Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-003592
On appeal from **HU/56662/2021**
IA/15640/2021

THE IMMIGRATION ACTS

Heard at Field House by MS Teams
On the 22 December 2022

Decision & Reasons Promulgated
On the 27 February 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

BINJALBAHEN DHARMESHKUMAR PATEL
[NO ANONYMITY ORDER]
Respondent

Representation:
For the appellant: Mr Steven Whitwell, a Senior Home Office Presenting Officer
For the respondent: Mr Paul Richardson of Counsel, instructed by Eagles Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission from the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 25

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October 2021 to refuse the claimant leave to remain as the spouse of a person present and settled in the UK. The claimant is a citizen of India, as is her spouse.

2. At the date of hearing, the claimant's spouse had indefinite leave to remain. He is now a naturalised British citizen.

3. **Mode of hearing.** The hearing today took place face to face

Background

4. The claimant came to the UK on 18 July 2009, age 26. She had leave to enter as a Tier 4 student, but she seems to have had bad luck with her study. She studied at Cosmopolitan College on an ACCA course. Her Tier 4 leave was first extended, but then curtailed to expire on 5 March 2012.

5. The claimant made another Tier 4 application in-country on 4 May 2012, which was unsuccessful due to non-payment of the fees.

6. On 29 June 2012, the claimant made a Tier 4 application to study at Richmond College, which was successful and her leave then continued until it was again curtailed to expire on 14 January 2014.

7. On 9 January 2014, the claimant applied for leave to follow a Chartered Management Accountant course at Khalsa College London. It was refused on 14 September 2015, on the basis that the claimant had used an ETS/TOEIC language certificate in her 2012 application, which ETS considered to be invalid, and that Khalsa College London had lost its Tier 4 licence by that date. The claimant was informed that the application was refused under paragraph 322(2) of the Immigration Rules HC 395 (as amended), and that any future application for leave to remain in the UK would be refused under paragraph 320(7B) of the Rules.

8. The ETS LookUp tool shows that the claimant purported to have taken a test at the London College of Social Sciences on which she scored 170/200 for both speaking and writing. The claimant on 13 March 2014 took an ESOL City and Guilds English language test, scoring only Pass grades in reading and writing and a First Class Pass for listening.

9. The September 2015 refusal decision carried an in-country right of appeal, which the claimant exercised. First-tier Judge Beg dismissed the appeal. The claimant appealed, first to the Upper Tribunal, and then by seeking permission to appeal to the Court of Appeal, which was not granted. She was appeal rights exhausted thereon on 22 February 2019. Her husband's linked appeal was dismissed in line with that of the claimant.

10. The Beg decision is not available. Mr Richardson did not have a copy and Mr Whitwell was unable to find one in the GCID records.

11. On 6 March 2019, the claimant made an application for leave to remain which was unsuccessful, and she exercised her right of appeal thereon.

That decision is discussed below as 'the Monson decision'. The claimant did not appeal the Monson decision beyond the First-tier Tribunal.

12. Following refusal of her private and family life application on 7 June 2019 and her unsuccessful appeal, on which she was appeal rights exhausted in April 2021, the claimant did not then embark for India, remaining in the UK without leave for over 2 years before making a spouse application on 13 September 2021. That application was refused on 25 October 2021 and that is the decision under challenge.

13. For completeness, I note that the claimant's husband became a British citizen on 19 July 2022.

The Monson decision

14. Both Counsel agreed that as First-tier Judge Monson in his April 2021 decision considered the Beg decision, it is appropriate for *Devaseelan* purposes to treat the Monson decision as the *Devaseelan* starting point in this appeal.

15. Judge Monson dealt with the Beg decision at [27]-[30] of his decision, treating it as his *Devaseelan* starting point. Judge Beg had been satisfied that the claimant had used a proxy test taker for her ETS/TOEIC qualification. Judge Monson noted that the claimant continued to protest her innocence but that there was no new evidence. Judge Monson found that there was a double deception, in 2012 in relying on the false ETS/TOEIC result, and in 2014, by stating that she had never used deception in a previous application. The claimant did not challenge the finding of fact that at the material time, 15 September 2015, Khalsa College had lost its Tier 4 licence and was no longer on the sponsor register.

16. The claimant and her husband were both given permission to appeal to the Upper Tribunal. On 21 March 2018, UTJ Jordan found no error of law in the First-tier Tribunal decision: the Secretary of State had discharged the evidential burden upon her and 'the attempts made by the [claimant] were inadequate to counter the matters which were raised by the Secretary of State'. He upheld the decision.

17. The claimant argued before Judge Monson that she had been in the UK lawfully for 9 years and 7 months at the date of application and that a decision of Judge Shiner on the husband's appeal was of assistance to her. The ground of refusal was discretionary and it was unduly harsh to continue to hold the proxy test against her after so long. Further, as her husband now had indefinite leave to remain in the UK, it would be unduly harsh to expect the claimant to go to India, particularly having regard to the impact of the Covid-19 pandemic, the difficulties in international travel which that had caused, and the delay which the couple might experience in getting an entry clearance application together.

18. Judge Monson found that there was no new evidence and that the claimant had deceived the Secretary of State in her 2012 application and failed to declare her deception in the 2014 application. He found as a fact that the claimant had used a proxy test taker, and done so dishonestly. She had never acknowledged her dishonesty.

19. Judge Monson considered section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended) and found that:

> "33. However, in the light of her proven deception, there is a strong public interest in not permitting her to remain in the UK. The [claimant] was warned that this would be the consequence of her dishonesty in the refusal decision of September 2015, and so since then, neither she nor her husband has had a legitimate expectation that, absent a favourable outcome to their appeals against the refusal decision of September 2015, she would be permitted to stay. …
>
> 35. … Mr Patel would not have accrued 10 years' continuous lawful residence but for him piggy-backing on his wife's tainted applications of 2012 and 2014, and then joining in the protracted litigation which ensued upon the meritorious refusal decision of September 2015.
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> 36. In the circumstances, I do not consider that requiring the [claimant] to return to India would be an unjustifiably harsh outcome for either the [claimant] or her husband. there are not insurmountable obstacles as defined by EX.2 of Appendix FM to married life being carried on in India, as it was before the couple entered the UK on a temporary basis. Now that Mr Patel has obtained indefinite leave to remain, the couple face the reasonable choice of either returning together to India to join their children there, or of the [claimant] returning on her own, and Mr Patel in due course sponsoring an application by her to return as the spouse of a settled person, once he has been in new employment long enough to be able to produce the specified evidence that the Minimum Income Requirement is met, and after the [claimant] has served a period of exclusion from the UK commensurate with the gravity of her immigration offending. "

20. Judge Monson rejected the proposition that Mr Patel would be unable to look after himself without his wife. The eligibility requirement was not met yet on income grounds. There was no evidence to show that because of the pandemic, the claimant as a returning Indian citizen would be barred from re-entry. The judge concluded:

> "38. Accordingly, having weighed in the balance the matters relied upon by the [claimant], I am not persuaded that the discretion that is inherent in the general ground of refusal invoked by the [Secretary of State] should have been, or should be now, exercised differently. I consider that the decision appealed against strikes a fair balance between, on the one hand, the private and family life rights of the [claimant] and her husband, and, on the other hand, the wider interests of society. It is proportionate to the legitimate public aims of firm and effective immigration controls and the prevention of disorder."

21. Permission to appeal to the Court of Appeal was refused. Judge Monson's decision is the *Devaseelan* starting point for the First-tier Tribunal decision in these proceedings.

First-tier Tribunal decision

22. Judge Suffield-Thompson at [36] followed the decision of Judges Beg and Monson in finding that the claimant did not meet the suitability requirements of the Rules. She then considered whether there were very significant obstacles as required in paragraph 276ADE(2)(vi). She found that there were none, and that the claimant could not bring herself within the Immigration Rules at all.

23. The First-tier Judge went on to consider Article 8 ECHR outside the Rules. She found the claimant to have 'a family in the UK' in that she lives here with her husband, to whom she has been married for many years, and long before coming to the UK. Article 8 was engaged but the interference was in pursuance of a legitimate aim, the maintenance of a lawful immigration policy.

24. The judge went on to assess proportionality. She found that all of the claimant's family, apart from her husband, were still in India. Friendships relied upon as quasi-familial in the claimant's witness statement were not supported by oral evidence from such friends at the hearing. In any event, the private life was minimal and could be given little weight under section 117B(4)(a).

25. The judge then considered the sponsor's position. He had come to the UK as a dependant of the claimant, and therefore he knew from the outset that the expectation was that they would both return to India after her studies. He had indefinite leave to remain now, and an income of more than the minimum £18600. The only reason he did not want to leave the UK was because of his job.

26. The claimant had come to the UK knowing she had to leave, had been dishonest, 'and has simply overstayed because she liked the life here and wanted to live here'. The sponsor was rather more integrated than the claimant: were it not for his Article 8 ECHR rights, the appeal would be dismissed.

27. The First-tier Judge concluded as follows:

> "59. On balance in this appeal, I do not find it reasonable to expect the [claimant] and sponsor to remove from the UK. If the [claimant] did have to leave without him (although I doubt [that this] is the case) she would face real issues as a lone woman in India (Home Office guidance "Women in India" section 4.8). If she did go back alone, then consequences will be that she is torn away from her husband and they will have to lead separate lives in separate countries. Looking at the test approved by Sedley J,

> "what must be shown is more than mere hardship or a mere difficulty or mere obstacle. I find that for the sponsor, there would be more than real difficulty. There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience."
>
> 60. Even if they went together I find, on balance, that as he now has indefinite leave to remain, it would be a breach of the sponsor's Article 8 rights. I do find that there is more than mere hardship in this appeal.
>
> 61. I find that the balance comes down in favour of the [claimant] and sponsor's Article 8 rights."

28. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

29. Permission to appeal was granted for three reasons:

    (1) That the judge arguably erred in not applying *Devaseelan* to the consideration of proportionality as well as suitability;

    (2) That there was an arguable contradiction between the findings about available family support in India at [39] and [59]; and

    (3) That at [59]-[61], the judge had arguably failed to apply the applicable legal principles and given inadequate reasons.

Rule 24 Reply

30. There is no Rule 24 Reply on behalf of the claimant.

31. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

32. For the Secretary of State, Mr Whitwell said that the Article 8 ECHR reasoning was irrational. The judge had not considered whether the circumstances advanced were exceptional circumstances for which leave to remain ought to be given outside the Rules. He relied on the grounds of appeal and on the findings of fact by Judge Monson and the judge in the present appeal.

33. The Article 8 ECHR findings were bordering on perverse. The husband's private and family life was not sufficient to trump that. The error of law was material and the decision should be set aside and remade by the Upper Tribunal by dismissing the appeal.

34. For the claimant, Mr Richardson accepted that the claimant could not bring herself within paragraph 276ADE (1)(vi) of the Rules. Any error in that respect was not material. He further accepted that (apart from the husband's progression to British citizen status) there were no new facts differing from the Monson decision in April 2021.

35. He told me that the husband now has British citizen status. He still earns over £18600 per annum, working in retail. To remove the claimant would breach his Article 8 rights: see *Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 11 (22 February 2017).

36. The First-tier Judge in this appeal had decided that the effect on the husband would be more than mere hardship or difficulty, which equated to insurmountable obstacles. If anything, the First-tier Judge had applied too high and demanding a test.

37. The language the judge used was not ideal but she had made it sufficiently clear what his reasons were for allowing the appeal. She had regard to the strong public interest in immigration control and the past dishonesty but was entitled to decide, for the reasons she gave, that private and family life outweighed those reasons.

38. If remaking was reached, the Tribunal should consider whether the ETS/TOEIC finding, now 10 years old, should continue to debar the claimant from returning to the UK and the level of interference with her family life: see *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40.

39. In reply, Mr Whitwell pointed out that the claimant had remained unlawfully between 2019 and 2021. Mr Richardson said that she was awaiting the outcome of her husband's successful human rights appeal. Mr Whitwell then observed that this was not a *Chikwamba* case because it lacked the certainty of readmission, by reason of the suitability findings. The claimant could succeed only on Article 8 outside the Rules, if at all.

40. I reserved my decision, which I now give.

Analysis

41. The First-tier Judge allowed this appeal outside the Rules, having acknowledged that the claimant could not bring herself within any provision of the Immigration Rules. That was correct and a proper *Devaseelan* application of the Monson decision. The only new facts before the First-tier Judge in this appeal were that the husband could now show £18600 income. His naturalisation post-dated the First-tier Tribunal decision.

42. It was in the analysis of Article 8 outside the Rules that the judge fell into error. She seems to have treated Article 8 as a general dispensing power, rather than looking to see whether there were any exceptional circumstances for which leave to remain ought to be granted outside the Rules.

43. The First-tier Judge's decision at [59]-[60] is perverse. At [39], the judge had found that there were no insurmountable obstacles to the reintegration of the claimant and her husband in India, where they had

their children and other family members. The claimant would be returning with her husband, and would not be a lone woman. I treat the part of [59] dealing with the status of lone women as obiter dicta, since the judge made it clear in her parenthesis that she did not think the husband would remain behind without his wife.

44. The Article 8 finding outside the Rules therefore depends on what the judge says at [60]. The test for insurmountable obstacles was rightly categorised by Mr Justice Sedley (as he then was) as requiring more than 'mere hardship or a mere difficulty or mere obstacle'. At [60], the judge simply asserts that there would be more than mere hardship. There is no reasoning at all.

45. This decision must therefore be set aside and remade.

Remaking the decision

46. I treat the Monson decision as my *Devaseelan* starting point. The factual matrix is not in dispute and there is no need to revisit it: I have set it out above.

47. The claimant does not dispute that she cannot bring herself within the Rules, and Judge Monson did not accept that the claimant's husband would not return with her to India. That seems to me to be right: they have been married a long time, came here together (leaving their children behind) and have developed very little private life outside their marriage in the 13 years spent in the UK.

48. The husband has his British citizen status and his job in retail, but there is nothing to stop him living in India, where their children and extended family still live. He has rather more private life than the claimant, but little weight can be given to such private life as they have developed, by reference to paragraphs 117B(4)(b) and 117B(5) of the 2002 Act (as amended).

49. I adopt the analysis in the Monson decision at [33]-[38] which remains the starting point for the proportionality consideration in this appeal. In considering Article 8 outside the Rules, I must look to see whether any exceptional circumstances have been shown. There are none here. The facts are not sufficiently different from those considered by Judge Monson in April 2021 to permit me to diverge from his conclusions, even if I were minded to do so, which I am not.

50. I substitute a decision dismissing the claimant's appeal.

DECISION

51. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the claimant's appeal.

Signed Judith AJC Gleeson Date: 22 December 2022

Upper Tribunal Judge Gleeson