Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09743/2019**

THE IMMIGRATION ACTS

Heard on: 15th March 2021 **Decision & Reasons Promulgated**
At: Manchester Civil Justice Centre (remote hearing) **On: 28th May 2021**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Sheikh Nabeel Raza + 3
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr E. Nicholson, Counsel instructed by JJ Law Chambers**
For the Respondent: **Mr A. McVeety, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on the 5th September 1983. His dependents are his wife and two daughters. He appeals with permission against the decision of the First-tier Tribunal (Judge Lebasci) to dismiss his human rights appeal.

Background and Matters in Issue

2. It is not in issue that the Appellant has lived in the United Kingdom since September 2004 when he was first given leave to enter as a student. He thereafter held leave in various capacities, before finally becoming 'appeal rights exhausted' on the 21st February 2019. None of the particulars matter for the purpose of this decision. The important point to be drawn from the chronology is that the Respondent accepts that the Appellant has now had a continuous period of ten years' lawful residence in the United Kingdom such that he meets the requirements of paragraph 276B(i)(a) of the Immigration Rules. When the Appellant applied for indefinite leave to remain pursuant to that rule, it was however refused with reference to the 'general ground for refusal' at paragraph 322(2) [and therefore the substantive requirements at 276B(i)(b) and 276B(iii)]:

> "the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave"

3. The substance of the Secretary of State's accusation, set out in her letter of the 23rd May 2019, is that the Appellant has previously submitted non-genuine documents in support of a variation of leave application. Specifically, it is said that certain of the documents submitted by him on the 18th August 2010 were fake, or fraudulently misrepresented the true position. That evidence included two letters purporting to be from his employer 'HTL', HMRC correspondence with that firm, and a Santander Bank Statement showing salary deposits from 'HTL Gizmos Ltd'. Various reasons are advanced in the refusal letter as to why the Secretary of State believes those documents to amount to false representations.

4. This was not however the first that the Appellant had heard of this matter. The allegations dated back to 2015 when his first application for indefinite leave had been rejected on the same grounds. The Appellant had appealed that decision and the First-tier Tribunal (Judge Mayall) had on that occasion found against him. Its conclusion that his claim to have been employed by HTL was "entirely false" was upheld by the Upper Tribunal and permission to appeal to the Court of Appeal was refused. It was against this background that the First-tier Tribunal in the instant appeal made its own evaluation of the matter. Directing itself to treat the decision of Judge Mayall as its *Devaseelan* starting point, it went on to find the new evidence produced by the Appellant to rebut the allegation unsatisfactory. In fact it further undermined his own case. The Tribunal therefore upheld the Respondent's decision with reference to s322(2) of the Immigration Rules.

5. The Tribunal went on to consider the family's wider circumstances, with reference to s55 of the Borders, Citizenship and Immigration Act 2009, Article 8 ECHR and s117B of the Nationality, Immigration and Asylum Act 2002. It found the parents in the family to be familiar with the customs, traditions and way of life in Pakistan, and that with extended family still living in that country, there was no reason to find that there would be very significant obstacles to their integration there. The children have spent their entire lives in the UK but at the ages of 5 and 2 could be expected to adapt to life in Pakistan. The Tribunal rejected the claim that the children could not speak their parents' first language: if that evidence was true it was nevertheless the case that as young children they would quickly learn it. The best interests of the children lay with remaining with their parents, and it was not disproportionate for the family to relocate as a whole to Pakistan. The appeal was therefore dismissed on human rights grounds.

6. The Appellant now has permission to appeal on the following grounds:

    i) It was not open to Judge Lebasci to find the allegation of deception made out in the absence of actual evidence. Although the Secretary of State had set out her reasoning in the refusal letter, she had failed to produce the specific evidence relied upon, for instance in the form of letters/ a Document Verification Report etc. It was not enough for her to rely on the *Devaseelan* findings of Judge Mayall;

    ii) There was insufficient evidence to support a conclusion that the Appellant and his witness Mr Haq had conspired together;

    iii) The Tribunal applied the wrong test in respect of Article 8

7. For the Respondent Mr McVeety opposed the appeal on all grounds.

Discussion and Findings

Ground 1: Devaseelan and the Absence of Evidence

8. It is trite that the burden of proof in respect of an allegation of deception lies on the Secretary of State, who must produce cogent evidence to discharge it. In this case the Respondent based her decision on two tranches of evidence. First there was the material submitted by the Appellant to the Home Office in 2015. This consisted of two letters from a company called HTL, purportedly the Appellant's former employer, a 2009 letter from HMRC and a Santander bank statement showing deposits from HLT Gizmos Ltd into an account in the Appellant's name. The second tranche of material consisted of the

investigations into the aforementioned documents. These investigations found, in summary, that the address on the HTL headed paper was inaccurate, and that there was no record of any such company having operated at that premises; the address held for HTL by Companies House was somewhere completely different and the VAT number on the headed notepaper related to another company entirely. I am told that all of that evidence was produced before the First-tier Tribunal (Judge Mayall) in 2016. It was not, however, produced before the First-tier Tribunal (Judge Lebasci) in 2019. On the latter occasion the Respondent simply referred to the decision of Judge Mayall. The question raised by ground (i) is whether in those circumstances Judge Lebasci was legally entitled to find that the Secretary of State had discharged the burden of proof.

9. The principles in Devaseelan v Secretary of State for the Home Department [2002] UKIAT 702 are well known. The Tribunal there addressed a phenomena arising from the coming into force of the Human Rights Act 1998. Asylum claimants who had already failed on refugee grounds before what were then called Special Adjudicators were able under the Act to bring cases on human rights grounds on essentially the same facts. The question for the Tribunal was to what extent if any the second tribunal was bound to follow the decision taken by the first:

> 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.

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 <u>always</u> 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 <u>always</u> 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…

(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.

10. These principles have been given positive endorsement by the Court of Appeal on several occasions, notably in Djebbar v Secretary of State for the Home Department [2004] EWCA Civ 804 when Lord Justice Judge remarked [at §30]: "perhaps the most important feature of the guidance is that the fundamental obligation of every special adjudicator independently to decide each new application on its own individual merits was preserved". It is common ground that in this jurisdiction the Devaseelan principles now have a wider application that the context in which they were originally given. They apply to factual issues beyond asylum, to previous determinations of all hues, and have even been held to apply to findings of fact made in respect of different claimants, where there is an overlapping factual matrix: AA (Somalia) v Secretary of State for the Home Department [2007] EWCA Civ 1040.

11. Here then Judge Lebasci was unquestionably correct to direct himself to treat the decision of Judge Mayall as the starting point for his own deliberations. That decision stood as an authoritative assessment of the claim *at the date of that appeal*, but Judge Lebasci was nevertheless obliged to conduct an assessment of the evidence *as it stood before him*. This is the crux of ground (i). Mr Nicholson submits that the principles in Devaseelan must now be read in light of the decision in Secretary of State for the Home Department v BK (Afghanistan) [2019] EWCA Civ 1358. There, he submits, the Court of Appeal emphasise that decision makers must evaluate the evidence before *them*, and if this leads to a finding in contradiction of an earlier decision, so be it. Mr Nicholson submits that since the Respondent failed to produce any of the actual evidence of deception before Judge Lebasci, she cannot have discharged the burden of proof.

12. I am satisfied that this ground is without merit, for the following reasons.

13. The circumstances in BK were that a former Taliban fighter had been refused British nationality - and had his indefinite leave to remain revoked - on character grounds, the Secretary of State having been satisfied that he had lied when he said that he was not a terrorist. To prove that to be a lie, the Secretary of State relied upon the findings of an Immigration Adjudicator who had heard BK's asylum appeal in 2004: Adjudicator Hands had recorded BK's evidence as being that he had "killed and tortured people" at the behest of the Taliban. Sixteen years later in his appeal before the Upper Tribunal, BK was able to produce the note that the Home Office Presenting Officer took of his evidence that day in 2004. It made no mention of any admissions to killing or torture. What it did say was that he had been *ordered* to "kill people at night" by Taliban commanders. The UT held that this was an unsatisfactory evidential basis to conclude that BK was in fact a terrorist. He had admitted to lesser acts, such as punching or harassing people, under coercion, but the new evidence showed that Adjudicator Hands had mis-recorded, or perhaps misunderstood, his evidence. He never said that he had killed, or tortured, anyone. The Secretary of State appealed to the Court of Appeal *inter alia* on the grounds that the

Tribunal had impermissibly gone behind the findings of Adjudicator Hands: the HOPO's note was not 'new' evidence and did not therefore fit within the Devaseelan guidelines. It could not therefore be used to displace the findings in her decision.

14. Upholding the Upper Tribunal's decision the Court of Appeal held that the Secretary of State advanced an impermissibly narrow reading of the Devaseelan guidelines.

> 44.I do not accept that in addressing the question of whether the finding of fact should be carried forward in that way, the tribunal is only entitled to look at material which either post-dates the earlier tribunal's decision or which was not relevant to the earlier tribunal's determination. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them. The basis for the guidance is not estoppel or res judicata but fairness. A tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal.

15. Before me Mr Nicholson's submissions focused on the injunction that every tribunal must conscientiously decide the case in front of *them.* I of course accept, as did the Tribunal in Devaseelan, that this is so. I further accept that ordinarily, in a case involving paragraph 322(2) of the Rules, the burden in proving dishonesty would lie with the Secretary of State, and this could only properly be discharged with the production of cogent evidence. If no such evidence is produced, and the Respondent's case rests simply on a bare allegation in a refusal letter, then the allegation will not be proved. It does not however follow that Judge Lebasci was here bound to allow the appeal. Here the evidence *had* been produced, albeit before a different judge. That judge had made an assessment of that evidence, and both the Upper Tribunal and Court of Appeal had found no arguable error in his approach. As such Judge Lebasci was bound to treat Judge Mayall's decision as an authoritative assessment of the evidence as it stood in 2016: on that date the Respondent had proven deception, and this was the starting point. BK comes nowhere close to suggesting that absent all the supporting evidence earlier Devaseelan determinations should be disregarded. It simply provides for the possibility, as does Devaseelan itself, that evidence in existence at the time of the first appeal, but only latterly produced, can properly be considered in the second. It is not authority for the proposition that all matters in issue must be relitigated on the evidence before the second judge. It is in fact diametrically to the contrary.

16. The written grounds develop a slightly different point. That is that the Respondent, having failed to comply with the directions to produce all the

evidence, put the Appellant at a litigation disadvantage because his witnesses could not be questioned about it. That is simply fallacious. The relevant content of the evidence in question is set out clearly in the refusal letter, and indeed in the decision of Judge Mayall. If the Appellant, or indeed either of his supporting witnesses, wished to offer a commentary upon it, it was in substance there for them to see.

Ground (ii): The witness evidence

17. There were two additional witnesses.

18. A Mr Haider attested to having frequently seen the Appellant in the area where HTL Gizmos were said to have been based at the relevant time. This, the Tribunal found, added little to the case, since at its highest all that this established was that nine years ago the two men had occasionally bumped into each other in the street. It went nowhere to proving that the Appellant had been employed by HTL Gizmos. No challenge is brought against that finding.

19. The second witness was a Mr Haq. I have to confess that I find his evidence, and the recording of it, somewhat confusing. In his written statement of the 18th July 2019 Mr Haq states that he was the "accountant of HTL" and that "HTL Gizmos Ltd was in a payroll arrangement with S.M Khan T/A HTL and the payments used to go from HTL Gizmos Ltd". As I understand it, he is saying that the employer of himself and the Appellant was HTL, but that a separate entity called HTL Gizmos Ltd administered the payroll. Why that should be remains opaque: as Judge Lebasci observed, it is unclear why two apparently separate companies would have such similar names. Mr Haq told Judge Lebasci that it was simply a coincidence. Judge Lebasci thought that unsatisfactory. Mr Haq further said that HTL Gizmos had been set up "purely to offer payroll services": that being the case, Judge Lebasci wondered, why did it contain the word 'gizmos' in its name. In any event, it is clear that Judge Lebasci found Mr Haq's evidence to attract very little, if any weight. Having had regard to the confused nature of that evidence I can understand why, but I would further observe that this was evidence of the type discussed under the 4th Devaseelan guideline: it was evidence in existence at the date of the appeal before Judge Mayall and no good reason was advanced as to why it had not been brought before that earlier Tribunal. It was therefore evidence to be viewed with the greatest circumspection. Mr Nicholson takes no serious issue with any of that.

20. His point is confined to this. That in 2010 a Santander Bank statement was lodged with the Home Office which appeared to show "faster payment" deposits made to the Appellant by HTL Gizmos Ltd. The Home Office accepted that those payments were indeed made. In his grounds of appeal Mr Nicholson suggests that this concession having been made, it had to be accepted that the payments were, as the men described, for work done, or that "back in 2010 Mr

Haq and the Appellant had conspired to fabricate evidence to give the impression of the Appellant's employment". Ground (ii) asserts that it was incumbent on the First-tier Tribunal to make a finding on which of these was true.

21. I do not accept that the choice faced by the First-tier Tribunal was as binary as Mr Nicholson suggests. Its task was confined to considering whether or not the Appellant had sought to mislead the Home Office in 2010. Much of the analysis made by Judge Mayall had been in respect of the purported employer's letters. If these were fake, as was indeed the finding of Judge Mayall, the refusal under s322(2) could be upheld. That finding could stand regardless of whether the payments had been made into that account by an entity called 'HTL Gizmos Ltd' . That being the case there was no requirement for the Judge to make a finding that the Appellant and Mr Haq had conspired together back in 2010 to make it appear that the Appellant was employed by the firm, earning a certain amount of money. It simply had to assess what weight could be attached to Mr Haq's claim that he could recall the Appellant being an employee. For the reasons that he gives, properly open to him, that weight minimal.

Ground (iii): Article 8

22. The final ground concerns the Tribunal's use of two phrases. At its §44 the Tribunal says this:

> "I do not consider there are **insurmountable obstacles** to his ability to continue his family life with his wife and children in Pakistan. I find there are no **exceptional circumstances** in this case"

Mr Nicholson submits that neither of these phrases had any place in the Article 8 assessment made by the Tribunal. Reliance is placed on TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109.

23. It was not in issue that the Article 8 rights of this family were engaged. They had all lived in the UK for a significant amount of time and had private lives here. The only question was whether the interference with those private lives that would be caused by requiring them to return to Pakistan would be disproportionate. Had the Tribunal confined its assessment of that question to whether there were "insurmountable obstacles" that would indeed have been an error of law. However the tests applied by the Tribunal at its §44 are not the sum total of its analysis. Elsewhere the Tribunal considers whether there are "very significant" obstacles [§33], whether it would be contrary to the children's best interests [§32] and whether the refusal was be "reasonable" [also at §44]. Reading the decision as a whole it is quite clear that the Tribunal conducted a rounded assessment of the Appellant's circumstances and those of his family. Its conclusion, that the refusal of leave was proportionate, was consistent with

the public interest considerations set out in s117 of the Nationality, Immigration and Asylum Act 2002.

Decisions

24. The appeal is dismissed.

25. There is no order for anonymity.

Upper Tribunal Judge Bruce
10th May 2021