Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11970/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 29 July 2019	**On 12 August 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR BALBIR SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms P Solanki, Counsel, instructed by Atwal Law
For the Respondent: Mrs H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of India, has permission to challenge the decision of Judge Fox of the First-tier Tribunal sent on 14 March 2019 dismissing his appeal against the decision made by the respondent on 16 May 2018 to refuse to grant him leave to remain.

2. The appellant had claimed that he had been resident in the UK since 1997, but the respondent's view was that there was no satisfactory evidence to show he had been in the UK before 4 January 2000 when he had made an asylum claim. The judge came to the same conclusion.

3. The appellant's grounds are essentially fourfold, the first alleging that the judge made material mistakes as to fact in relation to the witness evidence in several respects and failed to consider important aspects of the evidence from the witness; the second alleging procedural unfairness arising from the fact that the judge relied on certain problems in the evidence of the witnesses that had not been put to them in cross-examination; the third ground contending that the judge had failed to consider the documentary evidence substantively; and, fourthly, submitting that the judge failed to consider whether, even if the appellant was not accepted as having been in the UK since 1997, he may still have been resident prior to 4 January 2000 (the significance of any date after 4 January 1999 being that at the date of hearing (21 February 2019) the appellant would then have still met the twenty years' requirement set out at paragraph 276ADE(1)(iii) of the Immigration Rules.

4. The appellant's first ground centres on the judge's treatment of the four witnesses who were called to give oral evidence, namely [CS], [GS], [HS] and [AO]. The judge summoned the evidence of these four witnesses at paragraphs 33 – 51 and then evaluated it at paragraph 68 – 81 as follows:

> "68. The first witness stated that he first met the appellant in 1997. However, his witness statement confirms that he first met the appellant in 1999. I am conscious to consider that this discrepancy may be the result of an approximation as claimed by the first witness.
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> 69. However the first witness stated that he would see the appellant in Smethwick regularly during the week. The first witness is confident of this as he would never be present in Smethwick at the weekend due to personal commitments.
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> 70. The appellant's provided evidence that he secured employment at a farm in Evesham ('farm') shortly after his arrival in the UK; first bundle witness statement page 53. The appellant spent all weekdays at the farm and slept in a caravan on site. He only returned to Smethwick at weekends.
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> 71. It therefore follows that the appellant and first witness were never present in Smethwick at the same time according to their own evidence. This inconsistency damages the reliability of the first witness and I am unable to place any weight upon his evidence to support the assertion that the appellant was present in Smethwick during the relevant period.
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> 72. The first witness also stated that he has met the appellant at least 4 times per week since 1997. His witness statement confirms that the appellant and first witness socialised at each other's homes. However, the first witness has no meaningful knowledge of the appellant's personal life and has no awareness of his relationship status. This is not probative of an enduring friendship as claimed and reduces further the weight to be placed upon this evidence.
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> 73. In oral evidence the appellant stated that he met the second witness after his arrival in the UK. However, he also stated that he knew the second witness prior to his arrival in the UK. The

second witness confirmed that the appellant was present at the farm during weekdays. This further undermine the evidence of the first witness as stated above.

74. The witness statement of the second witness is of limited probative value as he confirmed that he was unaware of its contents prior to the appeal hearing when it had to be read to him by the interpreter.

75. Nor was the second witness able to state with any certainty that the appellant arrived at the farm in 1997. This is particularly unusual when considered in the context of the claim that the appellant and second witness shared accommodation in Smethwick for 9 to 10 years from 1997.

76. When the available evidence is considered in the round I am unable to place weight upon the evidence of the second witness to corroborate the appellant's claimed arrival on 4 March 1997.

77. The witness statement of the third witness suffers from the same defect as the witness statement of the second witness as stated above. The third witness confirmed that he is uneducated and illiterate. He does not know who wrote his witness statement and he had no knowledge of its contents before it was read to him by the interpreter at the appeal hearing.

78. However he continued to adopt the witness statement and I therefore consider the available evidence at its highest. He stated that the appellant has no ties to India; first bundle page 65. It therefore follows that the third witness is unaware of the appellant's significant family ties to India where the appellant's wife, children, siblings and mother reside.

79. Initially the fourth witness was able to state with certainty that he met the appellant shortly before he secured employment. However this evolved into approximately one year delay between these 2 key events. Nor was the fourth witness able to confirm the year he commenced the employment that provides the key event for his recollection.

80. I also note that there is no recognition of the appellant's presence at the farm and the fourth witness stated that the appellant's frequented a public house several times per week though he confined himself to non-alcoholic beverages.

81. I am unable to place any meaningful weight upon the evidence of the fourth witness. When the available evidence is considered in the round it is reasonable to conclude that the appellant has contrived evidence to support his claimed presence in the UK. These defects contaminate the remaining supporting letters for the same reasons along with the letter from the Sikh temple."

5. In the appellant's grounds a request was made for the Tribunal to make available to the parties the judge's Record of Proceedings so it could be compared with Counsel's Notes which were appended with the grounds. This request had been renewed in writing on 23 July 2019, but no reply was provided. At the hearing, I made the judge's ROP available to the

parties. Ms Aboni confirmed it was to all intents and purposes the same as Counsel's Notes.

6. I consider ground 1 is made out. In relation to the first witness, the judge considered his evidence was unreliable because (i) the appellant and he "were never present in Smethwick at the time according to their own evidence"; and (ii) the first witness "has no meaningful knowledge of the appellant's personal life and has no awareness of his relationship status" which was "not probative of an enduring friendship". The difficulty with (i) is that it depended on treating the appellant's evidence and that of the first witness as being that during weekdays at the relevant period of time the appellant stayed exclusively at the tomato farm in Evesham. Whilst that is one reading of what the appellant said in his witness statement at p53, it was clear from the appellant's oral evidence that during weekdays he also frequented Smethwick. If the judge considered there was an inconsistency in the appellant's own account regarding his location during weekdays, he should have put it to the appellant or ensured that the HOPO did. Further, there was no inconsistency on this matter in the first witness's evidence; he never said the appellant stayed exclusively on the farm during weekdays. In this regard I take judicial notice of two matters. One is that Evesham and Smethwick are relatively near to each other, a journey from one to the other taking around 30 – 45 minutes; the other is that tomato farming (even with greenhouses) is seasonal work, which rather indicates that for a considerable period each year the appellant would not have been working on the farm anyway. As regards (ii), whilst it is clear from the judge's own summary of the first witness's evidence that he had referred to meeting the appellant's wife once in 2015, that did not suffice to undermine the judge's assessment that the first witness had no "meaningful knowledge of the appellant's personal life". Nevertheless, the judge's error in relation to (i) cannot be rescued by reference to the issue of the extent of the first witness's knowledge of his personal life.

7. As regards the judge's treatment of the second witness, Mrs Aboni conceded there was a mistake of fact in that the judge gave as one of two reasons for rejecting his evidence that the appellant had arrived at the farm in 1997 "the context of the claim that the appellant and second witness shared accommodation in Smethwick for 9 to 10 years from 1997". That was not the second witness's evidence. The judge himself had recorded at paragraphs 44 – 45 that this was rather the evidence of the third witness. In addition, the judge's other reason for rejecting the second witness's evidence, namely that he was not "able to state with any certainty that that appellant arrived at the farm in 1997", is a mischaracterisation. Whilst the evidence given by the second witness on this issue may have been vague (he said he could not remember the day or month), he was adamant that he could be sure the appellant arrived in 1997 as this was three years after he himself had arrived. I concur with Ms Solanki that the judge does not appear to have taken account either of the fact that this witness was 81 years old.

8. In relation to the second witness, the judge stated that it was "of limited probative value as he confirmed that he was unaware of its contents prior

to the appeal hearing, when it had to be read to him by the interpreter" (paragraph 74); then at paragraphs 77 – 78 the judge stated this in respect of the third witness:

> "77. The witness statement of the third witness suffers from the same defect as the witness statement of the second witness as stated above. The third witness confirmed that he is uneducated and illiterate. He does not know who wrote his witness statement and he had no knowledge of its contents before it was read to him by the interpreter at the appeal hearing.
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> 78. However he continued to adopt the witness statement and I therefore consider the available evidence at its highest. He stated that the appellant has no ties to India; first bundle page 65. It therefore follows that the third witness is unaware of the appellant's significant family ties to India where the appellant's wife, children, siblings and mother reside."

9. From this context I glean two things. First, since there is nothing to suggest that the second witness did not also continue to adopt his witness statement, it is not clear why the judge did not adopt the same approach he said he would take in paragraph 78 in relation to the third appellant ("I shall consider the available evidence at its highest"). Second, if he really was taking the evidence of the third witness at its highest, this man's ([HS]'s) evidence was that the appellant lived with him from 1997 for ten years).

10. The grounds raise other matters concerning the judge's treatment of the four witnesses, but in light of what I have already observed about his treatment of the first three, it is unnecessary to elaborate further, except to point out one other unsatisfactory feature. The judge did not simply purport to explain why he found the evidence of the four witnesses unreliable. The judge's conclusion regarding this evidence was that it was concocted, he stating at paragraph 81:

> "81. I am unable to place any meaningful weight upon the evidence of the fourth witness. When the available evidence is considered in the round it is reasonable to conclude that the appellant has contrived evidence to support his claimed presence in the UK. These defects contaminate the remaining supporting letters for the same reasons along with the letter from the Sikh temple."

For such an assessment to be adequately motivated, it would have been necessary, in the interests of fairness, for it to have been put to the witnesses that they were lying. Yet this only appears to have been done in the case of the fourth witness (see paragraph 51: "The fourth witness does not accept that he is a tainted witness…").

11. It will be apparent from the above that the judge's approach to the four witnesses did in some respects manifest procedural unfairness. Whilst I would not entirely accept the litany of unfair aspects outlined in the appellant's written grounds, the procedural unfairness I have identified adds to the picture of a determination that fails to address the witness evidence properly.

12. I also consider that the appellant's third ground is made out. In paragraph 81 – cited above – the judge appears to reason that because the appellant has contrived the evidence of the four witnesses, this rendered suspect all of the other documentary evidence. Such reasoning is far too scattergun. The other documentary evidence included letters from the President of the Gurdwara and several from other friends who specifically stated that to their direct knowledge the appellant was in Smethwick in 1997. It may have been open to the judge to assess that this evidence possessed limited weight because the authors did not attend as witnesses. It was not open to the judge, however, without more, to treat it as "contaminated". A further aspect to the judge's error is that it appears to indicate that the judge assessed the weight to be attached to the evidence of the four witnesses in isolation from the documentary evidence; the evidence was not considered holistically.

13. I also see force in the fourth ground. Even if the judge had dealt properly with the witness evidence and concluded still that the appellant had not shown he had been in the UK since 1997, that did not on its own justify dismissal of the appellant's appeal. The appellant was entitled to be treated as meeting the twenty year requirement of the Rules even if able to establish he was in the UK from 4 January 1999, since the hearing of the appeal was in March 2019. It is possible to infer from the terms of the judge's assessment that he found evidence of 1998 and 1999 residence just as unsatisfactory as the evidence regarding 1997 residence, but, taken together with the other three grounds, this lacuna in the judge's decision reinforces its unsatisfactory basis.

14. For the above reasons I conclude that the judge materially erred in law. I see no alternative to the case being remitted to the First-tier Tribunal.

Directions

15. **I first direct that the case is made the subject of a Case Management Hearing. That is so there can be consideration of what has occurred in relation to the other direction which I make which is this:**

    Second, I direct that (i) the appellant's representatives forthwith make a subject access request to the relevant police authority in order to ascertain whether he was arrested as claimed in 1997, circa March of that year. For this purpose, he will obviously need to give accurate particulars of what name he used and any other details he gave; and (ii) within 6 weeks of this decision being sent to the parties, the appellant's solicitors inform the First tier Tribunal and the respondent as to the progress or outcome of this request.

16. To conclude:

    The decision of the FtT judge is set aside for material error of law.

The case is remitted to the FtT.

No anonymity direction is made.

Signed Date: 3 August 2019

Dr H H Storey
Judge of the Upper Tribunal