**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: UI-2021-001105**
**(HU/07543/2020)**

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On the 25 November 2022**

**Decision & Reasons Promulgated**
**On the 23 January 2023**

**Before**

**THE HONOURABLE MR JUSTICE DOVE, PRESIDENT**
**MR C M G OCKELTON, VICE PRESIDENT**

**Between**

**ASLAM MUSA MUNSHI**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr G Brown, instructed by Highfields Solicitors.
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer.

**DECISION AND REASONS**

1. The appellant is a national of India who applied for entry clearance to the United Kingdom for settlement with his wife. He is outside the United Kingdom, partly or wholly because he is a person who has previously contravened immigration laws by overstaying and then absconding, although it is fair and important to say that his departure was at his own expense and not that of the state.

2. Following that departure, he has made two applications for entry clearance, each of which has been refused on the basis previously set out in paragraph 320(11) of the Immigration Rules that entry clearance should be refused where a person has previously contrived in a significant way to frustrate the immigration rules by overstaying a visa. Each of the refusals resulted in an appeal. The first appeal came before Judge Holmes who investigated the appellant's history in his previous presence in the United Kingdom and also his subsequent history leading up to his marriage to the sponsor settled in the United Kingdom. The previous immigration history was not the subject of any considerable dispute; it was accepted, and for the avoidance of doubt, also found by Judge Holmes, that the appellant had indeed overstayed, had then absconded for a considerable period of many months, had been tracked down and arrested and more or less on arrest had made an application for further leave, which it is clear, Judge Holmes regarded as spurious and itself an attempt to frustrate the process of removing him.

3. Judge Holmes also went into the matters leading up to the appellant's marriage and indeed up to the decision against which he appealed and concluded that the appellant, despite his vows of having reformed, had not been frank with his wife about his immigration history and about the prospects of their being allowed to live together in the United Kingdom.

4. Judge Holmes therefore dismissed the appeal. There was then a second application for entry clearance which was again refused on the grounds of paragraph 320(11) and there was an appeal which came before Judge Hillis.

5. Judge Hillis based himself, almost entirely, on what Judge Holmes had said. That was, in our judgment, a perfectly proper application of the Devaseelan guidelines. Judge Hillis went on to say that nothing had happened since then other than the passage of time which to an extent is also true. Judge Hillis then also considered again the appellant's conduct since his removal and on an appeal, which, it has to be emphasised, could succeed only on the ground that to continue to refuse the appellant entry clearance was disproportionate as an interference with his family life and his wife's, came to the conclusion that the appellant had not made his case as an outcome of the balancing process.

6. The grounds of appeal against Judge Hillis's decision are broadly speaking to the effect that Judge Hillis did not take sufficient account of the passage of time. Those grounds were formulated largely by reference to the immigration rules and the guidance as it then was, and have been the subject of discussion at the hearing before us by reference in addition to the reformulated immigration rules dealing with exclusion on the basis of previous breach of the immigration laws.

7. Because the grounds were formulated so clearly by reference to the Rules the Secretary of State has made a response which is in addition clearly by

reference to the Rules. The response makes certain concessions which we have commented on in the course of the hearing.

8. We have before us an application for withdrawal of a concession or for an adjournment with a view for withdrawal of a concession. We refuse that application for the reason that we propose to dispose of this appeal in a different way. We are persuaded by the arguments we have heard not that the judge misunderstood or misapplied the immigration rules to the extent that they were properly before him, but that the judge erred in failing to appreciate that the process of condonation might, if not have an impact on the immigration rules, nevertheless have an impact directly on the matter with which the judge was concerned, which is the proportionality of the interference with his private and family life. It appears to us that although what the judge said was absolutely accurate, that meant that he failed to take into account as he should have done that as time goes on a breach of the immigration laws which was, although serious, not at the highest level of possible seriousness, is one which in human rights terms, even if not precisely under the immigration rules, fell for consideration.

9. We do not offer any direct criticism of the judge's approach which we think may have been over-influenced by the position the parties took before him. We emphasise that in reaching a view that we do, we have not taken into account the terms of the Secretary of State's Rule 24 response or her skeleton argument which we appreciate were made possibly in the heat of the moment before the present hearing, and which clearly carry implications which the Secretary of State may well not have intended. Our decision is made not on the basis of anything said by the Secretary of State but only on the basis of the human rights ground advanced and formally for the purposes of this hearing in the Upper Tribunal, conceded by the Secretary of State.

10. What we will therefore do is that we will set aside Judge Hillis's decision for the error of law that we have identified. We will direct that the matter be reconsidered by the First-tier Tribunal, constituted without Judge Hillis or Judge Holmes.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 30 November 2022