Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: JR/4288/2018

THE IMMIGRATION ACTS

HEARD IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

On 30th January 2019

Before

THE HONOURABLE MR JUSTICE JULIAN KNOWLES

Between
THE QUEEN ON THE APPLICATION OF
(1) PADMA PRIYA GOVINDARAJ
(2) SREESHKANTHARAJ EAGAMBARAM **Appellant**

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:

For the Appellant: Miss A Sheehra Instructed by Nag Law Solicitors.
For the Respondent: Mr V Mandalia Instructed by the Government Legal Department.

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DECISION AND REASONS

1. At the conclusion of the hearing on 30 January 2019 I announced that the application for judicial review was allowed for reasons to be given later. These are my reasons.

Background

2. This is primarily a challenge by way of judicial review of the Secretary of State's decision of 22 March 2018 refusing the First Applicant indefinite leave to remain (ILR). That decision was upheld on Administrative Review on 1 May 2018. That decision is also challenged. The Second Applicant is the First Applicant's husband. His claim for ILR as the spouse of a person with ILR was refused on 22 March 2018 at the same time as the refusal of ILR for his wife. Hence, his challenge is wholly contingent on his wife's claim succeeding.

3. On 3 February 2007 the Applicant entered the UK lawfully and in due course on 23 September 2010 she was granted leave to remain as a Tier 1 General Migrant. In 2010 and 2011 she received medical treatment in India for gynaecological problems. She was absent from the UK from 13 October 2010 to 21 March 2011 and then from 5 August 2011 until 12 September 2011. These periods are agreed to amount to 194 days.

4. On 18 September 2015, prior to the expiry of her leave to remain, she applied for ILR based upon her five years' residence in the UK under the Tier 1 category. In support of her application she submitted a letter dated 15 September 2015 and she also submitted medical evidence from her treating doctor in India explaining her absence from the UK. The First Applicant attended for interview with a caseworker and supplied information at the interview.

5. The relevance of the explanation for her 194-day absence is that in December 2012 the Immigration Rules (HC 395) were amended to allow a maximum absence from the UK of 180 days in five consecutive periods of 12 months calculated backwards from the date of decision. I will return to the Immigration Rules later.

6. On 23 January 2016 the Secretary of State refused her application, but this refusal was withdrawn following the issuing of legal proceedings. The application was refused again on 7 September 2016 but again this refusal was withdrawn following the issuing of legal proceedings.

7. On 7 December 2017 a Statement of Changes in Immigration Rules (HC 309) was presented to Parliament pursuant to s 3(2) of the Immigration Act 1971. The amendments relevant to this claim took effect from 11 January 2018. I will address these changes later. In summary, they permitted the Secretary of State to calculate the relevant period of five years (during which the applicant was permitted to be absent from the UK for no more than 180 days in a twelve month period) as ending with either the date of the application; the date of the decision; or any date up to 28 days after the date of the application, which ever date is most beneficial to the applicant.

8. On 16 February 2018 the Secretary of State requested further information from the First Applicant.

9. On 22 March 2018 the application for ILR was refused and this refusal was upheld following the making of representations (on 5 April 2018) and an Administrative Review on 1 May 2018.

10. The principal basis for the refusal was that the Applicant had been absent for 194 days in the year 19 September 2010 – 18 September 2011, and therefore 14 days over the permitted 180-day period in any 12-month period in the five years prior to the date of the application, so that she could not demonstrate a continuous period of five years in the UK.

11. The Secretary of State calculated the relevant periods as follows:

19 September 2010 – 18 September 2011	194 days
19 September 2011 – 18 September 2012	0 days
19 September 2012 – 18 September 2012	102 days
19 September 2013 – 18 September 2014	17 days
19 September 2014 – 18 September 2015	0 days

12. These periods are not in dispute. What is disputed is whether the Secretary of State correctly applied the Immigration Rules to them so as to refuse the First Applicant ILR.

13. Before turning to the reasons for refusal in more detail and the grounds of challenge, it is convenient first to set out the relevant Immigration Rules.

Immigration Rules

14. The relevant rule in force at the time of the First Applicant's application for ILR was made in 2015 para 245AAA *General requirements for indefinite leave to remain*:

> "For the purposes of references in this Part to requirements for indefinite leave to remain, except for those in paragraphs 245BF, 245DF and 245EF:
>
> (a) "Continuous period of 5 years lawfully in the UK" means, subject to paragraphs 245CD, 245GF and 245HF, residence in the United Kingdom for an unbroken period with valid leave, and for these purposes a period shall not be considered to have been broken where:
>
> (i) the applicant has been absent from the UK for a period of 180 days or less in any of the five consecutive 12 month periods preceding the date of the application for leave to remain, except that any absence from the UK for the purpose of assisting with the Ebola crisis which began in West Africa in 2014 shall not count towards the 180 days, if the applicant provides evidence that this was the purpose of the absence(s) and that his Sponsor agreed to the absence(s).
>
> …
>
> (c) Except for periods where the applicant had leave as a Tier 1 (Investor) Migrant, a Tier 1 (Entrepreneur) Migrant, a Tier 1 (Exceptional Talent) Migrant or a highly skilled migrant, any absences

> from the UK during the five years must have been for a purpose that is consistent with the applicant's basis of stay here, including paid annual leave, or for serious or compelling reasons."

15. As I have said, on 7 December 2017 amendments to para 245AAA were presented to Parliament, and these took effect on 11 January 2018. There were further amendments on 15 January 2018 but these are not relevant to this claim.

16. As amended with effect from 11 January 2018, para 245AAA specified:

> "The following rules apply to all requirements for indefinite leave to remain in Part 6A and Appendix A:
>
> (a) References to a "continuous period" "lawfully in the UK" means, subject to paragraph (e), residence in the UK for an unbroken period with valid leave, and for these purposes a period shall be considered unbroken where:
>
> (i) the applicant has not been absent from the UK for more than 180 days during any 12 month period in the continuous period, except that any absence from the UK for the purpose of assisting with a national or international humanitarian or environmental crisis overseas shall not count towards the 180 days, if the applicant provides evidence that this was the purpose of the absence(s) and that their Sponsor, if there was one, agreed to the absence(s) for that purpose;
>
> …
>
> (c) Except for periods where the applicant had leave as a Tier 1(Investor) Migrant, a Tier 1(Entrepreneur) Migrant, a Tier 1(Exceptional Talent) Migrant or a highly skilled migrant, any absences from the UK during the relevant qualifying period must have been for a purpose that is consistent with the applicant's basis of stay here, including paid annual leave, or for serious or compelling reasons.
>
> (d) The continuous period will be considered as ending on whichever of the following dates is most beneficial to the applicant:
>
> (i) the date of application;
> (ii) the date of decision; or
> (iii) any date up to 28 days after the date of application"

17. 'Continuous period' is defined by para 245CD(d)(ii) to be five years.

18. The Statement of Changes in Immigration Rules stated at p2, after dealing with amendments which are not relevant to this claim stated:

> "The other changes set out in this statement shall take effect on 11 January 2018. However, in relation to those changes, if an application has been made for entry clearance or leave to remain before 11 January 2018, the application will be decided in accordance with the Immigration Rules in force on 10 January 2018."

19. The Secretary of State is also able to grant ILR outside the Immigration Rules. In the present context, he is able to do so even where the applicant has broken their continuous leave by being outside the UK for more than 180 days in a 12-month period. The policy ('*Indefinite leave to remain: calculating continue period in UK')* in its current form (Version 17, 6 July 2018) is as follows, which the parties agreed was not relevantly different to the policy which applied as at the date of the First Applicant's application:

> "Exceptional cases
>
> This section tells you about the exceptional circumstances when you can grant the applicant indefinite leave to remain (ILR) outside the rules when their continuous leave is broken.
>
> Absences of more than 180 days in a 12-month period before the date of application (in all categories) will mean the continuous period has been broken. However, you may consider the grant of indefinite leave to remain (ILR) outside the rules if the applicant provides evidence to show the excessive absence was due to serious or compelling reasons.
>
> The applicant must provide evidence in the form of a letter which sets out full details of the compelling reason for the absence and supporting documents.
>
> Serious or compelling reasons will vary but can include:
>
> - serious illness of the applicant or a close relative
>
> …"

The Secretary of State's decisions

20. The operative parts of the decision letter of 22 March 2018 were as follows.

21. Having set out the relevant dates when the First Applicant was outside the UK the letter continued:

> "You are absent from the United Kingdom for a total of 313 days during the qualifying period of 5 years for Indefinite Leave to Remain which is the period 19 September 2010 to 18 September 2015 and for more than 180 days in one 12-month period as shown above.
>
> Between the period of 19 September 2010 and 18 September 2011 you had 194 days absence from the United Kingdom from 14 October 2010

> to 21 March 2011 and from 5 August 2011 to 12 September 2011. This is more than the 180 days permitted therefore you are deemed to have broken your continuous period ass outlined in Paragraph 245AAA(a).
>
> Consequently you have not spent a continuous period of 5 years in the United Kingdom as specified in paragraph 245CD(c) and (d)."

22. The Secretary of State then turned to whether the First Applicant qualified for ILR outside the Immigration Rules as an exceptional case, and concluded that she did not. The letter said:

> "You have stated in your application form dated 15 September 2015 that your absence from the United Kingdom was due to maternity and treatment for my polycystic ovarian disease (*sic*).
>
> In addition the letter provided with your application dated 18 September 2015 providing an explanation for your absences states:
>
>> 'Having left for India for medical treatment on the 14 October 2010, I was diagnosed with my polycystic ovarian disease (PCOD) with bleeding on the 23rd Oct 2010, and was receiving treatment for regulation for my periods and remained under observation until 19th of Mar 2011 and advised by my doctor to take time off work, get bed rest and avoid all travel for a period of not less than three months. At the end of that time, having recovered sufficiently I returned to the UK on the 21st of Mar 2011. Again I left for India to review for my PCOD treatment on 5th of Aug 2011 and from 10th of Aug 2011 to 10th Sep 2011 I went for regular check-up and l came back to the UK on 12th of Sep 2011.'
>
> To support this you have provided:
>
> 1. A medical certificate dated 9 December 2014 from Thomton Road Surgery.
>
> 2. A letter from Dr Umaparvathy, Consultant Obstetrician & Gynaecologist dated 21 March 2013
>
> We have carefully considered your claim about your health issues. It is noted that the letter from Dr Umaparvathy states that you were under her care from 23 October 2010 to 19 March 2011 and that you came for a review on 10 August 2011 and had treatment until 10 September 2011.
>
> You have failed to provide documentary evidence to support your claims that you were advised to take time off work and have bed rest for a minimum of three months.

> Furthermore you have provided no evidence to show that you were unfit to travel. In addition it is also noted that treatment for PCOD is available in the United Kingdom and no evidence has been provided to confirm why you were required to return to India from 5 August 2011 to 12 September 2011 for a review when treatment is available in the United Kingdom.
>
> Consequently in view of the fact that this is not compassionate or compelling the Secretary of State is not satisfied that your circumstances are such that discretion should be exercised outside the Immigration Rules."

23. Following this refusal, the First Applicant made representations to the Secretary of State in support of an application for Administrative Review. This set out factual information provided by the First Applicant in her interview with the case worker. The representations expressly said that the information was not new.

24. The decision was upheld on 1 May 2018 in the following terms:

> "Thank you for your application of 5 April 2018 for a review of the decision to refuse your application for lndefinite Leave to Remain as a Tier 1 (General) Migrant
>
> We have carefully considered the points that you raised in the administrative review application. We have maintained the original decision for the reasons given below.
>
> **Claimed you failed to tell the Home Office something relevant to your application**
>
> You claim that the decision to refuse your application was incorrect because it failed to take account of information which you failed to tell the Home Office (*sic*).
>
> However, your application was considered and decided on the basis of the evidence and information submitted and confirmed before the date on which the application was decided. We will not consider new evidence or information when reviewing the decision that was provided after that decision has been taken, unless it meets the requirements specified in paragraph AR2 .4 of Appendix AR of the Immigration Rules. It is your responsibility to ensure that all appropriate evidence and information is submitted with the application for leave to remain.
>
> You applied for indefinite leave to remain as a Tier 1 (General) Migrant and the application was therefore assessed under Part 6. As stated in the original refusal decision letter, you failed to satisfy paragraphs 245AAA and 245CD of the Immigration Rules as you do not meet requirements of 245CD(c) and (d) with reference to paragraph 245AAA(a). Therefore, we have maintained the original decision.

You state within your administrative review that you suffered from post-partem bleeding when your son was born. You stated your mother came to assist you, however shortly after the birth of your son your grandfather passed away and your mother returned to India. You state that you were extremely weak due to severe bleeding and therefore, your only solution was to return to India with your mother when your son obtained his passport. You state that when you were in India you decided to consult a famous genealogist (sic), Dr Umpaparvathy and you were diagnosed with polycystic ovarian disease (PCOD). Following your diagnosis you claim Dr Umpaparvathy suggested to carry out the treatment and as you were already on maternity leave you accepted. You claim you were advised by oral communication that you were not in a position to travel and needed to take a complete rest. You state you have a medical certification to prove that you were in treatment. Your advise that your treatment took longer than expected which resulted in complications with your son's visa documents and as your maternity leave was due to come to an end you returned to the UK to prepare the appropriate documentation. You state that you were required to return to India to receive further treatment as you did not want to see another doctor in the UK and starting from scratch as your health is important to you, however, you assert that you took these days paid annual leave.

You argue that we are unable to assess the seriousness of the medical issues you have faced. You state the seriousness of PCOD differs from person to person in which you experienced the highest severity of this condition and you state this will not be shown on any formal medical certificate. You have provided your NHS number for reference to enable verification that you are under a UK GP regarding this medical condition. Furthermore, you state that you have provided evidence from your GP in 2014 which states the your required to take off two days monthly from work. In light of the above, you request that due to your serious and compelling circumstances rased within your application, the decision to refuse your application to be reconsidered.

Careful consideration to be given to the points you raised within your administrative review. However, whilst it is accepted that you provided medical evidence to establish that you were receiving treatment in India, you have failed to provide evidence to establish that you were unable to travel and were required to bed rest for minimum of 3 months, whilst you claim this was advised orally, it is considered that the onus is on the applicant to provide evidence in support of their application regarding their absence in excess of 180 days within a 12 month period. Furthermore, whilst you claim that you did not want to see a doctor in the UK once you already started treatment in India, as this treatment is available in the UK it is considered that the original caseworker was correct in their assessment of your application, as it is

> considered from the evidence you have provided in the support of your application does not establish your absences from the UK for over 180 days within a 12 month period, were due to compassionate and compelling circumstances.
>
> In light of the above, the decision to refuse your application for indefinite leave to remain as a Tier 1 (Gen) migrant, is maintained."

Submissions of the parties

25. The Applicant submits that the decision of the Secretary of State as contained in the letter of 22 March 2018 and the Administrative Review should be quashed because:

    a. The Secretary of State had a residual discretion to apply the more generous provisions in the post-11 January 2018 version of para 245AAA which he did not consider exercising in her favour (and had he done so, she would have qualified for continuous residence in the UK). She relies on *R(Shaikh) v Secretary of State for the Home Department* [2014] EWHC 2586 (Admin) in support of the existence of such a discretion. She also submits that such a discretion was created by the policy which came into force on 11 January 2018 which addressed the circumstances in which the provisions of the new para 245AAA(d) (Ground 1).

    b. On the information provided by the First Applicant, the Secretary of State should have exercised his discretion to grant her ILR outside the Rules on the grounds that there were serious and compelling grounds for her absence from the UK in excess of 180 days (Ground 2).

    c. The Secretary of State acted in a manner that was procedurally unfair in that, whilst he sought further information in February 2018 (which the First Applicant supplied) he did not engage with her concerning her medical history as set out at her interview or ask for documentary support for what had been advanced by way of explanation (Ground 3).

    d. There was a failure to carry out a lawful assessment of the First Applicant's son's best interests under s 55, Borders, Citizenship and Immigration Act 2009 (Ground 4).

26. In response the Secretary of State submits that:

    a. The Immigration Rules were correctly applied. The relevant version of para 245AAA which applied in the First Applicant's case was that in force on 10 January 2018 and the beneficial changes which came into force on 11 January 2018 did not apply to her application, as HC 309 expressly provided. There is no such general discretion as contended for by the First Applicant, did the policy which came into force on 11 January 2018 in line with the amendments to the Rules in that day create a discretion in the Secretary of State to apply the more generous version of para 245AAA.

    b. The Secretary of State's decision to refuse to grant ILR outside of the rules on the grounds that the material put forward by the First Applicant did not amount to serious and compelling grounds was one that was open to him.

    c. There had been no procedural unfairness having regard to the nature of the operation of the points-based system in the Immigration Rules.

d. The Secretary of State had been entitled on the facts to conclude that the need to maintain the integrity of immigration control outweighed any possible effects on the First Applicant's children that might result from her and her husband and the family unit outside the UK.

Discussion

Ground 1

27. I have come to the clear conclusion that this ground of challenge is without merit. The December 2017 Statement of Changes in Immigration Rules (HC 309) explicitly provided that the version of para 245AAA which applied in relation to the First Applicant, given the date of her application, was that in force on 10 January 2018, and thus that the more generous version of para 245AAA (flexible might be a better description) which came into force on 11 January 2018 had no application in her case. It is common ground that if that is indeed the case, then the First Applicant failed to qualify under the Rules for ILR because of her 194-day absence from the UK in the year 19 September 2010 – 18 September 2011.

28. Counsel for the Secretary of State accepted that the letter of 22 March 2018 wrongly quoted (in part) the 11 January 2018 version of para 245AAA, however in my judgment that error did not undermine the Secretary of State's decision. Notwithstanding that error, it is plain that the Secretary of State had well in mind that the relevant period was five years ending with the date of the application, and no other period and he correctly determined that there had been an absence during a 12 month period during that time of more than 180 days.

29. The case of *R(Shaikh) v Secretary of State for the Home Department*, supra, does not support the proposition that the Secretary of State has a free-standing discretion to consider an application for ILR outside the Rules and published policies, the exercise of which must be considered in every case, to apply a more flexible version of a paragraph in the Rules – more flexible because of an amendment to the paragraph as compared to an earlier version - to an application for ILR, notwithstanding that the Rules expressly provide that the more flexible provision should not apply because the application for ILR was made before it came into force. Indeed, the existence of such a general discretion would render otiose the carefully delineated transitional provisions contained in the Rules.

30. The residual and rare nature of the discretion identified in *Shaikh* is apparent from [25], where the judge said (quoting earlier authority) that the discretion '… is not to be considered every time an application is to be made, and that the cases in which it should be considered and exercised are bound to be rare' and that ' … it is a discretion that is likely to be sparingly exercised'. It is also clear that the decision in *Shaikh* turned on its own facts, as the judge said at [35]: '… this is a case on its own particular facts taking into account all of the circumstance.' The facts of *Shaikh* were indeed unusual and striking in that the applicant had neglected to sign his application form and this error could have easily been remedied. It was not through culpability on the part of the Secretary of State, and the applicant had, to an extent, been misled. The judge, in support of his conclusion that the Secretary of State should have considered the application under a discretion outside the Rules and allied policies, quoted with approval the judgment of Sullivan J in *Forrester v Secretary of State for the Home Department* [2008] EWHC 2307 (Admin), [16], to the effect that not to have done so produced a result which was '… thoroughly unreasonable and disproportionate, inflexible

…without the slightest regard for the facts of the case, or indeed elementary common sense and humanity.'

31. There are no such special facts in this case. The First Applicant did not qualify for ILR under the rules because of her 194 days outside the UK in 2010/2011. The remedy against injustice in her case was the exceptional discretion provided under the relevant published policy for the Secretary of State to grant ILR where the absence was for serious and compelling reasons. There is no scope in this case for the exercise of any further residual discretion and the Secretary of State did not err in failing to do so (and in particular because he was never asked to do so).

32. Nor does the policy which came into force on 11 January 2018 avail the First Applicant. That policy came into effect so as to aid case workers in the application going forward of the new provisions in the Rules which came into force on 11 January 2018. It did not and could not create a discretion or duty in the Secretary of State to consider applying the new version of para 245AAA in the First Applicant's case when the Rules provided that it would not apply in her case. The policy, like the new version of that paragraph, simply did not apply to her.

33. This ground of challenge therefore fails.

Grounds 2 and 3

34. Both of these grounds concern the Secretary of State's refusal to grant ILR outside the Rules on the grounds of exceptional circumstances. At the conclusion of the hearing I was satisfied that the Secretary of State's decision was unlawful and could not be sustained and it was for that reason that I announced that his decision would be quashed for reasons to be given later.

35. A number of things are clear in relation to the First Applicant's case as made to the Secretary of State that she should be granted ILR outside the Rules on the grounds of exceptionality: (a) she gave a detailed account of events and the reasons for her seeking treatment in India to the caseworker at her interview when she applied for ILR; (b) she submitted medical and other evidence in support of her case; (c) the Secretary of State twice made adverse decisions which were later withdrawn following the threat or issuing of judicial proceedings; (d) in February 2018 the Secretary of State sought further information from the First Applicant; (e) the exceptionality claim was refused primarily on the basis that the First Applicant had not supplied documentary evidence to support the oral factual account which she had given to the case worker; (f) at no stage had the Secretary of State indicated that that account was not accepted or that it should be further evidenced by written material.

36. These matters, taken together, persuaded me that the Secretary of State's treatment of the First Applicant had been procedurally unfair so that his decision to refuse ILR cannot stand. The decision letter of 22 March 2018 and the Administrative Review decision of 1 May 2018 both amount, in substance, to a rejection as untrue of the First Applicant's case as she had put it forward to the case worker at her interview. It seems to me, therefore, that the following passage of the judgment of Laws J (as he then was) in *R v London Borough of Hackney ex parte Decordova* (1995) 27 HLR 108 is directly in point. The judge said:

> "In my judgment where an authority lock, stock and barrel is minded to disbelieve an account given by an applicant for housing where the

> circumstances described in the account are critical to the issue whether the authority ought to offer her accommodation in a particular area, they are bound to put to the applicant in an interview, or by some appropriate means, the matters that concern them. This must now surely be elementary law in relation to the function of decision-makers in relation to subject matter of this kind. It applies in the law of immigration, and generally where public authorities have to make decisions which affect the rights of individual persons. If the authority is minded to make an adverse decision because it does not believe the account given by the applicant, it has to give the applicant an opportunity to deal with it."

37. In the present case by early 2018 the Secretary of State had had the First Applicant's account of her medical treatment in India, and her explanation for her absence there, for some two and a half years. There had been much communication between the First Applicant and her solicitors and the Secretary of State in the course of the decision-making process which, as I have said, involved two abortive adverse decisions. Then, in 2018, the Secretary of State sought further information from the First Applicant about financial matters but never once raised any issue about the medical aspects of her case. Because he refused the application for ILR on exceptionality grounds on the basis that the First Applicant had not substantiated her account – and he therefore did not accept it as true – fairness demanded that the Secretary of State should have put the matters of concern squarely to the First Applicant so that she could deal with them. His failure to do so vitiates the lawfulness of his decision.

38. There are other points which can be made as to why the decision should be quashed. These include: that the wrong test for exceptionality was quoted in the 22 March 2018 letter, which referred to the test as being 'compassionate or compelling' when, as I have set out, the basis for being granted ILR outside the rules is that the absence for more than 180 days was for 'serious or compelling' reasons. Also, the Administrative Review said:

> "You claim that the decision to refuse your application was incorrect because it failed to take account of information which you failed to tell the Home Office (*sic*).
>
> However, your application was considered and decided on the basis of the evidence and information submitted and confirmed before the date on which the application was decided. We will not consider new evidence information when reviewing the decision that was provided after that decision has been taken …"

39. The first sentence of this passage makes no sense and it is not clear (to me at least) what the Secretary of State was trying to say. The second paragraph was irrelevant because, as the First Applicant's representations made clear, what she was setting out in them was information that had been provided to the case worker in 2015 and was not new information.

40. For these reasons, I quashed the Secretary of State's decision in respect of the First Applicant.

Ground 4

41. In these circumstances, I need not say anything about this ground of challenge.

Conclusion

42. For these reasons, the decision of the Secretary of State refusing the First Applicant ILR is quashed. It follows that the refusal of ILR for the Second Applicant must also be quashed.

Mr Justice Julian Knowles