IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001219
First-tier Tribunal No: HU/54282/2021

THE IMMIGRATION ACTS

Decision and Reasons issued:
On the 25 June 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

PRABU DASS MANIAM
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Malik of Counsel instructed by N K Law Solicitors Ltd.
For the Respondent: Mr T Lindsay Senior Home Office Presenting Officer.

Heard at Field House on 13 May 2024

DECISION AND REASONS

Anonymity

1. No anonymity direction was made by the First-tier Tribunal. There was no application before us for such a direction. Having considered the facts of the appeals including the circumstances of the appellant, we see no reason for making a such direction.

Background

2. The Appellant appeals with permission against the decision (the decision) of First-tier Tribunal Judge Davey (the Judge) prepared on 10 February 2023 and promulgated on 21 February 2024, dismissing his appeal against the Respondent's decision dated 21 July 2021 to refuse leave to remain based on his private life.

3. The Appellant is a national of Malaysia born in August 1970. The Appellant claims to have resided continuously in the United Kingdon (UK) since 6 December 1996.

4. On 29 December 2020 the Appellant applied for leave to remain under the Private Life Route under the Immigration Rules on the grounds of long residence.

5. The application was refused by the Respondent in a decision dated 21 July 2021. The Appellant appealed the refusal decision on the basis of his private life in the UK as he claimed he meets the requirements of Paragraph 276ADE(1) of the Immigration Rules, in particular (Paragraph 276ADE(1)(iii)) for a grant of leave on the basis that he had resided continuously in the United Kingdom (UK) for a period in excess of 20 years.

Refusal decision

6. The Respondent in the decision dated 21 July 2021, which was reconsidered on 30 January 2022 (pursuant to the First-tier Tribunal's direction to review the Appellant's case), did not accept that the Appellant satisfies the requirements of Paragraph 276ADE(1) of the Immigration Rules. The Respondent considered there was a lack of supporting evidence to support the Appellant's assertion that he had arrived in the UK in 1996 and there was a lack of evidence to support his claim to have resided continuously in the UK since this date. Furthermore, pursuant to Paragraph 276ADE(1)(vi), the Respondent was not satisfied that there were any very significant obstacles to the Appellant returning to Malaysia or that there were any exceptional circumstances in this case.

First-tier Tribunal hearing and decision

7. The appeal was heard at the First-tier Tribunal on 7 February 2023. Mr Schwenk of counsel appeared for the Appellant at the hearing. The Respondent was not represented at the hearing.

8. The Judge noted that the Appellant sought to establish his period of time in the UK by reference to "… the recollection of friends or acquaintances …"[4]. The Judge found that there was "… no real documentary evidence of any sort to cover the period of time …" the Appellant claimed to have been in the UK [7].

9. The Judge concluded that there "… was no basis directly under the Rules by which he was entitled [to] leave to remain." [12]. The Judge having considered paragraph 276ADE of the Immigration Rules, found on a balance of probabilities that the Appellant had lived in the UK for at least 20 years and met the requirements of paragraph 276ADE(1)(iii).

10. The Judge proceeded to consider Article 8 and the factors under Sections 117 of the Nationality Immigration and Asylum Act 2002. The Judge found that "… meeting one of the criteria of paragraph 276ADE(1) of the Immigration Rules was a significant factor but it was not wholly determinative …" and that there were no other material considerations

which militated in favour of the Appellant's remaining in the UK, accordingly the Respondent's decision was not disproportionate. The Judge dismissed the appeal.

Permission to appeal

11. First-tier Tribunal Judge Lodato in granting permission summarised the grounds seeking permission as follows:

> "In the sole ground of appeal, it is argued that the judge ought to have simply allowed the appeal once it was found at paragraph 12 that the appellant met the requirements of paragraph 276ADE(1)(iii) of the Immigration Rules. There is considerable force to the argument that TZ applies squarely on the facts of this appeal because the refusal is manifestly a disproportionate interference with Article 8 private life rights as the appellant was found to have met the requirements of the rules. I have considered whether this decision should be reviewed under rule 35 but have decided that this would not be appropriate in a case where the findings of fact, if preserved, may militate in favour of the decision being remade and the appeal being allowed."

12. The grounds upon which permission was granted were not restricted.

Rule 24 response

13. The Respondent filed a Rule 24 response dated 9 May 2024, one day out of time. The Respondent applied for an extension of time on the basis that a technical failure of the MyHMCTS platform prevented the Rule 24 response being provided sooner. Mr Malik raised no objection to the extension of time. We considered the delay was not significant and there was good reason for the delay. The Rule 24 response having been filed a few days prior to the hearing did not cause any prejudice to the Appellant. Accordingly we extended time as requested.

14. The Respondent accepted the decision is materially flawed such that it should be set aside. The Respondent submitted that the Judge's findings at [6], [8] and [12] "stand in material mutual conflict" and are irreconcilable with the Judge's conclusions elsewhere in the decision that the Appellant has proven he was continuously resident in the UK for over 20 years.

Adjournment application

15. On 29 April 2024, the Appellant's representative made an application for an adjournment of the hearing of this appeal on the basis that counsel Mr Schwenk who appeared for the Appellant before the First-tier Tribunal and who had drafted the grounds of appeal in relation to the decision was not available. The application was considered by Upper Tribunal Judge Kopieczek and refused on 30 April 2024, as although it is understandable that the Appellant would like the same counsel to represent him, there is no good reason why alternative representation could not be arranged in good time for the hearing and without causing any prejudice to the Appellant.

Upper Tribunal hearing

16. Mr Malik who appeared for the Appellant at the Upper Tribunal hearing apologised for the Appellant's representative's failure to comply with the Tribunal directions and file an electronic composite bundle. We had access to the bundle that was before the First-tier Tribunal, the decision of the Judge, the grounds seeking permission, the grant of permission and the Rule 24 response. Mr Lindsay and Mr Malik confirmed that they too had access to the same documentation. Despite the failure of the Appellant's representative to file an electronic composite bundle we were able to proceed with the hearing.

17. Mr Malik adopted the grounds seeking permission to appeal. In summary, Mr Malik submitted the Appellant's position is that the Judge having taken into account the evidence of the witnesses who had attended the hearing and the letters of support as well as the Appellant's witness statement and oral evidence concluded the Appellant had been in the UK for 20 years and the appeal should have been allowed. Mr Malik relied on TZ (Pakistan) v SSHD [2018)]EWCA Civ 1109 in support of the proposition that, since Article 8(1) is engaged, the finding that the Appellant meets the Immigration Rules is positively determinative of the appeal and the Judge erred in failing to allow the appeal. In addition, Mr Malik submitted that Judge had failed to take into account all the evidence as there is no mention in the decision of the letter from Mr Foley which appears at page 35 of the Appellant's Bundle.

18. In reply, Mr Lindsay adopted the Respondent's Rule 24 response and submitted the Judge had reached inconsistent findings as to whether the Appellant meets the Immigration Rules. Mr Lindsay made further submissions adding to the Rule 24 response as he stated that due to a technical failure of the My HMCTS platform the Rule 24 response was brief. Mr Lindsay stated that the crux of what the Secretary of State says is wrong with the decision is demonstrated by the Judge's confusing self direction and impermissible dual standard of proof applied at [8]. Mr Lindsay submitted that it was unclear from reading the decision as a whole whether the Judge heard oral evidence from the Appellant and/or any witnesses. Furthermore, Mr Lindsay whilst acknowledging that the Judge does refer to the witness evidence, submitted that the Judge failed to assess the evidence and make any findings as to the weight attributed to the evidence.

19. At the end of the hearing we announced our decision that the decision of the First-Tier Tribunal involved the making of an error on a point of law and is set aside. We now provide our reasons.

The Law

20. Sufficient reasons for decision must be given; mere statements that a witness was not believed are unlikely to be sufficient MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC). The Upper Tribunal in MK gives the following guidance:

> “(1) It is axiomatic that a determination discloses clearly the reasons for a tribunal's decision.
>
> (2) If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons.”

21. Henry LJ in the Court of Appeal in Flannery v Halifax Estate Agencies [2000] 1 All ER 373 made the following general comments on the duty to give reasons:

> "(1) The duty is a function of due process and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties - especially the losing party - should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know …… whether the court has misdirected itself and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not”

Decision on error of law

22. It is common ground between the parties that the Judge erred in law. We accept the Judge was not assisted by the absence at the hearing of a representative for the Respondent and that in the circumstances he tried to work through the “… sparse evidence” before him [12]. Unfortunately, the Judge fell into error in his decision.

23. The Appellant claimed on the basis of his private life that he met the requirements of paragraph 276ADE of the Immigration Rules. It is useful to set out the relevant parts of paragraph 276ADE as it was in force as at the date of the application and the date of the respondent’s decision.

> “276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) …; or
>
> (v) ….; or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

24. Paragraph 276ADE(1)(iii) of the Immigration Rules requires the Appellant to establish that has lived continuously in the UK for at least 20 years (discounting any period of imprisonment). The paragraph recognises that an individual will, over a period of time, have developed a private life to a sufficient degree so as to engage Article 8. That private life will comprise multiple aspects of the person's physical and social identity. The words "lived continuously in the UK" are important because to satisfy the requirement under this paragraph of the Immigration Rules there must be a continuity of residence in the UK.

25. The Judge at [3] noted that the Appellant claimed to have entered the UK as a visitor on 6 December 1996 and has remained in the UK after the expiry of his six months' leave without any basis to do so.

26. At [4] and [5] the Judge summarised the evidence of various friends and acquaintances relied upon by the Appellant to demonstrate that he has resided in the UK for a period in excess of 25 years. It is unclear from the Judge's summary or indeed from the decision read as a whole whether the Judge heard oral evidence from the Appellant and/or any of his witnesses or whether the Judge summarised the evidence from the letters of support and the Appellant's witness statement.

27. The Judge having considered the evidence summarised at [6] that:

"In the circumstances therefore, other than those to whom I have referred, there is really no evidence of his continued presence in the United Kingdom but his financial and personal circumstances he says were such that the last thing he could have done was to leave the United Kingdom either by being able to bear the cost of it or having any documentation upon which he could rely to re-enter."

28. At [7] the Judge reiterated his finding stating:

"… he has no real documentary evidence of any sort to cover the period of time he has been in the United Kingdom."

29. The Judge at [8] then proceeded to make findings in relation to whether there would be very significant obstacles to the Appellant's integration on return to Malaysia. The Judge then appeared to get confused as he proceeded to conflate a consideration of two separate paragraphs of the Immigration Rules, very significant obstacle to integration under paragraph 276ADE(1)(vi) with a consideration of the length of continuous residence in the UK under paragraph 276ADE(1)(iii).

30. We agree with Mr Lindsay that at [8] the Judge set out a self direction and impermissible dual standard of proof which further confuses matters as he stated:

"the burden of proof remains upon the Appellant to show on a balance of probabilities that he was in the United Kingdom and that it is reasonably likely that…"

31. The Judge found at [8] and [12] that:

"… There are thus periods when people can say they knew him and where he was a friend and had contact with them but it certainly is not sufficient nor is it argued to be sufficient to establish on a factually proven basis that he has remained continuously in the United Kingdom …"[8]

"I therefore considered that there was no basis directly under the Rules by which he was entitled for leave to remain …" [12]

32. We agree that these findings at [8] and [12] are irreconcilable with the Judge's conclusions elsewhere in the decision that the Appellant has in fact proven that he was continuously resident in the UK for over 20 years.

33. The Judge erred at [13] and [14] as the Judge having found the Appellant has met the Immigration Rules by acquiring 20 years residence in the UK, proceeded to undertake a proportionality assessment concluding that

"It did not seem to me that simply acquiring twenty years was a complete answer … I concluded that compliance or meeting one of the criteria of paragraph 276ADE(1) of the Immigration Rules was a significant factor but it was not wholly determinative."

34. This is contrary to the guidance given by Sir Ernest Ryder sitting in the Court of Appeal at paragraph 34 in TZ, that:

"where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed."

35. We find that the decision involves the making of material errors of law. We set aside the Judge's decision with no findings of fact preserved.

36. In considering whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade we have taken into account the submissions of the parties on the matter and the guidance in Begum (Remaking or remittal) Bangladesh [2023] UKUT 46 (IAC), which states at headnote (1) and (2):

"(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and

extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal."

37. We have carefully considered the exceptions in 7(2)(a) and 7(2)(b) when deciding whether to remit this appeal. Given that we have found that the Judge materially erred in his consideration of the Appellant's claim, no findings can be preserved. We therefore consider that it appropriate to remit this appeal to be reheard afresh in the First-tier Tribunal by any judge other than Judge Davey.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Davey.

N Haria

Deputy Upper Tribunal Judge Haria
Immigration and Asylum Chamber

17 June 2024