In the Upper Tribunal (Immigration and Asylum Chamber)

R (on the application of Hussain) v Secretary of State for the Home Department IJR [2015] UKUT 00486 (IAC)

Heard at
Birmingham Civil Justice Centre
On 28 May 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

The Queen on the Application of
KAMAL HUSSAIN

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Mr E Nicholson, instructed by J R Jones Solicitors appeared behalf of the Applicant.
Ms J Anderson, instructed by the Government Legal Department appeared on behalf of the Respondent

JUDGMENT

1. This is an application for judicial review. The decision challenged in the grounds is a deportation order dated 16 June 2014. Permission was refused on the papers but granted on limited grounds by HHJ Robert Owen QC on oral renewal.

History

2. The applicant is a national of Bangladesh. He was born in 1977 and arrived in the United Kingdom in 1987 and was granted indefinite leave. His presence in the

United Kingdom has always been with leave. The motivation for the Secretary State's decision is a long series of criminal offences.

3. The applicant's known offending history began in November 2001. He had one court appearance resulting in a conviction in that year, three in 2003, six in 2004, one each in 2005 and 2006, three in 2007, one in 2008, one in 2009, four in 2011, four in 2012 and at least three in 2013. On the Secretary of State's calculation, between November 2001 and October 2013 he had been convicted on 29 occasions for 49 known offences. In 2009 he was notified of his liability to deportation. Although he continued to offend, no action was taken against him at that stage. On 20 July 2012 there was a decision to make a deportation order against him, based on his offending. He appealed to a First-tier Tribunal, constituted of Judge Hanratty and Sir Jeffrey James. That panel allowed his appeal "with some reluctance", having reached the conclusion that the application of the immigration rules to the findings of fact it had made meant, as it said at [64]:

> "that in accordance with the Immigration Rules the appellant does escape from the normal consequences of his persistent and serial offending by virtue of paragraph 399A of the Immigration Rules."

4. In its closing observations at [72] (that is, the first of two paragraphs numbered 72), the panel said this:

> "The appellant must be under no illusion that any more re-offending and this Tribunal would expect the respondent to carry out most effective and determined efforts to remove this appellant from the jurisdiction. He has been warned."

5. The Tribunal's determination was sent out on 23 October 2012. In the following year the applicant was convicted of the following further offences:

   (i) Harassment – breach of restraining order – on a plea of guilty – fined £50 and one day detention.

   (ii) 18th February 2013 – harassment – breach of restraining order – on a plea of guilty fined £110 and one day deemed served in courthouse.

   (iii) 30th August 2013 – possession controlled drug class B – cannabis – plea – guilty – fine £100 and victim surcharge £20.

   (iv) 1st October 2013 – battery – plea guilty – imprisonment sixteen weeks.

   (v) Offences of common assault and destruction of property dating from 23rd April 2013 but dealt with on 1st October 2013 – imprisonment sixteen weeks concurrent and no separate penalty for destruction to property.

   There appears also to have been a court appearance on 5 December 2012 but the outcome is not clear: there is a mention both of an acquittal and of the applicant being fined £50.

6. On 23 October 2013 the Secretary of State made a new decision to make a deportation order against the applicant. The applicant appealed. The appeal was heard in the First-tier Tribunal by Judge Ford, who dismissed it in a determination sent out on 16 April 2014.

7. There was no attempt to appeal Judge Ford's determination, as indeed there had been no attempt to appeal the previous Tribunal determination. On 20 May 2014, however, the applicant's solicitors made further representations, including evidence of new facts, and asked the Secretary of State not to proceed with the deportation of the applicant. It was not suggested that there were any grounds for appealing Judge Ford's decision, but simply that there were reasons why the Secretary of State might be moved not to act on it. The Secretary of State was not persuaded. A letter confirming her original decision was sent on 10 June 2014, and on 16 June 2014 the deportation order was made.

8. It is now common ground that that order was erroneous, as pointed out in the applicant's judicial review grounds. That is because the Secretary of State purported to make a deportation order under the "automatic deportation" provisions of the UK Borders Act 2007, whereas the applicant was not liable to deportation under those provisions. The deportation order was replaced on 30 June 2014 by an order made simply on the basis of s 3(5)(a) of the Immigration Act 1971 because the Secretary of State deemed it to be conducive to the public good to deport the applicant from the United Kingdom. It is that replacement deportation order which is thus the focus of the present proceedings now.

9. The grant of permission to apply for judicial review is (omitting directions) in the following terms:

> "Permission to bring judicial review proceedings on the issue concerning Devaslaelan– v – SSHD (2002) UK1 at 702 [sic] only."

It is clear that that is intended, in line with the argument put to the learned judge (which Mr Nicholson has shown me), to be a reference to the decision of the Asylum and Immigration Tribunal in Devaseelan v SSHD [2002] UKIAT 00282, [2003] Imm AR 1.

The Law

10. In view of the limited grounds of challenge, and Mr Nicholson's focused attention to them, there are only three areas of the law that need to be set out. The first is paragraphs 396 to 399B of the Statement of Changes in Immigration Rules, HC 395 as in force between 9 July 2012 and 28 July 2014, a period which covers both the decisions to make deportation orders, both the appeal hearings and the making of the deportation order itself in this case.

> "396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if a person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would not be reasonable to expect the child to leave the UK; and

(b) there is no other family member who is able to care for the child in the UK;

or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

(b) the person is aged under 25 years, he has spent at least half his life living continuously in the UK immediately preceding the date of the of the immigration decision (discounting any period of imprisonment) and he has no ties (including

social, cultural or family) with the country to which he would have to go if required to leave the UK.

399B. Where paragraph 399 or 399A applies limited leave may be granted for a period not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate."

11. The word "may" in paragraph 399B is the routine expression in the Immigration Rules where the grant of leave may be expected to be the result of complying with conditions set out in the immediately preceding paragraphs. The provisions as a whole were described by the Court of Appeal in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 at [44] as "a complete code"; see also SSHD v MA (Somalia) [2015] EWCA Civ 48.

12. Secondly, Devaseelan is a "starred" determination of the Asylum and Immigration Tribunal arising out of the implementation of the Human Rights Act 1998 on 1 October 2000. In a number of cases applicants for asylum, whose claims had been refused by the Secretary of State and whose appeals had been dismissed, subsequently raised claims based on (in particular) article 3 of the European Convention on Human Rights. The question was the extent to which findings of fact in the asylum appeal ought to be taken into account in the determination of an appeal against a subsequent refusal of a human rights claim. At paragraphs 37 to 42 the Tribunal set out guidance to the judicial officers then called adjudicators, exercising the jurisdiction now exercised by the First-tier Tribunal. I do not propose to set it out in full. It may be summarised as follows. The second adjudicator should always take the first adjudicator's determination as a starting point. The second adjudicator should be cautious of allowing matters determined by the first adjudicator to be litigated before the second adjudicator on the same evidence. New evidence about matters personal to the appellant, that could have been put before the first adjudicator but was not, might be regarded with considerable caution, unless there is some very good reason why the evidence was not adduced earlier. New facts (that is to say evidence of matters occurring since the first determination), or material that may have been before the first adjudicator but which was not relevant to the issues before him, can always be taken into account by the second adjudicator and may result in a different determination. The second adjudicator is not bound by the first adjudicator's findings or by his determination. The second adjudicator is hearing a new appeal, against a new decision, and at a different time; but the guidance is intended to ensure economy and consistency in judicial determinations, whilst recognising that the appeals are separate.

13. The Devaseelan guidelines have the approval of the Court of Appeal in LD (Algeria) v SSHD [2004] EWCA Civ 804, and elsewhere. Although because of the context in which they arose the guidelines are expressed in terms assuming that the individual was unsuccessful in the first appeal, they have been taken to be generally applicable where a person comes before a Tribunal on a second occasion; and there have occasionally been signs of an extension of the principles to appeals by individuals related to an earlier appellant.

14. Thirdly, and nothing to do with Devaseelan, there is clear authority for the proposition that the Secretary of State is required to act on a final decision of the Tribunal allowing an appellant's appeal. Mr Nicholson cites authorities from R v SSHD ex parte Mersin [2000] EWHC 348 (Admin), through R (Boafo) v SSHD [2002] EWCA Civ 44 to Chomanga v SSHD [2011] UKUT 312 (IAC).

The Tribunal Determinations

15. Both of the determinations of the First-tier Tribunal include full considerations of evidence and discussions of the relevant law. No discourtesy is implied by looking only at the parts of them which have formed the subject of submissions in the present judicial review. Each starts from the position that the applicant falls within paragraph 398(c). Each continues by considering whether, on the evidence, paragraph 399 or 399A applies. The applicant's case against his deportation was based with varying levels of strength on the following three factors:

    (a) His relationship with his two children from a marriage in 2000. The couple separated in 2005, but it does not appear that they have ever divorced;

    (b) His relationship with Allison Armstrong, who was said to have been in a relationship with the applicant from about 2007;

    (c) His long residence in the United Kingdom and the lack of ties to Bangladesh.

16. Both the Tribunal in 2012 and Judge Ford in 2014 decided that the applicant's contacts with his children were not of such a nature that they fell for consideration under paragraph 399(a).

17. The Tribunal in 2012 examined the evidence of his relationship with Allison Armstrong in some detail. It had been a troubled relationship; a number of the applicant's convictions are for offences against her. It accepted her "emotional" evidence supporting the applicant and found that they hoped to get married and to start a new life in a different part of the country, and, in addition, that to an extent she was dependent on the applicant. The panel found that there were insurmountable obstacles to a family life with her in Bangladesh. In 2014 Judge Ford reached a different conclusion, which was that the evidence of the applicant and Allison Armstrong about their relationship was lacking in credibility. There were a considerable number of discrepancies: they differed even on whether they were married and whether they lived together. Judge Ford's evaluation of the applicant's evidence was that she did not accept that the applicant was committed to Ms Armstrong or genuinely believed that there was a future to the relationship. Thus, paragraph 399(b) did not apply at the date of the determination in 2014. I may add, as a postscript, that despite the applicant's avowals at the hearing on 26 March 2014, he wrote to the Secretary of State less than a month after receiving Judge Ford's determination, saying that he had decided not to continue the relationship with Ms Armstrong.

18. So far as paragraph 399A is concerned, the position is as follows. The Tribunal hearing the applicant's appeal in 2012 had evidence before it, including, as Mr

Nicholson wished to emphasise before me, evidence showing a number of visits to Bangladesh. The submissions made to the Tribunal, by (as it happens) Mr Nicholson, and recorded in paragraph 53 of the determination are as follows:

> "The appellant has grown up in Birmingham. He has been here in the UK lawfully since the age of 10, 25 years ago. He has no family life in Bangladesh. He had visited there once in 2007 but that was to visit his father's grave. He had no ties, family, cultural or social, now to Bangladesh. The appellant had been taking drug and alcohol courses and was being helped and receiving support. It would be disproportionate to remove him. The appellant has grown up here. He is not a shady adult, a serious criminal, who should be deported in order to protect the public."

The remainder of the submissions relates to family life. At paragraph 64 the Tribunal set out its conclusion on this issue:

> "We find that the appellant classically falls within [paragraph 399A]. He has lived in the UK for 25 years and the only ties in evidence that we heard that the appellant had were with his former in-laws whom he visited in 2007 when the relationship with his wife, as far as they were concerned, was probably continuing. We do not think it likely that he would have a relationship with his former in-laws now after this separation or even divorce. There is no other family there. The appellant came here aged 10 and hardly speaks Bengali and has really no social, cultural or family connections with Bangladesh at all."

19. Judge Ford, as I have indicated, began consideration of paragraph 399A from a different point of view, because she had concluded that the applicant was prepared to mislead the Tribunal in relation to matters affecting his family life. But at the beginning of her determination she set out both a reference to Devaseelan and the relevant parts of the 2012 determination. In particular, at paragraph [22], Judge Ford summarised paragraph 64 of the 2012 determination. In relation to links with Bangladesh, however, Judge Ford said this:

> "76. The appellant is in good health. I accept that he completed his education in the United Kingdom and that he has work experience in the UK. I take on board the findings of the Tribunal in October 2012 that the appellant has no remaining ties to Bangladesh. However, I had additional evidence that did not appear to be considered by that Tribunal. I had evidence that he had visited Bangladesh for five weeks in 97/98, five weeks in January 2001, just over five months in 2005 and four months in 2007.
>
> 77. The Appellant has acknowledged that he speaks some Bengali. I do not accept that he spoke English throughout his visits to Bangladesh and I am satisfied that he could quickly improve his language skills in Bangladesh so that he could cope with living there. I do not accept that he has cut all language ties with Bangladesh. Nor do I accept that he has cut all social or cultural ties to Bangladesh given the length of some of these visits, particularly the visits in 2005 and 2007.
>
> 78. The Appellant has employment experience in the United Kingdom and has some limited qualifications in catering. I am satisfied that he could secure employment sufficient to sustain himself in Bangladesh in the catering trade. Whilst I accept that his experience as a chef has been in Indian cooking and not in Bengali cooking, he

has experience as a waiter and could avail of the facilitated voluntary return scheme to return to Bangladesh and improve his skills so that he could work as a chef there.

79. Whilst I recognise the length of time the Appellant has spent in the UK and that he regards himself as British, contrary to the Tribunal's findings in October 2012 that he has severed all ties to Bangladesh, I am satisfied that he has extended family members there and an ability to quickly integrate into the society so that he can lead a full life there provided he steers clear of drugs and alcohol."

20. Judge Ford's view was therefore that the applicant did not fall within paragraph 399A. His appeal was therefore dismissed.

Mr Nicholson's submissions

21. Mr Nicholson's argument is as follows. Contrary to what Judge Ford said in the passage just extracted, the relevant evidence before her was the same as that before the Tribunal in 2012, particularly in relation to the number of visits to Bangladesh and their length. Applying the Devaseelan principles, therefore, Judge Ford was not entitled to depart from the conclusion of the Tribunal in 2012 on links with Bangladesh: she should have declined to allow the matter to be relitigated. Although Judge Ford's decision was not the subject of any suggestion that it contained a legal error, the Secretary of State was obliged by Devaseelan to rely on the first determination, that is to say the determination of the Tribunal in 2012, to take it as the starting point for her decision, and not to depart from the issues it had decided unless there was good reason to do so, for example evidence post-dating that determination.

22. In Mr Nicholson's submission, therefore, the deportation order could not stand. So far from being liable to deportation, the applicant was entitled to recognition as a person who fell within paragraph 399A, and therefore to a grant of leave in accordance with paragraph 399B.

Decision

23. I reject Mr Nicholson's submissions, for a number of interlocking reasons.

24. It is convenient to start with the most obvious. The Devaseelan guidelines are addressed to Judges, not to the Secretary of State. The starting point of the Devaseelan guidelines is that the earlier judicial determination is not binding on the judge determining the second appeal (although it will probably need to be taken into account). The point at which the guidelines have effect is when a judge is about to take the second judicial decision. By contrast, the Secretary of State never takes any judicial decision, and is not merely guided but essentially bound by the previous judicial decision. The Secretary of State's obligations in relation to a matter that has already been the subject of a judicial decision derive not from guidelines found in Devaseelan but obligations found in the line of cases beginning in Mersin, to which I have referred earlier in this judgment.

25. Secondly, and quite separately, there is nothing in the Devaseelan guidelines that specifically deals with the case where there have already been two judicial decisions, reaching opposite conclusions. In the context of the guidance being given, Devaseelan says that the "first" decision must be the starting point; but that is because the context is that the guidance is being given to the second decision-maker. There is no reason at all to suppose that, if there are already two judicial decisions, the person making a third decision should treat the first (older) decision rather than the second (newer) decision as his starting-point.

26. Thirdly, precisely because the Devaseelan guidelines are guidelines to judges and not to the Secretary of State, this is clearly a case where, on Mr Nicholson's submissions, the applicant had an alternative remedy available to him. If he considered that Judge Ford's conclusions were not reached lawfully, he could have sought permission to appeal against her determination. No such application was made. It is difficult to see any good reason why a recent appealable but unappealed determination should not be regarded as authoritative; and the availability of that mode of challenge to Judge Ford's determination would be sufficient of itself to prevent the applicant having the remedy he seeks by way of judicial review. As Ms Anderson points out, the result contended for by Mr Nicholson would mean that a party who does not seek to challenge a later adverse judicial determination can, in effect, seek to have it ignored because he would prefer to rely on the earlier determination. The rule that judicial review is a remedy of last resort avoids the peculiarity of such a result.

27. The applicant's challenge to the deportation order therefore fails. But in view of the persistent way in which Mr Nicholson put his submissions, I have considered whether there is any perceptible injustice to the applicant arising out of the events canvassed in his submissions.

28. Other things being equal, the applicant might have expected the 2012 determination to result in a grant of leave under paragraph 399B. As I have said, however, the Tribunal at that time made it clear that it thought that further offences might well lead to the applicant's deportation. The applicant committed a number of further offences very soon after that decision. It does not look as though carrying out the 2012 Tribunal's decision could be regarded as leading automatically to a grant of leave in the events which happened. By the time of the second appeal there had been those further offences. Supposing Judge Ford's determination had been the subject of an appeal based on the Devaseelan guidelines, it would have to have been argued that, in relation to ties to Bangladesh, the matter was dealt with, effectively finally, by the 2012 determination. That, certainly, was the way Mr Nicholson argued the matter before me. It is true to say that the 2012 Tribunal reached a clear conclusion on that issue, and it is clear also that it reached the conclusion rather unwillingly. It may further be properly surmised that the applicant's ties to Bangladesh in 2014 would be likely, in his circumstances, to be no closer than they were in 2012. It appears also to be true that the evidence, in particular in relation to visits, that was before Judge Ford, was the same evidence that had been before the 2012 Tribunal.

29. There are, however, in my judgement, two clear differences. The first is that Judge Ford had reached the conclusion I have set out, that the applicant was not telling the truth about his family relationships. Certainly Judge Ford was entitled to look at the relationships at the date of the 2014 hearing, and to reach conclusions about the credibility of the evidence. The relationships were, however, also canvassed in 2012, and it seems to me that Judge Ford was entitled to bring a different attitude to the question of links with Bangladesh, based on any revised view about whether the applicant's evidence was reliable or whether he was trying to mislead the Tribunal.

30. Secondly, although with some difficulty, using barely legible photocopies, Mr Nicholson was indeed able to show me that the evidence of all the visits to Bangladesh had been before the Tribunal in 2012, as I have pointed out, his own summary of the evidence to that Tribunal was that there had been only one visit, in 2007. That, at any event, is what the Tribunal recorded as his submission. In the circumstances, it can hardly be regarded as surprising that Judge Ford considered that there was now "additional evidence that did not appear to be considered by that Tribunal" that is to say, evidence of other visits, including one very long one in 2005. The applicant has been represented throughout by the same solicitors. I have not seen any suggestion that Judge Ford was told that evidence of all the visits was before the 2012 Tribunal and that Mr Nicholson's submission that there had been only one visit was either incorrectly recorded or factually incorrect. It is clear that the 2012 Tribunal makes no reference to any other visits, and the most likely reason for that is that they were relying on a submission made to them that there had been only one visit.

31. Be that as it may, the position as it seems to me is that an appeal on Devaseelan grounds against Judge Ford's determination would have been unlikely to succeed but there was no such appeal. Judge Ford's determination stands. Neither Devaseelan nor any other principle of law identified on the applicant's behalf prevented the Secretary of State from relying on that determination and proceeding to the applicant's deportation.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 14 August 2015