



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/43383/2013
IA/47663/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 16th June 2014**

**Determination
Promulgated
On 1st October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

**MR MUNEEER HUSSAIN SYED
MRS NOUSHEEN SANA**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Sreevalsalan
For the Respondent: Ms J Isherwood

DETERMINATION AND REASONS

1. The appellants are citizens of India. On 12th April 2013, they applied for indefinite leave to remain in the United Kingdom. That application was refused on 2nd October 2013, the respondent refusing to vary the appellants' leave and also deciding, on that day, to remove them from the

United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act").

2. In refusing the applications for indefinite leave, the Secretary of State took into account the appellants' immigration histories. The first appellant arrived in the United Kingdom on 10th February 2008. Paragraph 245CD(c) of the Immigration Rules ("the rules") provides that to succeed in the application he made for indefinite leave, he must have spent a continuous period of five years lawfully in the United Kingdom, of which the most recent must have been spent with leave as a Tier 1 (General) Migrant. The first appellant had leave initially under the Highly Skilled Migrant Programme and subsequently as a Tier 1 Migrant. However, the Secretary of State drew attention to his absence from the United Kingdom between 23rd March 2008 and 13th October that year. In this regard, paragraph 245AAA of the rules provides that a period of valid leave is not considered to have been broken where an applicant has been absent from the United Kingdom for a period of 180 days or less in any of the five consecutive twelve months' periods preceding the date of the application for leave to remain. The application for indefinite leave was made on 12th April 2013 and the relevant period of twelve months for considering absence was 13th April 2008 until 12th April 2009. The first part of the first appellant's absence fell outside this period and was disregarded by the Secretary of State. However, he was absent from 13th April 2008 until 13th October 2008, a period of 182 days. This exceeded the period of time allowed under paragraph 245AAA(a)(i) of the rules. The second appellant was given leave to enter the United Kingdom on 17th August 2011, as the first appellant's partner.
3. The Secretary of State took into account the medical issues that the first appellant relied upon as showing that he was unable to return to the United Kingdom sooner. A letter from a doctor referred to a prolapsed disc and to medical treatment in India from 16th June 2008 until 27th September that year. However, the Secretary of State found that the evidence revealed no reason why the first appellant was unable to return to the United Kingdom after that date. She considered whether to exercise discretion in his case but concluded that there were no sufficiently compelling reasons to do so. She concluded, as a result, that the requirements of the rules were not met and so the application for indefinite leave fell to be refused under paragraph 245CD(c).
4. So far as the appellants' human rights were concerned, the Secretary of State noted that they had suggested in the application for leave that they wished to rely upon Article 8 of the Human Rights Convention. A separate application was invited, using the appropriate, specified application form. Nonetheless, notwithstanding the failure to comply with the requirements of the rules, the Secretary of State considered whether it would be appropriate to allow the appellants to remain exceptionally, outside the rules. Having considered all the circumstances of their cases, she

concluded that there was nothing to justify the grant of leave on this or any other basis.

5. An appeal was brought against the adverse decisions. It was contended on the first appellant's behalf that the Secretary of State ought to have taken into account "the medical issue" and exercised her discretion differently. He travelled from India to the United Kingdom on 13th October 2008, about two weeks after he was certified medically fit. He was entitled to "a normal and reasonable post period" in which to prepare for his journey. The Secretary of State ought to have taken "a pragmatic approach". Overall, the period of the first appellant's absence from the United Kingdom exceeded the amount allowed by only two days. It took time to arrange travel from India to the United Kingdom and two weeks should have been considered a reasonable period of time.
6. It was also contended that the Secretary of State failed to give due consideration to the appellants' rights under Article 8. Paragraph 29 of the grounds is as follows: "Appellant [sic] has a private life in the United Kingdom." In the paragraph which followed, it was asserted that no legitimate aim was being pursued by the Secretary of State.

Determination of the Appeal in the First-tier Tribunal

7. The appellants' appeals came before First-tier Tribunal Judge Dineen ("the judge") on 28th February 2014. In a determination promulgated thereafter, the appeals were "allowed to the extent that the applications of the appellants are remitted to the respondent for further consideration." The judge took into account a recorded delivery slip showing that the application for indefinite leave was posted on 12th April 2013 and delivered on 15th April that year. At paragraph 6 in the Secretary of State's letter giving reasons for the adverse decisions, the application was described as having been submitted on 12th April 2013.
8. It appears that the judge found that the application was made two days after it was posted and that, for the purposes of the rules, the relevant period for calculating absence was 15th April 2008 until 14th April 2009. On this basis, the first appellant's period of absence from the United Kingdom was precisely 180 days.

The Application for Permission to Appeal

9. The Secretary of State applied for permission to appeal. It was contended on her behalf that the judge made a material misdirection. Paragraph 34G(i) of the rules provides that the date on which an application or claim is made is as follows: "Where the application form is sent by post, the date of posting ...". As the judge found that the application was posted on 12th April 2013, that was the date on which it was made and so the Secretary of State had calculated the period of absence correctly. The judge ought to have dismissed the appeals.

10. Permission to appeal was granted by a First-tier Tribunal Judge on 2nd May 2014. Paragraph 34G(i) of the rules appeared not to have been brought to the judge's attention and it was arguable that he erred in law in determining the appeals as he had.
11. In directions sent on an uncertain date, the parties were advised that they should prepare for the forthcoming hearing on the basis that, if the Upper Tribunal set aside the decision of the First-tier Tribunal, any further evidence that might need to be considered in remaking the decision could be considered at the hearing.
12. The appellants' solicitors provided a response under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. It was accepted on the first appellant's behalf that there was some force in the grounds in support of the application for permission to appeal but not accepted that any error would lead to a materially different outcome if the decision were remade. If the date of application were indeed 15th April 2013, the first appellant did not fall foul of the rules.

Submissions Regarding Error of Law

13. Ms Isherwood said that the rules were clear on the relevant date. The judge referred to the application for leave as having been posted by recorded delivery and it was clear that it was not sent by courier. It followed that the application was made on the day on which it was posted, 12th April 2013. In his grounds of appeal to the First-tier Tribunal, the first appellant himself described the date on which the application was made as 12th April. The Secretary of State properly refused the application and the judge erred in allowing the appeals.
14. Mr Sreevalsalan said that the application was submitted on 12th April 2013 and refused as the period of the first appellant's absence from the United Kingdom was more than 180 days.
15. He conceded that the first appellant could not show that the requirements of the rules were met as his absence amounted to 182 days. However, a medical report showed the compassionate circumstances in his case. The Secretary of State refused the application apparently on the basis that the first appellant took two weeks to return to the United Kingdom. He was discharged as medically fit on 27th September 2008 and travelled on 13th October that year. In the rule 24 response, attention was drawn to the judge's decision to remit the applications so that the Secretary of State could exercise discretion. Mr Sreevalsalan accepted that paragraph 8 of the Secretary of State's decision letter showed that she considered the exercise of discretion in assessing the application for indefinite leave but the documentary evidence in turn revealed that she did not consider discretion properly. The appellants disagreed with the Secretary of State's view that weight fell to be given to the period of absence after the first appellant's illness had come to an end. The medical evidence was dated

27th September 2008 and anyone would need time to recover and prepare to travel. Mr Sreevalsalan said that the appellants' case was that the judge did not err notwithstanding any mistake made regarding the date on which the application was made.

Conclusion on Error of Law

16. It is readily apparent that paragraph 34G(i) of the rules was not brought to the judge's attention. This is rather surprising. In any event, in the light of the rules, the date on which the application was made was 12th April 2013 and not 15th April. The judge decided to send the application back for further consideration on the basis that the latter date, the date of receipt, was the correct one but he erred in law in so doing. The decision of the First-tier Tribunal is set aside and must be remade.

Remaking the Decision

17. Mr Sreevalsalan made submissions on the appellants' behalfs. The evidence was before the Upper Tribunal. The Secretary of State had not properly considered how to exercise discretion. Paragraph 7 of the decision letter of 2nd October 2013 made mention of medical issues and a letter from the first appellant's doctor, dated 27th September 2008. Mr Sreevalsalan said that a person recovering from illness might be unable to board a plane. A reasonable amount of time was required. The appellant took fifteen days to begin his journey. The Secretary of State had not exercised discretion properly. She had the letter from the doctor before her. The appellants' case was that the Secretary of State had not acted in a reasonable way.
18. Ms Isherwood said in response that the medical evidence was acknowledged by the Secretary of State. It was clear that the decision maker had taken it into account. So far as Article 8 was concerned, the First-tier Tribunal grounds made brief mention of it but there was nothing to show any compelling or compassionate circumstances. The first appellant was absent from the United Kingdom for 182 days, more than the time allowed. The appellants might disagree with the way the medical evidence was considered by the Secretary of State but the weight to be given to it was a matter for her.
19. Mr Sreevalsalan then drew attention to the first appellant's witness statement, made on 28th February 2014. At paragraph 21 of that statement, the first appellant asked the Secretary of State to consider a normal and reasonable period of time, after medical treatment, for a person to travel to the United Kingdom. In considering whether to exercise discretion outside the rules, she was obliged to take this into account. The first appellant wished to rely on the relevant guidance, regarding calculating the continuous period in applications for indefinite leave to remain. This guidance bore on the exercise of discretion outside

the rules, in cases where the requirements of paragraph 245AAA were not met.

20. Reliance was also placed upon Article 8. The first appellant arrived here in February 2008 and had strong private life ties. His wife joined him in 2011 and their family life together had continued since then.
21. I allowed Mr Sreevalsalan time to obtain copies of the Secretary of State's guidance. The hearing resumed and he drew attention to page 28 of guidance published on 23rd January 2014 concerning absences of more than 180 days. Decision makers were advised that they might consider the grant of indefinite leave outside the rules if an applicant provided evidence to show that the "excessive absence" was due to serious or compelling compassionate reasons. Mr Sreevalsalan submitted that this showed that discretion should have been exercised differently.
22. Ms Isherwood said in response to this submission that it was clear that the guidance concerned the grant of leave outside the rules. In any event, the Secretary of State did consider the medical evidence and, at paragraph 8 of the decision letter, whether to exercise discretion in the appellants' favour.

Findings and Conclusions

23. In this appeal, the burden lies with the appellants to prove the facts and matters they rely upon and the standard of proof is that of a balance of probabilities. In remaking the decision, the Upper Tribunal had before it the evidence which was before the First-tier Tribunal, including the witness statement made by the first appellant on 28th February 2014.
24. It is readily apparent that the appellants are unable to show that the requirements of the rules have been met. It was accepted that their application for indefinite leave was made on 12th April 2013 and so the period of the first appellant's absence from the United Kingdom in 2008 was properly found to be 182 days, two days more than permitted by paragraph 245AAA(a)(i) of the rules. Although the margin of failure appears to be rather slight, important guidance has been given by the Supreme Court in Patel [2013] UKSC 72. There is no room for a formalised "near-miss" or "sliding scale" principle in relation to the requirements of the rules. A near-miss cannot provide substance to a human rights case which is otherwise lacking in merit. (paragraphs 55 to 57 of the judgment.)
25. The fundamental difficulty the appellants face is that paragraphs 8 and 12 of the decision letter sent by the Secretary of State to the first appellant on 2nd October 2013 show, as Ms Isherwood submitted, that the medical evidence obtained by him was taken into account. That evidence, consisting of a letter from a doctor, was before the First-tier Tribunal Judge. It records that the first appellant received treatment for a prolapsed disc between 16th June and 27th September 2008. As at the date

of the letter, he was described as having recovered successfully with no symptoms and was certified as medically fit. The decision letter shows that the Secretary of State took this into account. Her conclusion that there were no compelling or compassionate circumstances justifying the grant of leave, notwithstanding the period of absence, cannot be described as irrational or perverse. The decision letter shows that she properly considered whether to ignore the period of absence beyond what was permitted and whether to consider granting leave outside the rules. The appellants' cases have been advanced on the basis that her decision in this context was wrong. There is a short answer to this point. It is clear from the decision letter and from the guidance given to caseworkers in relation to calculating a continuous period of residence that in appropriate cases leave may be granted *outside the rules*. Section 86(6) of the Nationality, Immigration and Asylum Act 2002 provides that refusal to depart from or to authorise departure from immigration rules is not the exercise of a discretion for the purposes of section 86(3)(b). In other words, the exercise of discretion in this context, as opposed to making a decision where discretion is available under the rules, is not justiciable in the Tribunal. It is entirely a matter for the Secretary of State. She was entitled to decide not to depart from the rules and the appellants have not shown that her decision is unlawful.

26. As noted earlier, the grounds of appeal to the First-tier Tribunal briefly mention Article 8 of the Human Rights Convention. So far as the first appellant is concerned, it is asserted on his behalf that he has a private life in the United Kingdom and that no legitimate aim is pursued by the Secretary of State in refusing to vary his leave and seeking to remove him. So far as the second appellant is concerned, there is a similar assertion in the grounds that the adverse decisions are incompatible with her human rights and that she has built up "social ties in the UK" and has "family and private life" here. In neither case are there any details at all. The first appellant's witness statement similarly contains no detail regarding private or family life ties.
27. The first appellant has been present in the United Kingdom since 2008, save for his absence between March and October that year and his wife joined him in 2011. There can be little doubt that they may have established friendships and associations but, again, there is no detail in the evidence. There is nothing to show that any friendships cannot be maintained from abroad. There is also nothing to show that the appellants would face any real difficulty in re-establishing themselves in India, following their removal together as a family unit. Overall, taking into account the paucity of evidence, I find that their ties here are relatively modest and established in periods of time when they had only limited leave.
28. The legitimate aim pursued by the Secretary of State is the maintenance of immigration control, in the interests of the economic wellbeing of the United Kingdom. The failure to meet the requirements of the rules is a

factor of substantial weight in relation to the public interest in the appellants' removal. The evidence discloses very little to put in the balance on the other side. Again, the appellants have been here for a relatively short period of time, with limited leave throughout and the evidence does not show that their removal to India would result in any real difficulty. I find that Article 8 is engaged, the threshold of engagement being not particularly high. The adverse decisions were made in accordance with the law and in pursuit of a legitimate aim. Weighing the competing interests, I conclude that the balance falls on the Secretary of State's side. The decisions to refuse to vary leave and to remove the appellants amount to a proportionate response.

29. In summary, the appellants have not been able to show that the requirements of the rules were met. The decision of the Secretary of State not to depart from the rules was a matter for her and has not been shown to be unlawful. The appellants have not shown that the adverse decisions breach their human rights or are unlawful on any other basis. The appeals are dismissed.

DECISION

The decision of the First-tier Tribunal has been set aside. It is remade as follows: appeals dismissed.

ANONYMITY

There has been no application for anonymity and I make no direction on this occasion.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

FEE AWARD

As the appeals have been dismissed, I make no fee award.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell