IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000672
First-tier Tribunal No:
HU/55207/2023
LH/00580/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 September 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Ashraf Kalam
(NO ANONYMITY DIRECTION MADE)

Applicant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: In person
For the Respondent: Ms S. Simbi, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 14 June 2024

DECISION AND REASONS

1. At the hearing of this appeal at the Birmingham Civil Justice Centre on 14 June 2024, I informed the appellant that his appeal would be dismissed, with written reasons to follow.

2. For the reasons set out below, I set aside the oral decision I gave at the hearing and allow this appeal. I have concluded that the hearing before the First-tier Tribunal was procedurally unfair. I remit the appeal to the First-tier Tribunal, to be reheard by a different judge.

Factual background

3. The central issue in this appeal to the Upper Tribunal is whether the hearing before the First-tier Tribunal had been procedurally unfair on account of the judge resolving issues against the appellant which had not been ventilated between the parties. At the hearing on 14 June 2024, there was no evidence that it had been

unfair on that account. I therefore informed the parties that the appeal would be dismissed.

4. After the hearing on 14 June, I listened to a recording of the hearing before the First-tier Tribunal. The recording had not been available to me previously. Neither party had applied for direction that the recording be made available, and there was no other evidence as to what took place at the hearing. I obtained the recording after the hearing out of an abundance of caution because the appellant had appeared before me unrepresented. Although the appellant was able to participate in the hearing before me through a Sylheti interpreter, he was unable to explain to me what took place at the hearing, nor the questions that the judge had asked. Having now listen to the recording, it is hardly surprising that the appellant was unable to assist in relation to the judge's discussion of the principal controversial issues with the advocates. That part of the hearing was not translated for the appellant. He would have had no idea what was going on.

5. After listening to the recording, I decided that I was minded to set aside the oral decision and issued directions seeking their submissions on this proposed course of action on 16 July 2024. The directions set out my provisional view that, in light of the contents of the recording of the hearing, it was necessary to set aside the oral decision I had given at the hearing on 14 June 2024, and substitute that decision with a decision allowing the appeal, setting aside the decision of the First-tier Tribunal, remitting the appeal to the First-tier Tribunal to be heard afresh by different judge.

6. I invited submissions within 14 days. I informed the parties that it would be open to them to make an appointment to attend a tribunal hearing centre to listen to a recording of the hearing, and that an extension of time within which to make substantive submissions could be applied for in order to facilitate this process. Alternatively, either party could have ordered a transcript. Neither party responded to my directions, and I am not aware of either party having applied to make an appointment to listen to the recording of the hearing or applying for a transcript of the hearing.

7. My provisional view is now my settled view, for the reasons set out below.

8. Accordingly, I set aside my oral decision to dismiss this appeal given on 14 June 2024, acting under section 25 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), and substitute that decision with a decision to allow the appeal, and remit the appeal to the First-tier Tribunal to be heard by a different judge. I also consider that the power contained in rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 could be used to the same effect.

Factual background

9. This is the appellant's appeal against the decision of First-tier Tribunal Judge Norris ("the judge"). The judge dismissed the appellant's appeal against the Secretary of State's decision dated 4 April 2023, upheld on administrative review on 4 December 2023, to refuse his human rights claim.

10. The appellant appeared before the Upper Tribunal unrepresented due to the unavailability of his legal representatives. A Lawyer of the Upper Tribunal acting under delegated powers had previously refused an application to adjourn the hearing on the papers.

11. A central issue in this appeal to the Upper Tribunal is whether the hearing before the judge had been unfair because she did not canvass with the parties an issue on which she later found against the appellant. The issue was whether the appellant's claimed residence in the United Kingdom had been continuous since his arrival in 2005. In the judge's reserved decision, that was a factor she held against him in the overall proportionality assessment outside the rules (see para. 29(b)). It will also stand as a judicial finding of fact for any future application the appellant may make which relies on his claimed 20 years' continuous residence (or any other period, if so advised). The judge's findings on that issue were therefore almost as important than the substantive issues relating to the refusal of the human rights claim which was under appeal before her.

12. The judge found that the appellant had not been continuously resident as claimed since 2005. Having set out a series of findings of fact on this issue, she said, at para. 18:

> "At the date of application the Appellant had therefore been in the UK for a maximum of 16 years, but there is insufficient evidence to find on balance of probabilities that this was continuous. There are large gaps in the chronology above, between 2006-2008, 2013-2016 and 2017-2022. During most of those gaps, he had a valid passport."

13. That finding fed into her overall proportionality assessment, at para. 29:

> "I find that the factors raised by the Appellant do not outweigh the public interest because the factors are almost all against him, and those which are in his favour are countered by the fact of his poor immigration history. It was asserted on his behalf that the length of residence should outweigh the legitimate aim because the Respondent has not taken steps to remove him. I do not accept that because:
>
> […]
>
> > (b) It has not been shown on balance of probabilities that the Appellant has the length of residence that he has claimed…."

14. I pointed out at the hearing in the Upper Tribunal that the judge expressly stated in her reserved decision promulgated soon after the hearing before the First-tier Tribunal that that issue *was* in dispute and that the parties had agreed that those were the relevant issues. This is what the judge about the agreed issues:

> "4. The relevant circumstances not substantially disputed are:
>
> > (a) The Appellant had initially been refused a 12-month work permit visa to come to the UK to work in a short-listed occupation (meat cutter), on the basis that the Respondent did not believe that he would leave the UK on the expiry of the permit. The Appellant (and his sponsor) gave assurances that the Appellant would return and his appeal was allowed following a hearing before Immigration Judge Cox on 12 July 2005.
> >
> > (b) The Appellant accordingly came to the UK in October 2005. He did not return to Bangladesh on the expiry of his work permit.

> In 2022, he instructed solicitors to make an application on the basis of his private and family life in the UK. **Contrary to the assertion in the Appeal Skeleton Argument (ASA) and in the Appellant's witness statement, the Respondent does not accept that he has been continuously resident between those dates.**
>
> […]
>
> 8. The parties agree that I must resolve the following factual disputes about other circumstances put forward as relevant to the proportionality balancing exercise:
>
> (a) Has the Appellant shown that his removal from the UK would be a disproportionate interference in the private life he has developed here?
>
> (b) What weight, if any, should be accorded to any period of continuous residence shown by the Appellant, taking into account the factors under section 117B Nationality, Immigration and Asylum Act 2002?"
>
> (Emphasis added.)

15. The reference in para. 8(b) to "*any period*" of continuous evidence implied that the extent to which the appellant had accrued such residence was an issue upon which the parties had agreed that findings of fact needed to be reached.

16. The grounds of appeal did not engage with paras 4(b) and 8(b) of the judge's decision. First-tier Tribunal Judge I. D. Boyes, who granted permission to appeal, did not do so either. Neither party had applied for a direction for the recording to be produced, nor applied for a transcript, and there was no evidence before the Upper Tribunal as to what took place at the hearing before the First-tier Tribunal, other than the judge's own summary.

17. On the face of it, as I observed at the hearing on 14 June 2024, there was no evidence to contradict the judge's summary of the agreed issues at the hearing. I asked the appellant if he could remember what took place, and he said that he could not. I indicated that, on the basis of the judge's summary of what took place at the hearing, the appeal would be dismissed. The judge's decision gave every impression that her findings were squarely within the issues agreed by the parties. There could, it appeared, have been no unfairness. The remaining grounds were a disagreement of fact and weight. I reserved full reasons.

Recording of the hearing before the First-tier Tribunal

18. Having now listened to the recording of the hearing, it would appear that, contrary to what the judge stated at paragraphs 4(b) and 8(b) of her decision, the length of the appellant's continuous lawful residence was *not* identified as a disputed issue upon which the judge would have to make findings. The judge expressly stated that she would *not* be considering the appeal by reference to the appellant's claimed length of residence, since it was below 20 years. The judge observed that para. 276ADE(1)(iii) of the Immigration Rules, which at the relevant time made provision for a person with 20 years' continuous residence to be entitled to 30 months' limited leave to remain, was not capable of being engaged

on the facts of the appellant's case because on his case he had been resident for less than 20 years. She would not, she said, make findings on that issue.

19. The key features of the recording of the hearing are set out below. These summaries are not taken from a formal transcript, but from my own notes from listening to the recording of the hearing:

a. The judge clarified that the Secretary of State's refusal letter did not accept that the appellant had been continuously resident for 20 years. The presenting officer agreed.

b. The judge said that the length of the appellant's continuous residence was not relevant in any event, because he could not, on any view, meet the 20 year requirement then contained in para. 276ADE(1)(iii). She said the appeal was in the "territory" of para. 276ADE(1)(vi) (very significant obstacles to integration) and Article 8 private or family life outside the rules.

c. Referring to the claimed length of residence, the judge said that that issue was:

> "*simply not relevant to the determination in this case*, because he is not a 20 year applicant, so he can't qualify under that part of paragraph 276ADE". (My emphasis)

d. The judge said:

> "I am not deciding this on the basis of whether he has got 20 years. It is not asserted that he does. I am dealing with it on [the basis of] very significant obstacles and Article 8 outside the rules."

e. The appellant was asked under cross-examination by the presenting officer whether he had entered the UK in October 2005. The appellant agreed that that was when he entered the UK. The presenting officer then asked him whether he had left the UK since October 2005, to which he replied that he had not. That answer was not challenged by the presenting officer who then moved onto an entirely different topic, namely the appellant's prospective circumstances in Bangladesh.

f. There was no cross-examination about why the appellant had renewed his Bangladeshi passport while he had been in the United Kingdom, or on other matters relating to his credibility. It was not suggested by the Secretary of State – or the judge – that the appellant had travelled internationally using the passport during the time within which he was purportedly in the United Kingdom.

g. The presenting officer's cross-examination of the appellant took less than seven minutes. It focussed on the appellant's prospective circumstances in Bangladesh and the availability of continued financial support from his supporters in the United Kingdom.

h. At the conclusion of the appellant's cross-examination, the judge put ten questions of her own to the appellant, lasting around ten minutes. Those questions included how the appellant had supported himself financially

since his work permit had expired in 2006, whether he had worked while he was here, why he had not returned to Bangladesh upon the expiry of his work permit in 2006, why he did not apply to the Secretary of State to regularise his status until May 2022, and the extent of his cooking experience working in "odd jobs" in restaurants. She did not ask the appellant about whether he had been continuously resident in the United Kingdom since 2005.

i. The appellant's re-examination did not address the appellant's claimed continuous residence in the United Kingdom.

j. Neither party made closing submissions about the length of the appellant's claimed continuous residence.

k. The judge did not invite the parties to address her concerning the length of the appellant's claimed residence.

Preliminary view: an unfair hearing before the judge

20. It therefore appears that the judge's summary of the agreed issues, and her operative findings of fact concerning the appellant's claimed continuous residence, were at odds with the issues as agreed at the beginning of the hearing, and the understanding of the advocates as to what the issues were. The judge said, in terms, that the length of the appellant's claimed continuous residence was "simply not relevant" to her determination of the case, yet reached adverse findings of fact on precisely that basis. The presenting officer accepted the appellant's evidence concerning his continuous residence since October 2005 without further challenge.

21. The judge's questions to the appellant outlasted the presenting officer's cross-examination. The judge's own questioning was conducted on the premise that the appellant had been in the United Kingdom continuously since the expiration of his initial 12 month work permit ("..*why didn't you go back to Bangladesh as you had indicated you would when your work permit expired at the end of the year?*"). The appellant has not challenged this aspect of the judge's conduct of the hearing. It does appear that the judge's questions strayed considerably beyond clarification, but is not necessary for me to reach a conclusion about whether this aspect of the judge's conduct of the hearing was unfair.

22. The appellant had renewed his passport twice during his claimed time in the United Kingdom (October 2014, May 2022). He was not asked about that in cross-examination, or by the judge. Yet the judge made the following finding, at para. 16:

> "It seems to me that there would be no good reason to procure these passports if the Appellant was not intending to and did not travel."

23. Thus the judge made a positive finding of fact that the appellant had left the country during the period of his claimed continuous residence. That was not an issue identified for resolution. Nor was it was not the subject of any questioning, whether by either party or the judge.

24. Moreover, the presenting officer made no submissions about any apparent gaps in the appellant's residence. The Secretary of State's closing submissions were based on the premise that the appellant had been resident since 2005, which was

the answer the presenting officer accepted from the appellant during cross-examination without further challenge.

25. Perhaps most significantly, the judge had stated, in terms, that she would *not* reach findings on that issue. It was therefore unfair for the judge to reach findings of fact on that issue, having not raised the point with the appellant or his representative.

26. It is therefore now my preliminary view that the judge's conduct of the hearing was unfair. The appellant had no reason to conclude that his claimed continuous residence would be called into question, yet the judge resolved the appeal against the appellant on that basis.

27. The judge's findings concerning the appellant's claimed continuous residence were relevant not only to the proportionality assessment in these proceedings (para. 29), but they will be highly significant if the appellant chooses to regularise his status based on his continuous residence in the future. The appellant should not be tainted by previous adverse judicial findings which were reached in circumstances that were procedurally unfair.

28. In fairness to the judge, she initially sought the presenting officer's confirmation that the Secretary of State did not accept the appellant's claimed length of residence. Had the clarification and narrowing of the issues gone no further, whether the hearing was unfair may have been a more nuanced issue. However, by proceeding to emphasise that the length of the appellant's residence was "simply not relevant", and bearing in mind the remaining matters addressed at the hearing, I consider that it was procedurally unfair for the judge subsequently to make findings on that very issue. The judge defined – and thereby limited – the course of the hearing to exclude matters pertaining to the length of the appellant's residence. It was not a point that had been raised or relied upon by the Secretary of State. It is therefore hardly surprising that the presenting officer did not challenge that issue in cross-examination, nor make submissions on it. Equally, the appellant did not make submissions on the point. The judge's introductory remarks would have left both parties in no doubt that such issues were not relevant, and that they should not make submissions on those points.

29. I should add that the judge opened the hearing by identifying the appellant's solicitors' procedural defaults and highlighting the importance of procedural rigour. There is no criticism of that aspect of her conduct of the hearing (and I note that had the appellant provided an Appellant's Skeleton Argument in a timely manner as required by the practice direction, which did not take place, the confusion which resulted in the hearing before the judge being unfair may well have been avoided).

30. Finally, nothing in this decision should be read as endorsing a view of the merits of the appellant's case, in particular his length of residence. That is a matter that is yet to be decided, and in relation to which the First-tier Tribunal is pre-eminently best placed to determine.

Setting aside the oral decision of the Upper Tribunal given in court on 14 June 2024

31. I consider that the High Court would have the power to set aside a decision announced orally at a hearing in circumstances where (i) the final order or

judgment in the case remains pending, and (ii) post-hearing evidence came to light which undermined the conclusions previously reached. While it could be said that the appellant's solicitors bear a degree of responsibility for the fact that the Upper Tribunal was not furnished with sufficient information about what happened at the hearing before the First-tier Tribunal, the reality is that I have now had the ability to obtain such evidence myself, through the tribunal's administration. I therefore exercise the power under section 25(2)(c) of the 2007 Act to set aside the oral decision I gave at the hearing on 14 June 2024 at the Birmingham Civil Justice Centre to dismiss the appellant's appeal. It is plainly consistent with the overriding objective to do so. Deciding this case fairly and justly entails doing so on the basis of an accurate understanding of what took place before the First-tier Tribunal.

Other grounds of appeal

32. There are other grounds of appeal which it is now not necessary to determine.

Disposal

33. I now return to the substantive task of the Upper Tribunal on an appeal against a decision of the First-tier Tribunal, under section 12(1) of the Tribunals, Courts and Enforcement Act 2007.

34. I find that the decision of the First-tier Tribunal involved the making of an error of law on procedural unfairness grounds. I set aside the decision of the First-tier Tribunal and remit the case back to the First-tier Tribunal, to be reheard, by a different judge.

Notice of Decision

The decision of First-tier Tribunal Judge Norris involved the making of an error on a point of law and is set aside with no findings of fact preserved.

The appeal is remitted to the First-tier Tribunal, to be heard by a judge other than First-tier Tribunal Judge Norris.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 August 2024