Upper Tribunal
(Immigration and Asylum Chamber) HU/25205/2018 (V)

THE IMMIGRATION ACTS

Heard by *Skype for Business*	Decision & Reasons Promulgated
on 20 January 2021	on 15 February 2021

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

BAKHSHISH SINGH

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

For the Appellant: Mr K Forrest, Advocate, instructed by Gray & Co, Solicitors, Glasgow
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of India, born on 25 April 1975. On 7 September 2018, he applied for entry clearance as the husband of a British citizen. The ECO refused his application on 6 September 2018 on "suitability" grounds, because he had "previously contrived in a significant way to frustrate the intentions of the immigration rules by overstaying, illegally working and submitting multiple frivolous applications for leave to remain

in the UK". It is common ground that the application met the other requirements of the rules.

2. The appellant appealed to the FtT. Judge O'Hagan dismissed his appeal by a decision promulgated on 12 November 2019.

3. On 21 May 2020 UT Judge McWilliam granted permission to appeal to the UT, on the view that arguably the judge had not reasoned why discretion should be exercised against the appellant.

4. The SSHD, on behalf of the ECO, responded on 23 July 2020 to directions of the UT by conceding error of law:

> Judge O'Hagan … erred … at [17] … failing to provide reasons why earlier applications and in particular the 3 "*Zambrano"* applications between 25 October 2021 and 14 May 2012 were "frivolous". The judge notes that the number of applications in and of themselves does not make them frivolous and accordingly consideration of the frailties of the earlier 5 applications would need to have been undertaken…"

5. In a decision issued on 29 July 2020 UT Judge McWilliam quoted that concession, set aside the decision of the FtT, and gave directions with a view to a fresh hearing in the UT.

6. A transfer order was made to enable another judge to complete the decision-making of the UT. The technology enabled an effective remote hearing. I was asked to make a fresh decision without hearing oral evidence, based on the materials placed before the tribunal by both parties, and on submissions.

7. The main points which I noted from the submissions for the appellant were:

   (i) The case should be approached in terms of whether there are exceptional circumstances which render refusal of entry clearance a breach of ECHR Article 8 because it would result in unjustifiably harsh consequences for the sponsor.

   (ii) It was not argued that there would be such consequences for the appellant.

   (iii) The accepted material facts were that the appellant was unlawfully in the UK for most, although not all, of the years he spent here; he left voluntarily almost 3 years ago; a genuine and subsisting relationship exists between him and his wife; and she suffers from a range of quite serious medical conditions, both physical and mental, for which she takes multiple daily medications.

   (iv) The consequences of the decision for her were plainly harsh; but it was accepted they had to be shown to be so to an unjustifiable extent.

(v) The degree of harshness for the sponsor was shown by her statements and the medical evidence, from her GP, rheumatologist, and psychiatrist.

(vi) The sponsor needs considerable support, provided at present by a neighbour and from public sources. That provision is much poorer during the pandemic, and would be enhanced significantly by the presence of the appellant.

(vii) The public interest in excluding the appellant, after his voluntary departure, is not as strong as it was in refusing his claims made in the UK. His overstaying, and unsuccessful immigration proceedings should not now weigh significantly against him.

(viii) On the other side, the adverse consequences for his wife had become more acute.

(ix) This was not (as the FtT had thought), a classic *"Devaseelan"* case, not being the last in a series of repeated claims, but an application for entry clearance, raising a different issue, and not turning on whether to depart from previous adverse credibility findings.

(x) The stage had now been reached where there were exceptional circumstances because refusal of entry clearance interfered with family life to the extent of unjustifiably harsh consequences, breaching article 8.

8. The main points which I noted from the submissions for the respondent were:

(i) The finding by the ECO that the appellant contrived to frustrate the intentions of the rules was justified. That was relevant not only to whether the primary requirements of the rules were met but went to the public interest in the further balancing exercise.

(ii) The appellant claimed to have entered the UK as a visitor in 2006, but there was no record. At best, he was an overstayer for many years before making his first application in 2010. That application, and two applications in 2011, had no apparent substance and were plainly frivolous.

(iii) Further proceedings were unsuccessful. Judges in prior appeals accepted the marriage was subsisting but made rather adverse findings on the appellant's motivation in his relationship. "*Devaseelan"* principles did apply. There was no reason to depart from those findings. They were relevant in the balancing exercise.

(iv) There was no dispute with the medical evidence. Separation from the appellant has an adverse effect on the sponsor, particularly on her mental health. However, it had previously not been shown that she

could not access health care in India and could not relocate there. There was no reason to depart from that finding either.

(v) The appellant had worked illegally. That also weighed against him.

(vi) Both parties to the relationship had been aware that the appellant was not here lawfully. Statute required their family life to be given little weight.

(vii) The medical circumstances were compelling, but insufficient to outweigh the public interest in immigration control or to disclose unduly harsh consequences.

9. Mr Forrest replied:

(i) Section 117B of the 2002 Act does not apply in an out of country appeal. He accepted this was "a bold submission".

(ii) The appellant's conduct of proceedings from 2014 – 2018 was not frivolous. He established on judicial review that he should have had a decision carrying a right of appeal from within the UK. The decision showed that he had a case worth making. It was not his fault those proceedings were so protracted. When they ultimately failed, he left the UK shortly thereafter, which was to his credit.

10. I reserved my decision.

11. The appellant's wife suffers from serious health problems and is highly dependent on the assistance she receives. Her situation here was much better when the appellant was with her and would be so if he were to be with her again. Although she has visited India in the past, she has lived in the UK all her life. It has not been established that she could not live in India and could not obtain health care; but it is now patent that she will never elect to move. I accept that her unwillingness to do so cannot decide the case in the appellant's favour, but it is the reality against which a decision must be reached.

12. There is something in what both sides said about previous decisions and about *"Devaseelan"* principles. Previous judges were sceptical about the appellant's motivation in his relationship. It may well be that immigration advantage plays a large part. Nevertheless, the relationship has not been found previously to be other than genuine and subsisting, even if it has mixed motives. That is the starting point for consideration in terms of the rest of the immigration rules.

13. Section 117B of the 2002 Act is headed, "Article 8: public interest considerations applicable in all cases". It applies both to those who wish to remain in the UK and to those who wish to enter.

14. Section 117 B(4) provides that little weight should be given to a relationship established by a person at a time when the person is in the United Kingdom unlawfully.

15. At first sight, that is strongly against the appellant's case.

16. The immigration rules are now designed, as far as possible, to reflect all relevant article 8 considerations. The ECO's decision is expressly on the basis that the requirements of the rules are satisfied, apart from suitability, based on the immigration history. The primary provisions of the rules are the starting point, before enquiry is required into exceptional circumstances resulting in unjustifiably harsh consequences (which is practically indistinguishable from any test "outside" the rules).

17. The grant of permission, and the respondent's concession on error of law, point to a consideration firstly of whether discretion should be exercised against the appellant. If not, he meets the primary terms of the rules, short of exceptional circumstances resulting in unjustifiably harsh consequences; and as the rules are designed to comply with article 8, that should lead to success on human rights grounds.

18. In other words, the rules strike the proportionality balance at the point where, unless excluded on suitability grounds, the appellant has a right to enter the UK to live with his wife.

19. In terms of previous contrivance to frustrate the intentions of the rules, the ECO founded on (i) overstaying, (ii) illegally working and (iii) submitting multiple frivolous applications.

20. The appellant has a history of lengthy overstaying and may not even have been here lawfully in the first place. Such instances are not be condoned, but there are no aggravating features such as use of false identity and fraudulent claims.

21. On working illegally, the ECO specifies a period of employment in 2012 – 2013, which was legal, and another from April to September 2014, which was not legal, as the application leading to the certificate permitting employment had by then been refused. This counts against the appellant, but it is a relatively minor infringement.

22. Little is known of the circumstances of the applications up to 2013, although it seems likely they had slight foundations. Proceedings in 2013 – 2014 failed, but had at least enough substance to be worth arguing, and not all eventual findings were adverse. Proceedings from 2014 to 2018 were also ultimately unsuccessful but, as Mr Forrest submitted, the appellant had a stateable appeal to run.

23. The respondent has not established that "multiple frivolous applications" is a fair description of the overall history of litigation.

24. It is to the appellant's credit, although not decisive in his favour, that he left the UK after the failure of the most recent proceedings.

25. The appellant has contrived in the past to frustrate the intentions of the rules. Whether that should lead to discretion being exercised against him is a question of fact and degree, and of the passage of time. Has his contrivance been such as should bar him from entry for the rest of his and the sponsor's lifetime? The relevant considerations are the same as those invoked in relation to exceptional circumstances resulting in unjustifiably harsh consequences, although, for the above reasons, I consider that the case may succeed even if short of that high test.

26. In my judgement, as matters stand today, the other terms of the rules being satisfied, and taking account of all matters referred to on both sides, discretion should now be exercised in the appellant's favour.

27. The decision of the First-tier Tribunal has been set aside. The decision substituted is that the appeal is allowed on human rights grounds.

28. No anonymity direction has been requested or made.

Hugh Macleman

21 January 2021
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.