



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

Appeal Number: UI-2021-000746
First-tier Number: HU-50771-

2022

THE IMMIGRATION ACTS

**Heard at Edinburgh
On 29 June 2023**

**Decision Promulgated on
On 21st of November 2023**

Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN**

Between

MANDEEP LATHER

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J MacGregor KC, instructed by Drummond Miller Solicitors.

For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer.

DECISION AND REMITTAL

1. This appeal has a number of factual complications and uncertainties, to which both parties appear to have contributed.
2. The appellant is a national India, who claims to have entered the United Kingdom on 29 September 2019 with leave as a student. That leave was extended until September 2012. Before it expired, he applied for leave outside the rules, was refused and appealed and was then granted leave until 29 December 2013. Shortly after the expiry of that leave he applied for further leave to remain as a student, which was granted until 19 October 2015. During the course of that leave he applied for and was refused leave on human rights grounds. On 25 February 2016 he applied

for leave to remain on the basis of his family or private life. That was refused and all appeal rights were exhausted by 7 June 2019. On 11 June 2019 he applied for leave to remain as a spouse or partner. That application was refused on 3 March 2021. He appealed against that refusal to the First-tier Tribunal, where his appeal was heard by Judge Debra Clapham, who dismissed it. Applications for permission to appeal were refused by the First-tier Tribunal and by this Tribunal, but the latter decision was set aside by the Court of Session on the basis of a Joint Minute to dispose of judicial review proceedings. Permission to appeal to this Tribunal was subsequently granted on the basis of that Minute.

3. The following points appear to be common ground between the parties. First, the marriage between the appellant and his wife is genuine and subsisting. Secondly, the appellant's previous appeal was dismissed because the judge thought the appellant was not telling the truth both about his marriage and about his studies. Thirdly, the appellant cannot meet the requirements of the Rules for leave to remain as a partner, because he has no current leave.
4. In these circumstances, Judge Clapham had to consider whether the appellant could make his case outside the Rules. In making her decision, apparently, clearly on the basis of submissions made on behalf of the respondent, she referred to a need to demonstrate insurmountable obstacles, which she elaborated at paragraph [53] of her decision. In concluding that the removal of the appellant from the United Kingdom would not breach his, or anybody else's human rights, she set out a number of factors which she said counted against the appellant.
5. The grounds of appeal against her decision are, essentially, two-fold. The first is that the judge failed to take into account all material before her. In particular, she failed to take into account the appellant's claim that the only reason why he failed to meet the requirements of the Rules was that he was unable to make an application for a further extension of his leave because he was wrongfully detained at the time when such an application would have had to be made. The second ground is that "insurmountable obstacles" although appropriate to a decision under the Immigration Rules, is not the right test for considering an application that falls to be determined outside the Rules.
6. So far as concerns those two points, the appellant's position, which has been maintained for a number of years, appears to be based on a rather selective account of his immigration history and dealings with the Home Office. In the course of the latter, it appears that the Home Office has itself made statements and assumptions which cannot stand up to close examination. We do not know whether the Court of Session was also misled: but if it was, it was by the Joint Minute, to which both parties must have had input. At the hearing, we drew attention to a number of elements of the evidence that appeared to undermine the appellant's claim as to his leave history. We adjourned for Mr Mullen to make enquiries from the Home Office records, and to discuss the results of his enquiries with Mr MacGregor. When the hearing reconvened, Mr MacGregor told us that he did not rely on the ground relating to the claim

that the appellant had been unlawfully detained as a person without leave, or that that was the reason why he had not made an in-time application for leave.

7. So far as concerns the test expressed by the Secretary of State to the judge as the appropriate one, and applied by the judge, we accept that it was in its terms inappropriate, although it may be the case that there is little to choose between the application of such a test and the underlying question outside the Rules, which is whether the rights asserted by the appellant are such that he should be a person to whom the general structure of immigration control expressed through the immigration rules does not apply. There are, however, further difficulties, and it became clear in the course of the discussions between the parties to which we have referred, that there were a number of factors on both sides of the equation which had not been taken into account.
8. In these circumstances Mr Mullen told us that he thought that, for whatever reason, the determination of the First-tier Tribunal had not been as comprehensive as it needed to be and that the matter needed looking at again. Mr MacGregor was content with that position, as are we.
9. In the circumstances we set aside Judge Clapham's decision for error of law in the application of the incorrect test for article 8 outside the Rules. We remit the appeal to the First-tier Tribunal and direct that it be considered afresh.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 9 November 2023