



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28665/2014

THE IMMIGRATION ACTS

Heard at Field House
On 3 February 2015

Decision & Reasons Promulgated
On 24 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

EBRAHIM SAYYAD MOGHARRAB
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. K. Behbahani, Solicitor.
For the Respondent: Ms. L. Kenny, Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant is a citizen of Iran, born on 21 August 1948.
2. On 8 June 2014 his leave was cancelled on the basis of false representations having been made, or material facts not having been disclosed, or there having been a change of circumstances. Full reasons were set out in a notice of refusal 14 September 2014. The appellant appealed and following a hearing at Hatton Cross, in

a determination promulgated on 17 October 2014, Judge of the First-tier Tribunal A J M Baldwin dismissed the appellant's appeal. In so doing no anonymity order was made and that remains the position before me today as no application was put forward to justify the further consideration of such an order.

3. The appellant sought permission to appeal and on 19 December 2014 Judge of the First-tier Tribunal Kelly gave permission. His reasons for so doing were:-

"1. The appellant seeks permission to appeal, in time against a decision of the First-tier Tribunal (Judge Baldwin) who, in a determination promulgated on 17th October 2014, dismissed his appeal against the decision of the respondent to cancel his leave to remain in the United Kingdom as a visitor.

2. It is arguable, as the application contends, that the Tribunal erred in upholding the respondent's decision to cancel the appellant's leave to remain by reference to a retrospective application of amendments to paragraph 41 of the Immigration Rules which had not been in force at the time of the grant."

4. Thus the appeal came before me today.

5. At the outset I was informed by both representatives that the factual matrix found by the First-tier Tribunal Judge was not in dispute. It can be gleaned from paragraphs 9 and 10 of the judge's determination which state:-

"9. When the Appellant applied for a 5-Year Visit Visa he stated he wished to visit his sons in the UK for 'therr' (sic) weeks, giving the dates 25.12.11 to 8.1.12. He refers to ten previous visits to the UK. The Visa was not in the event issued until 13.2.12 and the visits which followed it were from 26.2.12 to 19.8.12, 25.9.12 to 10.3.13, 30.4.13 to 27.10.13 and 17.11.13 to 11.5.14. His Application Record shows that, when he arrived in the UK on 17.11.13 it was noted that he had been spending the majority of his time in the UK since 12.7.09. Both the Appellant and the UK Sponsor who was contacted were advised strongly that the Appellant should not continue spending the majority of his time in the UK. In the event, the Appellant went on to spend c.175 days in the UK leaving after approximately 25 weeks, on 11.5.14. He returned to the UK four weeks later, on 8.6.14, when he was interviewed with the assistance of a Farsi Interpreter.

10. In interview, the Appellant said he wanted to stay this time for 14 days as one of his sons here was having matrimonial problems. In the past he had generally stayed for about six months at a time and he admitted he had been 'living in the UK' because he liked it here. He did not know he could not stay this long. In the Grounds of Appeal it is asserted the Appellant never admitted he considered himself to have been living in the UK. In a Statement he denies ever having made false representations or failing to disclose material facts and had always complied with the 180-Day limit.

He had never been told by officials that his regular visits to the UK were a problem. He has three sons in the UK, one of whom is a refugee and they mean the world to him. Two of the sons provided a Statement, one of them - (Reza) - attending the Hearing to adopt it as true. They express concern at the prospect of their father not being allowed to return to the UK and they would never be able to travel together to see him in Iran. Reza told me that there had been small tensions in his own marriage which his wife's family 'made big' and his father thought big. However, his father had formed this opinion because he had heard him occasionally raise his voice to his wife in the bedroom. His father had been persuaded and did persuade him they were small matters. The son told me he now had a good life with his own wife. The Appellant confirmed he had never worked here, or registered with a Doctor, or secured a Tenancy, or opened a Bank Account here. He said he lived with his wife in Iran and he wanted to go back as he also had other children there."

The representatives also agreed before me that prior to the date of refusal the appellant had spent 24 of the previous 27 months in the United Kingdom.

6. Mr Behbahani most helpfully provided me with copies of the relevant Rule along with the version of paragraph 41 which came into effect on 6 April 2013 by virtue of the Immigration Rules HC 1039 which adds to paragraph 41(ii) "does not intend to live for extended periods in the United Kingdom through frequent or successive visits; and". He also handed up the authorities of **Oppong (Visitor - length of stay) Ghana [2011] UKUT 00431 (IAC)** and **Sawmynaden (Family visitors - considerations) [2012] UKUT 00161 (IAC)**.
7. In making his submissions Mr Behbahani relied on the grounds for seeking permission to appeal. He noted that in submissions in the First-tier Tribunal the judge was referred to the change in wording of paragraph 41 on 6 April 2013 and submitted that it was clear that the wording of paragraph 41 which applied to the period in which the appellant undertook his regular and extended visits to the United Kingdom did not include the wording: "... and does not intend to live for extended periods in the United Kingdom through frequent or successive visits". It was argued that it was on such basis that the appellant was able to undertake his regular visits under the watchful eye of the respondent on each occasion when he entered and left the United Kingdom for the purpose of his visits. In other words the appellant was not criticised by the respondent for undertaking such frequent and successive visits until the wording of paragraph 41 was changed in April 2013. Effectively, the appellant had not breached the Immigration Rules until the wording to paragraph 41 was amended. Accordingly the judge erred and it was wholly incorrect for the post 6 April 2013 paragraph 41 to be applied retrospectively in the way that it had been by the respondent. The reason being that it amounted to an unreasonable and irrational application of a change in the wording of a specific paragraph of the Immigration Rules as it effectively suddenly penalises those who had up until the change of Rule done nothing wrong by engaging in regular visits via their five year multientry visas which are purchased from the respondent at great

expense. He further argued that the judge had failed to properly consider this contention and as a consequence had “been complicit with the respondent in an (sic) flawed retrospective interpretation and application of the wording of post 6 April 2013 paragraph 41 of the Rules”. He further submitted that it was grossly unfair and unreasonable for the appellant, given his age and particular circumstances, to be penalised in such a way given his otherwise positive and clean immigration history.

8. Mr Behbahani also referred me to Sawmynaden and in particular paragraph 1 of the head note which I will detail below. He also argued, relying on Oppong, that it was “wrong to refuse someone entry clearance as a general visitor just because they have spent more than six of the last twelve months in the United Kingdom”. He acknowledged the appellant’s immigration history over the last fourteen years and the frequent and lengthy visits made to the United Kingdom. He contended that there should have been no reliance whatsoever on the post 6 April 2013 version of the Rules and that the appropriate way would have been for the Immigration Officer to have given the appellant a stern warning but no more. Furthermore, as in the reported cases, there was an element of a family emergency in the United Kingdom which the appellant’s son gave evidence about in relation to marital breakdown. Finally he made submissions in relation to the issue of “intention” and submitted that there was nothing within the Immigration Rules to say that “intention” must be maintained throughout entry clearance. The appellant has been wrongly penalised by the application of the new Rules.
9. Ms Kenny emphasised that on his own admission the appellant had spent the vast majority of his time during the last fourteen years in the United Kingdom and that prior to refusal 24 of the previous 27 months had been spent there. The Immigration Rules changed in 2013 and it was seven months thereafter that the appellant was given a warning. However, he did not heed the advice which was also given to the sponsor that the appellant should not continue spending the majority of his time in the United Kingdom. Having confirmed that he understood the respondent’s position and that he would comply in the future the appellant then went on to stay for just six days short of six months before returning to Iran for just four weeks and then back to the United Kingdom on 8 June 2014. She argued that following the change in the Immigration Rules the appellant could not assume that he could continue as under the old Immigration Rules. In any event the appellant’s intention did not change. His visa was cancelled because of a change in circumstances in that he applied to visit the United Kingdom for a period of three weeks but spent substantially longer time there. The judge was right to find at paragraph 21 that the appellant blatantly ignored the clear advice he and the sponsor were given and that having chosen to ignore that advice it would have been wholly inappropriate for an Immigration Officer to waste his breath giving another warning when the appellant returned to the United Kingdom after just 28 days in Iran having spent the previous 25 weeks in the United Kingdom. She too referred me to the case of Sawmynaden and in particular paragraphs (iii), (v) and (vi) of the head note. She contended that it was plain that the appellant was not a genuine visitor to the United Kingdom and that his appeal should be dismissed.

10. In response Mr Behbahani argued that the correct approach the judge should have adopted was to look at intention in the sense of going forward rather than by looking at previous conduct.

11. The head note to **Sawmynaden** states:-

- “(i) There is no restriction on the number of visits a person may make to the UK, nor any requirement that a specified time must elapse between successive visits.
- (ii) The periods of time spent in the United Kingdom and the country of residence will always be important.
- (iii) Both the expressed purpose of the visit and what the appellant has done in the past and intends to do in the future is material, together with the length of time that has elapsed since previous visits. In cases of this type, the appellant will be visiting a relative, often a parent visiting a son or daughter, often a son or daughter visiting a parent. In the case of a parent visiting a son or daughter, the parent will often fully participate in helping in the house, providing child care. In the case of a son or daughter visiting a parent, the adult child will often assist in care arrangements. None of these activities, for that reason alone, will take the individual outside the definition of a genuine visitor.
- (iv) The links that the appellant retains with her country of residence will be a material consideration. The presence of other family members will be a material consideration.
- (v) The Tribunal is required to ascertain what is the reality of the arrangement entered into between the appellant and the host in the United Kingdom. Is the reality that the appellant is resident in the United Kingdom and intends to be for the foreseeable future?
- (vi) The issue may be approached by considering whether the reality is that the appellant is now no more than a visitor to her country of residence as the purpose of the return home is confined to using his or her presence there solely as the means of gaining re-admission to the United Kingdom.
- (vii) This does not preclude the appellant from remaining in the country of residence for the least amount of time sufficient to maintain her status as a genuine visitor.
- (viii) Family emergencies, whilst likely to result in a longer visit than the established pattern, should not be regarded as taking up residence

without adequate supporting evidence to that effect. Thus, the pregnancy of a daughter or daughter-in-law or the aftermath of the birth might explain a more-protracted stay (within the 6-month duration of a single permitted visit); so, too, a serious medical condition.

(ix) There may be comparisons with the person who owns homes in two different countries. Is he resident in both or a visitor to one of them?"

12. To the extent that the First-tier Tribunal Judge relied on a version of paragraph 41 which came into effect on 6 April 2013 by reason of HC 1039 I find that that wording postdates the issue of the appellant's five year visa and relying on **Odelola [2009] UKHL 25** the judge materially erred in dismissing the appellant's appeal on that basis. Accordingly the making of the previous decision involved the making of an error on a point of law and in due course I will set it aside. It is therefore open to me to remake the decision which I do on the agreed factual matrix as found in the First-tier Tribunal Judge's determination.
13. In so doing I reject Mr Behbahani's submission that the correct approach is to look forward without any reference to the appellant's previous conduct. I am aware of factors to be taken into account including those highlighted by Ms Kenny in the head note to **Sawmynaden** and in particular the fact that periods of time spent in the United Kingdom in the country of residence will always be important, the fact that the express purpose of the visit and what the appellant has done in the past and intends to do in the future is material together with the length of time that has elapsed since previous visits, the reality of the arrangement entered into between the appellant and the host in the United Kingdom, whether the issue may be approached by considering whether the reality is that the appellant is now no more than a visitor to his country of residence as the purpose of the return home is confined to using his or her presence there solely as the means to gaining re-admission to the United Kingdom.
14. On the factual matrix here I accept all the submissions made by Ms Kenny in relation to these issues and consider these to be factors which are material in assessing whether this appellant is genuinely seeking entry as a general visitor for the limited time stated by him, not exceeding six months and intends to leave the United Kingdom at the end of the period of the visit as stated by him. This is an appellant who on his own admission spent the majority of time in the United Kingdom over a considerable period of time and admits having been living in the United Kingdom.
15. I find this is an appellant who cannot meet the requirements of paragraph 41 insofar as he is a genuine visitor who intends to leave the United Kingdom at the end of the period of his visit as stated by him.

Notice of Decision

I remake the decision in the appeal by dismissing it.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Appleyard

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 23 February 2015.

Deputy Upper Tribunal Judge Appleyard