Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12674/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 12th December 2018	**On 9th January 2019**
Typed, corrected, signed and Sent to Promulgation on 19th December 2018.	

Before

Deputy Upper Tribunal Judge Chalkley

Between

MRS DENISE CLAUDETTE FERNANDO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs C Johnrose, a solicitor with Ellen Court Partnership
For the Respondent: Mr Bates, a Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Singapore who was born on 20th August, 1962. On 20th March, 2018 she made application to the respondent for leave to remain on the basis of her private and family life with her husband, [JC], a British citizen ("the husband"). The appellant and her husband were married in Singapore in 1995 and have two British children who are now adults. Between 1995 and 2006 they lived together in various companies

where the husband had been sent to work. Sadly, the appellant and her husband were divorced in 2006, but they remained close and in 2010 they remarried again in Singapore.

2. The appellant arrived in the United Kingdom in 2011 and was granted leave to remain as a spouse. After two years she made an application for indefinite leave to remain and that was refused because she failed to satisfy the English language requirements. She appealed that decision and her appeal was allowed on Article 8 grounds. Instead of being granted indefinite leave to remain however the respondent simply granted her discretionary leave in 2013 following the appeal. Ordinarily, she would have been granted indefinite leave to remain, but for reasons which are not clear, she was only granted discretionary leave for a period of three years. The appellant sought to renew that leave, but unfortunately forgot to pay the required fee and so her application was then refused.

3. The appellant claims that she instructed representatives to apply for indefinite leave to remain on her behalf, but claims that she was let down. In September 2017, having made an application for leave to remain but before the decision was made, the appellant learnt that her father who, was living in Singapore at the time, had become seriously ill with a heart complaint and so on 9th September she returned to Singapore to visit him. Sadly, her father died. Her representative however, it is claimed, let her down and did not tell the respondent that she had left the United Kingdom. When she returned on 7th November 2017, she was allowed leave to enter, but only for six months on compassionate grounds. She has remained in the United Kingdom ever since and made application for leave to remain on the basis of her private and family life on 20th March this year. That application was refused by the respondent and having appealed to the First Tier Tribunal, the judge concluded that the appellant's human rights were outweighed by the interests of the wider general public. He dismissed the appellant's appeal.

4. The appellant challenged the decision on several grounds. The first is aa alleged failure by the judge to apply *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* * UKIAT 00702, given that there was in the file an earlier decision allowing a human rights appeal on behalf of the appellant. The first ground suggested that the judge had erred in failing to refer to *Devaseelan*. The fact that the appellant won her Article 8 appeal showed that her interests outweighed the public interest and the fact that the judge failed to mention this amounted to a material error of law rendering the decision unsustainable, it was alleged. The judge failed to consider that family life had been strengthened following the earlier decision, and yet he made no mention at all of the decision. The second ground suggested that the judge failed to give sufficient weight to material evidence. The judge considered the fact that the former adviser of the appellant had been the subject of a complaint because he had mishandled her application. There was evidence before the judge of a letter of complaint to the OISC and response from the OISC regarding her

complaint. There was also evidence in the form of "WhatsApp" transcripts showing communication between the appellant and her former representative where he acknowledges that he did not categorically inform the Home Office as requested that the appellant had left the United Kingdom and the reasons for doing so. It was suggested that the judge failed to take this evidence into account when determining the behaviour of the adviser. The grounds submitted that it was material evidence that the judge failed to give his mind to when determining the behaviour of the appellant's previous adviser and considering the decision in *Mansur (immigration adviser's failings: Article 8) Bangladesh* [2018] UKUT 00274 (IAC) and in particular paragraph 4, this being a "*blatant failure by an immigration adviser to follow P's instructions*". The third ground was failing to undertake proper assessment of the appellant's Article 8 rights and to some extent this challenge was duplicated in the last challenge which asserts that the judge failed to take into account all the compassionate factors when conducting the proportionality exercise, for example whether the appellant met the financial requirements, the question of accommodation which had not been an issue as far as the refusal was concerned, the fact that the judge found that private life had been established when immigration was precarious and the failure of the judge to engage with the appellant's personal history and the circumstances surrounding her application, namely:

- the failure of the judge to carry out an assessment of the core issue of the appellant's family life under Article 8, as opposed to her private life;
- the failure of the judge to give consideration to the evidence of the appellant's adult son;
- the failure of the judge to consider the appellant's spouse's human rights; and
- factors arising including the requirement for him to leave the UK and relinquish his rights as an EU national in order to continue his family life and other factors which the appellant's solicitor dealt with in more detail in her submissions.

5. Mr Bates pointed out that the judge had not erred in failing to refer to *Devaseelan*. The decision made in country by the Secretary of State was sustainable. The decision made by the earlier judge was made in 2013 and was relevant then, but the facts have changed since 2013 and what was needed in this appeal was what the judge did, namely to make an assessment of the circumstances as they prevailed at the date before him.

6. So far as the failure of the appellant's previous advisers is concerned, the judge did consider the question of *Mansur*, and her actually referred to it, but he points out that there is no finding by a regulator, because although a complaint had been made to a regulator, no finding had been made by the time of the hearing. As to the third challenge, the fact remained that the appellant could not meet the requirements of the Immigration Rules. The fact that she had been in the United Kingdom was something built into

the Immigration Rules, but the length of her residence in the United Kingdom alone was arguably irrelevant. There was nothing exceptional about the appellant or her circumstances, save for the fact that she had been granted six months' exceptional leave and that was given because of the circumstances in which she left the United Kingdom. Were the appellant now required to return to Singapore and make an application for leave to return as a spouse, there will be no reason at all why the appellant's husband could not, if he wished to, travel with her. The evidence before the judge was that they have savings and income and presumably they would be able to cope for the brief time it would take for the application to be made.

7. Mrs Johnrose asked me to note the reason why the appellant had left the United Kingdom in the first place. She originally came in 2011 as a spouse and after two years she made an application for indefinite leave to remain. That was refused because of her failure to satisfy the English language requirements. She appealed that decision and the Immigration Judge allowed her appeal. One would normally expect her to have been granted indefinite leave to remain by the Secretary of State, but for reasons which are not known and which appear never to have been challenged by her then advisers, she was only granted discretionary leave.

8. In 2013 she made an in time application for leave to remain prior to leave expiring. The appellant made application for leave to remain in June 2017 on the basis of her being a spouse of a person present and settled in the United Kingdom, but sadly received news that her father had suffered a heart attack and quite understandably decided that she wished to be with him. Sadly he died. On returning to the United Kingdom the appellant was granted six months' compassionate leave.

9. Mrs Johnrose submitted that the judge had erred in law by not properly considering the appellant's circumstances. He failed to consider when engaging in his proportionality exercise:-

   - that the appellant originally had leave in 2011 as a spouse;
   - that in 2013 the appellant should have been granted indefinite leave to remain and the fact that she was only granted discretionary leave should have been challenged but was not by those advising her at the time;
   - the circumstances surrounding why she left the United Kingdom when her father died;
   - the reason why the respondent granted her compassionate leave for six months; and
   - lastly, the effect on her and on her health, and indeed on her husband of the lengthy delays and circumstances surrounding her immigration status.

10. The judge also made a mistake of fact at paragraph 52(vii) of the determination in that he refers to the appellant's parents having

accommodation available to her and her husband to live in. In fact, the appellant's widowed mother lives with one of the appellant's siblings. Lastly, the judge also failed to take into account the fact that the appellant had received medical treatment whilst in Singapore which prevented her returning to the UK sooner than she did following the sad death of her husband.

11. I reserved my decision.

12. I have considerable sympathy for this lady and her husband. Together they have been through a great deal of turmoil in their attempts to regularise her stay in the United Kingdom. However, and with considerable regret, I have concluded that the decision must stand. I concluded that the judge did not materially err in law in his decision. It was not suggested in either the grounds of in submissions to me that the decision of the First Tier Tribunal Judge was perverse in the public law sense. It may not have been the decision I would have made, but that is not the test I have to apply.

13. The judge did not make any material misdirection by failing to refer to *Devaseelan*. The 2013 decision was in respect of an application made following an earlier refusal. It was not in respect of the same refusal and the circumstances prevailing in 2013 were hardly relevant to the circumstances prevailing before this judge when he came to consider the appeal. I simply do not believe that he failed to give sufficient weight to material evidence in respect of the complaint by the appellant to the OISC in respect of her previous advisers. He noted the complaint, but correctly pointed out that there had been no finding by the regulator. Indeed, during the course of proceedings I pointed out to the appellant's representatives that the letter written by the appellant's previous adviser was addressed to the Home Office (UK Border Agency) at Manchester Airport, and clearly advises the Home Office that the appellant has travelled to Singapore. The Home Office must have been aware of this letter because on her return from Singapore she was granted compassionate leave. The judge did take those matters into account.

14. So far as ground 3 is concerned, as set out in the application, this suggests that the judge failed to consider whether there were exceptional circumstances such as to grant leave out with the Immigration Rules. Ground 4 is really a further explanation of ground 3, but the judge did take into account everything he could have done. Mrs Johnrose referred me to her bundle and to various pieces of medical evidence, but the medical evidence in question comprised what appeared to be doctors' notes made in 1993, a 2018 list of medication (which does mean something to me, but only because of specialist knowledge I have, and probably would not have meant anything at all to any other judge) and what appear to be the appellant's general medical practitioner's computer records and a letter from a consultant to the appellant's general medical practitioner following a visit by her in January 2018. It would, frankly, be astonishing if

somebody who had experienced what this poor lady has experienced had not been affected by stress, but there was no letter from a medical practitioner confirming that she was suffering from stress or being treated for the effects of stress. The appellant's immigration history was something that the Immigration Judge was very well aware of and while he may have erred in suggesting that the appellant's parents have accommodation available for her and her husband to live in and some savings to tide them over, it is a fact that her family members do have homes in Singapore.

Notice of Decision

15. Immigration Judges are required to give very considerable weight to the interests of the wider general public in the maintenance of immigration control and I believe that this judge has done precisely that. There is nothing perverse about his decision, and whilst it may seem harsh, he has taken into account all the evidence presented to him. I have concluded, therefore, that the making of a decision by First-tier Tribunal Judge Thorne did not involve the making of an error of law and his decision shall stand. This appeal is dismissed.

16. No anonymity direction is made.

Richard Chalkley
A Judge of the Upper Tribunal.

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed therefore there can be no fee award.

Richard Chalkley
A Judge of the Upper Tribunal.