EN (abandonment – first decision nullity– Devaseelan applied) Cameroon [2005] UKAIT 00146

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House
On 4 October 2005

Determination Promulgated
On 20th October 2005
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Before

Mrs J A J C Gleeson (Senior Immigration Judge)
Mr C J Hodgkinson (Immigration Judge)
Mrs A J F Cross De Chavannes

Between

Appellant

And

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr E Waheed of Counsel instructed by Barry Clark Solicitors.
For the respondent: Ms N Hough, Home Office Presenting Officer.

It is an error of law for a second Immigration Judge to regard himself as bound by invalid determination of a first Immigration Judge; entitled, nevertheless, to have regard to first Immigration Judge's

summary of the appellant's first asylum claim and the account then given..

DETERMINATION AND REASONS

1. The appellant was granted review of the determination of an Immigration Judge, Mr C G M Timson, who dismissed her appeal against the Secretary of State's refusal to recognise her as a refugee and the setting of removal directions to Cameroon her country of origin. Review was granted on all grounds of appeal and in particular, in relation to the Immigration Judge's application of the principles in *Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702* (*formerly known as *Devaseelan)*. This decision is reported for what it says about the proper approach to an earlier determination where, unknown to the first Immigration Judge, that determination was a nullity because the appellant had left the United Kingdom before it was promulgated.

2. On entry, the appellant's asylum claim was based upon the risk to her on return to Cameroon of female genital mutilation (FGM). She has reached adulthood without being subjected to it but at 21 claimed to have been held down and threatened with late female genital mutilation. Her mother gave her money to go to Douala to her aunt for safety and the aunt then organised her flight to the United Kingdom.

3. That account was considered in the appellant's absence by the first Immigration Judge. the appellant was then in the Republic of Ireland (Eire) and returned later the same year, to make a fresh asylum claim in which her fear of female genital mutilation was intertwined with her mother's status as a Government opponent, women's rights champion, and SDF member. When the appeal was dismissed by the second Immigration Judge, the appellant applied for review, only then seeking to amend her grounds of appeal to argue perceived political opinion. The appellant complains in particular of the second Immigration Judge's reliance upon the difference between the two accounts, contending that he misapplied the *Devaseelan* principles.

Facts and chronology

4. The appellant left the Cameroon on 8 March 2002, travelling to the UK via Kenya and arriving here on 9 March 2002. She was interviewed on 13 March and her asylum appeal was refused on 16 March 2002. She is a Christian, though at different places in her account she describes herself as Catholic or Presbyterian. It has never been her case that she is a Muslim.

5. On 25 April 2002, the appellant left the United Kingdom and travelled to Eire to join her sisters there, without notifying the Appellate Authority of her departure or making arrangements for her mail to be forwarded.

6. On 9 May 2002, less than a fortnight after her departure, the first Immigration Judge determined the appeal. He was not aware that the appellant abandoned the appeal by departing from the United Kingdom, but that is the legal effect of her departure.

7. The Tribunal has not seen the first asylum application, the first interview or any of the evidence which was before the first Immigration Judge. The first Immigration Judge's determination is fully reasoned. It was the only available evidence before us and the second Immigration Judge of the account that the appellant gave in her first claim and on entry. It is not suggested on the appellant's behalf that his determination is an inaccurate summary of her primary account on entry. The determination was promulgated in July 2002, to her notified address for service. That month, according to the appellant, her mother died in the Cameroon.

8. The appellant remained in Eire from April – November 2002, where it seems she made another asylum claim. We do not have details of that, but it must have failed as she was returned to the United Kingdom by Eire in November 2002.

9. On 3 December 2002, the appellant renewed her asylum claim in the United Kingdom and made a witness statement in support of it. The appellant was interviewed in Liverpool on 15 January 2003, but the decision took some time.

10. On 31 January 2004, while the asylum application was pending, the appellant married a Mr L by whom she a daughter, LL, six months later (19 June 2004,). In June 2004, she was served with the letter of refusal and notice of decision and appealed promptly.

11. On 5 August 2004, the appellant made a second witness statement. On 22 September 2004, the appeal against the second refusal of asylum was heard at Bradford before the second Immigration Judge.

12. At that hearing, Mr Waheed applied for an adjournment and sought to persuade the second Immigration Judge that the substance of the first Immigration Judge's determination should be ignored in the light of the guidance given by the IAT in *Devaseelan*.

13. In her grounds of appeal before the second Immigration Judge, the appellant raised an Article 8 element relating to her marriage and daughter.

14. The appellant now relied on her mother's alleged political activities as a member of the Social Democratic Front (SDF), which she linked strongly to the risk of female genital mutilation on return to Cameroon. She explained the late raising of this second issue; she said that on entry she was traumatised by the prospect of return to Cameroon and, whilst she felt able to mention the female genital mutilation risk, did not feel able to mention her mother's politics. The second Immigration Judge did not find those activities credible for reasons set out at paragraph 25 of the determination.

15. The second Immigration Judge observed that, apart from the very late addition of political activity as part of her FGM claim, the second asylum claim raised exactly the same issues as the first. He treated the facts in relation to FGM as determined by the first Immigration Judge.

16. The second Immigration Judge heard oral evidence from the appellant but did not find her evidence credible; in particular (paragraph 25) he found it incredible that she been able to mention the risk of FGM on entry, a particularly emotive issue, but felt unable to mention her mother's political activities, the opposite of what one would normally expect.

17. He considered the appellant's claim on the alternative basis that it might be credible; based upon the IAT's decision in *NG (FGM – Cameroon) [2004] UKIAT 00247* , which reviewed objective evidence from Cameroon and found that FGM was not routinely practised there, and that internal relocation was open to those at risk. The second Immigration Judge reviewed the up-to-date evidence on Cameroon and the new variation in the appellant's account, but was not satisfied that his decision should differ from that of the first Immigration Judge.

18. The Article 8 claim was briefly considered and dismissed on *DM (Croatia)* grounds. The appellant's husband was a failed asylum seeker with a pending Immigration Appeal Tribunal hearing and no status. There is no challenge to that aspect of the second Immigration Judge's determination.

Error of law

Appellant's submissions (Mr Waheed)

19. In grounds of appeal to this Tribunal, Mr Waheed sought for the first time to add a ground of perceived political opinion as

well as membership of a particular social group. He defined the proposed group as ‘Women/Mother’s Family’.

20. Paragraph 3 of the grounds of appeal refers mystifyingly to acts knowingly tolerated by the Iranian authorities or from which the Iranian authorities would not provide effective protection, although the appellant's country of origin is Cameroon. We have disregarded that ground.

21. Mr Waheed indicated that he would not proceed with Ground A of his grounds of appeal (that the Immigration Judge’s application of the procedure rules was contrary to law); but he did rely on Ground B, that there was an error of law in applying *Devaseelan* in the manner already indicated and upon Ground C in relation to the Immigration Judge's refusal to adjourn the appellant’s appeal to await the appellant's husband's appeal, although he did not press that with any vigour.

22. The core of this appeal was and remains the *Devaseelan* point. Were it not for the Home Office concession before the second Immigration Judge, that the appellant was indeed out of the country at the time of the first Immigration Judge’s determination and thus, that the first Immigration Judge’s determination was a nullity as the appeal already been abandoned) Mr Waheed would have found himself in the odd position of having to prove that on behalf of the appellant that she abandoned her first appeal.

23. On the proper construction of the second Immigration Judge's determination, it is common ground that the appellant abandoned her appeal in that way, and that the determination of the first Immigration Judge was, although he did not realise that, in fact a nullity. The appellant’s solicitors did not seek to appeal or challenge that determination as served.

24. Mr Waheed therefore submitted that as a matter of law it was not open to the second Immigration Judge to regard the female genital mutilation point as settled by that nullified determination, and that the second Immigration Judge should have decided the question of credibility in relation to the FGM claim afresh, rather than restricting himself to the decision of the first Immigration Judge.

25. Mr Waheed further contended that the asylum interview on the second claim made a clear link between the death of the appellant's mother and the threat of FGM to her, and that to exclude that link and not re-investigate female genital mutilation fatally tainted the second Immigration Judge’s credibility decision.

26. The appellant's case now was that she been targeted for late female genital mutilation because of her mother's political activities in encouraging young girls not to respect traditions and supporting the SDF. If returned her mother's opponents would kill her (interview record, Questions 32 and 40) or at the very least, insist on performing female genital mutilation on her.

27. The error of law was accordingly material and the second Immigration Judge ought to have excluded from his mind the first Immigration Judge's decision. Those instructing Mr Waheed did not represent the appellant in the earlier appeal and were unable to give any further details of it, other than those contained in the decision of the first Immigration Judge.

Respondent's submissions (Ms Hough)

28. For the Secretary of State Ms Hough referred to the claimant's second witness statement (paragraphs 7 to 9 on page 92 of the appellant's bundle). The Immigration Judge indeed failed to reopen FGM but even if that were an error of law, in the light of *NG*, paragraph 28, there was no risk of circumcision for an adult woman such as this appellant. The Immigration Judge checked and updated the objective evidence and (paragraph 25) found that the appellant not mentioned her mother's SDF connection because she was stressed during the first asylum claim.

29. Under rule 48.5 of the 2002, Rules the onus was on the appellant to keep the Appellate Authority aware of her address for service and to ensure that she discovered the outcome of her appeal. As regarded the adjournment request, given the reasons set out in the determination, there was no error of law there.

30. On the appellant's own evidence, the Immigration Judge been entitled to reject the new evidence because if there been political problems they should have been mentioned at the earlier stage. If anything, the ubiquity of the link between the SDF and FGM in the second interview strengthened rather than weakened that point.

31. There was no necessity for the second Immigration Judge to ignore the first Immigration Judge's determination which contained full reasoning because the first Immigration Judge not been aware that the appellant was already out of the country, any error of law was not material. It was clear from the first Immigration Judge's determination that the appellant's own evidence not mentioned the SDF on the first occasion.

Appellant's further submissions in reply

32. In reply, Mr Waheed indicated that that was not the manner in which the *Devaseelan* principles been treated. The appellant's mother's SDF support and opposition to traditional cultural practices was difficult to compartmentalise as suggested and the facts to be considered as a whole.

33. The outcome might indeed have been different if the first Immigration Judge's decision not been treated as binding under *Devaseelan* and the credibility of the appellant's claim had been reopened. The appellant was not cross-examined on the evidence before the date of the first Immigration Judge's decision and credibility should have been considered as a whole.

34. Mr Waheed relied upon the Court of Appeal's decision in *Katrinak v Secretary of State for the Home Department [2001] EWCA Civ 832* in which Schiemann LJ criticised the Immigration Appeal Tribunal for reaching a conclusion which may possibly have been open to it, without a process of reasoning which was clearly set out, and after having stopped the appellant's advocate from developing his case as he wished (paragraph 25).

Conclusions

35. We first consider whether the Immigration Judge erred in refusing an adjournment to enable the appellant's case to be heard after resolution of her husband's appeal to the Immigration Appeal Tribunal, due to be heard on the same day as the appellant's appeal to the second Immigration Judge. the rules for adjournment in November 2004, were contained in rule 40 of the Immigration and Asylum (Procedure) Rules 2003, –

> *"40— Subject to any provision of these Rules or of any other enactment, an adjudicator or the Tribunal may adjourn the hearing of any appeal or application.*
>
> *(2) An adjudicator or the Tribunal must not adjourn a hearing on the application of a party, unless satisfied that the appeal or application cannot otherwise be justly determined*
>
> *(3) Where a party applies for an adjournment of a hearing, he must-*
>
> *(a) if practicable, notify all other parties of the application;*
>
> *(b) show good reason why an adjournment is necessary; and*
>
> *(c) produce evidence of any fact or matter relied upon in support of the application."*

36. The appellant was not married to her husband when in Cameroon. He is a witness only to the Article 8 element of the appeal. She lives with him and they would both have been

aware of the clash of dates long before the second Immigration Judge hearing. No attempt was made to comply with rule 40(3) and apply on notice. Mr Waheed's argument to the second Immigration Judge was that if the appellant's husband's appeal were allowed he would have indefinite leave to remain in the United Kingdom, which would impact on her own Article 8 claim, but in those circumstances, fresh representations could be made. We do not consider that the Immigration Judge erred in considering that the appellant's appeal could be justly disposed of before her husband's was finally concluded (paragraph 10 of the determination).

37. We turn now to the question of the second Immigration Judge's approach to the first Immigration Judge's determination. We began by reminding ourselves of the Immigration Appeal Tribunal's guidance in *Devaseelan*,

> *"37. ... the first Adjudicator's determination stands (unchallenged or not successfully challenged) as an assessment of 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...*
>
> *40. We now pass to matters that could have been before the first Adjudicator but were not.*
>
> *iv) 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 factors beyond dispute). It must 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 the 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.*

v) Evidence of other facts – 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 (iv), evidence dating from before the determination of the first Adjudicator might well have been relevant if it 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 evidence which is (ex-hypothesi) now rather dated."

38. The thrust of that passage is that the first hearing is the best account, taken as it is at the closest point to the original events, and should always be the starting point for any further consideration. It follows then that if the first Immigration Judge's determination were not nullified by the appellant's abandonment, there is no question but that the Immigration Judge would have been entitled to consider it.

39. There has been no attempt by either party to put before us the source material for the first Immigration Judge's conclusions of fact and his summary of the evidence before him. The question is, therefore, whether the second Immigration Judge was in any way prevented from treating the first Immigration Judge's summary of that evidence as relevant to the second determination, and whether his approach to that determination as a whole was correct. We divide the points for determination as follows -

(a) On the present facts, whether the second Immigration Judge was entitled to have regard to the first determination at all, and if so, to what extent?

(b) If he could consider the first determination, whether he erred in law in regarding the question of female genital mutilation as settled by the first Immigration Judge? And

(c) If so, whether such error of law was material on the particular facts of this case, in the context of the authorities and the current background evidence?

40. We answer those questions as follows –

(d) The first determination contains a summary of the appellant's documentary evidence on entry to the United Kingdom. There is no dispute but that the evidence as summarised was her case on entry. the second Immigration Judge could have taken into account the

first Statement of Evidence Form, interview, and witness statements if he them; they were not available, and there can be no objection at all to a clear summary of their contents, professionally prepared (albeit under a mistake of law as to the task he was undertaking) by the first Immigration Judge;

(e) However, as regards the conclusions of fact and law in the first determination, as that determination was a nullity, the second Immigration Judge erred in law in having any regard to those. In particular, it was wrong in law for him to regard the question of credibility of the female genital mutilation risk as having been settled by the first Immigration Judge, since the determination was of an appeal which no longer existed at the date of decision.

41. The Tribunal considers that it is an error of law for the second Immigration Judge to treat himself as bound by the findings of fact or law in a determination which was a nullity because the appellant had left the jurisdiction before it was promulgated; but that the second Immigration Judge may nevertheless have regard to the first Immigration Judge's recital of the materials and evidence before him and in particular, the account given by the appellant at the earlier hearing. We now consider in detail the materiality of such an error on the particular facts of this appeal.

Materiality of error of law

42. The second Immigration Judge had the advantage of being able to compare the account which the appellant gave on return to the United Kingdom in late 2002, (after her attempted claim in Eire and no doubt, discussions of her situation with her sisters who lived there) with that which she gave on entry to the United Kingdom in March 2002. The difference between the two fact sets is substantial. the account before the first Immigration Judge –

(f) Makes no mention at all of the SDF problem or the appellant's mother's anti-government views and activities.

(g) Is of a claimed risk to a twenty one year old woman of FGM which runs counter to the background evidence that FGM was normally performed on girls between four and six years old or at least pre-puberty.

(h) In her Self Completion Form prepared for her second claim, the appellant mentioned her mother's political activities for the first time at Questions 1, 3 and 5 of Section A of that form; Question 1 and 7 of Section C4,

political opinions; and Part D, further information. She said she was a Catholic.

(i) In the statement prepared to accompany that form in December 2002, there is mention of her mother's attitude to the cultural practice of female genital mutilation but no mention of the political elements later relied upon.

(j) In the asylum interview on 15 January 2003, the appellant stated she was Presbyterian rather than Catholic and mentioned her mother's SDF activities at Questions 16, 17, 18, 19, 20, 21, 29, 32, 40, 42, 43 and in the concluding questions. The appellant was able to hand in a copy of her mother's birth certificate and SDF ID card for the first time.

(k) Nevertheless, it was not until the grounds of appeal to the Tribunal from the second Immigration Judge's decision were settled (17 June 2004,) that the appellant specifically relied upon the political element of her mother's history.

(l) The appellant's August 2004 witness statement (which must have been prepared on advice) added human rights as a claim but did not mention the political aspects now relied upon.

43. The account as now given is so intertwined with her mother's political activity that it is unrecognisable from the rather simple account which was before the first Immigration Judge. We do not consider that the passages quoted from *Devaseelan* indicate that the Immigration Judge erred in taking that into account, indeed it seems to us that this is the classic situation where incremental increases are made in an account over the passage of time. were the Immigration Judge not permitted to take into account the earlier versions of the appellant's account and the differences between them, that would have the result of permitting the appellant to benefit from her own reticence in relation to what appears now to be a significant part of her core account.

44. We consider that it was open to the Immigration Judge to observe, as he did, that he would have expected the appellant to be less embarrassed in talking about her mother’s politics than about the prospect of a horrific mutilation of a very private part of her body, rather than as she now contends, finding it possible to talk about female genital mutilation but not politics. That is a sensible and sustainable position to take.

45. We have regard to the effect on this account of Section 8 of the 2004, Act if, as seems clear, the appellant has delayed in revealing this part of her account. It was open to the appellant to be frank about the case as she now puts it in March 2002, but she did not do so until January 2003, and her explanation is unsatisfactory. The Tribunal cannot, on that basis, treat this account as wholly credible and the Immigration Judge did not err therefore in finding her not to be a witness of truth. The degree to which he did so is, as always, a question of fact for the Immigration Judge.

46. Our primary conclusion is that the Immigration Judge's credibility findings are sustainable despite the error of law in his approach to the first determination. However, for completeness, we have considered his analysis of the background evidence and authorities on the country position (paragraphs 27-28). It is not an error of law to follow the leading country guidance determination. the Immigration Judge referred to *NG (FGM –Cameroon)* [2004] UKIAT 00247 –

7. "The Appellant plainly identified her own religious persuasion as Catholic. As such, if she feared that having to live in a Muslim area of the country might expose her to a risk of being located by her stepfather or perhaps subjected again to pressure from local Muslims to convert or marry or undergo FGM, Cameroon was a country in which there were several areas where the population was predominantly Christian. The Adjudicator was quite entitled to conclude she could resettle safely in a Christian area.

8. Ms Mallick set much store by the evidence (which included IRB, Canada materials and the CIPU Report of a Fact-finding Mission to Cameroon 17-25 January 2004,). She submitted that it indicated:

(i) FGM was a widespread and routine practice in Cameroon; and

(ii) it was not only practised on young girls but was also practised on women prior to marriage, regardless of her age.

9. We are bound to say we do not consider the objective country materials bear out that FGM is routinely practised on women and girls in Cameroon. It certainly continues to be practised on a significant percentage of the female population, but, even on the highest figures cited by Ms Mallick, it is only inflicted on one in five (i.e. 20%). Furthermore, on her own figures, the main victims were women and girls residing in predominantly Muslim areas of the country. the January 2004, Fact-finding mission report states at paragraph 9.11 that a diplomatic source stated that FGM occurs in three out of ten provinces in the east, south-west and far north.

10. It is true that even in the predominantly Christian areas of the country, FGM is still practised. We are also prepared to accept that the government has not passed laws to make FGM illegal or to repudiate the custom. However, whilst we accept that it can be

practised on women of any age prior to marriage, it is equally clear that it is normally practised on young girls aged 6-8 years. That is plainly stated in the CIPU Report at paragraph 6.70.

11. Ms Mallick urged us to find that the Adjudicator was wrong (and that we would be wrong) to rely on this passage from the CIPU Report. However, even on the alternative sources she urged us to prefer, the Amnesty International report in particular, there is no suggestion that the practice of FGM is inflicted as often on post-adolescent as on pre-adolescent females.

12. Ms Mallick submitted that, even if we found that the Appellant would not be at risk of being pursued or located by her stepfather or members of his family, we should find that it would be unduly harsh to expect a young woman on her own to relocate within Cameroon. In this regard she drew our attention to passages in the background materials highlighting discrimination against women in a number of areas. She also pointed out the poor record of the authorities in Cameroon: at paragraph 5.28 there was reference to "arbitrary arrests and detentions" and at paragraph 6.1 mention of numerous serious abuses of human rights. However, the background evidence fell well short of establishing a consistent pattern of gross, mass or flagrant violations of the human rights of women. The legal system in Cameroon permitted freedom of movement (CIPU, 6.51). Also relevant was that this particular appellant shown herself able to turn to Catholic Church members for help and support.

13. Whilst, therefore, the Appellant might face hardship in other parts of Cameroon outside her home or other Muslim areas, we do not consider that the evidence justified a conclusion that this Appellant would face a real risk of serious harm. ***”***

47. The October 2003 CIPU Country Report on Cameroon remains the latest background evidence on this issue. FGM in Cameroon is not widespread, and is carried out mainly on Muslim girl children. It is principally a pre-puberty exercise, or occasionally, pre-marital. There are provinces where it is not practised, it is rarely practised on adult women, and if so, only before marriage.

48. This appellant is now a married woman and is 23 years old. She has the support of her husband if she is returned now. It is not suggested that his appeal has subsequently succeeded, nor that there is any insurmountable obstacle to their joint return. Her husband cannot be troubled by her genital entirety; he married her and they have a daughter. The risk to such a woman is well below the level required to engage either the Refugee Convention or the ECHR. To the extent that the appellant relies upon any risk to her one-year old daughter, the risk to a Christian child of a man who is not troubled by the FGM issue and a mother who positively objects is small to vanishing point.

49. It follows that the Immigration Judge's error on the Devaseelan point is not material, whether or not the appellant is treated as credible. The Immigration Judge dismissed the political element of the account, after oral evidence and submissions. His reasons for doing so are properly explained and sound (*R (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982, at paragraph 90(3)).

Decision

50. For all of the above reasons, the decision of this Tribunal is that the original Tribunal did not make a material error of law and the original determination of the appeal shall stand.

Mrs J A J C Gleeson
Senior Immigration Judge

25 July 2013