



IAC-TH-WYL-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/40080/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15 October and 24 November 2015**

**Decision & Reasons Promulgated  
On 17 December 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

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

**Appellant**

**and**

**MOHAMMED JALAL AHMED  
(ANONYMITY DIRECTION NOT MADE)**

**Respondent/Claimant**

**Representation:**

For the Appellant: Ms S Sreeraman (15.10.15) and Mr I. Jarvis (24.11.15), Specialist Appeals Team

For the Respondent: Mr J. Plowright (15.10.15) and Mr G. Davison (24.11.15), Counsel instructed by Charles Simmons Immigration Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge NMK Lawrence sitting at Hatton Cross on 13 April 2015) allowing the claimant's appeal against removal on the ground that the decision was not in accordance with the law, and that a lawful decision on an Article 8 claim

outside the Rules was still outstanding. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

### **The Reasons for Granting Permission to Appeal**

2. On 27 July 2015 First-tier Tribunal Judge Frankish granted permission to appeal for the following reasons:
  1. In a decision promulgated on 6 May 2015 F-tTJ NMK Lawrence remitted the appeal, against refusal of leave to remain under article 8, to the respondent for a lawful decision on the grounds of failure so as to consider the application outside of the Rules.
  2. The application for permission to appeal asserts that the F-tTJ was wrong to have found that the respondent omitted to consider article 8; the refusal letter expressly considers the case outside the Rules, contrary to the F-tTJ's findings; Aliyu misapplied in respect of discretionary application of article 8; in the alternative the F-tTJ could and should have made his own article 8 decision.
  3. It is arguable that §20-29 of the refusal letter, including citation of a previous failed article 8 appeal to which both the respondent and the F-tTJ refer do, indeed, amount to the respondent having done what the F-tTJ says she has not done namely, to consider the case outside of the Rules which, accordingly comprises an arguable error.

### **The Relevant Background Facts**

3. The claimant is a national of Bangladesh, whose date of birth is 1 February 1980. He first entered the United Kingdom in November 1994, and on 20 October 2004 he applied for ILR on the grounds of long residence. His application was refused on 27 March 2007 with a right of appeal. It was not accepted that he had arrived in the UK in 1994. The documentary evidence lodged in support failed to substantiate this claim. Bank statements, wage slips and other financial information which he had provided dated back no further than 2001.
4. The claimant's appeal against the refusal decision was dismissed by Immigration Judge Culver in a determination promulgated on 5 September 2007. He found that the claimant did not qualify for leave to remain under the Rules, which required either ten years lawful residence or fourteen years' residence uninterrupted by any steps to effect the removal of an applicant. It was clear on the claimant's own account that he had not been in the UK unlawfully for fourteen years. He claimed to have established family life with an aunt and her children in Brighton, but no evidence had been received from the aunt or another relative. The claim of family life was undermined by the fact that he clearly had no connection with the address which he gave as his aunt's address. It was also indicated that at the time of application he was working in a restaurant in Devon which made his living with his aunt in Brighton unlikely.

5. The claimant did not leave the country following his appeal being dismissed. On 28 November 2012 he applied for ILR on Article 8 grounds. That application was refused on 17 June 2013 with no right of appeal. On 26 June 2013 his legal representatives requested that the decision be reconsidered, and on 26 September 2014, the Secretary of State gave her reasons for refusing his application on reconsideration, and for deciding to removing him as an illegal entrant or person subject to administrative removal under Section 10 of the Immigration and Asylum Act 1999 (asylum/human rights claim having been refused).

### The Hearing Before, and the Decision of, the First-tier Tribunal

6. At the hearing before Judge Lawrence, there was no appearance by a Presenting Officer for the Secretary of State. The claimant was represented by Mr Davidson of Charles Simmons Immigration Solicitors and he called the claimant and three supporting witnesses to give oral evidence. As the judge noted in her subsequent decision, the witnesses were not cross-examined because the Secretary of State was not represented. The three witnesses supported the claimant in his evidence that he had first arrived in the United Kingdom in 1994.
7. The judge's findings were set out at paragraph [5] onwards. In order for the claimant to succeed under Rule 276ADE, he had to demonstrate that he had resided in the UK for at least twenty years at the date of his application on 28 November 2012. There was an inconsistency in his witness statement. On the one hand he claimed to have arrived in the UK in 1994 (see paragraph 9) but he also claimed to have arrived in the UK in November 2004 (see paragraph 5). Even if it was accepted that he had arrived in the UK in 1994, and had been continuously resident ever since, he could only demonstrate that he had been continuously resident in the UK for eighteen years for the purposes of the Rules.
8. The judge observed that the Secretary of State had not removed the claimant when his appeal was dismissed by Judge Culver. In a covering letter dated 26 June 2013 his solicitors had asserted that the claimant had established a private life in the UK. The judge held that the Secretary of State had a duty to consider the submissions. The Secretary of State asserted that there was no evidence of any significant obstacles to the claimant returning to Bangladesh, but she had failed to consider the private life which he claimed to have established in the UK. The judge continued:

“8. In **R (on the application of Halimatu SA Adiya Damilola Aliyu and Fatima Oluwakemi Aliyu v Secretary of State for the Home Department [2014] EWHC 3919 (Admin)** the respondent had not considered the appellants' cases under article 8 of the Convention. The High Court held, “(1) *In my judgement, the claimants were entitled to a consideration of their individual circumstances outside the Immigration Rules*”. The ratio appears to me, to be, where applicants do not meet the New Article 8 Rules the respondent has a duty to exercise discretion outside the Immigration Rules (including, New Article 8 Rules) under article 8 of the Convention. Failure to consider article 8 of the Convention, that is to say exercise discretion outside the Immigration Rules, will render the decision wrong in law.

9. In the instant appeal I note the respondent has considered the application under para 276ADE only. Even if the appellant is accepted to have entered the UK in late 2004 and the appellant has remained in the UK ever since, it is incumbent upon the respondent to consider his application under article 8 of the Convention. The consideration under article 8 may not lead to a decision that the respondent must demonstrate that she has discharged her duty to exercise discretion by actively consideration issues under article 8, whether the decision is in favour of the appellant or not. In the instant appeal there is no evidence she has done that. Accordingly, I find her decision is wrong in law (see para 60 Aliyu). It is my finding that a lawful decision is still outstanding.”

### **The Error of Law Hearing**

9. At the hearing before me to determine whether an error of law was made out, Mr Plowright accepted that the Secretary of State had considered an Article 8 claim outside the Rules in the decision letter. However, he submitted that the Secretary of State’s consideration had been inadequate, and so the judge had not materially erred in law.
10. I found that an error of law was made out, and gave my reasons for so finding in short form, with my extended reasons to follow in due course.
11. In accordance with the standard Practice Direction, a Bengali interpreter had been booked and the claimant was present in court with his supporting witnesses to give oral evidence for the purposes of remaking the decision. However Mr Plowright submitted that the appeal should be remitted to the First-tier Tribunal for a de novo hearing, as the effect of the error had been to deprive the claimant of a fair hearing before the First-tier Tribunal. Ms Sreeraman expressed a preference not to proceed with the remaking of the decision immediately, because the witnesses would need to be cross-examined on the disputed issue of when the claimant had first arrived in the UK and this could more conveniently be done at a resumed hearing. So I agreed to adjourn, and to reserve my ruling on the forum in which the decision would be remade.

### **Reasons for Finding an Error of Law**

12. In the decision letter, the Secretary of State addressed Rule 276ADE at paragraphs 16 to 19. She concluded that the claimant did not meet the requirements to be granted limited leave to remain on the grounds of private life in the United Kingdom under Rule 276ADE. At paragraph 20, she said that it had also been considered whether the particular circumstances set out in the claimant’s application constituted exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 ECHR, might warrant consideration by the Secretary of State of a grant of leave to remain in the United Kingdom outside the requirements of the Rules.
13. The Secretary of State noted that the claimant relied on several letters of support from friends as showing that the relationship between him and his friends demonstrated dependency involving more than normal emotional ties. The

Secretary of State went on to quote various passages from the determination of Judge Culver which underpinned the conclusion that the claimant did not enjoy family life in the UK.

14. On the topic of private life in the UK, the Secretary of State noted that the claimant first came into contact with the Home Office in 2004 and it was therefore considered that he had been in the UK for no more than ten years. Due to a lack of evidence, it was not accepted that he had lost all social, cultural and family ties to his home country. It was also not considered that his private life in the United Kingdom was so strong that his removal would breach his human rights.
15. The Secretary of State went on to address “other exceptional circumstances”. With regards to his compliance with the conditions, it was noted that he had complied with all reporting conditions requested of him. But it was not accepted that there had been any circumstances beyond his control that had prevented him from returning to Bangladesh, and therefore his length of residence was not a factor in itself which would justify allowing him to remain here. So having considered all the circumstances of his case, it was concluded that he had provided no evidence which might justify allowing him to remain in the United Kingdom exceptionally.
16. Judge Lawrence thus plainly erred in asserting that the Secretary of State had failed to consider the claimant’s application under Article 8 ECHR. The Secretary of State had clearly done so in paragraphs 20 onwards of the decision letter.
17. In paragraph [60] of Aliyu, the court held as follows:

“In any event, as is made plain in Ganseabalan, a failure to consider whether to exercise discretion outside the Rules will, in itself, be unlawful.”
18. The Secretary of State did not fail to consider whether to exercise discretion outside the Rules.
19. Mr Plowright seeks to defend the judge’s decision on the ground that the consideration by the Secretary of State was inadequate. A bald assertion to this effect is simply not good enough. It needs to be shown that there was at least one compelling circumstance that had been raised in correspondence which the Secretary of State had wholly overlooked or ignored. The only alleged compelling circumstance which Mr Plowright raised before me was the claimant’s sheer length of residence (assuming that he arrived in 1994). But it cannot reasonably be maintained that the Secretary of State failed to engage with the claimant’s case on this issue in the decision letter.
20. Accordingly, the decision of the First-tier Tribunal was vitiated by a error of law such that it should be set aside and remade.
21. I do not consider that the claimant has been deprived of a fair hearing in the First-tier Tribunal. As is apparent from a letter which the claimant’s solicitors sent to the First-tier Tribunal on 18 November 2014, the judge made the finding in favour of the claimant which the claimant, through his solicitors, invited her to make (which was

the Secretary of State ought to reconsider her rejection of his Article 8 claim outside the rules).

22. The premise which underlay the judge's conclusion was (a) that there were not very significant obstacles to the claimant's reintegration to life in Bangladesh (and hence he could not succeed under Rule 276ADE) and (b) that it did not matter if he had only resided in the United Kingdom since 2004.
23. There is no cross-appeal against the judge's finding that the claimant could not bring himself within Rule 276ADE, so the only factual issue which potentially remains in controversy is the claimant's length of residence.
24. The First-tier Tribunal judge considered the claimant's case on length of residence and rejected it, because of the inconsistency in his witness statement. Arguably her reasoning on this issue was inadequate, as she did not engage with the "corroborative" evidence of the supporting witnesses, and she did not engage with the Secretary of State's case in rebuttal, which included the lack of documentary and/or independent third party evidence of his presence in the United Kingdom prior to 2001.
25. The witness statements from the three supporting witnesses are very short, and the number of documents evidencing the claimant's presence in the United Kingdom between 1994 and 2004 is relatively few. The nature and extent of the judicial fact finding that is necessary in order for the decision in this appeal to be remade is not such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal.
26. Accordingly, I find that there is no justification for departing from the normal approach to determining appeals in the Upper Tribunal where an error of law is found, which is that the appeal should be remade by the Upper Tribunal, even though some further fact finding is necessary.

### **The Resumed Hearing**

27. The claimant spoke through a Bengali interpreter whom he clearly understood, and he adopted as his evidence-in-chief his most recent witness statement and the two earlier statements that had been before the First-tier Tribunal. The earliest of these statements is at section B of the core bundle. It was relied on in support of the application made in October 2004 for discretionary leave to remain on human rights grounds.
28. His family were poor, and their poverty was exacerbated by the birth of his younger brother, Abdul Basit, six years after his own birth, thus stretching the family's resources even further. Shortly after Abdul's birth, his father was involved in a terrible accident which made him unable to work. The claimant was taken out of school, and a decision was made by his parents to send him out to work. He went to work for a family out of town. He believed the name of his employer was Mr Hussain. He used to do general household duties such as cooking and cleaning.

This arrangement continued for about four years and thereafter his mother told him that it had been arranged for him to stay and work with his employer on a permanent basis. This was the last time that he saw her or any other members of his family. Mr Hussain and his family moved to another part of Sylhet, which was more developed. In November 1994 Mr Hussain made a decision to take the family to the UK for a trip. Mr Hussain's family members in the UK had holidays approaching, and the plan was to spend time with them. He was shocked to learn that Mr Hussain wished to take him with them. When they arrived in the UK, they stayed with family members of Mr Hussain in Birmingham. Mr Hussain and his family remained in the UK for a period of two months and then decided to go back to Bangladesh. He thought he would be leaving with them, but was shocked and saddened to learn that he was not going to go with them. Mr Hussain stated it would be better for him in the long run if he remained in the UK.

29. The claimant said he remained with Mr Hussain's relatives in Birmingham. He did not go to school and stayed at home most of the time. This went on for two years. He used to go with the head of the family, Mr Abdul, to his workplace which was an Indian restaurant. As time progressed, he became familiar with the work at the restaurant, and he pursued it on a full-time basis. Eventually he moved out of Mr Abdul's home and stayed at his restaurant, as accommodation and food were provided for him there.
30. His first real job was at a restaurant called Akash in Chippenham. He was happy as there were many fellow Bangladeshis also working there. He began work as a kitchen assistant and worked there for approximately eighteen months before moving on. Since being in the UK, he had worked at the following restaurants, which he went on to list. He listed six restaurants. First on the list was the Cardamom restaurant in Upminster where he worked as a kitchen porter. Second on the list was the Megana Grill in South Woodford where he said he had worked as a cook. He also worked as a cook at the Maharani restaurant in Clapham. Restaurants four and five were outside London. He had worked as a tandoori chef at the Kohinoor in Kent and at the Viceroy Restaurant in Newhaven. The last restaurant where he had worked, and where he was still currently working, was the Raj Restaurant in Devon. He was employed as a tandoori chef earning a wage of £150 per week. He was highly regarded by his employer as he had been able to pick up on the skills of the trade very quickly.
31. He was currently residing at an address in Brighton with his aunt and her family. Her name was Shaheda Begum. She lived there with her two daughters, Shahema and Shimara. His aunt had supported him since he had managed to track her down. His aunt had four other children who were all married with their own families. He also had a cousin, Hafiz Mazir Uddin, who lived in East London. He enjoyed spending time with him and his family.
32. In his second witness statement signed on 19 November 2014, the claimant said that Mr Hussain had taken care of all the necessary paperwork with regard to bringing him to the United Kingdom. He was not asked any questions at the airport and Mr

Hussain dealt with the immigration officials. Mr Abdul and his family members welcomed him into their home and treated him with humility and kindness. They were very helpful and supportive towards him and helped him to settle into his surroundings and he slowly became accustomed to British lifestyle and culture. After an apprenticeship at Mr Abdul's restaurant, he became familiar with the work and managed to secure a job at an alternative restaurant where he was paid a moderate salary which was inclusive of meals and accommodation.

33. On 26 October 2012 he was encountered whilst working in an Indian restaurant in Brighton and subsequently detained. He was currently enjoying a full and active family life with his friends and relatives in the UK. He felt he had developed an emotional dependence on them, in particular with Ridwan Ahmed, which was above and beyond normal emotional ties.
34. In his third witness statement signed by him on 1 August 2015, the claimant said that the discrepancy in arrival dates noted by the First-tier Tribunal Judge was the result of a simple typing error which both he and his legal representative failed to notice.
35. The claimant was asked supplementary questions by Mr Davison, and was extensively cross-examined by Mr Jarvis. He also answered questions for clarification purpose from me.
36. He was asked about a set of original photographs taken of him in the street wearing a white baseball cap and a white fleece. Copies of these photographs appear at pages 221 and 222 of the claimant's bundle. The claimant said that the photographs had been taken by his cousin Mr Faysal in South Woodford when he was aged 15 years old.
37. On the back of one of the photographs someone had written, "Age 15 taken in South Woodford 1995". The claimant said that Mr Faysal had written these words. I asked the claimant when the photographs had been developed. He said he was not sure.
38. According to the refusal letter dated 14 November 2012 (page 64 of the claimant's bundle) when the claimant was interviewed following his detention on 26 October 2012 he said he had entered in 1994 *using a passport belonging to someone else*. Mr Jarvis put this to the claimant, who denied that he had said this. Mr Hussain had arranged a passport for him.
39. Mr Jarvis asked the claimant to provide an account of his movements between 1994 and 2001, including at which restaurants he had worked, and in what order. The claimant answered that, after spending two years in Birmingham, he had moved to Honiton in Devon where he had worked at the Raj Restaurant for six months. He then moved on to live with his aunt in Brighton for some six to seven years. He was not there permanently, as he used to go and work at restaurants where he was given overnight accommodation. He had gone to live with his aunt in 1997, and it might be in 1997 or 1998 that he had started working at the Megana Grill Restaurant in South Woodford. He initially said he worked there for a few days each week, but he later said that he was living and working there for six days each week. He had forgotten



when he had stopped working there. He started work at the Viceroy Restaurant in Newhaven towards the end of the year 2000. He confirmed that before the end of the year 2000 he had not worked in any other restaurants apart from the Raj, the Megana Grill, and the Viceroy.

40. It was put to him that in his second witness statement he indicated that he had eventually obtained proper employment at a restaurant, and he was asked which restaurant he was referring to. He said that this was the Kohinoor Restaurant in Sheerness, Kent, where he had started in 2001.
41. He was asked whether he had worked in Chippenham. He said yes, he had forgotten that. But he could not recall when he had worked there, and he had forgotten the name of the restaurant. He could not say whether he had worked in Chippenham before or after 2001.
42. His aunt had passed away on 14 November 2015. He had not asked her to give evidence on his behalf. That was why there was no letter or witness statement from her. Her daughter Jasnara had accompanied him to the hearing today, but she had not been asked to make a witness statement either. He had not provided any documentary evidence of his employment between 1994 and 2001 as he had lost contact with his former employers. There was a high turnover of staff, and ownership of restaurants was always changing.
43. He had met Faysal Ahmed (who lives in South Woodford) at the Megana Grill Restaurant in 1995. There was a birthday party taking place at the restaurant. He thought it might have been Faysal's own birthday, but he was not sure. He was still living in Birmingham at the time, so he did not have much contact with Faysal in 1996. The level of contact had been much greater after 2012, as following his release from detention he had gone to live with Faysal Ahmed, and he was still living with him.
44. He had met Gurdeep Virdee at the same birthday party. He was a friend of Faysal Ahmed, and he had a shop nearby. He had had good contact with Mr Virdee since he had been living with Faysal Ahmed.
45. He had met Mr Joynal Uddin (who lives at an address in Ilford, Essex) at his home in Ilford in December 1994. When he was working at Megana Grill, he would regularly go round to Mr Uddin's house in Ilford.
46. Mr Virdee was called as a witness, and confirmed that his letter dated 22 April 2014 at page 200 of the claimant's bundle was accurate. The address given at the top of the letter (100 Snakes Lane East, Woodford Green) was his work address. In the body of the letter, he said he had known the claimant from 1995, having met him through a friend. In his oral evidence, he said he had met the claimant at the Megana Grill Restaurant in Woodford. His friend Faysal Ahmed owned the restaurant, and he had invited him to a party which was taking place there. It was not Faysal's own party, it was a friend's party. The claimant was there as a guest, not as an employee. Faysal Ahmed had introduced the claimant to him as one of his friends. He did not

know where the claimant was living at the time, or anything about his situation. The next time he had seen him was in about 1998 at Faysal Ahmed's house. He had seen him more frequently after 2012 when he had become a permanent resident at Faysal Ahmed's house. He would often cook for them. Mr Virdee was confident that the first meeting was in 1995, as he used to travel internationally with his work.

47. Faysal Ahmed was called as a witness. On 19 July 2010 he had written a letter in his capacity as the proprietor of the Megana Grill Restaurant at 219 High Road, London E18. He wrote to confirm that he was very impressed by the claimant's qualifications and experience and would like to offer him full-time employment as a chef. The offer was subject to sight of the claimant's national insurance number and documentation confirming his entitlement to work in the UK (claimant's bundle page 190).
48. On 3 November 2010 Faysal Ahmed had written a letter from his home address in Chelmsford Road, South Woodford, London E18 confirming that he had known the claimant for over fifteen years and had always known him to be trustworthy and honest.
49. In his signed witness statement of 17 November 2014, which he adopted as his evidence-in-chief, Mr Ahmed said that he had been born in the UK to parents who were from Bangladesh. He had been residing at the Chelmsford Road address in South Woodford since 1990 with his family, who included his parents, wife and sibling. He had known the claimant since 1995, when they met at a family gathering in London. He got on extremely well at their first meeting when he discovered that he was from the same village as his father and a distant cousin. After that they maintained contact about four to five times a year and often met at other social engagements like weddings and parties, as they were from the same area in Bangladesh. The claimant had been residing with him and his family since November 2012. He had become aware of the claimant's immigration status after they met. The claimant informed him that he would like to settle in the UK as he had lost all contact with Bangladesh. The claimant was particularly close to his wife's younger brother Ridwan who suffered from a learning disability.
50. Mr Davison asked Mr Ahmed about the photographs. He said he had taken the photographs of the claimant in the street outside his home in South Woodford in 1995 when the claimant was aged 15. This was on an occasion when the claimant had come to see him at his home. He asked Mr Ahmed when the photographs had been developed. He said he could not recall. He developed them more or less at the same time as he had taken them.
51. In cross-examination, Mr Jarvis put to Mr Ahmed that on the back of the photographs there was typed the date of 23.10.01. Mr Ahmed said they could be reprints. He had not supplied the photographs to the claimant for the purposes of the appeal proceedings. It was only today that he had written on the back of one of the photographs that it had been taken in 1995. He did not notice that the photographs were printed in 2001 when writing that message.

52. He had met the claimant for the first time at the Megana Grill Restaurant at a birthday party. His friend Gurdeep was there. He had not met the claimant before. The claimant was not a friend of his before the party at which they met. He was a guest at the party. He did not know who had invited him. He was on his own. He had not asked him how he had got there. The claimant told him he was living with someone in Birmingham.
53. The claimant had not come to work in the restaurant. They had offered him a job on production of his papers. He had never actually worked at the restaurant, and he had never stayed in accommodation above the restaurant premises. He could not explain why the claimant had claimed the contrary. He did not know where the claimant had been living between 1995 and 2012.
54. He knew his parents were alive, but they are not on talking terms otherwise he would have known about this. He was not exaggerating the difficulties that the claimant would face on return to Bangladesh. The majority of people in Bangladesh relied on remittances from people abroad. It was put to him that he could provide the claimant with financial support in Bangladesh. He answered no, as he had his own family to look after. He had not realised that the claimant would be with him for as long as three years.
55. Mr Joyanal Uddin was called as a witness. On 1 November 2010 he had written a letter of support in the capacity of a representative of the Golapgonj Upazela Education Trust UK, which operated from an address in Goodmayes, Ilford, Essex. (Mr Uddin's home address is also in Goodmayes, Ilford, Essex). He said he had known the claimant as a member of "their organisations" for over eleven years. During his tenure, he had had the opportunity to meet the claimant in different activities as a colleague of the Golapgonj Upazela Education Trust UK. He found the claimant to be a determined, honest and hardworking person. He understood that he was making an application for indefinite leave based on the long-residence concession, and he fully recommended and supported his application.
56. In his witness statement, which he signed on 17 November 2014, and which he adopted as his evidence-in-chief, he said the claimant was his paternal cousin, although he now regarded him as his younger brother. He had known him all his life, especially after he first arrived in the UK in 1994. He felt they had a duty to support him and ensure his general wellbeing as he had no-one else to turn to for support. He had supported him financially and emotionally over the years and had provided him with a temporary home when needed.
57. In his oral evidence, he said that the claimant was his cousin brother. He had turned up at his house in December 1994 unannounced. He was aged about 13 or 14. He had come on his own from Birmingham. He told him he had come from a family who were living in Birmingham. The claimant had somehow obtained his address. He had just come up from Birmingham for the day. Mr Jarvis asked Mr Uddin whether he was worried about the claimant's situation, given how young he was. He said he was surprised. The claimant lived in Birmingham for two years and after

that he got jobs at restaurants. Mr Uddin initially said he did not think the claimant had his own family in the UK. But he then agreed that he had a cousin and auntie in Brighton. Altogether, they had about fifteen or sixteen cousins in the UK. Mr Jarvis put to Mr Uddin that the claimant had lived with his auntie until 2012. Mr Uddin indicated that he did not know one way or the other. He said he had seen the claimant regularly after 1996 when the claimant was working in London. He used to see the claimant every three months or so.

58. In his closing submissions on behalf of the Secretary of State, Mr Jarvis submitted that the evidence relating to the claimant's presence and movements between 1994 and 2001 was conflicting and inconsistent. There was no corroborative documentary evidence that the claimant was in the United Kingdom at all before 2001. Friends and relatives who had given evidence in support of the claimant had a motive to exaggerate their evidence in order to assist him in his appeal.
59. In reply, Mr Davison submitted there was nothing inherently incredible about the claimant's account. He was not a reliable historian, but this was only to be expected given that he was a child for the first four years that he was in the United Kingdom; and given that some of the matters he was being asked to recall had taken place over twenty years ago.
60. Faysal Ahmed was not the owner of the Megana Grill at the time that the claimant claimed to have been employed there. It was being run by Faysal Ahmed's father. Perhaps his father was employing the claimant illegally. Faysal Ahmed was away at university. Furthermore, if the whole thing was made up, they could have colluded in order to get their story straight on this point. Another indication that the claimant's account had not been concocted with the assistance of his supporting witnesses was that the claimant had always been consistent about entering the United Kingdom in 1994, including when he applied for discretionary leave to remain in 2004. At that time he needed to establish fourteen years' unlawful residence in order to take advantage of the long residence Rule. So it did not make sense that he would fabricate a date of entry of 1994, as opposed to fabricating a date of entry in 1990.
61. Mr Uddin did not really know the claimant, and it was difficult to see what incentive Mr Uddin would have to lie on the claimant's behalf. But Faysal Ahmed had a vested interest in helping the claimant as he was useful around the house.
62. Given his age between 1994 and 2001, and the fact that he was working illegally, it was credible that he was not able to produce any documents relating to that period. The only real evidence was the original photographs. He was plainly considerably younger in the original photographs than he was now.
63. He submitted that the claimant qualified for leave to remain under Rule 276ADE, applying Rule 276AO. Alternatively, the fact that he had now accrued over twenty years' residence meant he should succeed in an Article 8 claim outside the Rules.

## **Discussion and Findings on Remaking**

64. The claimant has been consistent about his claimed date of entry in 1994, but in most other respects his account has been wildly inconsistent. In 2004, when his recollection about his movements over the preceding ten years would have been much fresher, the claimant gave a materially different account than that which he is giving now.
65. In his 2004 account, he said that after leaving Birmingham he had gone to work at Akash Restaurant in Chippenham for eighteen months. But in his oral evidence, an eighteen month period of employment in Chippenham did not feature at all in his claimed employment history between 1994 and 2001. The implication of the evidence he gave in 2004 was that his employment at the restaurant in Chippenham was a significant period in his life, and so it is not credible that the claimant could have completely forgotten this period of his life when asked to give details of his alleged employment history between 1994 and 2001.
66. Another notable discrepancy is in that in the 2004 statement he claimed to be working at the Raj Restaurant in Devon, presumably staying there during the week, and returning to his aunt's home in Brighton at weekends. But in his oral evidence, he claimed that he had worked at the Raj Restaurant in Honiton, Devon, immediately after leaving Birmingham in 1996.
67. It is highly significant that the people who are, on his own account, best placed to testify to his presence in the United Kingdom in this period have not come forward, or been asked to come forward, as supporting witnesses. On his own account, the claimant was very well treated by Mr Hussain's family members in Birmingham with whom he lived after Mr Hussain allegedly abandoned him here. In the circumstances, it is not credible that the claimant would not have remained in contact with Mr Hussain's family members, including Mr Abdul, who allegedly gave him an apprenticeship in his restaurant in Birmingham, and effectively acted as his mentor. His claim to have lost contact with Mr Abdul is thus inherently lacking in credibility, and it is also undermined by the fact that some of the letters in support purportedly emanate from people who live in the West Midlands, including one at page 210 of the bundle from a person who claims to have met him at a wedding in Wednesbury, West Midlands, in 1998; and a letter from Mr Mohammed Ali Ahad who says that he first met the claimant in Birmingham at his mother-in-law's house in 1996.
68. Mr Davison characterised the original photographs of the appellant as being the only real documentary evidence of the claimant's presence in the United Kingdom as early as 1995. I find that the claimant does not look considerably younger in these photographs than he does in the other copied photographs in the bundle, and I find that he does not look as young as 15. He looks as if he is in his early twenties, which would be consistent with the date printed on the back of the photographs. The date on the back of the photographs is also consistent with the bank statements at pages 135 following. These statements show that the claimant opened an account at the NatWest branch in South Woodford on 16 August 2001, giving as his home address

the Chelmsford Road address of Mr Faysal Ahmed. So I am satisfied to a high degree of probability that the original photographs were taken of the claimant outside Mr Faysal Ahmed's home in October 2001.

69. Around the same time, the claimant registered with a GP practice in Ilford, giving as his address the same Castleton Road, Goodmayes address which is given by Mr Joynal Uddin in his subsequent letter of 1 November 2010. The fact that in the 2010 letter Mr Uddin says he has known the claimant "for over eleven years" rather than since 1994 (which would be for over fifteen years) reinforces Mr Jarvis's case that Mr Uddin, and indeed Mr Ahmed, are simply not telling the truth about when the claimant first came to the UK, and hence when they first met him in the UK.
70. The claimant has produced pay slips issued to him by the Viceroy Limited Restaurant in 2002 and 2003, and extensive documentation, including P60s, to show that he was employed at the Raj Restaurant in Honiton, Devon, between 2004 and 2007. The fact the claimant has been able to produce documents evidencing employment at these establishments, although he was present in the country illegally, shows that he should have been able to produce documentary evidence of his claimed employment in the United Kingdom prior to 2001.
71. The claimant's credibility, and Mr Ahmed's credibility as a supporting witness, is further undermined by a letter dated 29 October 2010 from Mr Nurul Islam, General Secretary of the Bangladesh Welfare Association,. Mr Islam wrote to confirm that he had personally known the claimant of the Chelmsford Road address (Mr Ahmed's home address) for the last ten years. Mr Islam's evidence is significant as he is ostensibly an independent witness. Not only does Mr Islam only confirm the claimant's presence in the UK for the last ten years - from the year 2000 - as opposed to the last sixteen years, but he also confirms that to his knowledge the claimant lives at Faysal Ahmed's home address. But according to both the claimant and Mr Ahmed, the claimant did not start living with Mr Ahmed until 2012. There is no documentary evidence of the claimant residing with his aunt in Brighton, whereas there is documentary evidence indicative of the claimant residing with Mr Faysal Ahmed as early as 2001.
72. Mr Davison submitted that if the claimant's claimed date of entry was fabricated, he would have claimed that he had entered in 1990, not 1994, in order to take advantage of the fourteen year unlawful residence Rule. I do not find this to be a compelling argument, as the claimant might have calculated that a claimed date of entry of 1994 was likely to be found more credible.
73. Although Mr Faysal Ahmed may not have been running the family restaurant in 1996/1997, it is not credible that he would have been unaware that the claimant was living and working at the restaurant during this period, if this was in fact the case.
74. Mr Uddin's account of the claimant turning up on his doorstep unannounced in December 1994 is wholly lacking in credibility, as is the account of the claimant meeting Faysal Ahmed and his friend at the Megana Grill Restaurant in 1995. Mr

Virdee said the claimant was introduced to him by Mr Ahmed as a friend of his, but Mr Ahmed had never met the claimant before. So it is not credible he was introduced as a friend. No credible explanation has been given as to how the claimant came to be at the restaurant in the first place, given that he was allegedly living in Birmingham at the time; he was not working at the restaurant; and no identifiable adult had brought him along to the restaurant as a party guest.

75. In conclusion, none of the supporting witnesses is reliable on the question of when they first met the claimant in the United Kingdom, and none is reliable on the claimant's presence in the United Kingdom before 2001. Alternatively, even if credence is given to their first alleged encounters with the claimant in the UK, each first encounter is entirely consistent with the claimant being present in the country temporarily as a visitor, and then returning to Bangladesh at some point in 1995 with the person or persons who brought him here as a visitor.
76. On any view, I find that the claimant has not discharged the burden of proving that he has been continuously resident in the United Kingdom since 1994, as opposed to having being continuously resident in the United Kingdom since 2001.
77. Accordingly, the claimant does not qualify for leave to remain on the ground that he has accrued at least twenty years' unlawful residence in the UK. Turning to an Article 8 claim outside the Rules, questions one and two of the **Razgar** test must be answered in his favour as he has been continuously resident here since 2001. Questions three and four of the **Razgar** test must be answered in favour of the Secretary of State, and so the crucial question is whether the proposed interference with the appellant's private life rights is proportionate, having regard to the public interest considerations identified in Section 117B of the 2002 Act as amended by the Immigration Act 2014.
78. In light of my primary findings of fact, there are no compelling circumstances which militate against the claimant's removal. There are not very significant obstacles to the claimant's reintegration into life in Bangladesh. The skills which he has acquired here as a chef can be used by him to obtain employment on return. If he has been financially supported by friends and relatives here such as Mr Faysal Ahmed, it is likely that he will be able to continue to look to such friends and relatives for continued financial support in Bangladesh while he is re-establishing himself there. The cost of living in Bangladesh is much lower than it is here, and so the financial outlay required to support the claimant in Bangladesh is correspondingly modest. Although the claimant can apparently speak some English, he does not display a high level of integration as he required the services of a Bengali interpreter in order to give his evidence. He is not financially independent. He has worked illegally and he is likely to have entered the country illegally in 2001. I find that the proposed interference strikes a fair balance between, on the one hand, his rights and interests, and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls.

**Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal is dismissed on all grounds raised.

I make no anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Monson