IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2023-005163

First-tier Tribunal No:
HU/57951/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

25th January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

OMAR RIFAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Duffy, Legal Representative, Farani Taylor Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 15 January 2023

DECISION AND REASONS

1. The appellant has been granted permission to appeal against the decision of Judge Hosie promulgated on 13 November 2023 ("the Decision"). By the Decision, Judge Hosie dismissed the appellant's appeal against the refusal of his human rights claim.

Relevant Background

2. The appellant is a national of Algeria, whose date of birth is 20 June 1972. He claims to have arrived in the United Kingdom in 2001. After making an

unsuccessful claim for asylum, he claims to have remained illegally ever since. He accepts that he has used multiple identities, and that one of his false identities is that of a Belgian national, for which he has held a false Belgian ID card.

3. On 7 January 2021 the appellant lodged further submissions to the effect that he had now accrued 20 years' continuous residence in the UK, albeit unlawfully, and he thereby qualified for a grant of leave to remain under the Rules.

4. In the refusal decision dated 5 October 2022, the respondent began by listing the various identities by which the appellant had been known. One of these identities was Samy Llami, a national of Belgium, whose date of birth was 10 June 1997.

5. The respondent rehearsed the appellant's immigration history. He had made an asylum claim in 2001 in the name of Omar Rifas, and he had declared that he was Algerian. He had come before an Immigration Judge in 2002 and his appeal was heard using this name. Following the dismissal of his asylum appeal and a refusal to allow him to take employment, he had absconded for nearly a decade, during which the Home Office became aware that he had used another Algerian identity.

6. He had made further submissions in 2011 and he had not disclosed any more information relating to his identity or nationality to the Home Office throughout this process. It was only on receiving the current further submissions of 2021 that the Home Office became aware (through a paragraph in his solicitor's letter) that he had obtained and had been using a Belgian identity under a separate name. Furthermore, he had been using this identity to secure employment and access to health services since 2004. He had been told by the Home Office that he should leave the country, but instead he had fraudulently obtained a Belgian identity and national insurance number in order to circumnavigate Immigration Laws.

7. He had attempted to establish 20 years' continuous residence in the UK using evidence sourced through this fraudulent identity. It was considered that S-LTR.2.2 applied. False information, representations or documents had been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application). He had submitted false information in order to secure an identity, which had subsequently given him access to the evidence he was using in support of his current application - namely, payslips; bank statements showing wages; job applications; national insurance number correspondence from the HMRC, P45s and P60s.

8. The respondent went on to rehearse the evidence that the appellant had submitted to show 20 years' continuous residence. The respondent acknowledged that in 2004 he had submitted evidence to show residence in June, July and November/December 2004. As to 2005, a P60 showed that he had worked in the UK at some point between April 2004 and April

2005. As to 2006, a P60 for the year from April 2005 to April 2006 showed that he had worked in the UK at some point during this period.

9. The respondent said that the remaining months in respect of the above years remained without evidence of residence in the UK. Furthermore, it was noted from his CV that travelling was one of his interests. He held a fraudulent Belgian identity card, which afforded him a right to travel. It was further noted that he stated on the CV that he was absent from the UK between 2003 and 2006, as he was working in a printing business in Belgium.

The Decision of the First-tier Tribunal

10. The appellant's appeal came before First-tier Tribunal Judge Hosie sitting at Hatton Cross on 8 September 2023. Both parties were legally represented, with Mr Duffy appearing on behalf of the appellant.

11. The Judge received oral evidence from the appellant and a supporting witness.

12. The Judge's finding of fact began at para [31]. She found that the appellant had used several identities. He had a false identity document which he had used to obtain a national insurance number and health care in the UK. In order to obtain employment, he had produced a CV which stated that he worked in Belgium between 2003 and 2006. The appellant disputed that he was in Belgium during this time.

13. At para [35], the Judge said that in his oral evidence the appellant claimed that he had obtained his fake Belgian ID card for free. She found this to be implausible, given that there was clearly a market value in a fake ID. When asked to adopt his witness statement, the appellant stated that half of his witness statement was true. He provided no further information in relation to this, and it was unclear which half he was referring to. In relation to the CV, he gave two versions of a narrative to explain why it stated that he was in Belgium between 2003 and 2006. On the one hand, he had stated that he had used an online template which had that information on it and he forgot to delete it. Yet, in oral evidence, he stated that he had deliberately included the information in order to obtain employment. In addition, the appellant had refused to disclose where he worked currently as a Chef.

14. At para [36], the Judge said she found that the appellant was not a witness of truth. She found that he would have had freedom of movement with a Belgian ID card. She found that the CV he had provided to obtain employment stated that he lived and worked in Belgium between 2003 and 2006. She noted that there was very limited evidence of residence in the UK for the years 2004 to 2006.

15. At [37], the Judge said that the only evidence of residence in 2004 was contained within his medical records, which were for Mr Llami Samy. There

was an incongruous entry dated 22 July 2004 which was entered on 29 May 2014 (sic). This was the only evidence provided in relation to the appellant's claimed residence in the UK. Even if this entry could be relied upon, it did not show that he was resident in the UK in 2004.

16. At para [38], the Judge said that the only documentary evidence to show the appellant was in the UK in 2005 was a P60. The first indication of a GP prescription was at AB/80, where the appellant was given a cream on 2 February 2007. The Judge held that this did not necessarily indicate residence in the UK.

17. At para [42], the Judge found that the documentary evidence provided and the oral evidence of the appellant, when taken together with the evidence of his supporting witness, was either untrue, incorrect, or misleading. She accepted the arguments made on behalf of the respondent, that even if the appellant had confessed to using false identities, this did not detract from the fact that he had provided evidence which he had obtained on the basis of the false identities in support of his present appeal. Therefore, S-LTR.2.2(a) of Appendix FM applied. The application therefore failed on grounds of suitability.

18. At para [43[, the Judge said that, even if she was incorrect in this, the appellant did not meet the long-residence requirement, due to the lack of documentary evidence covering certain periods, the CV which stated that he was in Belgium between 2003 and 2006, and the multiple frailties in the appellant's oral evidence when compared to that of his witness. She reiterated that she found the evidence of the appellant to be inherently unreliable.

19. At para [44], the Judge said that, even if she was incorrect in stating that the appellant's application fell for refusal on suitability grounds on a mandatory basis, inconsistent evidence had been provided to show that discretion should have been exercised in the appellant's favour.

20. The Judge went on to hold that the appellant had not made out a case that there would be very significant obstacles to his reintegration into life and society in Algeria.

The Grounds of Appeal

21. In the grounds of appeal, it was submitted that the Judge had made material errors of fact in para [37] (Ground 1), and para [38] (Ground 2).

22. In Ground 3, it was submitted that the Judge had applied too high a standard of proof at para [45] in stating her conclusion on Rule 276ADE(1)(iii), and that this error arose from an inherent failure on her part to assess all of the evidence and the concessions made by the respondent.

23. In Ground 4, it was submitted that the Judge had materially misdirected herself in law in holding that the ground of refusal under S-LTR.2.2 was mandatory rather than discretionary.

24. In Ground 5, it was submitted that the Judge's finding in the alternative was unlawful due to the multiple errors in the Judge's assessment of the documentary evidence, and because her reasoning as to why discretion should not be exercised in the appellant's favour was opaque and inadequate.

The Hearing in the Upper Tribunal

25. At the hearing before me to determine whether an error of law was made out, Mr Duffy developed the grounds of appeal.

26. On behalf of the respondent, Mr Tufan adopted the Rule 24 response opposing the appellant. While it was accepted that there was other evidence of the appellant's residence in the UK in 2004 and 2005, the Judge's error was not material because the Judge had made an adverse credibility finding against the appellant regarding his oral evidence for the period between 2003 and 2006.

27. After briefly hearing from Mr Duffy in reply, I reserved my decision.

Discussion and Conclusions

29. I consider that this case is on the borderline, as the Judge had the benefit of receiving oral evidence from the appellant, and she gave cogent reasons for holding that he was not a witness of truth, both by reference to his performance when giving evidence and also by reference to significant gaps in the documentary record.

30. However, I am persuaded that the Judge materially misdirected herself at para [37] and, albeit to a lesser extent, at para [38].

31. It is not the case that the only evidence of the appellant's presence in the UK in 2004 was a single entry in a medical record. As was conceded in the refusal decision, the appellant had also provided various payslips issued in 2004 and a P60 for the tax year running from April 2004 through to April 2005.

32. As to 2005, there were two relevant P60s, not one. The P60 to April 2005 was potentially indicative of residence in the UK up to April 2005, unless the amount of the P60 was all attributable to the disclosed payslips issued in 2004. The P60 to April 2006 was indicative of residence in the UK for some of the period between April 2005 and April 2006.

33. I accept that, even if the Judge had acknowledged this evidence, it would still have been open to her to find that the appellant had not shown on the balance of probabilities that between 2003 and 2006, when he was

working in Belgium according to his CV, he had not been absent from the UK for a continuous period in excess of 6 months.

34. But as submitted by Mr Duffy in his skeleton argument for the hearing before me, the test is not whether, absent the error, a fair-minded Judge would or could still dismiss the appeal, but whether the result must have been the same even there had been no legal error.

35. This is a very high threshold for the Secretary of State to surmount, and I find that it has not been surmounted. Of particular significance is the fact that, whereas it is entirely reasonable for the Judge to observe that a single doctor's appointment in 2004 does not establish residence in the UK in 2004, the position is less clear-cut with a monthly payslip, as this is *prima facie* indicative of the appellant living and working in the UK for the month in question. Thus, the payslips and the P60 for April 2004 to April 2005 relied upon by the appellant, to which no reference is made by the Judge, are supportive of his case that during the relevant period he was living and working in the UK, rather than living and working in Belgium.

36. For the above reasons, Grounds 1 and 2 are made out. As to Ground 3, I do not consider that the Judge applied too high a standard of proof, but I accept that her conclusion on the disputed issue of 20 years' continuous residence is unsafe due to her failure to take into account the concessions made by the respondent on the documentary evidence of residence in the UK during the period when, according to the CV, the appellant was working in Belgium.

37. Ground 4 is made out, but only on the basis that the Judge misdirected herself in treating the refusal on suitability grounds as being mandatory rather than discretionary. As the Judge went on to consider whether discretion should have been exercised differently, the error identified in Ground 4 is not in itself material.

38. As to Ground 5, I consider that the Judge's material error on the topic of residence contaminates her finding on the issue of whether discretion should have been exercised differently. This is because her stated reason for finding that the appellant had not discharged the burden of proving that discretion should be exercised in his favour was that "*insufficient consistent evidence has been provided*".

39. It may very well be the case that the Judge would have still made this finding even if she had taken into account the respondent's concessions as to the appellant's residence at certain points between 2003 and 2006, but it cannot be said that, absent the errors in paras [37] and [38] of the Decision, the Judge would have been bound to find that the discretion should not be exercised in the appellant's favour, given her reasoning as to why it should not be.

40. In summary, for the reasons given above, the Decision is unsafe, such that it must be set aside in its entirety, with none of the Judge's findings of fact being preserved.

Disposal

41. Given the extent of the fact-finding that would be required to remake the decision, the appropriate course is for the appeal to be remitted to Hatton Cross for a fresh hearing on all issues before another Judge of the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error of law, such that the decision must be set aside in its entirety and remade.

Directions

This appeal shall be remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any Judge apart from Judge Hosie, with none of the Judge's findings of fact being preserved.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
24 January 2024