IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2022-004866

First-tier Tribunal Nos: HU/56311/2021
IA/15073/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 11th of January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

RAJAMOHAN PARAMASIVAM
(ANONYMITY NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Badar, Counsel instructed by Indra Sebastian Solicitors
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 12 December 2023

DECISION AND REASONS

1. The appellant has been granted permission to appeal against the decision of Judge Karbani promulgated on 29 March 2022 ("the Decision"). By the Decision, Judge Karbani dismissed the appellant's appeal against the decision of the respondent dated 1 October 2021 refusing to grant the appellant leave to remain on the basis of having accrued 10 years' lawful residence in the UK.

Relevant Background

2. The appellant is a national of India, whose date of birth is 1 June 1978. He first entered the UK on 19 November 2009 on a Tier 2 (ICT migrant) visa which was valid from 10 November 2009 to 14 December 2012.

3. On 16 November 2020 the appellant made an in-time application for leave to remain under the long residence provisions of the Rules.

4. The respondent refused the appellant's application on the basis that the appellant had broken his continuous residence of 10 years, because he had spent a total of more than 18 months outside the UK as a result of the following absences:

    - 24 October 2011 to May 2012 for 199 days
    - 21 August 2014 to 13 February 2015 for 176 days
    - 9 March 2016 to 30 June 2017 for 478 days.

5. The respondent considered the appellant's explanation for these absences, which consisted of a combination of his wife's health conditions, fertility treatment and other personal or unfortunate events. The respondent considered that the reasons given by the appellant were not significant enough to warrant a use of discretion to grant outside the Rules, because it was not accepted that the appellant had returned to the UK within a reasonable period of time once he was able to do so.

The Hearing Before, and the Decision of, the First-Tier Tribunal

6. The appellant's appeal came before Judge Karbani sitting at Hatton Cross on 15 March 2022. Both parties were legally represented, with Mr Martin of Counsel appearing on behalf of the appellant.

7. The Judge received oral evidence from the appellant, who was cross-examined, and from the General Manager of the company which had been employing the appellant since 2002. In his evidence, the appellant said that he had first worked with the company in Dubai for 10 years, and then he had come to the UK. In his evidence, the General Manager said that he had known the appellant for the last 10 years and was aware of the appellant being on an ICT visa, and that he had applied for ILR. He said that the Company was happy to continue employing and sponsoring the appellant in the UK.

8. In the Decision at paras [19] and [20], the Judge summarised the closing submissions of Mr Martin. He said that there was no dispute as to the appellant's periods of absence from the UK, and that he was not making submissions on 276ADE. He relied on his skeleton argument, and submitted that the respondent had discretion which could be applied to a case such as this. The appellant should not be precluded from relying on the Guidance from the Home Office. Looking at the refusal decision, there

was no real analysis of the reasons given for his absence, and no proper consideration in line with the Guidance. He invited the Judge to find that the appellant had given his evidence in a straightforward and compelling way. It was accepted that the appellant did not have documentary evidence for each aspect of his claim. However, one could understand that due to his family problems. It was plausible that his wife was depressed and in need of her husband at that time.

9. The reasons for which he left to go to India did not need to be compelling. The issue was whether he was prevented from coming back for compelling reasons each time. It was understandable that the appellant was under pressure to have children, and the steps they took to achieve that. Given his wife's mood, it was essential that he stayed with her through the stages of that process until 2017. There were also the unfortunate incidents regarding his father's accident and then his mother passed away. There might not be evidence that he was specifically needed at the time, but it was self-evident. There was pressure on him to seek a divorce. The Judge was invited to find that there were sufficient reasons to excuse the absences.

10. The Judge's findings and reasons began at [24]. At [25], she said that the appellant had applied for ILR on the basis of 10 years' continuous lawful residence under 276B. On applying 276A, it was agreed between the parties that the appellant had broken the continuity of his residence on two bases. Firstly, that he had 2 periods where his absence from the UK exceeded 6 months. That was in October 2011 to May 2012, and from March 2016 to June 2017. The appellant was absent during the applicable 10-year period for a total of 853 days, which was 313 days over the allowance of 540 days within the Scheme. Alternatively, he had also remained outside the UK for a period of 18 months, which broke continuous leave for the purposes of 276B.

11. At paras [26] and [27], the Judge discussed the respondent's guidance set out in the Long-Residence Guidance, version 17, published in May 2021.

12. At [28], the Judge addressed Mr Martin's submission that, as a Tier 2 migrant, the appellant could have applied for settlement once he had been in the UK for 5 years.

13. At [29], the Judge addressed the first period of absence. The appellant had explained that the reason for his lengthy absence from his return trip in 2011 was a consequence of the fertility issues that he was experiencing with his wife. They had been trying for children for the last 4 years before that. The appellant said that he would return when his wife conceived. However, he received a message that she had had a miscarriage. While she accepted that the appellant and his wife wanted to start a family, she did not accept that this amounted to compelling circumstances for an extended length of stay in India. There was no indication in the evidence that he planned to come back earlier. It seemed to her, in respect of the first 2 absences, that he was intending to remain in India for 6 months in

any event because he was only visiting his home country once every 2 years.

14. At [30], the Judge addressed the absence in 2014. She found that the appellant again intended to stay for a period of 6 months, and it was only now, that it had become apparent to him that this affected his ability to qualify for indefinite leave on the basis of 10 years' lawful residence, that he was retrospectively justifying those absences through his wife's medical issues. It was submitted to her that it was plausible that there were cultural and family pressures to start a family, and perhaps even to divorce his wife, which she accepted. But she found that there was a lack of medical evidence as to the treatment and support his wife required. It followed that there was a lack of evidence that the appellant had to remain in India for extended periods, when his wife was already living with his family and was having contact with her own family members too. The appellant and his wife had chosen to live apart during their marriage, so that the appellant could pursue more lucrative work in the UK. She was not therefore satisfied that the compelling circumstances existed in order to justify his lengthy absences from the UK.

15. At [31], the Judge addressed the longest of the appellant's absences from the UK, which was upon his return to India in 2017. On that occasion he spent a period of over a year back in India. The appellant and his wife underwent IVF treatment, which was successful, and resulted in the birth of their twins. But there was no indication as to the length of time their treatment took; and why he needed to be in India for this extended period of time despite the fact that he was established and working in the UK. In respect of his father's unfortunate accident, she accepted that the appellant may have wished to assist or support the family for some time. However, there was no indication that the appellant needed to stay for the extended period of time that he did. Sadly, his mother also passed away at this time. But throughout this time, he had other family members residing in India. There was no supporting evidence that he had to remain in order to grieve and support the family for such an extended period of time. There was no evidence to support that he could not reasonably have returned earlier.

16. At [32], she found that the appellant had not demonstrated that there were compelling circumstances on each occasion. Even if she were to accept that these all amounted to compelling circumstances, she found that the appellant had not given detailed or accurate time-lines which in turn might have shown that he had to remain in India each time as long as he did, and that he returned to the UK as soon as it was reasonably possible to do so.

17. The Judge went on to consider an Article 8 claim outside the Rules. At [38], she observed that the appellant applied for ILR on the basis of a 10 years' lawful residence - not as a result of the 6 years he had already spent in the UK as a Tier 2 migrant. Although he might have been entitled to ILR earlier than after 10 years, he did not provide any details as to the

interference in his private life as a result of this. There was nothing to prevent him from making an application *"on that basis*" in due course.

18. His employer indicated that they would continue to sponsor him. Accordingly, she found that there was very limited interference with the right to private life as a result of him not applying or being considered for ILR on "*this alternative basis*".

The Grounds of Appeal to the Upper Tribunal

19. The grounds of appeal were settled by Mr Martin of Counsel. Although he did not number them, I find it convenient to do so in rehearsing the Grounds of Appeal, the initial reasons for refusing permission, and the arguments put forward on the appellant's behalf at the hearing before me.

20. Ground 1 was that the Judge had failed to give anxious or proper scrutiny of the appellant's claim, as was evidenced by the fact that the Judge had wrongly stated that the appellant had applied for ILR. Although the appellant had made a long-residence application, he had not applied for ILR because it was accepted that he did not have the evidence to satisfy the English or 'Life in the UK' requirements.

21. Ground 2 was that the Judge had made a further procedural error in para [38] by stating that the appellant could make another application in due course, and implying that he could carry on working for his employer in the UK. This was wrong.

22. Ground 3 was that the Judge had erred in law in considering the reasons for the appellant's long absences.

23. Ground 4 was that, in considering Article 8 outside the Rules, the Judge had failed to give appropriate weight to the submissions based on his extended period at the start of his time in the UK, and that he had complied with the limits on absences for Tier 2 migrants. There was no dispute that he was compliant between 2009 and 2015, and this was deserving of considerable weight. But the Judge had given unlawful reasons for failing to give them weight, or the weight they merited, and this was a material error of law.

The Reasons for the Initial Refusal of Permission to Appeal

24. On 11 June 2022, First-tier Tribunal Judge Mills gave reasons for refusing permission.

25. Ground 1 was misleading and contrary to what was set out in the appellant's own skeleton argument. The appellant had applied by reference to Rule 276B for indefinite leave to remain on the grounds of long residence. The Judge had not mistaken what the appellant sought.

26. As to Ground 2, the Judge did not err, at para [38], by noting that the appellant gave no details as to his private life interference, or by noting that he could make a further application on the basis that he had been a Tier 2 migrant for 6 years and would continue to have a sponsor.

27. As to Ground 3, paragraphs 5 and 6 of the grounds mischaracterised the Judge's findings at paras [29] and [30] of her determination. She made findings which were reasonably open to her on the evidence, or lack of it. She made the observation that there was no evidence that the appellant intended to return sooner than he did, and accordingly she found that his explanations had been retrospectively created. Paragraph 7 of the grounds was a mere disagreement with the Judge's finding. It was plainly wrong to say that the Judge gave no reasons for her findings. She made the observation that there were other family members residing in India - something not contradicted by the grounds. Further, she noted that there was no supporting evidence of the appellant's assertions that he specifically needed to remain.

28. As to Ground 4 (paragraph 8 of the grounds) this was plainly a further mere disagreement with the Judge. The Judge had in mind the appellant's submissions and she gave reasons for not acceding to the argument.

The Renewed Application for Permission

29. Mr Martin settled a renewed application for permission to appeal to the Upper Tribunal.

30. As to Ground 1, the appellant had not used an ILR application form. He had used the FLR (LR) application form. Obviously, regard had to be had to paragraph 276B, and this was what was set out in the skeleton argument. However, in oral submissions it was acknowledged that the appellant could not qualify for ILR, and so what was central was the extension provision in paragraph 276A. That this was not even mentioned, and the appeal just considered on ILR grounds, was evidence that anxious scrutiny was not applied by Judge Karbani.

The Reasons for the grant of permission by the Upper Tribunal

31. On 11 November 2022, Upper Tribunal Judge O'Callaghan granted permission to appeal for the following reasons:

> With hesitation I grant permission to appeal. The complaint that the Judge failed to adequately engage with [an] oral submission that the application for leave to remain was made under paragraph 276A is arguable, but the remaining grounds may, on initial consideration, amount simply to a disagreement with the findings of fact, and no more. It will be for the appellant to establish materiality.

The Rule 24 Response

32. On 19 December 2022, Chris Avery of the Specialist Appeals Team settled a Rule 24 response on behalf of the Secretary of State opposing the appellant's appeal.

33. The grounds asserted that there was an error because the FTT did not consider the oral submission that the appellant should succeed under the provisions of paragraph 276A of the Rules on the basis that he could not meet the language and knowledge of life in the UK requirements of Rule 276B. Since there was no record of this submission in the determination, if the appellant wished to pursue this point, then a statement from the Representative supporting this should be provided.

34. However, even if that was established, it would not be a material error, as the appellant's absences from the UK were properly considered by the FTT who found that there were not compelling circumstances that justified discretion being exercised. The residence requirements therefore were also not met, and there was no material error of law.

The Hearing in the Upper Tribunal

35. At the hearing before me to determine whether an error of law was made out, Mr Badar did not abandon Ground 1, but he acknowledged that the asserted error would only be material if the other grounds, in particular Ground 3, were made out. With respect to Ground 3, he submitted that the Judge's findings were irrational or at least were not supported by adequate reasoning.

36. On behalf of the respondent, Mr Wain adopted the Rule 24 response settled by his colleague. As to the other grounds of appeal, he submitted that they had no merit. The findings that the Judge had made were reasonably open to her on the evidence, and they were adequately reasoned.

37. After briefly hearing from Mr Badar in reply, I reserved my decision.

Discussion and Conclusions

38. In light of the way that the error of law of challenge has been pursued, I consider that it is helpful to set out the guidance given by the Court of Appeal in T (Fact finding - second appeal) [2023] EWCA Civ 475 as to the proper approach which I should adopt to the impugned findings of Judge Karbani:

> 56. The most-frequently cited exposition of the proper approach of an appellate court to a decision of fact by a court of first instance is in the judgment of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5:
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> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless

compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many.

(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
(ii) The trial is not a dress rehearsal. It is the first and last night of the show.
(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to the evidence (the transcripts of the evidence),
(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2022] EWCA Civ 1039 [2003] Fam 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135."

57. More recently, Lewison LJ summarised the principles again in *Volpi and another v Volpi* [2022] EWCA Civ 464 at paragraph 2:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence

into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

39. Mr Martin made a witness statement in respect of Ground 1, as he was invited to do by Mr Avery in the Rule 24 Response, but it was not relied on by Mr Badar as fortifying Ground 1, and it does not do so.

40. I consider that Ground 1 breaches the principle that a judgment should not be picked over or construed as though it was a piece of legislation or a contract. On analysis, the point sought to be taken is remarkably trivial. Rule 276A1 provides that the requirement to be met by a person seeking an extension of stay on the ground of long residence in the UK is that the applicant meets each of the requirements in paragraph 276B(i)-(ii) and (v). It is common ground that the key issue under 276B was 276B(i)(a) which states that the requirements to be met by an applicant for indefinite leave to remain on the ground of long-residence in the UK are that (i)(a) he has had at least 10 years' continuous lawful residence in the UK.

41. Accordingly, nothing turned on the distinction between the appellant applying for ILR under paragraph 276B or for an extension of stay on the ground of long residence under paragraph 276A1.

42. It follows that the Judge's failure to distinguish between the appellant applying for ILR under Rule 276B as against applying for an extension of stay on the ground of long residence under Rule 276A1 was of no consequence, given that in either case it was accepted that the appellant had not had continuous residence for an unbroken period, and was thus dependent upon the respondent exercising discretion in his favour.

43. As to Ground 2, The Judge was not clearly wrong to hold at para [38] that the appellant could apply to extend his stay on a different basis than the basis upon which his application had been refused. The reason why Mr Martin says that the Judge is wrong is that the appellant only currently has leave to remain under section 3C, and therefore the appellant cannot extend his leave to remain by making a fresh application. While it is true that the appellant would not thereby be able to secure continuous residence pursuant to an existing grant of leave to enter or remain, there is nothing to prevent him from making a fresh application before his section 3 leave expires, which it will do once his appeal rights are

exhausted. In addition, even if the appellant is not able to make such an application before his appeal rights have been exhausted, there is no reason to suppose that the respondent would not entertain an application made within a reasonable time thereafter.

44. In oral argument, Mr Badar raised a different objection, which was that there would be practical difficulties in obtaining the required sponsorship from his employer. This is not an objection that is raised in the grounds of appeal, and so I decline to entertain it.

45. In any event, the broader point is that the Judge was not guaranteeing that the appellant would be successful in making an application for leave to remain on an alternative basis. All the Judge was saying was that this was an option available to the appellant, and I am not persuaded that the Judge was clearly wrong to factor this consideration into her analysis.

46. As to Ground 3, I consider that on analysis the arguments put forward both in the grounds of appeal and also by Mr Badar in oral submission amount to no more than an expression of disagreement with findings that were reasonably open to the Judge for the reasons which he gave.

47. The Judge's findings were neither perverse nor inadequately reasoned. The Judge had the benefit of receiving oral evidence from the appellant, and the benefit of his oral evidence being tested in cross-examination. The Judge was not bound to accept at face value what the appellant said in his witness statement, rather than forming a view as to his credibility based on a holistic assessment of the evidence, and/or (as observed by Judge Mills) the lack of it.

48. I do not find it necessary to go through the arguments put forward by Mr Martin, or Mr Badar, as to why the Judge was wrong not to accept that - in respect of each absence - the appellant had been prevented from coming back to the UK any earlier. It is not necessary to go through the arguments one by one, as they all have a common theme, which is essentially that the Judge should have accepted what the appellant said in his witness statement. However, it was acknowledged by Mr Martin in his closing submissions that there was a lack of supporting documentary evidence for aspects of the appellant's explanation.

49. It was clearly open to the Judge to find that the lack of supporting evidence was fatal, and that the appellant had not discharged the burden of proof.

50. It was also clearly open to the Judge to attach considerable weight to the fact that there was no detailed time-line given in respect of any of the absences to show when the appellant would have come back in the normal course of events, or to show the precise sequence of events which unfolded so as to prevent the appellant from coming back any earlier than he did.

51. Ground 4 goes to the issue of proportionality, as does Ground 2. I consider that Ground 4 is merely argumentative. The Judge took into account the argument that the appellant would have been entitled to indefinite leave to remain as a Tier 2 migrant for a continuous period of 6 years between 2009 and 2015. She expressly accepted at para [37] that this was an aspect that was relevant to the proportionality of the decision. At para [38], she observed that the appellant had applied for ILR on the basis of his 10 years' lawful residence, not as a result of the 6 years he had already spent as a Tier 2 migrant. The Judge reasonably observed that, although the appellant may have been entitled to ILR on a different basis, he had not provided any details as to the interference in his private life as a result of this. The Judge continued:

> "There is nothing to prevent him making an application on that basis in due course. His employer indicated that they would continue to sponsor him. Accordingly, I find that there is very limited interference with the right to private life as a result of him not applying or being considered for ILR on this alternative basis."

52. It was clearly open to the Judge to reach this conclusion. The Judge was not bound to treat the submission made by Counsel on this issue as being a weighty consideration which tipped the proportionality balance in the appellant's favour.

53. In summary, for the reasons given above, no error of law is made out. In a well-reasoned decision, the Judge gave cogent reasons for finding that the appellant did not qualify for leave to remain on the grounds of long residence, and that there was no disproportionate interference with the appellant's right to family or private life as a result of the refusal decision.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal by the appellant is dismissed.

Anonymity

The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
January 2024