Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19009/2019

THE IMMIGRATION ACTS

Heard at Field House
On 13 November 2020

Decision & Reasons Promulgated
On 2 February 2021

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AFSHEEN YASIN
(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Mr S Nath, Counsel, instructed by Direct Access

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State refusing her leave to remain on human rights grounds on 5 November 2019.

2. The claimant is a citizen of Pakistan. She was born in 1976 and entered the United Kingdom in 2011 with entry clearance as a Tier 4 (General) Student. Her leave was extended until 20 April 2014. On 17 April 2014 she applied for further leave but the application was refused and subsequent appeal dismissed on 20 October 2017 by the First-tier Tribunal. She was refused permission to appeal further.

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3. The claimant remained in the United Kingdom and on 20 June 2019 made a further application leading to the decision complained of.

4. I turn immediately to the Secretary of State's grounds of appeal.

5. The first point is that the First-tier Tribunal did not apply properly the principles set out in the case of **<u>Devaseelan</u> (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka* [2002] UKIAT 00702**.

6. This, as will be well understood by anyone familiar with judicial fact-finding, determined authoritatively that findings made in an earlier decision on the same facts are a necessary starting point in any subsequent application based on the same evidence.

7. The second ground, beginning at paragraph 2, is, I find, a refinement of this point. It complains that the judge reached conclusions without being fully appraised with the facts.

8. The third ground, beginning at paragraph 4, raises the additional point that the decision is wrong on its own terms because the judge did not consider properly the law set out in **<u>SM and Qadir</u> (ETS – Evidence – Burden of Proof); [2016] UKUT 229**.

9. There is a regrettable impertinence about the Secretary of State's grounds. First, whilst it is clearly settled law that the First-tier Tribunal Judge should have had regard to the earlier decision, the grounds do not acknowledge the fact that the Secretary of State failed to provide a copy of that decision and a soupçon of humility would not have diminished the point being made. Second, the Secretary of State did not attend before the First-tier Tribunal and so did not give the judge the help to which she was entitled. Third, the grounds assign the judge to the male gender. No doubt if the Secretary of State had attended she would have realised that too was wrong.

10. However absent litigants are entitled to a fair hearing and Mr Kotas, who is in no way to be blamed for any deficiencies of any kind in the grounds of appeal, argued that there was not a fair hearing.

11. Mr Nath referred me to the decision of this Tribunal in **<u>MM</u> (unfairness; E & R) Sudan [2014] UKUT 105 (IAC)**.

12. I have considered that and his submissions but with respect that case is dealing with a rather different point. In **<u>MM</u>** a document had not been considered that ought to have been considered and the case determined that a procedural failure leading to a document being ignored could be an error of law but that case concerned evidence. The problem here, at least as far as grounds 1 and 2, are concerned is a matter of law. I have summarised the point made in **<u>Devaseelan</u>** above. No doubt a better summary could be drawn but it is sufficient for present purposes. The rule in **<u>Devaseelan</u>** is not a matter of evidence. It is a matter of law that *obliges* a second decision maker to begin by looking at the earlier decision when it is, or appears to be, based on similar facts. Paragraph 39(1) leave no room for doubt:

   > "The first Adjudicator's determination should always be the starting-point".

13. It was not the starting point here because it was not produced.

14. Having reflected on this matter I have concluded the First-tier Tribunal plainly erred in law by going ahead and making findings without obtaining first a copy of the First-tier Tribunal's decision that was said to be relevant. Whilst some criticism must fall on the

Secretary of State for not providing a copy, the obligation was the judge's and on this occasion she did not do what she ought to have done although, as indicated she was not getting the help that she was entitled to expect.

15. I make the point that the primary obligation is on the party who seeks to rely on the document. I say this for essentially pragmatic reasons. The party who wishes to rely on an earlier decision must know about that earlier decision and know about its contents, else it has no business seeking to rely upon it. It can be assumed therefore that in this case the Secretary of State was fully aware of the earlier decision. The Secretary of State should have made sure it was in front of the judge. Failing to do that however does not change the law and it is the judge's responsibility to apply the law and therefore it was a matter for the judge to insist on the earlier decision being found.

16. I fall shy of saying that an appellant's representative in the circumstances had a duty to disclose the earlier decision. Obviously there is a duty not to pretend there was not an earlier decision and, as it is a requirement in law to look at the decision, the appellant's legal representatives could not in any way be criticised for breaching their obligations to their client by assisting the Tribunal by providing a copy. However the party that may prefer the earlier decision to be ignored, which will usually be a claimant, may not be particularly organised or concerned about the reasons for an earlier decision failing. Such a party genuinely might not have a copy of an earlier decision and genuinely might not have the ability to trace it.

17. The Tribunal's records are, generally, fairly reliable in matters of this kind and in the absence of direct help from the parties, the judge should at least have adjourned the hearing for the Tribunal to find a copy of the decision.

18. It follows that I am satisfied the First-tier Tribunal erred in law because it went ahead without insisting on a copy of the earlier decision being found. I doubt if it would have been too difficult to find one because there is one in my file that was produced for the hearing at the Upper Tribunal.

19. In stating this I am aware of the matters set out in paragraph 9 of the Decision and Reasons where the judge recorded Mr Nath's objection before her to adjourning the matter, pointing out there could be no adequate compensation in costs and there had been two previous adjournments. However this is not a case where the Secretary of State had said that she could not provide the necessary documents. The documents had not been provided. As far as I can see there was no explanation put before the judge to explain why the claimant had not produced the earlier decision, although there may be a perfectly good explanation, I do not know. Neither is there any suggestion that the Tribunal's library services had failed.

20. I am very aware of the difficulty the judge perceived. As I have indicated, I consider it to be the primary responsibility of the party that relies on an earlier decision, in this case the Secretary of State, to get before the Tribunal the decisions on which she seeks to rely, but that does not change the Tribunal's obligation to apply the law and the law requires consideration of the earlier decision.

21. The decision of the First-tier Tribunal in IA/01356/2016 promulgated on 20 October 2017 ought to have been considered. If it had been considered it may be that the other findings would not have been made.

22. I set aside the decision of the First-tier Tribunal.

23. This is a case that needs to be heard again. The First-tier Tribunal has not considered the case properly and I have decided to remit it to the First-tier Tribunal where it can be determined.

Notice of Decision

24. This appeal is allowed. The First-tier Tribunal erred in law. I set aside its decision and I direct the case be heard again in the First-tier Tribunal.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal Dated 29 January 2021