



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20886/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6th August 2018

Decision & Reasons Promulgated
On 23th August 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR LUIS EDUARDO GARCIA LOPPEZ

Claimant/Respondent

Representation:

For the Secretary of State: Mr J Isherwood, Home Office Presenting officer

For the Claimant/Respondent: Mr J Gajar of Counsel, instructed by Londinium Solicitors

DECISION AND REASONS

1. On 5th July 2016 the claimant made a human rights application for leave to remain in the United Kingdom which was refused in a decision dated 8th August 2016.
2. It was not accepted that the claimant fell within the provisions of paragraph 276ADE(1) – CE and it was not accepted that he had been in the United Kingdom continuously for twenty years. It was considered that there were no exceptional circumstances in his case to consider the matter outside the Rules.

3. The claimant appealed against that decision to the First-tier Tribunal, which appeal came before First-tier Tribunal Judge Chana on 29th January 2018. In a decision promulgated on 12th February 2018 the appeal was allowed on the basis of long residence of twenty years dating from 25th September 1996.
4. A challenge has been made to that decision by the Secretary of State on the basis that the Judge fell into error in her application of paragraph 276ADE.
5. The Immigration Rules required that the assessment of the date of residence for the purposes of paragraph 276ADE was to be calculated from the date when the application was made, namely on 7th July 2016.
6. Even accepting that he had been in the United Kingdom since 25th September 1996, less than twenty years had accrued. Such was an error, which meant that technically the Judge should have gone on to consider the matter outside of the Immigration Rules and she did not.
7. Permission to appeal to the Upper Tribunal was granted on that basis and the matter comes before me to determine the issue.
8. Both parties agreed that it was an error on behalf of the Judge to have found that the claimant met the Immigration Rules and did not go on to consider exceptional circumstances or Article 8 of the ECHR.
9. In those circumstances both parties agree that the decision should be set aside to be remade by the proper principles.
10. The essential issue as between the parties is whether or not the claimant has been in the United Kingdom for the requisite period. It was said that the claimant has provided insufficient evidence to show that fact. Seemingly that was because, as he agreed before the First-tier Tribunal Judge, he had gone underground for an appreciable period of time.
11. The Judge, for the reasons as set out in the determination found that he was credible as to his account, not least because in the respondent's bundle there is a decision dated 18th June 1998, appeal number HX/71417/1997 which is his appeal against the decision of the respondent refusing his asylum claim made in 1996. The decision notes that the claimant was interviewed by an Immigration Officer on 25th September 1996.
12. That would seem to be cogent evidence as to the date of arrival although not necessary cogent evidence that he has remained in the United Kingdom ever since.
13. I was asked by Mr Gajar to preserve those findings. It seems to me that to do so would unnecessarily tie the hands of a subsequent fact-finder and decision-maker, nevertheless it would be open to the Judge rehearing the matter to note the evidence

that was presented and to adopt it if need be. It would be open to apply Devaseelan to the findings of fact if need be.

14. A matter of some concern to me which has been raised with the parties is whether there has been fairness and transparency in the overall decision making process.
15. On 6th July 2012 the claimant submitted an application for leave to remain on the basis of long residency, namely fourteen years. That application was refused on 27th December 2013 but became the subject of judicial review on 27th January 2016. The judicial review was conceded and a consent order was signed on 27th January 2016 agreeing that the case would be reconsidered. I was not entirely clear whether that reconsideration was of the decision of 6th July 2012, as per the transitional provisions in relation to the application for fourteen years' long residence.
16. Mr Isherwood submits that that agreement was superseded because the claimant made the application of 7th July 2016 for leave to remain on the basis of human rights. Whether or not that should fairly be treated as a new application under the Immigration Rules or merely an additional aspect to the matter perhaps needs to be clarified. It would seem to be unfortunate if the claimant loses the continuity between his original application of July 2012 for fourteen years simply because he sought to add to it under Article 8. That is a matter that can be considered by the parties as it may be potentially relevant to the issue of exceptional circumstances outside of the Rules.
17. In all the circumstances therefore, given the significant dispute as to residence, the matter will be remitted to the First-tier Tribunal in accordance with the Senior President's Practice Direction. Both parties seem to be agreeable to that course.

Decision

The Secretary of State's appeal before the Upper Tribunal succeeds to the extent that the First-tier Tribunal decision is set aside to be remade by a fresh hearing.

No anonymity direction is made.



Signed

Date 14 August 2018

Upper Tribunal Judge