Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03428/2019

THE IMMIGRATION ACTS

Heard at Birmingham Justice Centre, Priory Court	**Decision & Reasons Promulgated**
On 5th February 2020	**On 2nd March 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR BALJIT SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N. Ahmed (Counsel)
For the Respondent: Mr C. Howells (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Obhi, promulgated on 23rd July 2019, following a hearing at Birmingham Priory Court on 5th July 2019. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of India, and was born on 15th December 1974, and is a male. He appealed against the decision of the Respondent dated 21st November 2018 refusing his application for leave to remain in the United Kingdom under Appendix FM at paragraph 276ADE of the Immigration Rules, HC 395.

The Appellant's Claim

3. The Appellant's claim is that he has been in the United Kingdom since 26th March 1995. He had initially applied for asylum. This was refused. His appeal was unsuccessful. He is now in a relationship with a British national, Miss Narinder Kaur Kang, and they have known each other for nineteen years. They had been married in accordance with their religious custom. He has established a private and family life with his partner. He should be permitted to remain in the UK on the basis that he has been in this country for over twenty years. He also claims that there is an acceptance by the Respondent that he has indeed been in the UK for twenty years. However, he bases this simply on the fact that he entered the UK in 1995. The Respondent rejects the assertion that the Appellant has been in the UK for twenty years. Although he had entered the UK in 1995. He has not provided any evidence for the years from 1998 to 2008, that he was indeed resident in this country.

The Judge's Findings

4. The Tribunal's findings bellow were that the Appellant had not been in the UK for twenty years at the date of the application as required by paragraph 276ADE(1), and therefore had been unable to show that he had lived continuously in the UK for at least twenty years (paragraph 276ADE(1)(iii)). The judge held that although there had been a previous decision by Judge Holt which was promulgated on 10th December 2015, the judge there had not been asked to determine, as a question of fact, "whether the Appellant had resided in the UK for a continuous period of twenty years" (paragraph 20). The judge went on to further add that, "even if there had been a finding in relation to the point, that would have been a starting point" in the consideration of the evidence, "but it is not even a finding" (paragraph 21).

Grounds of Application

5. The grounds of application make the point that given that there was an earlier decision by Judge Holt in 2015 this meant that the rule in **Devaseelan [2002] UKIAT 702** applied. What this stated was that, whereas it was the case that a prior decision was a "starting point" a subsequent judge could take a different view but only, as is stated in paragraph 41(6), if the facts currently relied upon "are not materially different". The grounds state that the facts here were not materially different insofar as the determination of the question of the Appellant

having been in the UK for twenty years was concerned, because this question had actually been specifically determined by Judge Holt in the previous decision in 2015.

6. Permission to appeal was granted by the First-tier Tribunal on 10th October 2019 on the basis that it was arguable that there had been a misinterpretation of the previous decision of Judge Holt by the Tribunal of Judge Obhi.

Submissions

7. At the hearing before me on 5th February 2020, Mr Ahmed, appearing on behalf of the Appellant, submitted that it was important to recognise that at the time that Judge Holt promulgated her decision on 10th December 2015, what she was doing was looking at an application that had been made by the Appellant on the basis that he had been in the UK for fifteen years only. However, by the time that the decision was made by Judge Holt, she had firmly concluded that, *"The Appellant has certainly been physically present in the United Kingdom for over twenty years now ..."* (paragraph 22). However, following that decision the Appellant had then made, on the basis of his residence in the UK for twenty years, a further application for leave to remain on 14th February 2018. By that stage, he was making an application when he had already been in the UK for twenty years (as this had been so found by Judge Holt in 2015). The only remaining question was whether he had been continuously in the UK for twenty years, and the judge had found previously that he had been continuously in the UK for twenty years. The oddity in the determination by Judge Obhi lay in the fact that she did not make any reference at all to what the judge stated previously at paragraph 22, namely, that, "The Appellant has certainly been physically present in the United Kingdom for over twenty years now ..."

8. In his reply, Mr Howells submitted that, if one looks at the refusal letter (at page 66) it is clear that, the Secretary of State accepts on 21st November 2018, that the appellant entered the UK on 26th March 1995 (see paragraph 4). However, thereafter the Secretary of State's view is that "You have not provided evidence that you have been residing in the UK continuously from 1998 to 2008" (paragraph 29). It had been accepted by the authorities that the Appellant had indeed been in the UK from March 1995 to May 1989. Notably, from the period thereafter, it was not accepted that the Appellant had provided evidence to show that he was still in this country. Nevertheless, Mr Howells accepted that the judge's conclusion in the Tribunal of Judge Obhi, that the previous decision is one where "There is one sentence in the decision which states that the Appellant had only been in the UK for about fifteen years (paragraph 19 of the decision), but nowhere does the judge say that she accepts that, he has resided in the UK continuously for a period of twenty years ..." (paragraph 19), was incorrect. This is because Judge Holt had made it quite clear at paragraph 22 of her determination that the Appellant "Has

certainly been physically present in the United Kingdom for over twenty years now".

Error of Law

9. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law, such that it falls to be set aside. This is because, whereas the judge quotes from the determination of Judge Holt previously by drawing attention to paragraph 19, she neglects to refer to paragraph 22 of Judge Holt's determination where it is made quite clear that, "The Appellant has certainly been physically present in the United Kingdom for over twenty years now ..." That is a finding of a plain fact which on **Devaseelan** principles is one which is not materially different as a question, from that which was firmly determined as question of fact by a previous Tribunal under Judge Holt. Insofar as Judge Obhi states that, "Even if there had been a finding in relation to the point, that would have been a starting point of my consideration of the evidence, *but it is not even a finding*" (paragraph 21), that statement is incorrect. What **Devaseelan** makes clear (at paragraph 39(1)), is that the first judge's determination, "should always be the starting point", and this plainly is a determination of fact, and that this particular question is not one which it can be said is "materially different" (see paragraph 41(6)) from what has already been determined by Judge Holt. The rule in **Devaseelan**, accordingly, was wrongly applied.

Remaking the Decision

10. I have remade the decision on the basis of the findings of the previous judge, the evidence that I have heard today, and the decision of Judge Obhi. I am allowing this appeal because this is a case where, once it is accepted that the Appellant "has certainly been physically present in the United Kingdom for over twenty years now", that is application thereafter on 14th February 2018, was against the backdrop of that particular finding. That being so, paragraph 276ADE means that the Appellant "has lived continuously in the UK for at least twenty years", and that was the case "at the date of the application" such that his appeal falls to be allowed. For this reason I allow the appeal.

Notice of Decision

11. This appeal is allowed.

12. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 14th February 2020

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a Fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 14th February 2020