



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005181
First-tier Tribunal No: HU/50570/2020
IA/02426/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

UPPER TRIBUNAL JUDGE KEITH

Between

ARJUNAN VINAYAGAM
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: *Mr R McKee*, instructed by Raj Law Solicitors
For the Respondent: *Mr T Melvin*, Senior Home Office Presenting Officer

Heard at Field House on 16 February 2023

DECISION AND REASONS

1. These written reasons reflect the oral reasons which I gave at the end of the hearing. The appellant appeals against the decision of First-tier Tribunal Judge O'Keeffe, to whom I will refer in the remainder of these reasons as the FtT. The appellant had appealed to the FtT against the respondent's refusal of his application for leave to remain on human rights grounds. As recorded by the FtT in her later decision, the appellant's immigration history included previous asylum claims. He claimed to have entered the UK on 31st May 2000, and made an asylum claim on the same day. That application was refused on 3rd May 2001 and his appeal against that decision was dismissed on 9th January 2002. The appellant was granted permission to appeal by the Upper Tribunal and his appeal was once again dismissed on 30th January 2003. The FtT continued, at §4:

"On 9th October 2012, he submitted further representations which were refused on 8th November 2013 without a right of appeal. On 15th September 2014, he submitted further representations which were refused on 23rd November 2017 without a right of appeal. On 11th April

2019, he made further representations which were refused on 16th May 2019 without a right of appeal. On 11th February 2020 he submitted the representations under consideration.”

2. The respondent refused the most recent representations in a decision dated 8th September 2020, which the FtT considered. For the avoidance of doubt, the appellant was no longer claiming asylum, and instead was appealing based on the right to respect for his private life (Article 8 ECHR). Central to the FtT’s analysis of the appellant’s human rights claim were two issues: the appellant’s credibility; and the period of time in which he had been living continuously in the UK, for long-residence purposes. His credibility was relevant to his claim to have lived in the UK continuously, for the purposes of paragraph 276ADE(iii). He claimed to have lived continuously in the UK at the date of his further submissions dated 11th February 2020 for a period of 19 years and 11 months.

3. At §22, the FtT recorded at the outset of the hearing that the appellant’s representative accepted that at the date of his application, the appellant had lived in the UK for less than 20 years. The representative argued that since, by the date of the hearing, he had now lived continuously for at least 20 years, it was disproportionate to expect him to make another application. The FtT went on to consider whether the appellant had proved that he had lived in the UK continuously for 20 years. She noted that he had made an application for asylum on 31st May 2000. He claimed to have entered the UK that year, which the respondent did not dispute. A Judge of the First-tier Tribunal had heard evidence from the appellant, in an appeal, in 2001. There was a further First-tier hearing in on 12th September 2022, at which the appellant again gave evidence (§24). The appellant was therefore in the UK at the time of both appeal hearings. However, critically, at §25 the FtT continued:

“25. There is no documentary evidence to place the appellant in the UK again until he made further representations to the respondent on 9th October 2012 and 15th September 2014. There is then no documentary evidence to place the appellant in the UK until he made further representations on 11th April 2019 and 11th February 2020. The respondent asserts in the reasons for refusal letter that the appellant had failed to report in the past”.

4. The FtT added, at §27:

“27. There are gaps in the appellant’s immigration history relevant to his continued presence in the UK; notably between the end of 2002 when he gave evidence before the First-tier Tribunal and October 2012 when he made further representations to the respondent. There is then a further gap after the appellant’s further representations made on 15th September 2014”.

5. At §28, the FtT stated:

“28. Despite having claimed to have lived continuously in the UK since 31st May 2000, there is simply no documentary evidence to support that beyond the record of his attendance at the Tribunal and the various written representations made on his behalf for leave. In oral evidence the appellant said he did not have a permanent address and was living in fear of being sent home.

The appellant was asked in cross-examination whether he had any evidence to show that he was in the UK between 2004 and 2012 and he said that as he did not have a home, he did not have any evidence. He was asked whether he had contact with people during that time and he said he did not have anybody. Later in evidence he said he was homeless from 2003 until 2012 or 2013”.

6. I pause as it is unnecessary to reiterate the FtT’s subsequent finding that she was satisfied that the appellant had been present since 2012/13 because of the witness evidence of somebody with whom the appellant lived and whose credibility the FtT accepted. However, as the FtT noted at §32:

“32. That left the period from 2000 when the appellant entered the UK and 2012. The last point of record was the appellant’s oral evidence to the First-tier Tribunal in September 2002. There was and is no requirement of course for the appellant to corroborate his case, but the burden of proof is on him. Ms Sriharan submitted that the appellant had simply gone underground. I accept that people living on the margins of society or homeless are far less likely to have access to records such as tenancy agreements, medical records or even friends to support their case”.

7. The FtT explained at §§33 to 36:

“33. The difficulty with any assessment of the credibility of the appellant’s evidence is his immigration history which shows that he is willing to utilise sustained deception in order to advance his case. When the appellant made his claim for asylum, he said that he was a Sri Lankan national named Archunan Vinayak. He did give the same date of birth that he gives me. He maintained this deception as to his name and nationality before the Tribunal at the hearings on 14th December 2001 and 12th September 2002. The appellant gave an account that he had been actively involved with the LTTE, that he had been arrested, detained and tortured. None of this was true.

34. According to the reasons for refusal letter, the appellant maintained the deception as to his identity and nationality until his representations made in September 2014 when he said he was an Indian national. The appellant did not seek to argue otherwise. In oral evidence before me, the appellant made a hopeless attempt to suggest that there was no difference between the names Archunan Vinayak as used by him in his asylum claim and the name Arjunan Vinayagam as used before me. They are manifestly different.

35. Having eventually accepted before me that the details he gave when he made his asylum claim were not correct, the appellant attempted to say that everything that was done was done by his solicitors. He said, “several times I have been telling the truth. The solicitor has been saying the wrong thing”.

36. I reject that assertion entirely. The appellant said nothing of this in his statement. There is no evidence that the appellant had made any complaint to the Solicitors' Regulation Authority or any other regulatory body about the conduct of his former legal representatives. I am completely satisfied that the appellant was responsible for the deception carried out on the Home Office and on the Tribunal. I am completely satisfied that he was aware of that deception and that it was he who maintained the deception until September 2014".

8. The crux of the FtT's decision, with which the appellant takes issue, is at §37:

" 37. I find that given the appellant's history of deception, I can place no weight on his oral evidence about any of his personal circumstances. The appellant's evidence is wholly devoid of credibility. On the evidence before me considered as a whole, I find that the appellant has not demonstrated that he has remained in the UK continuously since his first entry in 2000. Whilst the evidence demonstrates that it is more likely than not that the appellant has been living in the UK since 2012, I find that the appellant has not demonstrated that he has lived in the UK for more than 20 years".

9. The FtT then went on to consider very significant obstacles to the appellant's integration in India, on which I do not dwell, as the grounds focus primarily on the FtT's findings in relation to continuous lawful residence, but I note in passing that the FtT expressly considered, as she was required to do, Section 117B of the Nationality, Immigration and Asylum Act 2002 and other relevant factors from §§41 to 45.

The Application for Permission and the Grant of Permission

10. The appellant appealed against the decision in grounds that were out of time, but in respect of which an extension of time was granted. I pause to note at this stage a preliminary matter, with which I dealt at the beginning of the hearing, but I repeat briefly now, for completeness. Mr McKee invited me to allow his submissions on whether the FtT had erred in taking, as a contested issue, the fact of continuous presence between 2002 and 2012, when he said the respondent had "implicitly accepted" this in the refusal decision. I had canvassed with him whether this was ever a submission to the FtT, or in the grounds of appeal to this Tribunal, as the issue of "implicit acceptance" did not appear to be a ground of challenge. He accepted that it had not been raised in the grounds of appeal to this Tribunal on which permission had been granted, nor had there been any application to amend the grounds. Mr Melvin objected to my hearing submissions on a possible new ground. I agreed with Mr Melvin's objection. I bore in mind the need for procedural rigour (see [Joseph \(permission to appeal requirements\)](#) [2022] UKUT 00218 (IAC) and [Latayan v SSHD](#) [2020] EWCA Civ 191). To use the Court of Appeals' phrase at §32 of [Latayan](#), these new submissions were being raised "on the hoof" with no prior notice, and without any written particulars, let alone any grant of permission. I declined to hear submissions on this new issue. I did not refuse any application for permission to amend the grounds, because there was no such proper application. Rather, Mr McKee wanted to expand his oral submissions beyond the grounds.

That was not in accordance with the overriding objective and was unfair on the respondent.

11. I turn to the grounds in respect of which permission had been granted.

The appellant's submissions

12. The appellant argued that at the date of the hearing, assuming the continuity of presence, it must be right that he had lived in the UK for 20 years, even if, at the time of his application, he had not. The appellant also argued that the FtT had failed to consider, when assessing his credibility, that the respondent had accepted the appellant's suitability, for the purposes of Section S-LTR.4.2 of the Immigration Rules. The respondent could have held against the appellant that he had "made false representations" or "failed to disclose any material fact", but had not. In contrast, the FtT had been concerned about false representations as being the basis for her conclusion that there were gaps in the documented records for the appellant's presence in the UK. She had discounting entirely his oral evidence on that basis. The FtT was "so incensed by the appellant's deliberate deception in making a bogus asylum claim, passing himself off as a Sri Lankan Tamil when he was really an Indian Tamil," that as explained in her reasons at §37, the FtT had erred in placing no weight on the appellant's oral evidence. The same error undermined the FtT's analysis of very significant obstacles to integration. The appellant added in his grounds that there was no linguistic difference between the appellant's claimed names.
13. Mr McKee pointed out in oral submissions, as trite law, that simply because somebody was untruthful in one respect did not mean that they were untruthful in all respects. The FtT had given herself no "Lucas" direction (R v Lucas [1981] QB 720). The FtT's reasons were deficient. For example, the FtT had failed to consider the difficulty that the appellant would have had in leaving and re-entering the UK unlawfully, without being encountered, or its likelihood.

The respondent's submissions

14. Mr Melvin relied on the Rule 24 response. The appellant was conflating credibility and suitability. The burden was on the appellant to prove continuous presence in the UK. His evidence was inadequate. The FtT had been conscious that those living at the margins of society might have difficulty accessing documentary evidence. The FtT had also been conscious that there was no need for corroboration. The FtT was entitled to ask about whether other witness evidence was available for the period between 2002 and 2012, and to be sceptical about the appellant's oral testimony, when he had maintained false testimony over such a long period, on matters as serious as claims of torture, nationality and identity. In these particular circumstances, the FtT was entitled to be unwilling to accept the appellant's word for continuous presence. She was not obliged to speculate on the likelihood or practical difficulties of clandestine exit and re-entry. Rather, the FtT was entitled to consider the evidence before her. The appellant's lack of credibility which was not the sole factor, but formed part of the FtT's assessment of the appellant's continuous presence in the UK and integration in India.

Discussion and Conclusions

15. First, I accept Mr Melvin's submission that the appellant's grounds conflate the suitability requirements of the Immigration Rules, with the appellant's general credibility. Just because an application is not formally rejected on suitability grounds does not mean that the respondent is prevented from raising the issue of adverse credibility, or that the FtT is prevented from assessing this. The respondent had expressly referred to the appellant's attempts to deceive her about his nationality on a number of occasions (§25 of the refusal decision). More importantly, the FtT did not fall into an error of assuming that because an asylum claim was unsuccessful, the appellant must have provided false testimony. In this case, the FtT considered the appellant's evidence that he had tried to be honest, and that his lawyers had lied. She rejected that evidence as untruthful, noting the lack of any complaint to the SRA or reference in an earlier witness statement. That was an assessment open to her, on the evidence before her. The FtT was entitled to consider the appellant's false testimony in assessing his general credibility and her reasons were clear.
16. Second, in fairness to Mr McKee, he does not suggest that it was impermissible for the FtT to have considered the previous deception, but he argued that the error was to have focussed on it to the exclusion of all other evidence or consideration, in discounting the appellant's evidence, particularly when those living at the margins of society may have little other evidence on which to rely.
17. I do not accept Mr McKee's submission that the FtT focussed solely on the appellant's lack of credibility. She also enquired of, and considered, other witness testimony. When other witnesses were available, such as after 2012, the FtT did make findings beneficial to the appellant. This undermines the contention that she dismissed the appeal because she was incensed at the appellant's previous deception. She was also conscious that there was no need for corroboration. She did not draw adverse inferences from the absence of alternative evidence. In considering the evidence as a whole, she considered as part of it, the appellant's oral testimony, of continuous presence, without much other detail, for a ten-year period between 2002 and 2012, as well as his claims that there were very significant obstacles to integration in India. The challenge for the FtT in this case was that she was being asked to accept the word of someone whom she had found to be so deliberately untruthful, over a sustained period, including in the earliest stage of his dealings with the respondent and earlier FtTs, as well as in his evidence to her. Ultimately, she was not prepared to accept the reliability of the appellant's oral assertions, despite being acutely aware of the limitations on obtaining other evidence. She did so, not because some of his assertions in some aspects might be unreliable, but because of a stronger conclusion - that he was a completely unreliable witness. I cannot say that the FtT erred in law in reaching that conclusion. It was a conclusion open to her to reach, on the evidence before her. It was also clearly explained. The same conclusion informed the FtT's analysis of obstacles to integration in India. She reminded herself, at §39, of SSHD v Kamara [2016] EWCA Civ 813. She did not accept his claim to have lost all ties to India, or that he would be unable to build up his private life within a reasonable period of time. She considered the support provided by a UK-based friend, and the disruption to that support caused by the appellant's removal. None of that analysis discloses any error of law.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Judge J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7th March 2023