



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00063/2020

THE IMMIGRATION ACTS

Heard at Field House
On 9 June 2021

Decision & Reasons Promulgated
On 20 July 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

DEREK RICKY THORPE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr Lourdes, Counsel instructed by VR & Shaw Solicitors
For the Respondent: Mr Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

Background

2. The appellant is a citizen of Trinidad and Tobago, born on 2 July 1967.

3. The appellant claims that he entered the UK in December 1998 as a visitor and remained in the UK (without leave) thereafter. He claims that he meets the conditions of paragraph 276ADE(1)(iii) of the Immigration Rules, as he has accrued 20 years of continuous residence in the UK.
4. In a decision dated 4 December 2019, the respondent did not accept that the appellant has lived in the UK continuously for over 20 years. The respondent noted that the documentation supplied by the appellant to corroborate his presence in the UK did not cover about half of the years he claimed to have been in the UK.
5. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Rastogi ("the judge"). In a decision promulgated on 20 November 2020, the judge rejected the appellant's claim to have lived in the UK continuously for over twenty years and dismissed the appeal. The appellant is now appealing against that decision.

Decision of the First-tier Tribunal

6. The judge refused an application by the appellant's representative for an adjournment in order to obtain a full copy of the appellant's GP records. The judge explained in paragraphs 9 - 11 of the decision why this application was refused. In short, the judge's reasons were: (a) the application was made at the conclusion of submissions, (b) no reason was given why the GP records had not been obtained previously, (c) granting the application would have resulted in the hearing being part heard and the need for a further hearing, and (d) it was by no means clear that the GP records would be decisive of the issues in dispute.
7. The judge heard evidence from the appellant and his sister. It appears from paragraphs 27 - 35, that the appellant and his sister were asked, in considerable detail, about the appellant's hospitalisation and illness (with TB) between 2000 and 2004. The judge found at paragraph 35:

"On the basis of the above analysis I am driven to the conclusion that neither the appellant nor his sister are reliable historians when recalling the chronology of the appellant's illness [between 2000 and 2004]. However, I did find them in general terms to be consistent in their narrative of the progression of the illness and in particular they both gave detailed and consistent evidence about the appellant's presentation upon falling ill for the second time and the difficulties the hospital had in diagnosing him due to his psychosis."

8. The judge found it to be noteworthy that the medical records did not show any GP attendances between 2014 and 2019 despite there being oral evidence of both witnesses that he had attended the GP. The judge noted that the appellant's claim to have had a foot operation in 2015 was, however,

corroborated by a letter. The judge stated in paragraph 43 that one possible explanation for the absence of GP attendances between 2014 and 2019 was that the appellant was not in the UK at that time.

9. The judge noted that the appellant submitted passports covering the entire period in question and that the only entry stamp to the UK was on 29 December 1998. The judge stated in paragraph 49 that the appellant did not have leave to be in the UK and therefore would not have lawfully been able to re-enter the UK without securing entry clearance. However, he found at paragraph 50 that the passports were of only limited evidential value. He stated:

“I have considered the weight to be attached to the passports. I agree with [the respondent’s representative] that the absence of entry and exit stamps cannot be converted into positive evidence of residence. For that reason they have limited evidential value.”

10. The judge concluded at paragraph 53 that:

“[N]oting that there is presently seven of the 20 years for which corroboration has not been provided, and as I have not found the appellant and his sister to be wholly reliable witnesses, the appellant has failed to satisfy me that he has resided in the UK for a continuous 20 year period.”

Grounds of Appeal

11. The appellant advanced the following grounds:

- a. Having found, at paragraph 35, that the appellant and his sister were in general terms consistent in their narrative, the judge erred by dismissing the appeal on the basis that the appellant and his sister were not “wholly reliable witnesses”.
- b. The appellant produced sufficient documentary evidence to discharge the burden of proof that he has been in the UK continuously for over 20 years.
- c. The appellant was prejudiced by the judge refusing to adjourn the hearing in order to allow the appellant to obtain and adduce his GP records.
- d. The judge erred by not attaching weight to the fact that the appellant had no way of lawfully re-entering the UK during the period covered by his passports.

Admission of GP records

12. Mr Lourdes sought, at the commencement of the hearing, permission to rely on the appellant's GP records, which had been obtained following the First-tier Tribunal hearing. Mr Kotas opposed the application, arguing that because the records were not before the First-tier Tribunal they were not relevant to whether an error of law was made. I refused to admit the records as Mr Lourdes was unable to identify any reason they were relevant to whether the judge erred in law. I agreed, however, that if I found there to be an error of law, they would be admitted for the re-making of the decision.

Analysis

13. I do not need to consider all of the grounds because I am satisfied that the judge erred by failing to adjourn the hearing in order to give the appellant an opportunity to obtain, and submit, a complete set of his GP records. I reach this conclusion with great reluctance considering the circumstances in which the adjournment was requested. As noted by the judge in paragraphs 9-11, the adjournment was requested towards the end of the hearing in response to questions asked by the judge and without any explanation as to why the appellant's solicitors had failed to obtain and submit the records prior to the hearing.
14. The importance of procedural rigour has been emphasised by the Court of Appeal (see, for example, Singh LJ in paragraphs 67-69 of *Talpada, R (On the Application Of) v The Secretary of State for the Home Department* [2018] EWCA Civ 841) and acceding to a request such as this is undoubtedly undermining of procedural rigour. However, the question that needs to be addressed is whether the appellant has been deprived of a fair hearing. The test, as explained in *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC), is that of fairness; and it can be unfair to not adjourn a hearing even if that is inconsistent with a proper regard for procedural rigour.
15. The judge gave two reasons (in paragraph 53) for not accepting the appellant has lived in the UK for 20 continuous year. These are that: (a) there was an absence of documentary evidence corroborating the appellant's presence in the UK for seven of the twenty years he claimed to have been in the UK continuously; and (b) the appellant and his sister were not "wholly reliable witnesses". The finding that the appellant and his sister were not "wholly reliable" was made despite the judge not making any adverse findings in respect of their credibility (other than to note that they were not reliable historians about the chronology of the appellant's illness in 2000 - 2004). Although I am sympathetic, given the importance of procedural rigour, to the judge's decision to refuse to adjourn the hearing, I am of the view that in this case, which turned on the documentary evidence and where the GP records (which could be obtained with relative ease and speed, and would constitute

highly reliable evidence) had the potential to be determinative of the appeal, fairness required an opportunity to be given to the appellant to obtain and submit them. I therefore set aside the decision on the basis that the judge erred by not adjourning the hearing.

16. Although I reserved my decision on whether to set aside the First-tier Tribunal's decision, I invited the parties to make (and they made) submissions for the re-making of the decision. I am satisfied that I am in a position to re-make the decision on the basis of these submissions.
17. The appellant's case, as argued before me by Mr Lourdes, in summary, is that there are two very strong items of evidence that corroborate his claim to have not left the UK since 1998.
 - a. First, there are no entry stamps on his passports (and expired passports) between 1998 and the present, other than on 29 December 1998 which was when he entered the UK. Mr Lourdes submitted that if, at any time since 29 December 1998, the appellant had left and re-entered the UK, there would be a record of this in his passports.
 - b. Second, there are medical records confirming (and the respondent does not dispute) the appellant's presence in the UK between 2000 and 2003; and since 2003 he has been a patient at the same GP practice, where he has attended appointments on numerous occasions. Reliance was placed on a letter dated 30 December 2020 from the Brigstock and South Norwood Partnership GP Practice, stating that the appellant has been registered with them since June 2003 and enclosing a printout of electronic records covering the period between May 2004 and 1 July 2020.
18. Mr Kotas argued that the appellant's passports did not constitute strong evidence: he submitted that continuous residence in the UK cannot be established merely by presenting blank passports.
19. Mr Kotas accepted that the GP print-out indicates that the appellant has seen a GP at least once every year apart from in the years 2007, 2010, 2016 and 2017. He also acknowledged that it was not in dispute that the appellant had been in the UK between 2000 and 2003. He submitted, however, that (a) it does not follow from the fact that the appellant visited a GP during the course of a year that he was in the UK for the entirety of that year; and (b) there are four years in respect of which no corroborating documentary evidence has been produced; and (c) overall, there was a paucity of documentary evidence corroborating the appellant's presence in the UK even recognising the difficulty that the appellant may have had in locating documents. Mr Kotas submitted that the evidence, considered together, was not sufficient to establish that the appellant has resided continuously for 20 years in the UK.

20. The medical records adduced by the appellant show his presence in the UK between 2000 and 2003 (as found in paragraphs 36 and 40 of the First-tier Tribunal decision, and acknowledged at the hearing by Mr Kotas), and that he saw a GP in all years between 2004 and 2020 other than 2007, 2010, 2016 and 2017. This evidence does not establish beyond doubt that the appellant has been continuously in the UK. As observed by Mr Kotas, seeing a GP once or twice a year does not mean a person spent the entirety of that year in the UK and there are four years in which there is no corroborating documentary evidence at all to indicate the appellant's presence in the UK. However, I do not need to find it is certain the appellant has continuously been in the UK: the standard of proof is the balance of probabilities. In my view, the medical records establish that it is more likely than not that the appellant has not left the UK since 2000.
21. I have reached this conclusion without relying on the appellant's blank passports. The blank passports are not determinative, as argued by Mr Lourdes, but they do indicate that the appellant has not lawfully exited and re-entered the UK, which supports his claim that he has not left the UK. This evidence reinforces the conclusion I reached on the basis of the medical records.
22. Continuous residence of 20 years is the only condition of paragraph 276ADE(1) in dispute. As I am satisfied that this condition is met, it follows that the appellant meets the requirements of paragraph 276ADE(1). The consequence of the appellant satisfying a route to leave under the Immigration Rules - in this case paragraph 276ADE(1) - is that the public interest in maintaining effective immigration controls does not weigh against him in the Article 8 proportionality assessment. See *TZ (Pakistan) and Another v Secretary of State for the Home Department* [2018] EWCA Civ 110. I therefore allow the appeal under article 8 ECHR.

Decision

23. The decision of the First-tier Tribunal involved the making of an error of law and is set aside. I re-make the decision by allowing the appeal.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan

Dated: 6 July 2021