IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001742
First-tier Tribunal No: PA/53039/2021
HU/20089/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 March 2023

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

E K R
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Ms A Smith, instructed by Camden Community Law Centre

Heard at Field House on 9 January 2023

Although this is an appeal by the Secretary of State, I shall refer to the parties as in the First-tier Tribunal.

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a citizen of Uganda born in 1948. Her appeal against the refusal of her protection and human rights claim was allowed by First-tier Tribunal Judge L Nolan ('the judge') on 11 November 2021.

2. The respondent appealed on the grounds the judge misdirected herself in law for the following reasons:

> "1. The FTTJ has allowed the appeal on asylum and human rights grounds. The appellant's previous appeal was dismissed and the appellant was found not to be credible in her original asylum claim [9].
>
> 2. While the FTTJ has cited Devaseelan (Second Appeals - ECHR - Extra-Territorial Appeal Number: Effect) Sri Lanka * [2002] UKIAT 00702 at length [43], it is submitted that the FTTJ has failed to have substantive regard to matters such as whether the appellant made a complaint about her previous representatives, which is a matter for consideration as set out in Deevaseelan (sic) [42 (7)] '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.'
>
> 3. Furthermore, the FTTJ notes that no reasons have been given as to why the evidence on which the appellant now seeks to rely was not before the FTTJ at the previous hearing [46].
>
> 4. It is submitted that FTTJ has erred in essentially allowing the appellant to re-argue her case on the basis of evidence which should have been submitted previously, and for which no reason has been given."

Submissions

3. On behalf of the Secretary of State, Ms Cunha submitted the judge had misapplied Devaseelan even though she quoted from it. The judge failed to approach the further evidence with caution and there was no good reason why that evidence could not have been obtained earlier. The appellant blamed her previous representatives for the failure to obtain medical reports for the appeal hearing in 2016. The judge failed to consider the appellant's failure to make a complaint against her previous representatives. There was no good reason why the further evidence was not before the First-tier Tribunal in 2016.

4. In addition, Ms Cunha submitted, the judge failed to give adequate reasons at [51] and [52] for why she departed from the 2016 decision. There were numerous credibility points against the appellant in the 2016 decision, and set out in the respondent's refusal decision, which the judge failed to address. The medical evidence was relevant to plausibility not credibility. The judge ignored the findings of fact in the 2016 decision and allowed the appellant to re-litigate her appeal without good reason contrary to Devaseelan. The judge failed to address the internal inconsistencies upon which the previous negative credibility finding was based. Ms Cunha accepted the appellant could potentially succeed on Article 8 and

requested that any remaking should be delayed to allow the respondent to consider this.

5. Ms Smith relied on the rule 24 response dated 16 February 2022 and submitted there was no material error of law because the judge repeatedly referred to and properly applied Devaseelan. The judge's reasons at [44] to [46] adequately explained why she departed from the 2016 decision. Thereafter, the judge gave reasons for why she allowed the appeal.

6. Ms Smith submitted the judge properly considered Devaseelan as a preliminary issue. The grounds did not challenge the judge's findings at [51] and [52] and permission was not granted on the basis the judge had failed to give adequate reasons for allowing the appellant's protection claim. The appellant had made a fresh claim and submitted further evidence. She did not claim her previous representatives were incompetent. There was no medical evidence on appeal in 2016. The appellant was first diagnosed with PTSD in 2018.

7. Ms Smith submitted the guidance in Devaseelan could not be interpreted to mean that further evidence cannot be considered unless a complaint is made. The reason why further evidence was not available should be decided on a case by case basis. The poster of the election campaign in 2001 was not received by the appellant until 2017. This was an important piece of evidence which contradicted the findings in the 2016 decision.

8. Ms Smith submitted, on reading the decision as a whole, it was clear the judge had properly applied Devaseelan and given adequate reasons for departing from the 2016 decision. The expertise of the experts was not challenged and the judge proceeded on the basis that the previous representative's failure to obtain this evidence was not a sufficient reason in itself. The judge identified other reasons, including the election campaign poster, which entitled her to revisit the 2016 decision. The lack of evidence of a complaint was not material. The judge's findings on the substantive protection and human rights claim were not challenged and were well reasoned.

9. In response, Ms Cunha accepted the guidance in Devaseelan was flexible, but it required the judge to treat the further evidence with circumspection. There was no enquiry as to why the election campaign poster was not sent before 2017. The judge departed from the negative credibility findings in the 2016 decision without good reason.

Conclusions and reasons

10. Unusually there were two grants of permission in this case. First-Tier Tribunal Judge Dixon granted permission in December 2021 on the grounds it was arguable the judge had failed to properly apply the guidance in Devaseelan. First-tier Tribunal Judge Boyes granted permission in January 2022, only with reference to the human rights claim, on the grounds it was arguable the judge failed to give adequate reasons. Nothing turns on this. The grounds of application were the same and Ms Cunha relied on the grounds set out at [2] above. In summary, the respondent submits the judge failed to properly apply Devaseelan and failed to give adequate reasons for why she departed from the findings in the 2016 decision.

11. The judge commenced her 'findings of fact and reasons' by quoting extensively from Devaseelan at [43] and it is apparent from [44] and [45] that the judge properly applied the guidance therein. At [46] the judge gave her reasons for departing from the 2016 decision:

> "At the 2016 hearing, Counsel for the appellant requested an adjournment to allow the appellant's representatives to obtain expert reports, including a medical report. The adjournment was refused, and although any decision on an application for permission to appeal the 2016 determination is not before me, it would be reasonable to assume that the refusal of the adjournment formed a ground of appeal. According to the respondent's chronology, permission to appeal was refused by both the FTT and then by the UT, and the appellant became appeal rights exhausted on 3rd November 2016. Ms Smith's case was that the subsequent medical and expert reports cast significant doubt over the findings of the 2016 determination, particularly with regard to the credibility of the appellant. However, I am mindful that the Devaseelan principles do not, prima facie, permit an appellant to ask a Tribunal to disregard the findings of fact of an earlier Tribunal where the second appeal is based on essentially the same facts as the first appeal, particularly if there is no good reason given as to why any new evidence was not put before the first Tribunal. In this case, the reason why the medical and expert reports were not before the first Tribunal appears to be simply because the previous representatives did not obtain them, rather than any other substantive reason as to why that evidence could not have been presented to the first Tribunal. There was no explanation before me as to why the previous representatives had not obtained such evidence. The exception of course is the original copy of the campaign poster which I accept was only received by the appellant after the previous hearing. Notwithstanding, I do also bear in mind the guidance from SSHD v BK (Afghanistan) that every Tribunal must conscientiously decide the case in front of them, and the material now provided by the appellant is certainly capable of shedding a new light on the conclusions and findings of the 2016 determination. I note that the appellant has not sought to amend or add to her original claim in any way. IJ Oxley in 2016 did not have the benefit of the medical or expert reports which had not at that time been commissioned (including the appellant's 2018 diagnosis of PTSD), and nor did she have the original version of the poster nor the online sources which are said to refer to the appellant's political activities, and I accept that those circumstances amount to a legitimate reason to depart from the findings of 2016 bearing in mind my duty to conscientiously and fairly decide the case before me. I therefore go on to consider the merits of the asylum claim, taking into account the updated evidence provided by the appellant."

12. It is clear from [43] to [46] that the judge properly directed herself in law and considered Devaseelan as a preliminary issue. The judge considered the 2016 decision as a starting point and applied a degree of sensible flexibility necessary in giving anxious scrutiny to the appellant's asylum claim. The appellant had not been assessed by the Helen Bamber Foundation in 2016 and she was not diagnosed with PTSD until 2018. The appellant did not assert her representatives were incompetent and therefore any lack of complaint was not material. In any event, on a proper application of the guidance in Devaseelan, the judge was

entitled to consider the further medical evidence and expert reports on a case by case basis.

13. I find the judge's decision to depart from the findings in the 2016 decision was open to the judge on the evidence before her and she gave cogent reasons for coming to that conclusion. There was no challenge to the judge's findings on the substantive asylum and human rights claim.

14. Accordingly, I find there was no material error of law in the decision promulgated on 11 November 2021. I dismiss the Secretary of State's appeal.

Notice of Decision

Appeal dismissed

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 January 2023