



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: HU/18182/2019**

THE IMMIGRATION ACTS

Heard at George House, Edinburgh

Decision      &      Reason  
Promulgated

On 9 December 2021

On 21 January 2022

Before

Mr C M G OCKELTON, VICE PRESIDENT, & UT JUDGE MACLEMAN

Between

**BENSON MWANGI**

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellant: Mr M Way, Advocate, instructed by Drummond Miller,  
Solicitors

For the Respondent: Mr M Diwyncz, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a citizen of Kenya, born on 8 February 1948. He applied on 6 February 2019 for leave to remain in the UK on private life grounds.
2. The respondent refused the application on 16 October 2019, for one reason only (at page 3 of 7):

.... You are a national of Kenya and you entered the UK on 22 March 1998.

You claim to have been continuously resident in the UK since, however you have been unable to provide evidence to demonstrate your residence between the years 2005 - 2010 and there is no information to confirm your presence ... within your Home Office records.

It is not considered credible that you would be able to provide no evidence at all of your presence in the UK for a period of 5 years.

3. FtT Judge P A Grant-Hutchison dismissed the appellant's appeal by a decision promulgated on 21 February 2020, saying at [13]:

Although I accept that it may be difficult for someone without status to obtain documentation particularly if they have become homeless, I find it unlikely that [he] cannot produce some documentation showing that he was in this country for such a lengthy period. On this basis alone, I would have refused the appeal under the rules. However, I am fortified ... by the appellant's own evidence. If he was indeed a director (and he speaks of taking documents to the Registrar) there must be some evidence ... Even if Benjam Security was not a limited company the appellant has stated that an accountant was employed. I would expect accounts to be available ...

4. The FtT and the UT refused permission to appeal. In course of a judicial review, parties agreed by joint minute that it was "arguable that the FtT erred in law by failing to explain adequately why it rejected the [appellant's] evidence that he had been continuously resident in the UK between 2005 and 2010". The UT granted permission in light of the minute and the Court's interlocutor.
5. The appellant has been legally represented throughout the proceedings. Although not relevant to whether the FtT erred on the case before it, it is to be noted that while preparing for the judicial review counsel identified documents held by Companies House relating to the existence of Benjam Services Ltd from 2006 - 2013 and the appellant's involvement with the company from 2007 - 2013.
6. Mr Way advanced 4 grounds. They are headed as (1) failure to make a clear credibility finding, or in any event, give reasons; (2) failing to take into account relevant matters; (3) coming to conclusion that was logically inconsistent or incompatible with a finding of fact; and (4) failing to apply the correct test in terms of article 8.
7. Mr Way submitted to us that the Judge overlooked that this was a case of an illegal entrant on false documents who never held a valid passport or other travel documents and was unable to leave the UK.
8. That did not appear to us to have been part of the case before the FtT. The respondent's decision narrates that the appellant entered with entry clearance as a visitor; by clear implication, using a legitimate visa endorsed on his legitimate Kenyan passport. The FtT narrates similarly at [2]. There is no challenge in the grounds.
9. Mr Way identified that in a statement dated 6 December 2019 the appellant said he had no travel documents and so could not have travelled out of the UK, and that the decision in a failed asylum appeal in 2000 said that he "illegally obtained a passport which he returned to an agent after securing entry into the UK".
10. Those items are buried in large inventories of productions to the FtT. The Judge's attention was not drawn directly to them, and no submissions were made. We see no error by the Judge by failing to burrow into volumes of evidence to discover a case which was not developed before him.

11. In any event, that case would have been weak. It is contrary to a plain record of entry on a genuine passport. The passage in the 2020 decision is more of a narration than a finding. The point was not a significant issue, and the appellant failed in those proceedings to discharge the burden of proof, even to the lower standard.
12. We are therefore unable to accept the assertion by Mr Way in submissions and at [40a] of his skeleton argument that the Judge “failed to take proper account of ... the unchallenged fact that the appellant had no means to leave the country”. On the contrary, the evidence before the FtT showed no obstacle to his leaving lawfully whenever he chose (quite apart from the possibility of travelling unlawfully, as he now says he did).
13. Mr Way also sought to find error by giving no weight to evidence from the DWP that the appellant was entitled to a state pension from 8 February 2013. However, on reference the documentation does not show that the appellant had any relevant history of earnings in the UK. Mr Way accepted that no basis was laid before the FtT for an inference that the award of a pension in the minimum sum of £25.48 weekly reflects any more than 10 years residence, which did not require to be continuous, and might have been at any time. This yields nothing about the appellant’s whereabouts from 2010 – 2015. Mr Way said this was an adminicle of evidence which the Judge should have dealt with, but we are satisfied that no case was advanced to him on this basis which required further consideration. Further, we are unable to see that the matter might have made any difference.
14. Ground 2 does not show that the Judge erred by failing to take any relevant matter into account.
15. The appellant’s submissions fall even further short of making out ground 3, which aims to show that the FtT could only rationally have concluded to the contrary.
16. It was accepted that ground 4 stands or falls with the others, so we say no more about it.
17. We return to ground 1. The Judge plainly did decide the issue in the case, holding that the appellant failed to discharge the burden of proof, and giving reasons. At [13] he firstly accepts that the appellant might have difficulty over documentation. That is correct, and uncontentious. He then finds it unlikely that some documentation could not be produced over such a lengthy period (5 years), which is well within judicial scope. The next reason is that if the appellant had been a company director, or otherwise in business, he could have produced corporate and accounting records. That reasoning is obvious and sound.
18. Such evidence is now forthcoming; which does not show that the Judge was wrong, but makes it plain that he was right.

19. Mr Way's submission was that the Judge needed to go further, because it is "not proper to reject an account merely on the basis of an assertion that it is not credible or not plausible". He referred us to a series of cases on the extent and nature of reasoning required of Judges, all to similar effect, and all uncontentious, which we do not find it necessary to cite.
20. We see nothing in any of those authorities which discloses error of law by the judge. He clearly found that the appellant failed to establish his case, giving reasons which we have found irreproachable and more than adequate to support his conclusion.
21. Mr Way advanced his argument principally by reference to *Wani* [2005] CSOH 73, where Lord Brodie said at [22]:

It is for the applicant for asylum to establish his claim. To do so he will have to satisfy the relevant decision maker as to the occurrence of events in the past and the risk of the occurrence of events in the future. How the decision maker is to deal with the material relevant to the decision is discussed in *Karanakaran supra*. An important part of that material is likely to be the account given by the applicant himself, in whatever form it comes before the decision maker. The credibility of that account will have to be evaluated. This evaluation must be carried out with great care and sensitivity but it must be done, and that by reference to the tests of consistency and inconsistency ordinarily applied in court. That may involve looking at what the applicant has to say about peripheral as well as central issues: *Asif v Secretary of State for the Home Department supra* at 189C. What, however, is not proper is to reject an applicant's account merely on the basis of an assertion that it is not credible or not plausible. To say that an applicant's account is not credible is to state a conclusion. An adjudicator is a tribunal of fact. A finding as to credibility is his particular province. Where evidence is given orally, the adjudicator will have the benefit of hearing that evidence. That advantage is to be borne in mind by any court that is requested to review an adjudicator's determination. Nevertheless, it is incumbent upon an adjudicator to give reasons for an adverse conclusion on credibility which are both comprehensible and cogent. In the absence of such reasons a determination falls to be regarded as irrational.

22. Those observations were made in a different context. This was not an asylum appeal. The standard of proof here was the ordinary civil standard, balance of probability, not reasonable likelihood. The appellant had the burden. He was not in the position of an asylum appellant faced with the difficulty of providing evidence other than his own account. He had legal representation. He did not limit his evidence to his own statements. The Judge decided the case by evaluating the evidence he chose to present, reaching the view that evidence which should easily have been available was not brought. The decision does not simply state a conclusion. It is not based "merely on ... an assertion" that the oral evidence "is not credible or not plausible".
23. The Judge's reasoning contains no error which can be illuminated by reference to *Wani*.
24. We find the principal challenge misconceived. The well-established case law on adequacy of reasoning did not require the Judge to go any further than he did.

25. The appellant's efforts have been misdirected. The existence of company records is a public fact. Those records are within ready reach of any representative. The material which has now come to light was easily obtainable and of obvious value to the appellant's application to the SSHD. His representatives could and should have located and provided it at that stage. On all information now before us, it seems unlikely there would have been any need for an appeal.
26. On seeing the SSHD's reasons for refusal, the issue became glaring. Production of the evidence then might logically have been expected to result in a reversal by the SSHD or at least in shortening of proceedings.
27. At any point, the appellant might have made a fresh application with excellent prospects of success, rather than engaging in lengthy and wasteful appeal and judicial review proceedings.
28. The appellant has not shown that the FtT's resolution of the case before it involved the making of any error on a point of law. The decision of the FtT shall stand.
29. No anonymity direction has been requested or made.



9 December 2021  
UT Judge Macleman

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#### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **"working day"** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

**6. The date when the decision is “sent’ is that appearing on the covering letter or covering email.**