



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000439
First-tier Tribunal No:
HU/51165/2022
LH/00573/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On the 12 June 2023

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MOHAMED DALI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Fazli, Counsel, instructed by Black Antelope Law
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Heard at Field House on 8 June 2023

DECISION AND REASONS

1. These written reasons reflect the oral decision which I gave to the parties at the end of the hearing. The appeal relates to whether the appellant has lived continuously in the UK (albeit unlawfully) for at least twenty years. If he has, it is argued that he would meet the requirements of paragraph 276ADE(1)(iii) of the Immigration Rules, which would be determinative of his human rights appeal (see TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109). In a decision promulgated on 3rd January 2023, a Judge of the First-tier Tribunal, Judge Seelhoff, had not accepted the claim of continuous residence. Whilst he noted the appellant's evidence and that of a witness, who claimed to have met the appellant regularly since the appellant's claimed arrival in 2001, the Judge rejected purported pay slips as fraudulent, having been produced by a dishonest accountant and he noted that tenancy agreements started only in 2012 (paragraph 11 of the decision).

2. Crucially for this appeal, the Judge concluded at paragraph 12 that:

“In terms of the evidence of the supporting witness he was clear in saying that the Appellant and his brother are like family to him having grown up in the same building in Algeria. He gave evidence that he believed that the Appellant and his brother had been in the UK in 2001 and that he had first met them there but the reason he gave for being sure of that was that he believed it was the year before he got married. The witness was unable to give much more in terms of details of when he had seen the Appellant and his brother in the UK and how he had verified the dates or the periods of time he was referring to.”

3. The Judge went on to assess the appellant's evidence and concluded that he had not delivered the best evidence that he could. His brother had not given evidence, nor had there been any evidence apart from the one friend from the Algerian diaspora community in Walthamstow. The Judge was not prepared to take on trust the word of someone who admitted to having evaded immigration control (the appellant) and whilst he would not go so far as to make a finding that the appellant was lying about his length of evidence, without more reliable evidence, the appellant could not make a finding on the balance of probabilities that he had proven that he was in the UK for 20 years at the date either of the application or before the Judge. The Judge went on to consider very significant obstacles to the appellant's integration in Algeria, which is not the subject of this appeal.

Grounds of appeal and grant of permission

4. The appellant has raised three grounds, which substantially overlap. Ground (1) is that the Judge failed to assess the supporting witness's oral evidence of having seen the appellant on a regular basis in the UK during the 20-year period. The Judge attached some weight to correspondence from those who did not attend the Tribunal hearing but limited weight to the live witness. The Judge also failed to make credibility findings about the appellant's evidence. If the Judge were willing to accept the appellant's evidence as being honest, (for example at paragraph 10), then it was incumbent on him to explain why he did not except the remainder of his account.

5. Ground (2) is that the Judge erred in requiring independent evidence, in circumstances where the difficulty of an illegal overstayer providing documents was accepted – see: R (Khan) v SSHD Department [2016] EWCA Civ 416. The Judge's discussion at paragraph 14 of the absence of independent evidence was inconsistent with R (Khan).

6. Ground (3) is that the error in the Judge's analysis of continuous residence also infected the Judge's proportionality assessment.

7. Upper Tribunal Judge Rintoul granted permission on the renewed application for permission, on 26th April 2023. The grant of permission was not limited in its scope.

Discussion and conclusions

8. I do not recite the parties' submissions, which I have considered in full, except to explain why I have reached the decision I have. On a preliminary point, Mr

Fazli made an oral application, without notice, to amend the grounds, to add a ground that the Judge had erred in concluding that the appellant's payslip documents were fraudulent. I enquired whether he had made a written application and what the explanation was for it being with no notice. He said that it was permissible to make an oral application without needing to do so in writing. He said that the new ground had "occurred to him" as he read the papers the day before this hearing. He was unable to explain why a written application had not been made yesterday. The precise nature of the ground changed as he developed his application, to which Mr Walker objected. He submitted that the Judge's findings that payroll slips produced under the PAYE Regulations, years after the claimed work were fraudulent, were wrong, on a "Robinson obvious" basis. When I enquired how the reasons were so obviously wrong, he then submitted that the reasoning was not adequate, although he was not able to explain in what way. I rejected the amendment application. It was without notice, without any adequate explanation, changed as the oral submissions developed, (which illustrates the importance of applications to amend grounds being made in writing) and was without any arguable merit, as the Judge had fully and fairly explained why he had reached the decision he did, at paragraphs 9 and 10. I bear in mind the need for procedural rigour, which the application plainly did not meet.

9. Mr Fazli then developed the third ground, (paragraph 27 of the grounds), which referred, in generic terms, to the Judge not considering the evidence which supported the claimed length of residence. He referred to specific letters from supporters, who had not attended the hearing before the Judge, which attested to having known the appellant for various periods of time and that he was of good character. Mr Fazli suggested that it was an error not to have referred to each specific letter, as opposed to what the Judge did, which was to refer to the supporters' evidence in summary terms (paragraph 13). This argument, which was in reality a substantial expansion of the grounds, also has no merit. The Judge was plainly not required to discuss each letter. Most of the letters were in generic terms and made no specific reference to the period of the appellant's continuous presence in the UK, which was the key issue before the Judge. The Judge was also entitled to attach limited weight to them, in the absence of their authors' attendance before the Judge. The fact that some of the authors may or may not have been British citizens and in jobs of responsibility was not something the Judge needed to recite, contrary to Mr Nazli's submission. The expansion of this ground was also misconceived.
10. Where the grounds do disclose a material error of law, identified as arguable by Upper Tribunal Judge Rintoul in the grant of permission, was the Judge's failure to explain whether he rejected the evidence of the live witness, at paragraph 12, and if so, why. The grounds attached an annex of the cross-examination evidence, which Mr Walker accepted had accurately recorded the oral evidence, in which the witness had discussed meeting the appellant daily in a coffee shop in his neighbourhood. Mr Walker made no formal concession but said that he could see that the Judge's reasons on this issue were problematic. I concluded that the analysis of the supporting witness's evidence was deficient. The Judge needed to explain if he rejected the witness evidence and if so, why. While the Judge's reasons were otherwise admirably clear and succinct, that was a material error of law.

Disposal of proceedings

11. I discussed with the representatives how to dispose of the proceedings. Both agreed that as the error undermined the assessment of the witness's credibility, and the appellant may seek to call additional witnesses, the nature and extent of the necessary fact-finding on remaking made it appropriate to remit remaking back to the First-tier Tribunal (see paragraph 7.2(b) of the Senior President's Practice Statement).

Notice of Decision

The decision of First-tier Tribunal Judge Seelhoff contains material errors of law and I set it aside.

I remit this appeal to the First-tier Tribunal, without preserved findings of fact.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal for a rehearing, with no preserved findings.

The remitted appeal shall not be heard by First-tier Tribunal Judge Seelhoff. No anonymity directions apply.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8th June 2023