Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/09577/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th October 2020	**On 6th November 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR HUMAYUN SHAHZAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Malik, Counsel instructed by Law Lane Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

The appellant appeals against a decision of First-tier Tribunal Judge M B Hussain promulgated on 13th February 2020. In the determination Judge Hussain dismissed the appellant's human rights claim.

The grounds of appeal.

The grounds of appeal maintained that the judge had erred in finding that the appellant had not suffered historic injustice such that he should have been restored to the position he would have had. There had been an improper

approach to a previous First-tier Tribunal determination that of First-tier Tribunal Judge James in 2017.

The grounds of appeal asserted that historic injustice against an immigration applicant is an admissible consideration in any subsequent Article 8 proportionality exercise where, but for the injustice, the appellant would be entitled to leave to remain, **Ahsan and Others v Secretary of State for the Home Department [2017] EWCA Civ 2009**, which stated:

> *"If on a human rights appeal an appellant were found not to have cheated, … the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated."*

The history of the appeal was that on 4th February 2009 the respondent refused his application of 28th October 2008 for leave to remain as a Tier 1 (Post-Study Work) Migrant. The reasons for refusal were that the appellant had submitted a post-graduate qualification certificate in business management from the Cambridge College of Learning but that college had never in fact offered such a course and the appellant fell to be refused under paragraph 322(1A) of the Immigration Rules. At that time paragraph 322(1A) provided that leave to remain must be refused where:

> *"False representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application."*

The applicant was accorded 0 points and the application was refused.

On 27th March 2009 the appellant made a further application, and this was refused on 29th July 2009. No right of appeal was apparently granted, but on 5th August 2009 the appellant nonetheless appealed to the First-tier Tribunal and on 10th November 2009 Immigration Judge Ross dismissed the appellant's appeal. Judge Ross found the appellant had continued in the 27th March 2009 application to represent that he had a diploma from Cambridge College of Learning and therefore fell to be refused. Judge Ross further determined that in relation to the (said to have been withdrawn) 28th October 2008 application the appellant fell to be refused under paragraph 322(2), which at the material time provided that leave to remain should normally be refused where: "The applicant had made false representations or … [failed] to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave … in support of the application for leave to enter or a previous variation of leave."

On 10th March 2010 the appellant became "appeal rights exhausted" in relation to the proceedings before Judge Ross.

On 8th February 2011 the appellant made a fresh application for leave to remain as a Tier 1 (Post-Study Work) Migrant. The respondent refused that application on 14th April 2011. The appellant was awarded all points but was refused under paragraph 322(2) based on the previous applications refused on 2nd February 2009 and the fact that the appellant "used deception in this application".

On 3rd December 2015 the appellant applied for indefinite leave to remain based on ten years' continuous lawful residence. That application was refused on 11th July 2016 with a right of appeal. The appellant was again refused, this time under paragraphs 322(1A) and 322(2). On 13th December 2017, First-tier Tribunal Judge James dismissed the appellant's appeal. However, at paragraph 22 of her determination she found, based on First-tier Tribunal Judge Mailer's determination in **Saira Younas v Secretary of State for the Home Department IA/00325/2011**, (where it had been found that the appellant in that case had unknowingly submitted documents from Cambridge College of Learning and had in effect been the victim of fraud), that the appellant did not "knowingly deceive when he submitted his CCoL certificate in support of his application". The appellant was subsequently refused permission to appeal against the result of Judge James's determination, however, the judge's finding on the deception point was, it was submitted, effectively preserved.

Against this backdrop First-tier Tribunal Judge Hussain at [32] to [33] of the instant determination under challenge found that the principle of historic injustice was not engaged because:

> *"The finding made by Judge James was that she was not satisfied that the appellant had personal knowledge of the falsity of the Cambridge College of Learning documents not that the documents were not false. By contrast, paragraph 322(1A) catches those who submit false documents without actual knowledge".*

Judge Hussain's reasoning was apparently that notwithstanding the First-tier Tribunal Judge's finding in 2017 the appellant still fell to be refused in 2009 for submitting a false document under paragraph 322(1A).

It was submitted that Judge Hussain's reasoning omitted consideration of the fact that in the 14th April 2011 refusal, the appellant was awarded all points but was refused under paragraph 322(2) for historically having made false representations but not under paragraph 322(1A) for having submitted a false document. In order for a document or representation to be "false", "dishonesty or deception is needed, albeit not necessarily that of the applicant himself" – see **AA (Nigeria) [2010] EWCA Civ 773** at [76]. In other words, as stated by Rix LJ in **AA**, a document can "tell a lie about itself" but in the case of a representation the deception must emanate from a person. The only person who could be said to have made a false representation in the appellant's 2008 application is the appellant

himself. The respondent's finding in the 14th April 2011 refusal that the appellant fell to be refused under paragraph 322(2) was therefore necessarily an allegation that the appellant had made a false representation. This is underscored by the fact the respondent in the same refusal accused the appellant of having practised deception. That allegation was found to be unproved by Judge James in 2017. Judge Hussain thus erred in finding that the principle of "historic injustice" was not engaged as a result of Judge James's finding.

Permission to appeal was granted by Upper Tribunal Judge Martin, stating that it was arguable that the judge had erred in failing to take into account the finding of a previous judge as to the appellant's culpability in relying on a Cambridge College qualification. As pointed out at paragraph 30 by First-tier Tribunal Judge Hussain, the decision of Judge James related to a refusal under paragraph 322(2) of the Immigration Rules, "which is different from the paragraph relied on [in] the decision of 4th February 2009".

Submissions

At the hearing before me Mr Bilal submitted a skeleton argument relying on **Ahsan** such that an historic injustice against an immigration applicant is a powerful consideration in that applicant's favour in any subsequent Article 8 proportionality exercise where, but for the injustice, the appellant would have been entitled to leave to remain. This was consistent with earlier decisions in the Court of Appeal, for example **R (Gurung & Ors) v Secretary of State for the Home Department [2013] EWCA Civ**. There were no gradations of historic injustice and further, the courts should not be exacting in searching for a causal link between the injustice and loss of status. The issue rested on whether Judge Hussain erred in finding that the appellant had not suffered an historic injustice.

In particular, Mr Malik submitted that Judge Hussain's reasoning omitted consideration of the crucial fact that in the 14th April 2011 refusal the appellant was awarded all points but was refused under paragraph 322(2) for historically having made false representations and not under paragraph 322(1A) for having submitted a false document. In relation to representations dishonesty needed to be found, **AA (Nigeria) [2010] EWCA Civ 773**. It was the appellant who was said to have made false representations in the 2008 application and the respondent found in the 14th April 2011 refusal that the appellant was refused under paragraph 322(2). That allegation was found to be unproven by First-tier Tribunal Judge James in 2017 and Judge Hussain erred in finding that the principle of historic injustice was not engaged as a result of Judge James's finding. But for the historic injustice the appellant would have been granted leave as a Tier 1 (Post-Study Work) Migrant on 14th April 2011 and the appellant was entitled to be restored to the position he probably would have been had the injustice not occurred. Upper Tribunal Judge Finch made a similar observation albeit in a different context when she granted the appellant permission to apply for judicial review and that order culminated in the

respondent issuing the refusal of 16th May 2019 with a right of appeal. The respondent had previously rejected the underlying application of 10th April 2018 as a repeat claim under paragraph 353 of the Immigration Rules.

Mr Jarvis submitted that the argument by the appellant was misconceived for a number of reasons. At no point did First-tier Tribunal Judge James refer to the earlier decision of Judge Ross of 10th November 2009. That decision of Judge Ross was undisturbed by the appellant's further appeals and he became appeal rights exhausted on 10th March 2010. That was the legal starting point for Judge James as per **Devaseelan v SSHD [2002] UKIAT 00702**. The 2011 decision did not assist.

In Judge Ross's decision decided a few months after the 2009 refusal, the judge made strong adverse credibility findings against the appellant and concluded that he was thoroughly dishonest. Judge Ross made a finding against the appellant both under paragraphs 322(1A) and 322(2). The decision of Judge James therefore did not dispose lawfully of the issues of deception and it should be noted that the appeal was dismissed and the Secretary of State could not have appealed further, see **The Secretary of State for the Home Department v Devani [2020] EWCA Civ 612** at paragraph 27.

The decision of Judge James could not be described as an authoritative final disposal of the issues as per **Devaseelan** paragraphs 37 to 39:

> *"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."*

Mr Jarvis submitted that First-tier Tribunal Judge Hussain did not materially err in his conclusion because that was the only conclusion that could have been reached as a matter of law. The decision of Judge James did not include consideration of the decision of Judge Ross, and merely constituted a repetition of the oral assertion by the appellant that he did not carry out deception. Proper application of the binding decision of **Devaseelan,** and particularly paragraph 41(6), bearing in mind the lack of new material could not have caused Judge James to deviate from the findings of Judge Ross,

"41

(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 relitigated. ..."

For completeness, within the judgment of Judge James there was no mention at all of the Tribunal's reported decision in respect of the business management and information technology diplomas issued by the Cambridge College of Learning, **NA & Others (Cambridge College of Learning)**.

Judge James made reference to an unreported decision, **Younas**, which had no binding effect whatsoever on any other judge in the Tribunal and she did not engage with the very clear findings of the Tribunal in **NA** at paragraphs 45, 147 and 149, in particular at paragraph 147:

> "*It will be apparent from our above findings that we consider that no person claiming to have undertaken a PgDip course in IT or BM at CCoL can have done so without knowing that such a claim amounted to a false representation*",

and at paragraph 149:

> *"On the above findings none of the CCOL PgDip in IT or in BM certificates submitted by the applicants corresponded to such underlying facts. There were no courses run and, a fortiori, no successful completion of such courses. There was no examining, whether by a board or anyone else. Accordingly, those submitting them also used false documents."*

Again, it was submitted that Judge James's decision in respect of the appellant's claim to have been duped could not lawfully bind First-tier Tribunal Judge Hussain or indeed constitute a lawful starting point without proper regard to the strong findings in this reported and to the FtT virtually binding decision of the Senior Tribunal.

Judge Hussain was therefore clearly correct when he concluded that Judge James's decision did not show there was no deliberate deception or an historical injustice in this case.

In respect of the historic injustice the Secretary of State relied on **CI (Nigeria) v The Secretary of State for the Home Department [2019] EWCA Civ 2027** at paragraph 99. Reliance here on 'historic injustice', as in **CI** should be restricted.

Further, the Secretary of State contended that the appellant's reliance on **Ahsan** was misconceived because there the court dealt with a materially different scenario, namely the appellants in that appeal argued an out of country appeal was an ineffective remedy and the Court of Appeal agreed that such remedy was not an effective one. The court did not conclude that there would always be one way for the Secretary of State to remedy the procedural disadvantage. The decision in **Ahsan** should be read in its own specific context. It was not an historic injustice case and the general guidance on resolution of the deception issues in those appeals centred upon the unlawful impact of the unlawful impact of the sole out of country appeal available and the issue was procedural unfairness, not the

consequences of an historical erroneous immigration decision. As is absolutely clear, this appellant had an in country right of appeal which he exercised in 2009 and which was met by a dismissal by the decision of Judge Ross. There was no legal duty in this kind of case to restore the appellant to his previous position.

There was therefore no historic injustice in law as a matter of fact and nothing to add to the Article 8 assessment as alleged by the appellant at paragraph 15 of the grounds.

At the hearing before me Mr Malik submitted that there were two procedurally intact decisions of the First-tier Tribunal before me. I was referred to the Upper Tribunal decision **PAA (FtT: Oral decision – written reasons) Iraq** [2019] UKUT 00013 (IAC) in relation to two conflicting decisions.

Mr Jarvis submitted that the decision of **PAA** as a solution did not assist the Tribunal. These were circumstances where the same judge gave an oral decision allowing the appeal and in a written decision dismissing the appeal. In those circumstances the Rules were specific. First-tier Tribunal Judge Hussain had no power to resolve the appeal in any way and **PAA** had no part to play. Judge Hussain had to determine whether Judge James's decision resolved the issue in the appellant's favour, but her decision was made in ignorance of the further former decision. In essence, there could not have been a decision other than the decision made by Judge Hussain. Therefore, the underpinning claim of historic injustice was simply not present. Judge Hussain was legally obliged to justify a diversion and chose not to. **Ahsan** did not apply. The appellant had an appeal in country, and he lost. There was nothing in any jurisdiction to return the appellant to any point in a particular time.

In order to obtain leverage from the 2011 decision in relation to paragraph 322(2) it needed to be shown that the Judge Ross' decision was wrong, that the appellant had not displaced the decision of Judge Ross and Judge James's decision was not a starting point. **Ahsan** was not authority to say that anyone in such circumstances should be treated as if they were here lawfully. Ultimately, Judge Hussain reached the right conclusion.

Mr Malik contended that **Devani** did not prevent the Secretary of State from appealing on a point of law. The ratio of **PAA** was that both cases were procedurally intact.

Analysis

First-tier Tribunal Judge Ross promulgated his decision on 10th November 2009 following the promulgation of **NA & Others (Cambridge College of Learning)** in August 2009. He recorded at paragraph 1 that the appellant

> *"stated in his application form on 20th October 2008 for a Tier 1 (Post-Study Work) Migrant that he had obtained a postgraduate diploma in business management at the Cambridge College of Learning and that he had studied there between October 2007*

> *and August 2008. He produced a copy of the diploma from the Cambridge College of Learning dated August 2008, and a letter from the college confirming that he had passed the course, and a further letter showing his grades."*

Judge Ross found that that application was refused on 2nd February 2009 on the basis that the documents submitted from the Cambridge College of Learning were false because the college

> "*have never offered a legitimate postgraduate qualification in business management. As a consequence, false representations had been made under paragraph 322(1A) of the Immigration Rules*" .

Judge Ross found in his determination at paragraph 8 that in that subsequent application (that before Judge Ross) the appellant stated that he had obtained a postgraduate diploma from the Cambridge College of Learning (that document being before the Secretary of State). I shall return to his findings below.

Judge James considered the appellant's appeal against the decision of the Secretary of State dated 11th July 2015 to refuse his application for indefinite leave to remain on the basis of his ten years' residence. She refused that appeal, not least because he had not shown that there were very significant obstacles to his removal to Pakistan but stated this in 2017 in her determination:

> *"Turning to the suitability requirements I can deal with the issue of deception briefly. It is clear that CCoL acted in an entirely improper fashion by offering qualifications for which it had no authority. I have noted the decision in* ***Younas*** *which, as a First-tier decision, is not binding authority. The circumstances in that application are not dissimilar from those in the present appeal. In that appeal he (sic) FtT determined that the circumstances were suspicious but nonetheless found that the Appellant had not used deception. In this appeal I also find that the circumstances are suspicious. The Appellant is a qualified lawyer in Pakistan. It could be expected that he would recognise when he was being duped. However, looking at the evidence in the round and on the narrowest of margins I find that he did not knowingly deceive when he submitted his CCoL certificate in support of his application. I have noted the decision in* ***A (Nigeria) v SSHD [2010] EWCA Civ 773*** *and* ***LU 30.8.2010*** *and I am not satisfied that the Respondent has established that the appellant acted dishonestly."*

This decision was promulgated on 13th December 2017.

In the decision under challenge before me, Judge Hussain considered the point made by the appellant that he must consider whether the appellant had been the victim of an historic, injustice and if he had, whether that was

sufficient for allowing his appeal on the basis of paragraph 120 of **Ahsan.** Judge Hussain, however, did not accept that the appellant had been a victim of historic injustice and stated at paragraph 29:

> *"As noted earlier, the injustice is said to arise from the respondent's decision of 4th February 2009 which it is said wrongly accused the appellant of deception and that wrong is proven by the finding of Judge James in his/her determination of 13th December 2017."*

The judge continued:

> *"As I will demonstrate below, the finding of Judge James does not undermine the Secretary of State's conclusion that the appellant was engaged in deception and the subsequent finding of Judge Ross."*

The judge proceeded that looking closely at Judge James's decision that the paragraph relevant to that refusal was paragraph 322(2) of the Immigration Rules, which was different "from the paragraph relied on in the decision of 4th February 2009". Judge Hussain cited paragraph 22 of Judge James's conclusions and proceeded at paragraph 32 as follows:

> *"32. The finding then made by Judge James was that he/she was not satisfied that the appellant had personal knowledge of the falsity of the Cambridge College of Learning documents not that the documents were not false. By contrast, Paragraph 322(1A) catches those who submit false documents without actual knowledge. In the brackets, the emphasis is made very clear 'whether or not to the applicant's knowledge'.*
>
> *33. In my view, the findings of Judge James does (sic) not show that the allegation of deception made against the appellant in the refusal letter of 4 February 2009 is now proven to be wrong. In any event, there is an interesting jurisprudential question as to whether a decision of a First Tier Tribunal made later can overturn a decision of a Tribunal of the same level made earlier? It is unnecessary to examine that issue in light of my findings that Judge James' decision does not prove that in taking the decision on 4 February 2009 the appellant was the victim of a historical justice."*

Judge Hussain stated that paragraph 322(1A) caught those who submitted false documents without actual knowledge but that the findings of Judge James did not show that the allegation of deception made against the appellant in the refusal letter of 4th February 2009 were now proven to be wrong. Judge Hussain addressed the arguments in relation to historical injustice finding the appellant was not a victim of any injustice but found on the above reasoning that there had been none.

The point asserted by the appellant's representative was that Judge James' decision referred to a different paragraph, that being 322(2).

Nonetheless, Judge Ross in the determination promulgated on 10th November 2009 and which postdated **NA (Cambridge College of Learning),** recorded the history, noted the applicant had submitted a postgraduate diploma certificate in business management at the Cambridge College of Learning and that the application was refused on 2nd February 2009. The judge recorded at paragraph 3 that the appellant made a fresh application to study at the University of East London but this application was "refused for similar reasons", that being both paragraph 322(1A) and 322(2). Judge Ross cited **NA (Cambridge College of Learning)**, reviewed the evidence before him including the appellant's oral evidence and his statement in which he stated that he was a genuine student but had attempted to withdraw his original application and recorded "*he claimed that the Cambridge College of Learning had provided a course. However, he decided to withdraw his application under Tier 1 because he was aware that the Cambridge College of Learning had been investigated*".

The judge noted that in his subsequent application the appellant continued to represent that he had obtained a postgraduate diploma (which had been submitted to the Secretary of State) from the Cambridge College of Learning and at paragraph 12 First-tier Tribunal Judge Ross concluded:

> *"It is clear to me that the appellant has been thoroughly dishonest in relation to his applications in this case. He has submitted the first application on the basis that he had a diploma at the college which was plainly untrue, since an exhaustive and definitive decision of the Tribunal has determined that no such diploma has ever been legitimately issued by the college. Realising that his application was going to be refused on the basis that he had submitted a bogus document, he then withdrew his application before the decision was made. He then made a fresh application based on enrolment at the University of East London. However, the application, part of which I have been provided with makes it clear that he was claiming in this application that he had a postgraduate diploma from the college."*

At paragraph 13 Judge Ross stated:

> *"It has been submitted to me that although it could be argued that the appellant fell foul of paragraph 322(2), this paragraph does not apply as the application did not deceive anyone because it was withdrawn*",

and at paragraph 14:

> *"Apart from the fact that the submissions made to me are extremely unattractive in the context of the history of this appeal, I also consider that they are wrong. Firstly it is clear to me that in relation to the second application, which is the subject*

> *of this appeal as I understand it, the appellant has continued to represent that he has a diploma at the Cambridge College of Learning. His application therefore is to be refused under paragraph 322(1A)" [my underlining]*,

and the judge continued:

> *"I also consider that the appellant has made a false representation in the past in relation to his initial application."*

Judge Ross proceeded to refuse the appeal under paragraph 322(1A) and paragraph 322(2). Those findings by Judge Ross were definitive and are the underpinning for future decisions. The appellant either did not or was unsuccessful in any challenge to the decision of Judge Ross, which stands.

First-tier Tribunal Judge James, however, in her decision in 2017 recorded that the appellant submitted that he had not been complicit in dishonesty. She was clearly aware that there had been an appeal dismissed in 2009 as it is recorded in the appeal documents on the file before her, but she seemingly made no further investigations and was not provided with the appeal determination by the appellant. The appellant did, I note, provide the First-tier Tribunal decision of **Younas**, which was another First-tier Tribunal decision exculpating on the particular facts, an appellant who had studied ABE level 6. (By contrast, the appellant's marks clearly showed various courses at level 7 on the transcript although that is not the issue in play here). The appellant in 2017 submitted that the Cambridge College of Learning had perpetrated a fraud on him.

As per **Devaseelan** the starting point for Judge James's decision should have been the decision of Judge Ross. There was no mention of that decision in her determination and save for the assertions and statements of the appellant no further evidence. As can be seen from above from paragraph 41(6) of **Devaseelan**, if the second Adjudicator relies on facts that are not materially different from those put to the first Adjudicator the second Adjudicator should in effect regard the issues as settled by the first Adjudicator's determination.

Secondly, the decision of Judge James made no reference to **NA (Cambridge College of Learning)**, which is also cited above. It was clear that at paragraph 149 that with reference to the Cambridge College of Learning PgDip in business management "*there were no courses run and, a fortiori, no successful completion of such courses. … Accordingly, those submitting them also used false documents.*"

NA (Cambridge College of Learning), is a binding authority, and there is no explanation with reasoning as to why the judge departed from that authority, merely with an observation that the Cambridge College of Learning "acted in an entirely improper fashion by offering qualifications for which it had no authority".

In preference First-tier Tribunal Judge James chose to rely on **Younas**, which she noted as a First-tier Tribunal decision was not binding authority. The Practice Directions of the Immigration and Asylum Chamber of the First-tier Tribunal and the Upper Tribunal at Section 11.3 identify that "it should be emphasised that the Tribunal will not exclude good arguments from consideration but it will be rare for such an argument to be capable of being made only by reference to an unreported determination". The judge merely stated that the circumstances in that appeal "are not dissimilar from those in the present appeal", although these were not explored in detail. As stated, however, she did not reference the decision of First-tier Tribunal Judge Ross, not least because it was not before her.

What Judge James did was to enlist, without more, the oral assertion made in 2009 that the appellant did not carry out deception. Without following the correct approach as set out in **Devaseelan** to Judge Ross' decision and without proper analysis and reasoning that decision of Judge James was flawed on the finding of lack of dishonesty. A mere reference to 'similar facts' to **Younas** cannot suffice in the circumstances.

I find that the circumstances in this instance are far from the circumstances in **PAA (FtT: Oral decision - written reasons) Iraq [2019] UKUT 00013 (IAC)**. The circumstances are wholly different, not least the decision was the conflict between an oral and written decision by the same First-tier Tribunal judge and there was no question that **Devaseelan** principles were engaged. The position of Judge Hussain was that he had to consider both decisions in the light of **Devaseelan** and he was obliged as per **Devaseelan** to commence with the decision of Judge Ross. Applying **Devaseelan**, Judge Hussain could do no more and when the decision of Judge James is analysed there is no material error in Judge Hussain's decision. He could not follow her decision for the reasons given above. Judge Hussain identified that the injustice was said to have arisen for the respondent's decision of 4th February 2009, which it said wrongly accused the appellant of deception but he accurately reasoned at paragraph 29 that "*as I will demonstrate below the finding of Judge James does not undermine the Secretary of State's conclusion that the appellant was engaged in deception and the subsequent finding of Judge Ross"*.

Judge Hussain proceeded to cite from Judge James's conclusion and although he identified that paragraph 322(1A) catches those who submit false documents without actual knowledge and Judge James had made the decision in relation to paragraph 322(2), the underpinning decision as he had identified was that of Judge Ross (made on both paragraphs 322 (1A) and 322(2) and it was entirely open to him for the reasons given above to find at paragraph 33:

> *"The findings of Judge James does not show that the allegation of deception made against the appellant in the refusal letter of 4th February 2009 is now proven to be wrong."*

For the reasons outlined above that must be correct. Mr Malik submitted that the refusal decision of the Secretary of State dated 2011 assisted the appellant. This decision, however, post-dated the underpinning decision of Judge Ross and cannot be used to assist the appellant in the circumstances as set out.

I turn to a consideration of **Devani [2020] EWCA Civ 612** and whether the Secretary of State should have appealed Judge James's decision, which in fact dismissed the appellant's appeal in 2017, in relation to the finding on dishonesty or lack of it. Mr Malik submitted that the Secretary of State should have appealed on a point of law. Paragraph 27 of **Devani** refers to Section 11 (2) of the Tribunals, Courts and Enforcement Act 2007, which reads, "any party has a right of appeal, subject to subsection (8)" but Underhill LJ continues:

> *"Subsection (1) defines a right of appeal, so far as relevant, as a right of appeal to the UT on a point of law. I accept that on a literal reading subsection (2) could be construed as giving a right of appeal not only to a party against whom an order has been made but also to a party who has obtained, as regards that order, the exact outcome that they sought: although usually the winning party would have no wish to appeal, occasionally they may be dissatisfied with particular findings made by the Court or with aspects of its reasoning (the present case, if the slip rule were unavailable, would be an example albeit of a very specific kind). But for the winning party to have a right of appeal in such a case would be contrary to well-established case-law governing the position in the common law courts, which reflects important policy considerations; the authorities are well-known, and I need only refer to the commentary in para. 9A-59.3 of the White Book. It was not suggested to us that there was any reason why Parliament should have intended a different approach in the case of appeals to the Upper Tribunal. Ms Broadfoot sought to support DUTJ Latter's conclusion by reference to the decision of the UT in EG and NG (Ethiopia) [2013] UKUT 000143 (IAC), but that was not concerned with the present point at all. I am sure that section 11 (2) of the 2007 Act is intended to confer a right of appeal only against some aspect of the actual order of the FTT, and that the phrase 'any party' must be read as referring only to a party who has in that sense lost."*

I therefore do not find that the Secretary of State can be criticised for not appealing Judge James's decision in relation to dishonesty because the Secretary of State was in fact the winning party in that instance.

My focus, however, is the decision of First-tier Tribunal Judge Hussain and I find that there was no material error of law in his reasoning as to the dishonesty. As such, the arguments in relation to historical injustice only bite if the findings in relation to dishonesty are set aside, and they are not. In **CI (Nigeria)** the court noted the racially discriminatory nature of

policies previously considered have led to consideration of historic injustice by the superior courts but reliance was not permitted where there would be a major extension in a wholly different class of case. That is the position here. Further, I can understand the argument that should the appellant have suffered historical injustice that he might be put in a similar position but the appellants in **Ahsan** were arguing that they should be entitled to an in country right of appeal and this is what this appellant has already had.

However, for the reasons I have given the question of historic injustice does not arise or a factor in the Article 8 proportionality and the judge himself found at paragraph 34 that it was unnecessary to explore further because he had not found that the appellant was a victim of any injustice. He accepted that the appellant had lived in the United Kingdom since 2005 and his aspirations had not progressed in the way he expected since 2009 but there was no reason why he could not return, retrain and resume his practice in Pakistan and re-establish himself there. As such, the decision will stand and I dismiss the appeal.

Notice of Decision

The decision of First-tier Tribunal Judge Hussain will stand. The appellant's appeal remains dismissed on human rights grounds.

Signed Helen Rimington Date 27th October 2020

Upper Tribunal Judge Rimington