



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08905/2019

THE IMMIGRATION ACTS

Heard at Manchester via Skype
On 21 December 2020

Decision & Reasons Promulgated
On 11 January 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

HALIL GULDEDE
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Khan instructed by Parker Rhodes Hickmotts Solicitors.

For the Respondent: Mr A McVeety Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Monaghan ('the Judge') promulgated on the 23 September 2019 in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a male citizen of Turkey born on the 15 April 1977.
3. The appellant claims to have arrived in the United Kingdom, unlawfully, on 4 December 1988. He claimed asylum on 7 December 1998 which was refused leading to the appellant becoming appeal rights exhausted on 13 August 2004. He later absconded but was encountered during an enforcement operation in Sheffield on 20 May 2016. A number of applications in different capacities were made and refused, leading to a further application on 2 May 2019 for leave to remain on human rights grounds which was also refused. This is the refusal appealed before the Judge.
4. The Judge addresses the ability of the appellant to succeed under the Immigration Rules between [96 - 105], concluding the appellant had failed to show he was entitled to leave on this basis.
5. At [96] the Judge finds the appellant could not satisfy the requirements of paragraph 276 ADE(1) as he had not lived continuously in the United Kingdom for at least 20 years. The Judge did not dispute that the appellant had entered the United Kingdom on 4 December 1988 but found the application for leave to remain was made on 28 September 2018 and the decision to refuse on 2 May 2019, meaning the necessary 20 years had not been met.
6. At [99] the Judge finds the appellant cannot meet the suitability requirements of the Immigration Rules; noting the appellant had failed to pay litigation costs awarded to the Home Office at the date of the application but found this was, in any event, a discretionary ground for refusal.
7. The Judge considers article 8 ECHR outside the Rules between [106 - 112] concluding that any interference with the appellant's private life is proportionate.
8. The appellant relied upon two grounds of appeal, the first asserting the Judge erred in law in assessing whether the appellant had been residing in the United Kingdom for 20 continuous years. The respondent in the refusal letter of 5 May 2019 stated the appellant had failed to show evidence of residence from 2007 when he absconded until 2011 and then nothing from 2012 to 2016. The Judge accepted the oral evidence of the appellant's brother, finding there was evidence to support a finding that the appellant had been seen at his brother's business fairly regularly between 2007 and the present day, at [86]. The appellant asserts that the Judge's finding there was no reliable evidence of the appellant's whereabouts between 2002 and 2005 is not a period in dispute between the parties and was not referred to in the refusal letter as between 2002 and 2005 the appellant was in the United Kingdom going through his asylum appeal and subject to reporting requirements which he honoured until 2007. It is asserted the Judge failed to consider this evidence which was materially relevant to the merits of the article 8 element of the appeal.
9. Ground 2 asserts the Judge failed to make clear findings on the suitability requirements in that notwithstanding noting that S-LTR is discretionary, no specific findings were made on the implication of that.

10. Permission appeal was granted a Designated Judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

It is arguable the Judge erred in law by not taking account of time spent in the United Kingdom by the appellant subsequent to 28 September 2018, being the date of his application for leave to remain and gave no reason why she did not take account of this with reference to s.85(4) Nationality, Immigration and Asylum Act 2002 as amended.

The Judge at paragraph 99 with reference to the Appellant outstanding litigation and debt and his suitability for leave simply noted that the ground for refusal was a discretionary ground but did not consider whether discretion had been considered by the respondent.

Both grounds are arguable and permission to appeal is granted.

11. There is no Rule 24 response from the Secretary of State although Mr McVeety confirmed at the outset that the appeal is opposed.

Error of law

12. Paragraph 276 ADE of the Immigration Rules states:

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) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); 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.

276ADE (2). Sub-paragraph (1)(vi) does not apply, and may not be relied upon, in circumstances in which it is proposed to return a person to a third country pursuant to Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

13. It is therefore the specific requirements of the Rule that the minimum 20-year period required by 276ADE(1)(iii) is achieved by the date of application which, on the chronology, was not shown to have been achieved by the appellant.
14. Between [80 – 84], when discussing the evidence relating to time in the UK, the Judge writes:
 80. It was clear to me that the Appellant was hesitant and unsure about this evidence and required prompting at some points from Mr Mullarkey. Given that he was claiming to have lived at the address in Darnall in 2017, which is recently, it casts doubt on his credibility that he was unable to fully recall that address and required prompting.
 81. Whilst I have reminded myself that the core issue is whether the appellant has been living continuously in the United Kingdom for 20 years and not, for example, whether he has been living in Sheffield or at different addresses in Sheffield; nor is this memory test either, nevertheless, I have decided that I must place significant adverse weight on the unsure and hesitant nature of this evidence and also on the fact that the Appellant had not previously disclosed a truthful and accurate history of where he had been living or with whom and finally that his evidence is highly inconsistent with his brothers evidence.
 82. Taking all of this into consideration, I have decided that I cannot be sure, even on the balance of probabilities where the Appellant has been living and with whom some of the period under scrutiny.
 83. Further support for this finding can be found in the Appellants medical records where Mr Mullarkey pointed out that there is a very large gap of time from 23/04/2007 when the Appellant failed to attend an appointment until 05/07/2013 when the next entry occurs. This was put to the Appellant by Mr Mullarkey. He said that he could not make himself ill. He was feeling fine and well that period. I find that is not reasonably likely that the Appellant would not need to seek medical help of any kind for over six years.
 84. Mr Mullarkey submitted that this was evidence that the Appellant had left the United Kingdom for a period. Ms Khan submitted that this be very difficult given that he did not have any travel documents. Whilst there is some strength in both those competing submissions, the fact remains that the Appellant has failed to substantiate on the evidence provided when viewed in the round, that he has been continuously present in the United Kingdom for over 20 years at the date of the hearing.
15. The Judge took into account evidence provided by witnesses including the appellants brother and it was for the Judge to place weight upon that evidence as seen fit. In relation to the brother's evidence the Judge finds that at best it supports a finding that the appellant had been seen at his brother's business at regular intervals between 2007 and the present day. Even if it is accepted the appellant has been in the UK during that time, this does not mean the appellant can succeed under the Immigration Rule as with a date of entry of 4 December 1988 and the human rights application of 23rd September 2018 the requisite 20-year period had not been acquired. This is accepted by the appellant in Ground 1.
16. In relation to the litigation debt issue, it is not disputed that at the date of the First-tier hearing that debt was still outstanding. The original debt was £1020 of which £300 had been paid. Ms Khan advised the Upper Tribunal that the balance had now been paid in full but that is clearly something which occurred

after the hearing before the First-tier Tribunal. Date of payment was confirmed by Mr McVeety as 3 December 2019.

17. This is a human rights appeal in which the Judge was required to adopt a structured approach as per the Razgar guidance. The Judge finds the appellant has a private life in the United Kingdom which will include ties formed as a result of length of time the appellant has lived here. The date at which matters relevant to article 8 are considered is the date of the hearing. Taking matters at their highest, by 11 September 2019 the appellant had acquired the necessary 20 years residence in United Kingdom, but this is not a case which required the Judge to give weight to the fact the appellant met the requirements of the Immigration Rules as at the relevant time, date of application, as he did not.
18. Whilst the evidence does appear to support a finding that by the date of decision, and correspondingly at the date of the hearing before the Upper Tribunal, the appellant had acquired the necessary 20 years continuous residence in the United Kingdom, that is arguably more relevant to his ability to succeed if he makes a fresh application in which the date of that application becomes the relevant date rather than in relation to whether at the date of the application leading to the decision under challenge the 20 year period had been made out, which it had not. No legal error material to the Judge's conclusion that the relevant period had not been made out under the Immigration Rules or the weight the Judge gave to that fact as part of the article 8 assessment has been established.
19. The grounds also state the Judge failed to make a clear finding on the suitability requirements of the Immigration Rules, specifically S-LTR4.4, when refusal under S-LTR is discretionary. It is correct that no specific findings are made on the implication of that, but even if the weight given to the litigation debt element theoretically resulted in a finding that matter should not have been held against the appellant in relation to the Rules, that will still not enable the appellant to succeed meaning such omission is not material. The decision of 2 May 2019 was made because it was stated by the respondent:
 - a) The Appellant does not meet the suitability in S - LTR and paragraph 276 ADE(1)(i) because he fails to meet S-LTR 4.4. It is noted that he has litigation debt outstanding of £1020 under Invoice number LR/35418/A.
 - b) Further, the First Appellant fails to satisfy the provisions of paragraph 276 ADE(1)(iii)(iv) and (v) the rules in respect his private life.
 - c) In relation to paragraph 276ADE (1)(vi) it is not accept that there would be very significant obstacles to his integration into Turkey if the Appellant were required to leave the United Kingdom because he resided in Turkey up to the age of 21 years which includes his childhood, formative years and a portion of his adult life. He has demonstrated his ability to adapt to life in another country during his stay in the United Kingdom. You can use the same ability when he returns to Turkey, a country which he is already familiar with....

20. Other reasons within the refusal letter are noted by the Judge at [13], but I accept Mr McVeety's submission that had the Judge considered the discretionary nature of S-LTR the decision would clearly have been the same on the evidence and sustainable facts as found, namely that the appellant had not established an entitlement to succeed under the Immigration Rule in any event. The error identified in ground 2 is therefore not material.
21. The Judge must have accepted the appellant's claim relating to the nature of his private life as indicated by [107]. The nature and quality of the private life is not necessarily dependent upon whether the appellant has established 20 years as the evidence relied upon by the appellant and others reflects what the appellant claims in that regard. It is not made out that any issues in relation to the period the appellant was reporting or in which the Judge seems to have thought he was out of the UK, when he was not, had a material impact upon the merits of the Article 8 aspect of the appeal; especially as it has not been made out the nature of the private life claimed would have been any different from that the appellant claimed which appears to have been accepted by the Judge.
22. The question in relation to article 8 ECHR was whether the interference with that private life is proportionate to the legitimate aim relied upon by the respondent.
23. The Judge note the private life had been formed during the time the appellant was in the United Kingdom unlawfully, and that pursuant to section 117B of the 2002 Act it was appropriate to apply little weight to such private life. This is not challenged in the grounds, per se. Having weighed up the competing interests the Judge finds at [112]: *"Based on all the same fact is found above and the conclusions drawn above, I find that there is nothing about the Appellant's circumstances which means that the public interest can be outweighed in this case. They do not amount to insurmountable obstacles or exceptional circumstances for reasons already set out. The removal of the Appellant would not lead to unjustifiably harsh consequences for him for reasons fully set out above"*.
24. The fact the appellant has now paid the litigation debt, meaning he may not now fall foul of the suitability requirements (although this will have to be assessed by the official considering any further application) and in light of his ability to establish 20 years continuous residence in the United Kingdom in any further application, there is support for the appellant making a fresh application under the long residence requirements of the Immigration Rules.
25. I do not find it made out, however, that the finding in the decision under challenge, namely that the appellant could not succeed under the Rules and in light of that and other findings, that the decision is a proportionate interference with the appellant's private life, falls outside the range of findings reasonably open to the Judge on the evidence. It is a decision in line with the evidence and applicable law.

Decision

26. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

27. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 29 December 2020