IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002993
On appeal from: HU/52418/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 10th of October 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE KHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A C R
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Abigail Smith of Counsel, instructed by Danielle Cohen Immigration Lawyers
For the Respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

Heard at Field House on 25 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant has been granted anonymity, and is to be referred to in these proceedings by the initials A C R. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant.

Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant challenges the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision on 8 February 2023 to refuse to grant leave to remain on the basis of Articles 3 and 8 ECHR, by reference to paragraph 276ADE(1)(iv), (v) and (vi) of the Immigration Rules HC 395 (as amended).

2. The appellant is a citizen of the United States of America. She identifies as multi-racial, being of Chinese-Jewish heritage.

3. **Mode of hearing.** The hearing today took place face to face.

4. For the reasons set out in this decision, we have come to the conclusion that the appellant's appeal fails and the decision of the First-tier Tribunal is upheld.

Procedural matters

5. **Vulnerable appellant.** The appellant is a vulnerable person and is entitled to be treated appropriately, in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance. She was recognised as such before the First-tier Judge but no adjustments to the hearing below were requested save that the questions asked in cross-examination be short and clear, which was done.

Background

6. The appellant came to the UK age 49, on a Tier 2 Student visa, valid from 17 January 2019 to 31 May 2020. On 30 March 2020, her student leave was curtailed with 60 days' notice, to expire on 12 May 2020. By that time, the UK was in Covid-19 lockdown.

7. On 12 May 2020, the appellant made a private and family life claim which was refused on 9 April 2021. The claim was based on her being engaged to be married to a British citizen. The appellant had and exercised an in country right of appeal. She was appeal rights exhausted on 20 April 2022. She had lived in the UK for just over 3 years by then.

8. The main basis of the appellant's case is that by reason of her health issues, there would be a risk at the Article 3 ECHR level if she were to be returned to the United States, alternatively that she would face very significant obstacles to integration on return.

9. The appellant further asserted that she would be subject to discrimination by reason of her Chinese-Jewish heritage and that she had previously suffered harm in the United States for that reason.

Health issues

10. The appellant has a number of serious health conditions, primarily Ehlers-Danlos syndrome, but also hypermobility, chronic fatigue immune dysfunction syndrome with mast cell activation, reactive airway disease, tricuspid valve prolapse, pressure-induced urticaria, borderline high blood pressure, central serous choroidopathy, and multiple allergies, including to many medications. She has had a rhinoplasty. She has in the past had Lyme disease and peripheral neuropathy.

11. The appellant did receive treatment while living in the United States and receives state benefits from her country of origin. A letter from William R Heller DO in Aptos California, indicates that she was under his care from 2013-2018 for musculoskeletal and autoimmune diseases. A letter from Dr Victoria Hamman NMD, a licensed naturopathic medical doctor in San Francisco, written on March 21 2020, indicated that the appellant was nervous about flying back to the United States during Covid-19, and confirmed that she had been treating the appellant since 2001.

12. The appellant has also received treatment in the UK for her various ailments. It is not clear when Ehlers Danlos syndrome was diagnosed, whether in the United States or the UK.

First-tier Judge Howorth's decision ('the Howorth decision')

13. First-tier Judge Howorth dismissed the appellant's previous appeal in March 2022. The appellant did not appear or arrange representation at the hearing.

14. The Respondent was represented and Ms Morgan, who appeared for the Respondent, was unsure whether the appellant was still in the UK at the date of hearing.

15. Judge Howorth considered the evidence before him, setting out the appellant's ailments at [13], the Dr Lascar letter at [14], and the lack of any more recent medical evidence. The Covid-19 pandemic was winding down by March 2022.

16. The core of Judge Howorth's conclusions were in [15]-[18]:

> "15. There is no updated evidence before me of any medical opinion in respect of whether the Appellant would still be at risk given reduction in risk of the current prevalent COVID variant.
>
> 16. Most of the Appellant's medical conditions, she has lived with for many years prior to coming to the UK to study. I can therefore be confident that the Appellant can function with these conditions to a reasonable standard. The pandemic has obviously been difficult for persons that have pre-existing health conditions, however the risk posed to the Appellant currently is not evidenced before me.

> 17. The Appellant's conditions, as far as they are evidenced in no way meet the standard set out in *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 to amount to a breach of Article 3. Return of the Appellant would not mean she would face a risk of any decline in her health, as far as I am aware on the evidence before me.
>
> 18. In respect of Article 8, 117B requires I place weight on the public interest being in effective immigration control. The Appellant's relationship is one on which I have no evidence of its length, or the current circumstances, I cannot therefore factor this into an Article 8 assessment. I do place weight on the fact that the Appellant may face greater difficulties than a person of good health in returning to make an entry clearance application, but that does not outweigh the weight of the need for effective immigration control in the instant case. I therefore dismiss the Appellant's appeal."

First-tier Judge Russell's decision ('the Russell decision')

17. The appellant did not challenge the Howorth decision, either within or out of time. Instead, she made a further application on 28 March 2022, as a Family Member (Private Life). She again relied on the relationship with her claimed fiancé, who also has a number of medical conditions requiring management in the UK.

18. The Respondent was not satisfied that the family life relied upon was sufficient to outweigh the UK's right to control immigration. By this stage, and partly of course because of Covid-19, the appellant had been in the UK for over 5 years, most of it without leave.

19. The appellant appealed to the First-tier Tribunal. At the hearing, she was represented by Mr Azmi of Buckingham Legal Associates, and gave oral evidence remotely. She was treated as a vulnerable witness.

20. First-tier Judge Russell and the parties' representatives all agreed that the Howorth decision was the *Devaseelan* starting point.

21. Two other persons gave evidence, Ms Mary Goody and Mr James Wannerton. The Home Office Presenting Officer did not cross-examine either of them. Neither of them is medically qualified and the Judge did not place much weight on their evidence.

22. The Judge's assessment of the remaining medical evidence is at [21]-[23]. The Judge explained his reasons for not giving significant weight to the new medical evidence at [18] and [24]:

> "18. The Appellant has provided some further evidence in relation to her physical and mental health for this new appeal, however it is material upon which I can place little weight. …
>
> 24. Whilst I accept that the Appellant has significant health issues, she has not demonstrated substantial grounds for believing there would be a real risk her health would be exposed to serious, rapid and irreversible decline if returned to the USA. Her Article 3 claim fails."

23. At [25]-[[28], the First-tier Judge considered the 'very significant obstacles to reintegration' test, finding that the appellant's health and the problems arising from her ethnic origin did not meet that high standard. There was no international protection claim before the First-tier Tribunal.

24. At [29]-[35] the Judge considered whether there would be unjustifiably harsh consequences of removal such that leave to remain ought to have been granted outside the Rules. The private life relied upon was caught by s.117B(5) of part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended) and could be given little weight. In any event, there was no evidence of an extensive private life here: the appellant was not employed and could maintain the friendships she had made from the United States by modern means of communication.

25. Her medical conditions had been treated in the United States previously and this was not a factor which could tip the scales in the appellant's favour.

26. The First-tier Judge dismissed the appeal. The appellant appealed to the Upper Tribunal.

Permission to appeal

27. Ms Smith, who appears for the appellant today and settled the grounds of appeal, has the disadvantage of not having appeared below. Her submissions are prolix, but are helpfully summarised at [2] of the grounds of appeal:

> "2. The Judge made material errors of law in dismissing the appellant's human rights appeal in summary as follows:
>
> (a) In relation to the Article 3 assessment, the Judge erred in his approach to the *Devaseelan* principles and erroneously failed to independently decide the case on its individual merits as are required (per *SSHD v BK (Afghanistan)* [2019] EWCA Civ 1359) and/or failed to consider either adequately or at all the new evidence that was not before the Judge in 2022 and failed to provide any or any adequate reasons for rejecting that evidence;
> (b) With regard to whether there are Very Significant Obstacles to Integration, which was not considered by the previous Judge in 2022, the Judge failed to apply the correct test (per *Secretary of State for the Home Department v Kamara* [2016] EWCA Civ 813) and failed to consider the relevant evidence and factors and/or failed to provide any or any adequate reasons for rejecting that evidence;
> (c) Furthermore, in relation to the broad proportionality assessment required of the interference with the appellant's private life, including her physical and moral integrity(per *Bensaid v United Kingdom* [2001] 33 EHRR 205), under Article 8 the Judge failed to carry out a proper assessment taking all of the appellant's circumstances cumulatively and/or failed to provide any or any adequate reasons for rejecting that evidence."

28. Permission to appeal to the Upper Tribunal was granted on all three grounds by First-tier Judge Fisher:

> "2. The grounds seeking permission to appeal have been drafted by Counsel who did not appear at the hearing. Extending to some 31 paragraphs over 8 pages, they are unnecessarily long. Experienced Counsel should be able to identify an error of law far more succinctly. In essence, the grounds assert that the Judge erred in his application of the principles set out in *Devaseelan*, that he applied an incorrect test in deciding whether there would be very significant obstacles to integration on return to the USA, and that he failed to conduct a proper assessment of proportionality.
>
> 3. In order to be granted permission to appeal, it is only necessary to demonstrate that there has been an *arguable* error of law. In paragraph 16 of his decision, the Judge accepts that there was no fresh evidence to warrant departure from the previous findings of the tribunal. *It is arguable that he ought to have identified the new evidence and dealt with it in more detail.* Although there is no reference to the decision in *Kamara*, the Judge has largely dealt with those principles, although *it is arguable that his consideration of the Appellant's medical issues is inadequate*. Arguably, this infects his proportionality assessment under Article 8 outside the Rules. "
>
> [*Emphasis added*]

Rule 24 Reply

29. The respondent filed a Rule 24 Reply to the grant of permission. She contended that the First-tier Judge's reasons on Article 3 were adequate, taking the Howorth decision as the *Devaseelan* starting point, and the medical evidence being incapable of reaching the extended *Paposhvili/AM (Zimbabwe)* level of seriousness.

30. As regards Article 8, at [7] the respondent put her argument thus:

> "7. A plain reading of the consideration at [25-28] shows that these were considered as part of a broad evaluation, noting that there was evidence which was less than credible [26-27] and her ability to have lived until relatively recently to the age of 49 years as indicators of being able to form a private life as she had. There is no obligation for the [First-tier Judge] to revisit the medical conditions in a repetitive nature, nor was the [First-tier Judge] required to detail every item of evidence. "

31. The respondent reminded the Tribunal of the guidance given by the Court of Appeal in *Ullah v Secretary of State for the Home Department* [2024] EWCA Civ 201 (6 March 2024) at [26], as to the extent of the Upper Tribunal's error of law jurisdiction. The First-tier Judge was not obliged to refer to each item of evidence and had engaged appropriately with the arguments and evidence before him, giving sufficient reasons for his conclusions.

32. Dealing with Article 8 outside the Rules, the grounds were no more than a disagreement with the outcome of the appeal.

33. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

34. The oral and written submissions at the hearing before us are a matter of record and need not be set out in full here. We had access to all of the documents before the First-tier Tribunal.

35. For the appellant, Ms Smith set out her contentions, which closely mirrored the extensive grounds of appeal. Her core arguments were that the Judge had not considered the evidence for himself, independently, that he had failed to take a broad evaluative approach to the new evidence, that the 2022 decision was based on a relationship which had already ended by the date of hearing, and that the proportionality assessment of Article 8 outside the Rules, in just a single paragraph, was inadequate.

36. For the respondent, Mr Tufan relied on the Rule 24 Reply. The new evidence produced did not change the factual matrix which was advanced in 2022 in the Howorth decision. The Tribunal should be slow to conclude that the Judge had overlooked any element of the evidence.

37. Regarding Article 3 ECHR, the Grand Chamber had considered the *Paposhvili* test again in 2021: see *Savran v. Denmark* - 57467/15 (Judgment : No Article 3 - Prohibition of torture : Grand Chamber) [2021] ECHR 1025 (07 December 2021) in which the court emphasised that the *Paposhvili* remained the standard to be applied, whether the health issues were physical or mental. At [134], the court emphasised that the host state's obligations did not arise until the demanding threshold test in [183] had been found to apply and Article 3 to be engaged.

38. In *Mwesezi v The Secretary of State for the Home Department* [2018] EWCA Civ 1104 (15 May 2018) the Court of Appeal considered and distinguished the factual matrix in *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813, on which the appellant relied.

Legal framework

39. The core guidance in *Devaseelan* on the treatment of new evidence is at [39]-[41] and sets out six categories (the references to Adjudicators should now be read as references to First-tier Judges):

> "39. In our view the second Adjudicator should treat matters in the following way.
>
> **(1) The first Adjudicator's determination should always be the starting-point.** It is the authoritative assessment of the appellant's status at the time was made. *In principle issues such as whether the appellant was properly represented or whether he gave evidence, are irrelevant to this.*
>
> **(2) Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator.** If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his

case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.

(3) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator. The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.

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 close 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 addiction 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 are not materially different from those put to the first Adjudicator**, and proposes to support the claim is in essence the same evidence as that available to the appellant at that tine, **the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination** 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 would 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." [*Emphasis added*]

40. An appellate court may interfere with the First-tier Tribunal's findings of fact and credibility only where they are 'plainly wrong' or 'rationally insupportable': see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [2]-[5] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed.

41. The basis on which the Upper Tribunal may interfere with fact-finding by a First-tier Judge was revisited in March 2024 in *Ullah,* the decision of the court being given again by Lord Justice Lewison, with whom on this occasion Lord Justice Green and Lady Justice Andrews agreed.

42. The framework for engagement with fact-finding is described therein as 'settled', as indeed it was in *Volpi.* In *Ullah,* the proper approach is summarised at [26]:

> "26. Sections 11 and 12 TCEA 2007 Act restricts the UT's jurisdiction to errors of law. It is settled that:
>
> (i) the FTT is a specialist fact-finding tribunal. The UT should not rush to find an error of law simply because it might have reached a different conclusion on the facts or expressed themselves differently: see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 [2008] 1 AC 678 at paragraph [30];
>
> (ii) where a relevant point was not expressly mentioned by the FTT, the UT should be slow to infer that it had not been taken into account: e.g. *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 at paragraph [45];
>
> (iii) when it comes to the reasons given by the FTT, the UT should exercise judicial restraint and not assume that the FTT misdirected itself just because not every step in its reasoning was fully set out: see *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19 at paragraph [25];
>
> (iv) the issues for decision and the basis upon which the FTT reaches its decision on those issues may be set out directly or by inference: see *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095 at paragraph [27];
>
> (v) judges sitting in the FTT are to be taken to be aware of the relevant authorities and to be seeking to apply them. There is no need for them to be referred to specifically, unless it was clear from their language that they had failed to do so: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 at paragraph [34];
>
> (vi) it is of the nature of assessment that different tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one tribunal has reached what might appear to be an

unusually generous view of the facts does not mean that it has made an error of law: see *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 at paragraph [107]. ”

Discussion

43. We remind ourselves of the three areas of challenge in this appeal:

    (a) the Judge erred in his application of the principles set out in *Devaseelan*,
    (b) he applied an incorrect test in deciding whether there would be very significant obstacles to integration on return to the USA, and
    (c) he failed to conduct a proper assessment of proportionality.

44. Beginning with the *Devaseelan* question, it is right that the appellant’s personal situation has changed. She is no longer engaged to her British citizen partner and that relationship has come to an end. She has provided a considerable number of letters of support and some additional medical evidence. At [16]-[17] in the grounds of appeal, the appellant challenges the weight given to the evidence of Ms Goody and Mr Wannerton, arguing that it was not open to the Judge to decide that the evidence before him did not justify his departing from the assessment of the evidence in the Howorth decision.

45. That submission demonstrates a fundamental misunderstanding or misreading of the *Devaseelan* guidance. In this appeal, the appellant’s evidence before the First-tier Tribunal was correctly characterised as further evidence of facts not materially different from those put before the first Judge. Apart from the end of her relationship with her former fiancé, there are no new factual matters.

46. The evidence about her friendship group suffers from two defects: first, it could and should have been advanced in 2022, as part of the evidence considered in the Howorth decision. Second, as all of these friendships were developed when the appellant had either precarious student leave (see s.117B(4)(a) of the 2002 Act) or was in the UK unlawfully (see section 117B(5)) the Judge is directed to give little weight to the private life developed in such circumstances.

47. The weight to be given to the new medical evidence was a matter for the First-tier Judge. His assessment is neither ‘plainly wrong’ nor ‘rationally insupportable’: see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [2]-[5] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed.

48. It is clear from the authorities cited above that the question whether a person will face ‘very significant obstacles’ to reintegration in the country of origin is also a question of fact for the First-tier Judge. The Judge had regard to the fact that this appellant lived in the United States, and received treatment, for many years before coming to the UK, where she has also received treatment. She has both capital and income in the

United States, because she receives US state benefits by reason of her health issues, and has the money from the house she sold there when she was hoping to settle in the UK with her British citizen fiancé. The First-tier Judge did not err in concluding that the test of 'very significant obstacles' was not made out.

49. Finally, there is the question of proportionality of Article 8 ECHR outside the Rules. Section 117B binds the Judge in consideration of Article 8 ECHR, both within and outwith the Immigration Rules. The private life relied upon can be given little weight. We consider that the Judge's conclusions at [29]-[35] are properly, intelligibly and adequately reasoned. There are no very compelling circumstances for which leave to remain ought to have been granted outside the Rules.

50. Overall, these grounds of appeal in this respect are no more than a vigorously expressed disagreement with findings which were correctly reasoned and were open to the First-tier Judge on the evidence before him.

51. Accordingly, we dismiss the appellant's appeal and uphold the decision of the First-tier Tribunal.

Notice of Decision

52. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law
We do not set aside the decision but order that it shall stand.

Judith Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 30 September 2024