Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20138/2016**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 12 October 2018	**On 18 October 2018**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

JOHN BANGS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K McGuire, Advocate, instructed by McGill & Co, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This decision is to be read with:

   (i) The respondent's decision dated 26 July 2016, refusing the appellant's application for leave to remain on family and private life grounds.

   (ii) The appellant's grounds of appeal to the First-tier Tribunal.

   (iii) The decision of FtT Judge Fox, promulgated on 7 March 2018.

   (iv) The appellant's grounds of appeal to the UT, stated in the application for permission to appeal filed on 21 March 2018.

(v) The grant of permission by FtT Judge Parkes, dated 6 April 2018.

(vi) The respondent's rule 24 response, dated 8 June 2018, to the grant of permission.

2. Mr McGuire did not adopt the point suggested in the grant of permission (not in the grounds) that the FtT had reversed the burden of proof.

3. Mr McGuire submitted that the judge had found, at least implicitly, that by the date of the hearing the appellant had lived continuously in the UK for 20 years. Mr Govan said there was no such finding.

4. Paragraphs 14 – 16 might have been more explicit. However, on this issue I uphold the submission for the appellant that the obvious reading of those paragraphs, and of the decision as a whole, is that the judge was satisfied of the appellant's claimed period of residence.

5. Mr McGuire accepted that the finding did not enable the appellant to say that he had met the requirements of the immigration rules, because those apply "at the date of application"; and that the right of appeal is not under the rules, but on human rights grounds only. However, he said it was relevant that the appellant showed that he could meet the terms of the rules, designed to be compliant with human rights, at that date, and that as there were no considerations on the other side, the appeal should have been allowed. He referred to *SSHD v Patel*, IA/53456/2013, a decision of a deputy judge promulgated on 12 December 2014. He accepted that is not an authority, but adopted its line of argument, and submitted that as the appellant has now obtained 20 years residence, it would be disproportionate to remove him.

6. Mr Govan submitted that there were gaps in the evidence such that satisfaction of the requirements of the rules was not shown, and that if he had 20 years residence, it was proportionate to expect the appellant to apply again and to show compliance with the rules.

7. Mr McGuire in response said that the decision left the appellant with nothing else to prove, and that as the respondent's decision proposed his removal, that was the matter to be put into the proportionality scales, not just the making of a further application.

8. I find that on proof of 20 years' residence, there was no other live issue in respect of the terms of paragraph 276ADE of the rules.

9. The appellant has not shown any flaw in the respondent's decision at the time it was made. However, the judge failed to note the potential significance of his finding of 20 years residence, disclosing a rather different situation at the date of the hearing. Having overlooked that point, I do not think the assessment that removal would be proportionate can safely stand.

10. Mr McGuire argued that the decision should be taken as posing the outcome as removal. I am not persuaded on that issue.

11. On a correct appraisal the question was not whether removal was proportionate, but whether it was proportionate to expect the appellant to make the application required under the rules. Although there are exceptions, that is a proportionate requirement in most cases.

12. It is no fault of the respondent that the appellant needs to apply again. When he made the application leading to these proceedings, he was not able to satisfy the rules. He could not reasonably have expected any other outcome.

13. The respondent's decision does (rightly) advise the appellant about liability to removal. However, it also carefully sets out all options, including (at page 7 of 8) the making of a further application if the appellant has new reasons or grounds for wishing to remain in the UK. That would be a reasonable and proportionate outcome.

14. (It appears on present information that such an application has good prospects of success, but that of course will be decided on its own merits, and this decision is not to be taken as an indication of the outcome.)

15. The decision of the First-tier Tribunal is set aside. However, the decision substituted is again that the appeal, as brought to the FtT, is dismissed.

16. No anonymity direction has been requested or made.

15 October 2018
Upper Tribunal Judge Macleman