also before Judge Woolley and, further, that these bank statements do not cover the Gap Period.

19. I raised with the parties whether the relevant guidelines in Devaseelan were guidelines (1), (6) and (7) and whether Judge Malone's self-direction at para 16 of his decision was correct.

20. For the Secretary of State, Mr Avery submitted that the claimant had done nothing to address Judge Woolley's concerns in the appeal before Judge Malone. Para 16 of Judge Malone's decision, where he directed himself on Devaseelan, represented a serious contraction of the guidelines in Devaseelan. Mr Avery drew my attention to guideline (7) of Devaseelan which concerns cases in which new evidence is submitted to the second judge, whereas there was in fact no new evidence before Judge Malone. Mr Avery submitted that para 16 of Judge Malone's decision appears to be his shorthand for the Devaseelan guidelines.

21. Pursuant to Devaseelan, Judge Malone had to treat Judge Woolley's findings as a starting point. The issues were the same. There was no new evidence before Judge Malone. It was therefore difficult to see how Judge Malone could legitimately depart from Judge Woolley's findings.

22. Mr Avery submitted that, in any event, Judge Malone's assessment of the SN Letter was narrow. He failed to take into account that there was no evidence of continuity of Mr Amoako's employment. The SN Letter is very short on specifics. Judge Woolley had considered the SN Letter in the round, taking into account all of the evidence before him, including the oral evidence of the claimant and Mr Amoako.

23. Mr Akohene submitted that Judge Malone's self-direction at para 16 of his decision was correct. He submitted that it was correct for Judge Malone to say that Judge Woolley's findings were a starting point unless there were good reasons justifying departing from them. The text underlined in the quote from para 37 of Devaseelan shows that the findings of Judge Woolley were not binding and that Judge Malone was correct to say that he could depart from Judge Woolley's findings if there were good reasons for doing so.

24. At para 22 of his decision, Judge Malone noted that the SN Letter had not been challenged by the Secretary of State. At para 25, he said, correctly in Mr Akohene's submission, that Judge Woolley's conclusion as to what the SN Letter meant was not a "*finding of fact*". Judge Malone said that there were facts stated in the SN Letter that were not challenged by the Secretary of State or Judge Woolley.

25. Mr Akohene submitted that Judge Malone was entitled to assess the statements of fact in the SN Letter and reach his own finding of fact. He found that there were good reasons for departing from Judge Woolley's finding that the claimant had not established that Mr Amoako exercised Treaty rights for the duration of the Gap Period. Since the SN Letter was a short letter, Judge Malone's reasoning did not need to be elaborate. At para 24, he said that Judge Woolley's interpretation of the SN Letter was "*impermissible*" and at para 25, he said that he could not accept Judge Woolley's finding that followed from his interpretation of the SN Letter and that he felt compelled to depart from it.

26. In response, Mr Avery drew my attention to the text that I have italicised in my quote of para 37 of Devaseelan, which he submitted was the context in which the text that Mr Akohene relied upon, which has been underlined, must be considered. In the instant case, the claimant had not built upon the case that she advanced before Judge Woolley. The fact that Judge Malone did not agree with Judge Woolley's interpretation of a specific piece of evidence was not a good enough reason to depart from Judge Woolley's findings. He asked me to consider the public interest in finality of litigation.

27. I reserved my decision. I asked the parties what the position would be if I decided that Judge Malone had materially erred in law in law. I said that it seemed to me that, if I concluded that he had materially erred in law, it must follow that I would re-make the decision on the appeal and dismiss the claimant's appeal against the Secretary of State's decision without the need for a further hearing. Mr Akohene agreed that that was correct. He did not suggest that the claimant would seek to adduce further documentary or oral evidence.

Assessment

28. Mr Akohene relied upon the words I have underlined in the quote from para 37 of Devaseelan. He therefore submitted that, pursuant to Devaseelan, Judge Woolley's finding concerning the Gap Period was not binding on Judge Malone. Not only does Mr Akohene's submission in this regard ignore the fact that the underlined words should be read in the context of words that I have italicised in my quote of 37 of Devaseelan (where the Tribunal said that an applicant may build upon a case, which does not apply in the instant case because the claimant did not build upon her case before Judge Malone), it ignores the fact that the Tribunal then proceeded to formulate its principles, at para 39 onwards of its decision.

29. In Devaseelan, the Tribunal formulated seven principles. Principles (2), (3), (4) and (5) are plainly not applicable in the circumstances of the instant case for reasons which are obvious, i.e. the claimant did not rely upon any facts happening since the decision of Judge Woolley; she did not rely upon any facts happening before Judge Woolley's decision which were not relevant to the issues before Judge Woolley; she did not rely upon facts personal to her that were not brought to the attention of Judge Woolley and that were relevant to Judge Woolley's decision; and country guidance evidence was not relied upon in either appeal.

30. Only principles (1), (6) and (7) potentially apply.

31. Plainly, Judge Malone was aware of principle (1) of Devaseelan since he said that Judge Woolley's findings were a starting point. However, the fact that he departed from Judge Woolley's finding notwithstanding that he did not have any new evidence demonstrates that he misunderstood principles (1), (6) and (7). It is plain from principle (6) that, if the facts relied upon before the second judge are not materially different and an applicant proposes to reply upon what is in essence the same evidence "*as was available to the applicant at that time*", the second judge should treat the issues as settled by the first judge's decision and make his findings in line with that decision rather than allow the matter to be re-litigated.

32. Principle (7), which refers to "*some very good reason why [an applicant's] failure to adduce relevant evidence before [the first judge] should not be, as it were held against him*", only comes into play if the second judge had before him relevant evidence that was not before the first judge. However, as Judge Malone did not have before him any new evidence at all, principle (7) was inapplicable.

33. Accordingly, on the material before Judge Malone, only principles (1) and (6) applied. These make no mention of "*good reasons*" to justify departing from the findings of the first judge. Accordingly, Judge Malone's reference to "*good reasons justifying my departing from [Judge Woolley's findings of fact]"* was based upon a misapprehension of principles (1), (6) and (7) of Devaseelan as a consequence of which he misdirected himself in law.

34. I am therefore satisfied that Judge Malone did err in law. To conclude otherwise would not only be unfair to the Secretary of State it would be contrary to the strong public interest in the finality of litigation.

35. Given that the material fact relied upon before Judge Malone was the same as the material fact relied upon before Judge Woolley (that Mr Amoako had exercised Treaty rights for the duration of the Gap Period) and that the claimant relied upon the same evidence as she relied upon in the appeal before Judge Woolley (i.e. the SN Letter),

Judge Malone was bound to make his findings in line with the finding of Judge Woolley pursuant to principles (1) and (6) of Devaseelan. If he had done so, he would have been bound to find that the claimant had not established that Mr Amoako had exercised Treaty rights for the duration of the Gap Period and therefore he would have been bound to dismiss the appeal. The error of law was therefore material.

36. I therefore set aside Judge Malone's decision in its entirety.

37. It is not necessary for me to consider for myself Judge Malone's assessment of the SN Letter and whether or not the Secretary of State had disputed the statements of fact in the SN Letter. If I were to do so, I would myself be departing from the Devaseelan principles and permitting the claimant to re-litigate the appeal that she lost before Judge Woolley.

38. As stated at para 27 above, Mr Akohene agreed that, if I were to conclude that Judge Malone materially erred in law and set aside his decision, I would proceed to re-make the decision on the claimant's appeal without the need for a further hearing. He did not suggest that the claimant would seek to adduce further documentary or oral evidence.

39. I therefore proceed to re-make the decision on the claimant's appeal.

40. Principle (6) of Devaseelan applies given the following facts:

    i) The claimant has not provided any new evidence. She relies upon the same evidence as was considered by Judge Woolley.

    ii) The material issue before Judge Woolley and the material issue before me is the same, i.e. whether Mr Amoako had exercised Treaty rights for a qualifying period of 5 years. This turns upon whether he had exercised Treaty rights for the duration of the Gap Period.

    iii) Judge Woolley found that the claimant had not established that Mr Amoako exercised Treaty rights for the duration of the Gap Period.

41. Accordingly, I treat the issue of whether Mr Amoako exercised Treaty rights for the duration of the Gap Period as settled by the decision of Judge Woolley. I therefore make my finding, in line with the finding of Judge Woolley, that the claimant has not established that Mr Amoako exercised Treaty rights for the duration of the Gap Period. I do not allow the matter to be re-litigated.

42. I therefore dismiss the claimant's appeal against the Secretary of State's decision.

Decision

The decision of Judge of the First-tier Tribunal Malone involved the making of an error of law sufficient to require it to be set aside. I set it aside in its entirety.
I have re-made the decision on the claimant's appeal against the Secretary of State's decision. I dismiss her appeal against the Secretary of State's decision.

Upper Tribunal Judge Gill Date: 27 January 2019