



IAC-FH-CK-V1

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

**Appeal Number: HU/08115/2019**

**THE IMMIGRATION ACTS**

**Heard at Field House  
(remote hearing)  
On 13 May 2021**

**Decision & Reasons Promulgated  
On 28 May 2021**

**Before**

**UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**MOIN AKHTAR  
(ANONYMITY DIRECTION NOT MADE)**

**Respondent**

**Representation**

For the Appellant: Mr Tufan, Senior Home Office Presenting Officer Counsel  
For the Respondent: Mr Fazli, Counsel, instructed by Edward Marshall Solicitors

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were designated in the First-tier Tribunal.
2. The respondent is appealing against the decision of Judge of the First-tier Tribunal Buckwell (“the judge”), promulgated on 19 December 2019, allowing the appellant’s article 8 ECHR human rights appeal.

**Preliminary issue: error by the Upper Tribunal when granting permission to appeal**

3. The First-tier Tribunal did not admit the Secretary of State’s application for permission to appeal because it was made out of time. There was no error in so doing, as confirmed in *Bhavsar (late application for PTA: procedure)* [2019] UKUT 00196 (IAC).
4. As the application had not been admitted, the Upper Tribunal, when considering the renewed application for permission, was required to apply rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008, whereby the Upper Tribunal can only admit the application made to it (whether or not that application was in time) if it considers it is in the interests of justice for it to do so.
5. The Upper Tribunal did not apply rule 21(7) and instead, mistakenly, stated that the First-tier Tribunal did not have the power to refuse to admit the permission application. Mr Fazli argued that because of this mistake I should consider the issue of the lateness of the application for permission to the First-tier Tribunal.
6. The Upper Tribunal decision granting permission to appeal was an excluded decision under s11(5) of the Tribunals, Courts and Enforcement Act 2007: see *Patel & Ors v The Secretary of State for the Home Department (Rev 1)* [2015] EWCA Civ 1175. I therefore do not have jurisdiction to set it aside, and it can only be challenged by way of judicial review: see *Ndwanyji (Permission to appeal; challenging decision on timeliness)* [2021] UKUT 00378 (IAC).
7. I therefore declined to consider the lateness/admission issue and proceeded to hear argument on the substantive appeal.

**Background**

8. The appellant is a citizen of Pakistan born on 17 November 1964.
9. In 1992 he entered the UK. In 1993 he applied for asylum. His application was refused (in 1994) and subsequent appeal dismissed (in 1995).
10. In 2009 he was granted Indefinite Leave to Remain on the basis of long residency.
11. In 2012 he was issued with a certificate of naturalisation as a British citizen.

12. On 18 September 2014 he was deprived of his citizenship under section 40(3) of the British Nationality Act 1981 on the basis that he obtained his British nationality fraudulently. The fraud identified by the respondent was that the appellant concealed that he was outside the UK on the following occasions: (a) in 2005, when he was issued a Pakistani passport in Rawalpindi, and applied for a family visit visa in Islamabad; and (b) when his children born in 2000 and 2004 were conceived, as there was no evidence that his wife visited the UK in the relevant time frame.
13. The appellant appealed against the decision to deprive him of citizenship. The appeal was heard by Judge of the First-tier Tribunal Phillips. In a decision promulgated on 28 May 2015, Judge Phillips dismissed the appellant's appeal. Following a detailed consideration of the evidence, Judge Phillips found the appellant to not be a credible witness. He found that, on the balance of probabilities, the appellant was in Pakistan in 2005 when he obtained his passport and made a visitor visa application. He also did not accept the appellant's explanation for the birth of his children in 2000 and 2004, which was that in 1999 and 2003 his wife entered and exited the UK unlawfully. Judge Phillips found that the appellant was outside the UK when his children were conceived. Permission to appeal against the decision of Judge Phillips was refused.
14. In a decision dated 13 December 2018, the respondent considered whether to grant the appellant leave on the basis of his family and/or private life. The respondent refused, on the basis that, as the appellant had made false representations in previous immigration applications, he did not satisfy the applicable suitability requirements of the Immigration Rules: S-LTR 4.2 and 4.3. It was also stated by the respondent that there were not very significant obstacles to the appellant's integration in Pakistan and that there were not exceptional circumstances rendering refusal a breach of article 8 ECHR.
15. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Buckwell ("the judge"). In a decision promulgated on 19 December 2019, the judge allowed the appeal.

### **Decision of the First-tier Tribunal**

16. The judge considered in detail the appellant's claim that he had not engaged in deception. He found the appellant to be a credible witness and accepted his account. Amongst other things, the judge accepted the appellant's evidence that his passport in Pakistan was obtained by agents on his behalf whilst he remained in the UK and that his children were conceived in the UK following illegal entry by his wife.
17. The judge referred to the decision of Judge Phillips in three paragraphs. At [46] he noted that a witness in that appeal (Mr Shaheen) was now deceased. At [47]

the judge stated that the date of the hearing was recorded incorrectly in Judge Phillips' decision. And at [80] the judge stated:

"In view of the evidence presented I have found it appropriate to depart from certain findings previously made by Judge Phillips. There is clearly additional evidence before me."

18. The judge stated twice (in paragraphs 1 and paragraph 74) that it did not appear that the appellant had challenged the respondent's deprivation of citizenship decision. This is plainly wrong, as the appeal before Judge Phillips was against the deprivation of citizenship decision.

### **Grounds of appeal and submissions**

19. The respondent argues that the judge erred by failing to follow *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* \* [2002] UKIAT 00702.
20. Mr Tufan submitted that, before Judge Phillips, the appellant relied on the same evidence and submissions as he did in this appeal; and that Judge Phillips considered the evidence thoroughly. He argued that the judge failed to explain why he considered it appropriate to depart from the findings of Judge Phillips.
21. Mr Fazli argued that the judge referred to the decision of Judge Phillips in paragraphs 46, 47 and 80 of the decision and it is therefore apparent that he was aware of, and had regard to, the earlier decision. He also argued that the judge gave thorough and cogent reasons, based on a detailed consideration of the evidence, for accepting the appellant's account. He argued that *Devaseelan* does not preclude a judge from forming his own views having heard oral evidence.

### **Analysis**

22. *Devaseelan* states in relevant part that:

39(1)The first Adjudicator's determination should always be the starting-point. It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.

....

41(6)If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated....

23. The Court of Appeal has confirmed that *Devaseelan* remains good law: see *BK (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 1358; *AL (Albania) v Secretary of State for the Home Department* [2019] EWCA Civ 950.
24. The judge erred because he was required to, but did not, treat the decision of Judge Phillips as a starting point. Although the decision of Judge Phillips was mentioned, the judge did not in any way engage with it.
25. Moreover, the appellant relied on facts that were not materially different from those before Judge Phillips, and supported his claim by reference to the same evidence that was available to - and was considered by - Judge Phillips. Accordingly, as explained in [41(6)] of *Devaseelan*, the judge needed to regard these issues as settled by Judge Phillips rather than allow the matter to be re-litigated. The judge erred by failing to have regard to this guidance in *Devaseelan*.
26. I have decided to remit the appeal to the First-tier Tribunal to be heard afresh by a different judge. This is because the nature of the error is such that none of the findings can be preserved.

### **Notice of Decision**

The appeal is allowed.

The decision involved the making of a material error of law and is set aside.

The appeal is remitted to the First-tier Tribunal to be heard afresh before a different judge.

Signed

*D. Sheridan*

Upper Tribunal Judge Sheridan

Dated: 14 May 2021