Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: UI-2022-002730
HU/51895/2021; IA/06382/2021

THE IMMIGRATION ACTS

Heard at Field House
On 11th October 2022

Decision & Reasons Promulgated
On 4th December 2022

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR ASGHAR ALI SHAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Mustafa, instructed by Synthesis Chambers Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Manuell (the judge) on the basis that there were material errors in his decision. The appellant appealed the refusal of the respondent dated 1st October 2020 under paragraph 276ADE(1)(iii) and (vi) of the Immigration Rules and Article 8 (on human rights grounds).

2. The appellant submitted that the evidence provided established that the appellant had lived in the UK for over twenty years and that leave should be granted under paragraph 276ADE(iii). He relied on his witness

© CROWN COPYRIGHT 2022

statement and the witness statements of Mr Muhammad Riaz Bhatti, Mr Jamsheed Ahmad and Mr Muhammad Imran Zaheer. All supporting witnesses were British and were men of good character. They attended the hearing and gave oral evidence. All confirmed that they had known the appellant for over twenty years while living in the UK. Their evidence should, in effect, have been accepted.

Ground 1: The judge had failed to take into account relevant evidence

3. The judge determined that the appellant had not lived in the UK for over twenty years. He noted at [6] to [20] that all three supporting witnesses claimed that they had known the appellant over twenty years. The judge stated that the witness statements were brief and uninformative and that the witnesses had made foolish generalisations, but the judge failed to record the oral evidence of Mr Bhatti correctly. Mr Bhatti had told the Tribunal in oral evidence that he specifically recalled meeting the appellant in 2000 as they met at the time the Lahori Nihari Restaurant which opened in their area in East London in 2000. He further explained how he remembered first meeting the appellant in 2000 as he was running a mobile phone shop at that time. He ran the shop from 1997 to 2003. The judge incorrectly recorded Mr Bhatti’s evidence that his mobile shop opened in 2000 but failed to record Mr Bhatti’s evidence that he remembered first meeting the appellant during the time and that he ran a mobile shop and referred to the opening of the Lahori Nihari Restaurant in 2000. Mr Bhatti did not on any reasonable analysis provide evidence that was vague. His evidence was not, as found by the judge, made up of foolish generalisations. In closing submissions, the point was specifically made on behalf of the appellant that Mr Bhatti being able to tie his first meeting with the appellant to 2000 with the opening of the restaurant and the period in which he ran the mobile phone shop from 1997 to 2003 and this was credible evidence, to be taken into account. The judge failed to acknowledge this evidence, let alone put any weight on it, rather misrecording the evidence of this witness.

4. The judge further failed to place any weight on the consistency of Mr Bhatti’s evidence with the evidence of Mr Zaheer. Mr Zaheer confirmed that he is the owner of the Lahori Nihari Restaurant and that his restaurant did indeed open in 2000 as stated by Mr Bhatti and the appellant. No credit was given by the judge for the consistency of the account by both witnesses.

5. The judge further failed to note that Mr Bhatti was cross-examined by the respondent’s Counsel as to whether he had even given evidence to the Tribunal before to assist an appellant seeking leave to remain and Mr Bhatti in order to explore the credibility of his evidence. Mr Bhatti confirmed that he had never attended the Tribunal as a supporting witness before.

6. Again, the judge should fairly have noted this in the evidence. In determining the veracity of his evidence. Mr Bhatti was not a witness for

hire but had given sworn, uncontradicted evidence that he had known the appellant since 2000. The judge had found Mr Bhatti to be a dishonest witness without any justification.

7. Mr Bhatti had explained in oral evidence that he had not been able to attend as a witness at the appellant's previous hearing in 2014 as he had been in Pakistan. Mr Bhatti explained in oral evidence that he had been in Pakistan for two to three months at that time and that his current British passport would not bear the stamp from his travel in Pakistan as his current passport had been issued after 2014.

8. The judge again failed to record the reason why Mr Bhatti would not be able to provide proof of his travel in 2014 when dismissing his evidence at [27] as incredible and in short, a nonsense. The failure by the judge to consider the evidence with care in favour of such broad, intemperate conclusions constituted a material error.

9. Likewise the outright dismissal of the written and oral evidence of Mr Ahmed and Mr Zaheer constituted a material error. The judge concluded at [27] that no weight was to be provided to their evidence and that the strong impression was created that a story had been fabricated to support the appellant, an allegation which was a very serious matter.

10. As noted, Mr Ahmed and Mr Zaheer are British citizens of the utmost good character. They both provided oral evidence, consistent with their filed evidence that they have known the appellant since 2001. Mr Zaheer's evidence that his restaurant opened in 2000 was consistent with Mr Bhatti's evidence of meeting the appellant in 2000 on the opening of the restaurant. Mr Ahmed maintained in evidence that he and the appellant first met in the local mosque. There was nothing incredible or indicative of dishonesty in any of the witnesses' evidence and indeed neither the respondent's Counsel nor the judge put to the appellant or the witnesses that they were being dishonest. As to the judge's finding that Mr Zaheer's reason for not attending the Tribunal in 2014 was incredible and in short, a nonsense, the judge failed to explain why Mr Zaheer's explanation of being unable to attend previously due to business commitments was incredible and a nonsense given the accepted evidence that Mr Zaheer has been the owner of a busy restaurant since 2000.

11. Mr Zaheer further explained that he had been unable to give evidence previously as he had been in Iraq. The appellant had also stated in oral evidence, in a controlled environment, that Mr Ahmed had been in Iraq at the time of the earlier appeal. The evidence was again consistent, and the judge should not have found that the appellant's witnesses were fabricating evidence.

Ground 2: There was a failure to properly consider **Devaseelan**

12. At [26] the judge found that no cogent evidence had been produced at the 2020 (sic) hearing to cast doubt on Judge Kamara's findings and no cogent

reasons given for the absence of the appellant's witnesses at the 2014 hearing. For the reasons given, see above, the consistent, credible, truthful evidence of all three supporting witnesses as to how long they had known the appellant had lived in the UK was cogent evidence and was merely dismissed by the judge without appropriate scrutiny.

13. It was specifically submitted on behalf of the appellant that new facts had been brought to light which had not been considered by the Tribunal in 2014, namely the relationship between the appellant and three witnesses over the course of twenty years while in the UK and thus the earlier determination could be legitimately revisited.

14. The judge's failure to consider the extent to which the Tribunal could revisit the earlier determination as invited to do so also constituted a material error of law. A careful application of **Devaseelan v SSHD** [2002] UKIAT 00702 would have justified the granting of this appeal on proper consideration of the evidence.

The Hearing

15. Mr Mustafa submitted that between the witnesses there was no inconsistency and they had separately confirmed the existence of the appellant in the UK in 2001. The judge recorded at [9] that the appellant had given evidence that he had not asked the witnesses for witness statements for the hearing before Judge Kamara in 2014. Mr Bhatti had confirmed that he was in Pakistan for two to three months in 2014 and Mr Ahmed had confirmed that he had been in Iraq. That was a good reason in accordance with **Devaseelan** for their absence in 2014 from the court hearing. They were not in the UK. The judge did not ask why they were unable to provide evidence. The judge had given inadequate reasoning for finding that the witnesses' evidence was not accepted.

16. In sum, the grounds set out the complaint and the judge should have attached different weight to the evidence of the witnesses and thus the matter would have been decided differently.

17. By contrast, Mr Clarke submitted that the grounds were nothing more than a disagreement. The judge took into account the witness evidence and the appellant simply did not like the approach. I was reminded that this was the appellant's "third bite of the cherry" and it could be seen that the judge did comply with the guidance in **Devaseelan v Secretary of State for the Home Department [2002] UKIAT 00702**. The judge addressed the evidence head on at [26].

18. There was no credible evidence that the witnesses were abroad at the requisite time, and they were simply assertions without supporting evidence that the two witnesses were not in the UK. There was no application in 2014 for the production of the witnesses or for an adjournment and they were professionally represented. I was referred to [20] and [21] of **TK (Burundi) v Secretary of State for the Home**

Department [2009] EWCA Civ 40. There was no evidence that the witnesses were not in the country. There was no evidence of travel, no evidence from other witnesses that they were not in the country. This evidence would have been probative in 2014 and there was a complete failure to provide such evidence. There was no attempt to get the evidence and in the light of the direction of **Devaseelan** to afford circumspection to evidence which could have been before the Tribunal but was not. It was difficult to see how the judge had erred.

19. Mr Clarke submitted that it should be remembered that there were very significant adverse credibility findings made against the appellant in 2014 and criticism made of the surrounding documentation; that was clear from [15] and [16] of Judge Kamara's decision. Not least, the appellant had entered a tenancy agreement fixed for twelve years on the same day he was supposed to have arrived in the United Kingdom and then a purported to sign a second tenancy agreement when one was clearly not needed. Nothing about that was addressed in the witness statement or the adverse findings made about witnesses who had apparently altered their statements ([20] of Judge Kamara's decision).

20. The assertion that the judge had given the wrong date of the opening of the shop did not assist the appellant. The judge made a series of findings which were open to him and the references within the witness statements to the effect that the appellant was honest and hardworking when he was previously found to be incredible, and he was not allowed to work did not undermine the decision of the judge and weight given to the evidence was clearly a matter for him.

21. In response, Mr S Mustafa confirmed that the evidence was not available to the appellant in 2014 as the witnesses were not in the UK.

Analysis

22. As can be seen from Judge Manuell's decision at [25], Judge Kamara's findings are the Tribunal's starting point. She found that the appellant had begun residing in the United Kingdom shortly before his first application to the Home Office which was made in September 2007. She noted that the appellant admitted that his wife and children were residing in his father's house in Pakistan and that he had regular contact with them. Judge Kamara gave no weight to the tenancy agreements produced by the appellant to show his length of residence nor to the evidence of his only witness, Mr Raja Asgar Ali. Judge Kamara recorded that the appellant maintained he arrived in the United Kingdom in November 1998, but she assessed the documentary evidence put forward by him and comprehensively rejected the tenancy agreements said to be signed in November 1998 fixed for nearly fourteen years at a fixed rent and which was undermined by a further tenancy agreement said to be signed in November 2008. As she considered, the supporting letters were all "short on detail" and several of them amounted to "templates with blank spaces to be completed in pen in relation to the name of the subject and length of

the residency". The Mr Raja's witness evidence altered mid-sentence as to whether the appellant was a friend of his or a friend of a friend.

23. In sum, Judge Kamara found the appellant had not established the requisite fifteen years' continuous residence in the United Kingdom. She found his evidence implausible and gave no weight, for legitimate reasons, to the documentation and witness evidence provided. It was noted by Judge Manuell that the previous decision of Judge Kamara was the starting point, and it is important to be reminded of the essential principles set out in **Devaseelan** as follows:

> *"40. We now pass to matters that could have been before the first Adjudicator but were not.*
>
> *4)* ***Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection.*** *An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should* ***not usually*** *lead to any reconsideration of the conclusions reached by the first Adjudicator.*
>
> *(5)* ***Evidence of other facts - for example country evidence may not suffer from the same concerns as to credibility, but should be treated with caution.*** *The reason is different from that in (4). Evidence dating from before the determination of the first Adjudicator might well have been relevant if it had been tendered to him: but it was not, and he made his determination without it. The situation in the Appellant's own country at the time of that determination is very unlikely to be relevant in deciding whether the Appellant's removal at the time of the second Adjudicator's determination would breach his human rights. Those representing the Appellant would be better advised to assemble up-to-date evidence than to rely on material that is (ex hypothesi) now rather dated.*
>
> *41. The final major category of case is where the Appellant claims that his removal would breach Article 3 for the same reason that he claimed to be a refugee.*

> *(6)* ***If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator,*** *and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time,* ***the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and <u>make his findings in line with that determination</u>*** *rather than allowing the matter to be re-litigated. We draw attention to the phrase 'the same evidence as that available to the Appellant' at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion."*

24. It was quite clear that the witnesses for the appellant maintained that they had known him since the year 2000. They neither attended the court in 2014 nor gave a witness statement. The appellant's explanation at [9] as the judge recorded was that

> *"he could not produce evidence that the witnesses present today had been in Pakistan or Iraq in 2014. He was not sure of the travel timings. He had not asked any of them for witness statements".*

25. As the judge correctly noted at [24], the appellant provided "*no independent documentary evidence of any matter in issue. He has persisted in repeating claims that have been determined against him*".

26. The key findings were made at [26] and [27] of Judge Manuell's decision:

> *"26. No cogent evidence was produced at the 2020 hearing to cast any doubt on those [Judge Kamara's] findings. There was no cogent evidence placed before the tribunal to show that any of the Appellant's witnesses present at his hearing on 6 May 2022 were unable to attend the hearing on 4 February 2014. There was no credible evidence that any such witness was abroad, whether in Pakistan, Iraq or elsewhere. There was no evidence to explain why, if any such witness had been abroad, witness statements had not been provided for him or them. Nor was there any evidence to show that any adjournment had been sought to enable any of the witnesses to attend the hearing. The*

tribunal notes that the Appellant was represented by experienced specialist counsel in 2014.

27. The witness statements produced for each of the witnesses were brief and singularly uninformative. They made foolish generalisations, such as that the Appellant was 'honest and hardworking.' The Appellant had already been found to be dishonest and of course has never had permission to work in the United Kingdom. There were no supporting documents of any kind, despite the obvious need for corroboration. Under cross examination no new illumination of the facts emerged. The witnesses' answers about when and how they claimed to have met the Appellant were vague at best. Their alleged reasons for being unable to give evidence in 2014 were incredible and in short a nonsense. The tribunal is unable to give any weight to the claims advanced by any of the witnesses called by the Appellant. The strong impression was created that a story had been fabricated to support the Appellant. That, of course, is a very serious matter indeed."

27. In essence, on the reasoning given, it was open to the judge to conclude that there was no cogent evidence before the Tribunal to show that the witnesses could not attend the court in 2014 or that they were even abroad. In particular, there was no evidence to explain why, if they had been abroad no witness statements had been provided in 2014. As set out in **Devaseelan** above, facts which were personal to the appellant that were not brought to the attention of the first Adjudicator, although relevant, should be treated with the greatest circumspection. That is precisely what the judge did. As **Devaseelan** states, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator. In accordance with [41] of **Devaseelan**, if the appellant relies on facts that are not materially different and adduces what is in essence the same evidence the Adjudicator should regard the issues as settled by the first Adjudicator's determination. That said Devaseelan offered this caveat:

"42. We offer two further comments, which are not less important than what precedes then.

> *(7)* ***The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him. …****"*

28. There was no very good reason produced, for the appellant's failure to adduce evidence before the 2014 Tribunal and the judge from his findings was crystal-clear about that. As the judge states at [26], there was no evidence as to why witness statements had not been provided previously if the witnesses had been abroad and no independent documentary

evidence to show the witnesses had been abroad, nor was there any evidence to show an adjournment had been sought to enable any of the witnesses to attend the hearing despite the fact that the appellant was represented by experienced specialist Counsel in 2014.

29. The findings at [27] by the judge should be seen against the context as explained above. It was open to the judge to find that the witness statements produced for each of the witnesses were brief and singularly uninformative. It was quite right that despite the repeated generalisations that the appellant was honest and hardworking, (and here I ignore the word “foolish” as adding little to the import of the statement that they were generalisations) adverse credibility findings had previously been made against the appellant. As the judge identified, the appellant had already been found to be dishonest and had never had permission to work in the United Kingdom.

30. The misstating of when the restaurant was opened does nothing to assist the appellant against the overall background as the judge cogently found described it. Indeed it was not just one but all three witnesses who had failed to produce witness statements in 2014 and neither of the witnesses said to be abroad, had produced objective evidence to that effect. As such the judge was entitled in the face of ‘no supporting documents of any kind’ to state at [27] that, “their alleged reasons for being unable to give evidence in 2014 were incredible and in short a nonsense”. The judge was entitled, as he did, to take into account his view that the witnesses’ explanations for failure to produce documentation were not credible when evaluating the appellant’s claim, see [16] of **TK (Burundi) v Secretary of State for the Home Department** **[2009] EWCA Civ 40**. As stated, the failure to provide and explanation for the absence of documentation ‘*may be a factor of considerable weight in relation to credibility where there are doubts about the credibility of a party for other reasons’*. That is the case here. The appellant’s assertions have *previously* been found to be lacking in plausibility. Mere disagreement about the weight to be accorded to the evidence, which is a matter for the judge, should not be characterised as an error of law, **Herrera v SSHD [2018] EWCA Civ 412.**

31. It was thus open to the judge to reject the evidence on the basis that there was no credible evidence that either witness was abroad or why witnesses’ statements had not been provided. There was no failure to take into account relevant evidence. The judge clearly dealt with the witness evidence and any recording errors were not material. The judge does not state explicitly that the witnesses were dishonest, merely that a “strong impression was created that a story had been fabricated” but moreover, the judge gave no weight to the claims advanced by the witnesses called by the appellant.

32. For the reasons given above, it is not accepted that the judge failed properly to apply [37] to [42] of **Devaseelan**. He was fully aware that the Tribunal retained the power to revisit a case in relevant circumstances but

was aware of his duty to make findings in line with the first determination rather than allowing the matter simply to be relitigated. In effect, there was no “very good reason why the appellant’s failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him” as per [42(7)] of **Devaseelan**.

33. Neither ground of appeal has any traction, and neither is sustainable. I dismiss the challenge and the decision of First-tier Tribunal Judge Manuell shall stand; the appellant’s appeal remains dismissed.

Notice of Decision

The appeal remains dismissed.

No anonymity direction is made.

Signed Helen Rimington Date 31st October 2022

Upper Tribunal Judge Rimington