



IAC-BH-PMP-V1

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

Appeal Number: IA/33434/2014

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 5th August 2015**

**Decision & Reasons Promulgated
On 24th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

**KUNDAN LAL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V James of Counsel instructed by LLB Legal Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. On 29th December 2014 Judge of the First-tier Tribunal Grant-Hutchison gave permission to the appellant to appeal against the decision of Judge of the First-tier Tribunal Pickup in which he dismissed the appeal against the respondent's decision to refuse leave to remain on the basis of long residence and on human rights grounds applying the provisions of paragraph 276ADE of the Immigration Rules relating to private life.

2. Judge Grant-Hutchison thought it arguable that the judge had failed to consider the guidance in *Devaseelan (Second appeals – ECHR – extra-territorial effect) Sri Lanka* [2002] UKIAT 00702 in relation to an earlier determination which should be a start point, even if the decision related to a point of law as opposed to findings of fact.
3. In the grounds of application it was contended that Judge Pickup was wrong to conclude that *Devaseelan* did not apply to the earlier decision of Judge Phull who had allowed the appeal to the limited extent that the respondent's refusal was not in accordance with the law.

Submissions

4. Ms James expanded upon the grounds arguing that Judge Pickup should have taken into consideration the findings of the earlier judge in paragraph 11 of her decision in which she found that the respondent had failed to consider the appellant's application for leave made on 6th July 2012 under the Rules applicable prior to 9th July 2012. She argued that there were exceptional circumstances examined by the judge even if they related to what the appellant's representatives had done at the time. The failure of Judge Pickup to apply *Devaseelan* in that respect therefore tainted the rest of his decision because the exceptional circumstances relating to the appellant's earlier application were not taken into consideration even though the first judge had made positive findings about them.
5. Mr McVeety relied upon the response in which it is stated that the appellant's valid application was made after the change in Rules on 9th July 2012 and could not succeed under those Rules. Further, Judge Pickup had given cogent reasons for concluding that the first judge's decision resulted from an application of the law. In any event it was unclear what Judge Phull intended to flow from the finding of exceptional circumstances when her decision stemmed from an error on a point of law in the respondent's decision.
6. Mr McVeety also submitted that the appeal could have not been allowed by Judge Phull on the basis of exceptional circumstances as there was no such principle applicable. My attention was drawn to the refusal decision of 30th July 2014 which forms the basis of this appeal. This is referred to in paragraph 17 of the decision in which the judge quotes from the refusal as follows:

“We cannot be held responsible for your representatives' errors. As this application was made after 9th July 2012, we are under no obligation to consider the case under the now abolished fourteen year long residence Rules”.

Mr McVeety emphasised that the appellant's failure to submit a valid application before the Rules changed was not the fault of the respondent. The decision was remitted back by Judge Phull for the respondent to consider the decision against exceptional circumstances which was done.

7. In conclusion Ms James reminded me of the content of her skeleton argument in which she contends that an appellant should not be prejudiced by the errors of his professional advisers. The respondent's latest refusal letter had made no reference to the earlier decision by Judge Phull and the respondent was wrong to simply reiterate the arguments set out in the first refusal letter.

Conclusions

8. After I had considered the matter for a few moments I announced that I was not satisfied that the decision of the First-tier Tribunal showed an error on a point of law. My reasons for that conclusion now follow.
9. Judge Pickup was not wrong to conclude in paragraph 15 of his decision that the guidance set out in *Devaseelan* did not apply to the earlier decision of Judge Phull who had decided that the respondent's decision was not in accordance with the law and a fresh decision was required. That is because Judge Phull had simply reached a conclusion on a point of law rather than fact. But even if Judge Pickup's decision was wrong and the earlier decision should have been a start point, the error is not, I conclude, material. There was nothing in the decision of Judge Phull which could have been followed by the second judge. Whilst the earlier decision recites events which suggest that the appellant's representative had been negligent, no reasons are given for the conclusion that the respondent should have considered the appellant's application under the Rules prior to 9th July 2012. The "exceptional circumstances" which may have related to the errors allegedly made by the appellant's representatives could not have any relevance to the fact that a valid application was not made by the appellant until after 9th July 2012.
10. At paragraph 16 of his decision Judge Pickup correctly points out that it was not the responsibility of the Secretary of State to protect the appellant against the failure of his representatives to act expeditiously. The application initially made was invalid and could not be accepted. The application did not fall to be considered under previous long residency requirements. There was nothing in Judge Phull's decision, even if it had been taken into consideration, which could have led to a favourable decision by Judge Pickup. In reaching that conclusion I bear in mind that Judge Pickup's decision also gives adequate and cogently reasoned consideration to the position of the appellant under human rights and was entitled to dismiss that claim also.

Decision

11. No material error on a point of law is shown, the decision of the First-tier Tribunal shall stand.

Anonymity

12. An anonymity direction was not made by the First-tier Tribunal and was not requested before me.

Signed

Date

Deputy Upper Tribunal Judge Garratt