Upper Tribunal
(Immigration and Asylum Chamber)

Sawmynaden (Family visitors – considerations) [2012] UKUT 00161(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 March 2012	.....

Before

MRS JUSTICE LANG DBE

UPPER TRIBUNAL JUDGE JORDAN

Between

Mrs Krishnambal Sawmynaden

Appellant

and

The Entry Clearance Officer

Respondent

Representation :

For the Appellant: Mr S. Subbarayan

For the Respondent: Mr N. Bramble, Home Office Presenting Officer

In visit visa cases:

(i) There is no restriction on the number of visits a person may make to the UK, nor any requirement that a specified time must elapse between successive visits.

(ii) The periods of time spent in the United Kingdom and the country of residence will always be important.

(iii) Both the expressed purpose of the visit and what the appellant has done in the past and intends to do in the future is material, together with the length of time that has elapsed since previous visits. In cases of this type, the appellant will be visiting a relative, often a parent visiting a son or daughter, often a son or daughter visiting a parent. In the case of a parent visiting a son or daughter, the parent will often fully participate in helping in the house, providing child care. In the case of a son or daughter visiting a parent, the adult child will often assist in care arrangements. None of these activities, for that reason alone, will take the individual outside the definition of a genuine visitor.

(iv) The links that the appellant retains with her country of residence will be a material consideration. The presence of other family members will be a material consideration.

(v) The Tribunal is required to ascertain what is the reality of the arrangement entered into between the appellant and the host in the United Kingdom. Is the reality that the appellant is resident in the United Kingdom and intends to be for the foreseeable future?

(vi) The issue may be approached by considering whether the reality is that the appellant is now no more than a visitor to her country of residence as the purpose of the return home is confined to using his or her presence there solely as the means of gaining re-admission to the United Kingdom.

(vii) This does not preclude the appellant from remaining in the country of residence for the least amount of time sufficient to maintain her status as a genuine visitor.

(viii) Family emergencies, whilst likely to result in a longer visit than the established pattern, should not be regarded as taking up residence without adequate supporting evidence to that effect. Thus, the pregnancy of a daughter or daughter-in-law or the aftermath of the birth might explain a more-protracted stay (within the 6-month duration of a single permitted visit); so, too, a serious medical condition.

(ix) There may be comparisons with the person who owns homes in two different countries. Is he resident in both or a visitor to one of them?

DETERMINATION AND REASONS

1.
The appellant is a citizen of Mauritius who was born on 13 February 1945. She is now 67 years old and was already over 65 when, on 26 May 2011, the Entry Clearance Officer in Port Louis refused to grant entry clearance to her as a family visitor intending to visit her daughter.

2.
The refusal of entry clearance was expressed in the following terms:

“I note that you have previously travelled to the UK many times since 2005. I note that your passport shows that you entered the UK on 28 May 2010 and were granted leave to remain for six months. I note that you returned back to Mauritius on 12 August 2010 and stayed here almost 2 months. Your passport shows that you returned to the UK on 9 October 2010 and that the immigration officer gave you a recorded landing and granted you leave to remain for six months. I note that you arrived back in Mauritius on 31 March 2011. You have been back here for almost 2 months and have now applied for a five-year multiple entry visa clearance to the UK. I note that you state on your application form that you intend to visit the UK from 11 June 2011 until 9 December 2011. From May 2010 until March 2011 you have spent almost 8 ½ out of the last 12 months in the UK. With your proposed trip, you are intending to spend a further six months in the UK (which would make a total of 14 ½ out of the last 18 months in the UK). Whilst there is no restriction on the number of visits a person may make to the UK, nor any requirement that a specified time must elapse between successive visits, it is reasonable, however, for the ECO to consider the stated purpose of the visit in the light of the length of time that has elapsed since previous visits. A visitor should not, for example, normally spend more than six out of any 12 months in the UK.

In view of all the above, I do not consider that your actions are within the spirit of the immigration rules for family visitors. I note that you are widowed and that your two daughters and six siblings all live in the UK. Given that you have been spending long periods of time in the UK over the last few years, this raises doubts as to your true intentions.

Given all of the above and considering your application as a whole, I am not satisfied that you are genuinely seeking entry as a visitor for a limited period as stated by you, not exceeding six months and that you intend to leave the UK at the end of the period of the visit as stated by you (as required by Paragraph 41 (i) and (ii) of the Immigration Rules."

3.
The appellant is a retired civil servant with a good pension of £450 a month. She owns her own home. In the circumstances to which we will later refer, her husband died in August 2010. She has family in the United Kingdom as well as a son in Canada. Indeed, the statement that she has made in support of these proceedings was made on 11 October 2011 whilst she was visiting him.

4.
For the purposes of these proceedings, and most helpfully, we have been provided with a detailed schedule of the appellant's travelling to the United Kingdom. (The list excludes the visits made to her son in Canada or her journeys to other countries.)

30 November 2001 37 days London

16 May 2005 34 days London

14 June 2005 14 days London

25 May 2007 54 days London

23 July 2007 49 days London

19 September 2007 15 days London

10 October 2007 32 days London

3 October 2009 32 days London

25 May 2010 75 days London

9 October 2010 172 days London

5.
It is immediately apparent that the visit made on 9 October 2010 is substantially the longest visit that she has made and comes shortly after her bereavement when, understandably, she wanted the support of her daughter following the death of her husband.

6.
For our purposes, the material provisions of paragraph 41 of the Rules are as follows:

T he requirements to be met by a person seeking leave to enter the United Kingdom as a general visitor are that he:

(i)
is genuinely seeking entry as a general visitor for a limited period as stated by him, not exceeding six months…; and

(ii)
intends to leave the United Kingdom at the end of the period of the visit as stated by him…

7.

In Oppong (visitor – length of stay) Ghana [2011] UKUT 00431 (IAC), the Tribunal (Upper Tribunal Judges P.R. Lane and Perkins) summarised the approach it adopted in these terms:

An application for a visit visa which, if granted, could result in permission to spend more than 6 of 12 months in the United Kingdom is likely to be scrutinised rigorously but it is wrong to refuse someone entry clearance as a general visitor just because they have spent more than six of the last twelve months in the United Kingdom. In certain circumstances a person can utilise paragraph 41 in order to visit the United Kingdom to provide temporary care for a person present here.

8.
The respondent in Oppong had decided that the appellant was not genuinely seeking entry as a general visitor for a limited period as stated by her not exceeding six months and that she had not shown that she intended to leave the United Kingdom at the end of the period of the visit as stated by her. After the notice of appeal had been sent to the respondent, the case was reviewed by an Entry Clearance Manager who said:

“However, I note from our own records and from the appellant’s own admission that between October 2007 and October 2009, the appellant spent a total of about sixteen months in the UK. In light of this I consider that the appellant has been residing in the UK whilst having been granted leave to enter as a visitor only.”

9.
The Tribunal stated there was nothing about intending to care for a relative that is inherently incompatible with admission as a general visitor. It continued:

13.
It may well be that a person who spends little time in his country of nationality will find it hard to prove that he satisfies the requirements of the Rules for entry clearance to the United Kingdom as a visitor. Certainly such a person should expect his application to be subject to rigorous scrutiny and a person who does not have a clear reason for wanting to make frequent visits may well find that his claims about the duration and purpose of the visit and his intention to return are not believed; but there is nothing about a prolonged stay in the United Kingdom punctuated by return trips to the country of origin followed soon by a further application for entry clearance as a visitor which in itself as a matter of law disqualifies an applicant from being a visitor.

10.
The Tribunal considered policy guidance entitled “General visitors: frequency and duration of visits” suggesting that “ a visitor should not normally spend more than six out of any 12 months in the UK unless they have a good reason, such as receiving private medical treatment ”. It said that whilst this was useful guidance it did not state the law and it would be wrong to refuse someone entry clearance as a general visitor just because they have spent rather more than six of the last twelve months in the United Kingdom.

11.
The present appeal came before Immigration Judge TRP Hollingworth, whose determination, promulgated on 26 October 2011, duly dismissed the appeal. No evidence from the sponsor was provided. The Judge recorded that, with the death of her husband in August 2010, the appellant had few significant family members in Mauritius. Although the Immigration Judge recorded that it was conceded that the appellant had spent a total of 14 ½ months out of the last 18 months in United

Kingdom, this was not factually accurate as the table in paragraph 3 above reveals. The Judge went on to say:

“It is therefore hard to escape the inference that the appellant is not only seeking the maximum period of residence in the United Kingdom now [b]ut if the five-year revolving visa is approved, she will spend six months periods whenever it suits her. In my view, therefore, she is not an ordinary visitor.”

12.
The Judge’s determination avoids deciding what is an ordinary visitor and whether the appellant needed to establish that she was an ordinary visitor in order to meet the requirements of the Immigration Rules. In our judgement, the question is not whether she is an ordinary visitor but whether she is a visitor.

13.
On the basis of this flawed reasoning, the Judge found that the appellant's intentions

“…overall were probably to use such visits in the future as a preliminary to settlement here at some stage.”

14.
Once again, this is not the issue that the Immigration Judge was required to determine. Whatever the future applications may be or, indeed, whether they will or will not succeed (all of which is speculative) it appears that he accepted that the appellant was a visitor albeit for a purpose that he found fell outside those permitted under the Rules. We are satisfied that this reasoning is wrong in law. The sole issue before the Judge was whether the appellant intended to visit which necessitated her also establishing that she would leave at the end of the period permitted for a single visit.

15.
In this context, it is important to recall the evidence that was before the Judge which included statements from the appellant’s son and her daughters to the effect that the appellant had always travelled with her husband when he was alive and that she intended to continue visiting her daughters and her son on a regular basis. The family considered itself fortunate to be able to afford meeting each other on a regular basis, notwithstanding their living in different countries. She repeated her claim that she only intended to visit as the opportunity presented itself and not to settle either in the United Kingdom or in Canada. As there were no direct likes between Mauritius and Canada, travelling to Canada via the United Kingdom was the most convenient route for her, permitting her to visit relatives both in the United Kingdom and in Canada. She asserted, with some justification, that she had been honest and transparent with her intentions to date and had complied with the requirements of her visa. In paragraph 7 of her statement, the appellant acknowledged that she could apply to settle under the Immigration Rules but expressly disavowed an intention to do so. She made the reasonable claim that, as she is retired and her daughters are at work, it was more logical for her to visit the families of her children than it was for them, at much greater cost, to visit the appellant in Mauritius.

16.
We are satisfied that there was no reason for the Judge to dismiss the appellant's claims, short of making an adverse credibility finding. However, there was, and is, no material upon which such a finding could properly have been made. The death of her husband was a reasonable explanation for her wishing to spend more time with her children. It follows that the appeal must succeed.

17.
In reaching this conclusion, we have considered what factors might be material in a assessing whether an applicant is genuinely seeking entry as a general visitor for the limited period as stated by her, not exceeding six months, and intends to leave the United Kingdom at the end of the period of the visit as stated by her. The following considerations are relevant and may be helpful:

(i)
There is no restriction on the number of visits a person may make to the UK, nor any requirement that a specified time must elapse between successive visits.

(ii)
The periods of time spent in the United Kingdom and the country of residence will always be important.

(iii)
Both the expressed purpose of the visit and what the appellant has done in the past and intends to do in the future is material, together with the length of time that has elapsed since previous visits. In cases of this type, the appellant will be visiting a relative, often a parent visiting a son or daughter, often a son or daughter visiting a parent. In the case of a parent visiting a son or daughter, the parent will often fully participate in helping in the house, providing child care. In the case of a son or daughter visiting a parent, the adult child will often assist in care arrangements. None of these activities, for that reason alone, will take the individual outside the definition of a genuine visitor.

(iv)
The links that the appellant retains with her country of residence will be a material consideration. Inevitably, there is likely to be access to accommodation if only for the purpose of returning home in order to make the application that is intended to result in a return to the United Kingdom. The presence of other family members will be a material consideration.

(v)
The Tribunal is required to ascertain what is the reality of the arrangement entered into between the appellant and the host in the United Kingdom. Is the reality that the appellant is resident in the United Kingdom and intends to be for the foreseeable future?

(vi)
The issue may be approached by considering whether the reality is that the appellant is now no more than a visitor to her country of residence as the purpose of the return home is confined to using his or her presence there solely as the means of gaining re-admission to the United Kingdom.

(vii)
This does not preclude the appellant from remaining in the country of residence for the least amount of time sufficient to maintain her status as a genuine visitor.

(viii)
Family emergencies, whilst likely to result in a longer visit than the established pattern should not be regarded as taking up residence without adequate supporting evidence to that effect. Thus, the pregnancy of a daughter or daughter-in-law or the aftermath of the birth might explain a more-protracted stay (within the 6-month duration of a single permitted visit); so, too, a serious medical condition.

(ix)

There may be comparisons with the person who owns homes in two different countries. Is he resident in both or a visitor to one of them?

DECISION

The Immigration Judge made an error on a point of law and we re-make the decision allowing the appeal under the Immigration Rules.

Signed

Upper Tribunal Judge Jordan

Immigration and Asylum Chamber

5 April 2012