IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002564
First-tier Tribunal Nos:
HU/51843/2021
IA/07442/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

Mr Ahmed Ali
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Gajjar (Counsel)
For the Respondent: Mrs Nolan (Senior Home Office Presenting Officer)

Heard at Field House on 3 July 2023

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Andrews, promulgated on 14th April 2022, following a hearing on 31st March 2022, remotely via Cloud Video Platform. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, and is 73 years of age, having been born on 16th December 1949. He appealed against the decision of the Respondent dated 19th February 2020, refusing his application on human rights grounds for leave to remain in the UK, on the basis of his family and private life, claiming to have lived in the United Kingdom continuously for at least 20 years.

The Appellant's Claim

3. The essence of the Appellant's claim is that he has lived continuously in the UK since 10th September 1998. However, in 2016, a First-tier Tribunal Judge had found that the Appellant had lied about this date. The Appellant, nevertheless, argues that there is good reason to depart from the 2016 judge's findings. In any event, there would be very significant obstacles to the Appellant's integration into life in Pakistan, in view of his health problems, and the length of time that he has been in the UK. He also adds that he was persecuted for his political beliefs in Pakistan and has suffered a loss of ties with that country during the time that he has been in the UK. Therefore, his removal would constitute a disproportionate interference with his Article 8 rights.

The Judge's Findings

4. The judge adopted a structured approach, setting out three issues for consideration. First, whether the Appellant had lived continuously in the UK for at least twenty years (paragraph 276ADE(1)(iii) of the Immigration Rules). Second, whether there would be very significant obstacles to the Appellant's integration into life in Pakistan (paragraph 276ADE(1)(vi) of the Immigration Rules). Third, whether the decision of the Respondent breached Article 8 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR"). The Respondent disagreed. The Appellant's application did not meet the requirements of the Immigration Rules. There had been a previous decision which meant that the Rule in **Devaseelan [2022] UKIAT 702** applied with respect to second appeals and this Tribunal could not depart from the previous judge's 2016 findings. Furthermore, the Respondent asserted that there were no very significant obstacles to the Appellant's integration into life in Pakistan. His health problems had been considered but the Pakistan healthcare system would be able to help him, and his conditions were not so severe as to found a claim to remain in the UK. Finally, there were no exceptional circumstances that would render a refusal a breach of Article 8 of the ECHR.

5. At the hearing before Judge Andrews, the Appellant's friend, a Mr Chaudhary, attended to give evidence as his witness (see paragraph 11). Mr Chaudhary adopted his 10th November 2021 witness statement. He confirmed he was a British citizen who had been in the UK since 1993, and then vouched for the Appellant as having been in the UK since 1998 , asserting that he was like a part of the family, such that Mr Chaudhary "has always provided the appellant with financial support, and will continue to do so if the appellant remains in the UK" (paragraph 17). Mr Chaudhary was cross-examined and here he stated that he was unaware that the Appellant previously had a Tribunal hearing in 2016. However, the Appellant attended Mr Chaudhary's family gatherings although there were no photographs or video evidence of this during the period 1998 to 2008 (paragraph 18).

6. The judge observed that there had been two previous decisions by the Tribunal with respect to the Appellant. There was a decision in July 2010 (which had not been produced by either side) and a decision by Judge Flynn on 8th November 2016 (which had been produced and relied upon by the Respondent). Both were refusal decisions against the Appellant. The Rule in **Devaseelan [2022] UKIAT 702**, accordingly applied in providing guidelines on how a second judge should approach the decision of another judge. The first decision is to "be the starting point" (paragraph 39 of **Devaseelan**). 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 (paragraph 40(4)). This was because the first Adjudicator's determination would have been made closer to the events alleged. There must be some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be held against him (paragraph 40(7)). The decision in **Devaseelan** had also highlighted a matter that is all too often overlooked, namely, that "there is an increasing tendency to suggest that unfavourable decisions by Adjudicators are brought about by error or incompetence on the part of the representatives", so that "new representatives blame old representatives; sometimes representatives blame themselves for prolonging the litigation by their inadequacy …" (paragraph 42(7)). The decision in **Devaseelan** make it clear that, "An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence …" (paragraph 42(7)).

7. The judge went on to consider submissions on behalf of the Appellant, given by Mr Gajjar of Counsel, who had wisely accepted that Judge Flynn's 2016 decision would be the starting point. Mr Gajjar, however, asserted that, "Mr Chaudhary says that he sees the Appellant most weekends, and his evidence is not undermined by his being unaware of the Appellant's 2016 appeal" (paragraph 25).

8. In her findings of fact, the judge at the outset observed how, "I have also had the opportunity to see and hear the appellant and his witness give evidence" (paragraph 26). The Appellant had lived all his life in Pakistan and he spoke Urdu and he had a number of good friends in the UK (paragraph 27). The medical evidence had not been challenged by the Respondent (paragraphs 28 to 29 and paragraph 30(ii)).

9. The judge then dealt with the evidence of Mr Chaudhary and the Appellant's other friends who had simply submitted witness statements, namely, a Mr Shabir, a Mr Azad and Mr Azam. She pointed out that, "it was not explained to me why the appellant could not have arranged for witnesses to provide oral and written evidence in 2016, before Judge Flynn", so that given this was the case, "this current witness evidence falls squarely within *Devaseelan* Guideline (6)" (at paragraph 32). Although Mr Gajjar proceeded to suggest that the negligence by the Appellant or his previous representatives could be the reason why Mr Chaudhary was unaware of the 2016 hearing, the judge was clear that following the guidance in **Devaseelan**, "I should be very slow to conclude that the appeal before Judge Flynn was materially affected by a representative's error or incompetence" (paragraph 33). This was despite the fact that, "the appellant has been consistent as regards his claimed date of entry into the UK …" (at paragraph 37). The judge also rejected the Appellant's evidence that he was at possible risk from the PPP (at paragraph 43). As for his health problems, these were not an obstacle to his reintegration in Pakistan and it was not accepted that he could not afford healthcare there (paragraph 45). The human rights claim was also rejected under Article 8 of the ECHR (see paragraphs 50 to 57). In a detailed analysis of both the facts and the established case law in this area the appeal was dismissed.

Grounds of Application

10. The grounds of application by Mr Gajjar stated that the judge erred in failing to allow the appeal under paragraph 276ADE(1)(iii). The Appellant had been in the UK for at least twenty years now and that there had been witness statement evidence which was credible and unblemished. Second, that the judge had ample basis upon which to depart from a previous determination, because Mr Chaudhary had not been able to give evidence previously together with other witnesses who had tended witness statements, and in any event, the previous decision was over four years old now. Third, that there would be very significant obstacles under paragraph 278ADE(1)(vi) of the Immigration Rules given that the Appellant suffered from anxiety, hypertension, depression, arthritis, and various other ailments. Fourth, the Appellant's removal would be disproportionate as it would give rise to unjustifiably harsh consequences. A Rule 24 response was entered dated 22nd June 2022 by the Respondent, pointing out that the Appellant had not been a credible witness and the judge was entitled to so conclude, and to place reliance upon a previous 2016 decision. Permission to appeal, however, was granted on 25th May 2022 by the First-tier Tribunal on the basis that the judge had erred in placing excessive weight on Mr Chaudhary's lack of evidence at the pervious hearing, and therefore failing to engage with that evidence, having regard to the judgment in **BK (Afghanistan) [2019] EWCA Civ 1358**.

The Hearing

11. At the hearing before me on 3rd July 2023, Mr Gajjar essentially focused on the one point upon which the permission to appeal had been granted, namely, that Judge Andrew's determination placed undue reliance upon the previous decision of Judge Flynn dated 11th December 2016, but failed to attach any importance to the witness evidence of Mr Chaudhary, who was comprehensively disbelieved (at paragraph 34), simply on the basis that he had not given evidence before the Tribunal of Judge Flynn in 2016, when he could have done so. Mr Gajjar accepted that **Devaseelan** applies, and that Judge Andrews had to begin with that decision as a starting point, but that the evidence of Mr Chaudhary could not just be rejected out of hand on the basis that he had not been called to give evidence in 2016. The fact was that the witness, Mr Chaudhary, gave clear evidence that he was aware of the Appellant's presence in the United Kingdom throughout his claimed period of stay by virtue of his attendance at the family gatherings and events of Mr Chaudhary. Mr Gajjar submitted that every Tribunal was duty bound to conscientiously decide the case for the Appellant before them but that the judge below had failed to engage with the evidence of Mr Chaudhary at all, choosing instead to simply reject it (together with his witness statement evidence at page 8).

12. For her part, Mrs Nolan submitted that she would rely upon her Rule 24 response and that the judge below had adequately engaged with the evidence of Mr Gajjar (at paragraph 31). It must be borne in mind that the judge was being asked to depart from the decision of Judge Flynn, and no proper reasons had been advanced as to why the four witnesses who are now being presented before the Tribunal of Judge Andrews, had not earlier been called upon to do so, and that the judge had very clearly engaged with the argument of the solicitor's prior negligence (at paragraph 34). The fact was that Judge Flynn's decision was made at a time closer to the Appellant's entry, and the judge dealt with that point as well, concluding that this was simply an attempt to disagree with the decision of Judge Flynn (at paragraph 35). It was also the case that the Appellant's skeleton argument was fully engaged with by the judge below.

Error of Law

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

14. First, in what is undoubtedly a very comprehensive and well-structured determination by the judge below, which engages with every aspect of the Grounds of Appeal argued before her, the judge nevertheless does not engage with the witness evidence of Mr Gajjar. The reason for this is the application of **Devaseelan**, which is painstakingly evaluated and then applied by the judge below, with it being highlighted that facts that were relevant and yet not brought to the attention of the first Adjudicator, "should be treated by the second Adjudicator with the greatest circumspection (at paragraph 22).

15. The error, however, lies in the judge's statement that "it was not explained to me why the Appellant could not have arranged for witnesses to provide oral and written evidence in 2016, before Judge Flynn", so that for these reasons "this current witness evidence falls squarely within Devaseelan Guideline (6)." (At paragraph 32).

16. Although the decision in **BK (Afghanistan) [2019] EWCA Civ 1358** does not suggest that absent all the supporting evidence earlier **Devaseelan** determinations should be disregarded, it does provide for the possibility (also provided for in **Devaseelan** itself) that evidence in existence at the time of the first appeal, but which has only subsequently been produced, can properly be considered in a later decision. This is not to say that all the matters in issue stand to be relitigated all over again on the evidence before the second judge. That is plainly not so.

17. It is salutary to note that the Court of Appeal has approved the **Devaseelan** Guidance in **Djebbar v Secretary of State for the Home Department [2004] EWCA Civ 804** by noting (at paragraph 30) that "the most important feature of the guidance is that the fundamental obligation of every Special Adjudicator independently to decide each new application on its own individual merits was preserved". The Court of Appeal also considered that:

> "The great value of the guidance is that it invests the decision making process in each individual fresh application with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second Adjudicator's ability to make the findings which he conscientiously believes to be right." (At paragraph 40).

18. The decision of the judge below risked imposing an unacceptable restriction on the judge's ability to make findings as advocated by the Court of Appeal.

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Andrews, pursuant to Practice Statement 7.2 (paragraph a) because the effect of the error in this case has been

to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be considered by the First-tier Tribunal.

20. No anonymity direction made.

Satvinder S. Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29th November 2023