IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20817/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC and via Skype for Business On 29th January 2021

Decision & Reasons Promulgated On 23rd February 2021

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MR SATNAM SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Z Nasim, Counsel, instructed by Whitefield Solicitors
For the respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 29th January 2021.

2. Both representatives and I attended the hearing via Skype, while the hearing was also available to watch, live, at Manchester CJC. The parties did not object to

attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Mulholland (the 'FtT'), promulgated on 8th April 2020, by which she dismissed the appellant's appeal against the respondent's refusal on 3rd December 2019 of his application for leave to remain, based on long residence, in particular the fact that he had entered the UK on 19th June 1998. The respondent did not refuse the application on grounds of suitability, but did not accept that the appellant's presence in the UK since 1998 as continuous. The appellant had lived in his country of origin, India, until aged 37 years' old and the respondent further did not accept that there would be very significant obstacles to the appellant's integration in India for the purposes of paragraph 276ADE(1)(vi) of the Immigration Rules.

4. In essence, the appellant's claims involved the key following issues: his continuous presence in the UK; and a very significant obstacles to his integration in India, having spent last 21 years in the UK. He claimed that he would be unable to find employment in India to support his living costs and would face an incredible difficulty in adjusting to life there.

The FtT's decision

5. The FtT noted that the appellant had entered the UK on a false identity with a false date of birth, on 19th June 1998 (§1). His asylum claim had subsequently been refused on 11th December 2014. The FtT considered extensive bundles of evidence running to 118 pages, and five witnesses. The FtT noted, at §13, his claimed cohabitation with one of the witnesses since 1998 in West Bromwich, albeit the witness then moved away (§14). At §15, the FtT noted that the appellant had absconded and an address other than in West Bromwich was recorded. An NHS medical card issued in 2003 referred to a further address and in 2010, the appellant provided a fourth address in his application to register his father as a British citizen (§15).

6. The FtT noted what she regarded as a changed account as to addresses at §16 and the lack of reliability a witness's evidence, at §17, as to the appellant's whereabouts after 2002 despite the witness claiming to have known that the appellant was lived in a specific address. Witnesses' lack of awareness that the appellant claimed to have lived in London undermined their evidence (§18).

7. The FtT was satisfied that the appellant had attended weddings in the UK in 1999; 2003 and 2006, but did not find as reliable, at §20, the appellant's assertion that he was unable to produce documents to open a bank account or obtain any other services, as when he had claimed asylum on entering the UK he would have been given an Asylum application Registration Card or 'ARC'. The FtT found that the appellant had managed to live in the UK and work, despite not having the right to do so, and so must have satisfied those employing that he had the right to work (§21).

8. The FtT placed particular weight, at §22, on the appellant's failure to appeal against the respondent's refusal of his asylum claim in December 2014, after which his solicitors had sent a letter to the respondent on 3rd December 2015 asking for an update on the appellant's claim, which cast doubt on the appellant's whereabouts at the time (§23).

9. The FtT noted that the appellant was able to produce some medical records in 2003, 2008 and 2010 but not medical records for the period before 2012 (§24).

10. At §26, the FtT noted that the appellant had since obtained a passport, which showed his address in India, which was inconsistent with his claim to have no home to go to if he were returned there.

11. Considering evidence as a whole, the FtT concluded at §28 that she was not satisfied that the appellant had discharged the burden of proof of showing that he had been continuously present in the UK since 1998. There were inconsistencies in the accounts of where the appellant was living; gaps in the knowledge of witnesses; a paucity of independent documentary evidence; no attempt by the appellant to contact the respondent about his outstanding asylum claim from 1998 until 2010; and no attempt to alert the respondent that he had given a false name and date of birth until 2010.

12. In relation to paragraph 276 ADE(1)(vi) of the Immigration Rules, namely very significant obstacles to the appellant's integration in India for the purposes of his private life, at §32, the FtT considered that the appellant had not provided any information as to how he managed to live in India before coming to the UK aged 37; who his family members were and where they were. He had not provided any supporting evidence about job prospects and only when pressed, he indicated that his brother still lived in the family home in India. The FtT also recorded at §34 that the appellant had not given details of his schooling or educational qualifications or what obstacles there might be to his integration in India, beyond the passage of time.

13. At §39, the FtT reminded herself of the provisions of Sections 117A and B of the Nationality, Immigration and Asylum Act 2002 and carried out a proportionality assessment first through the lens of the Immigration Rules, noting at §44 that if the appellant did not meet the Rules, it was unlikely that a different outcome would result from a free-standing proportionality exercise. The FtT nevertheless went on to carry out such a free-standing assessment, and concluded that while the appellant had established a private life in the UK (§52), and his Article 8 ECHR rights were engaged, the appellant was not financially independent and his private life had been established when his immigration status was precarious, so that little weight should be attached to it. The FtT concluded that the respondent's refusal of the appellant's application was proportionate and dismissed the appellant's appeal.

The grounds of appeal and grant of permission

14. The appellant lodged grounds of appeal on six grounds, details of five of which are set out below. Permission was initially refused all grounds by a Judge of the First-tier Tribunal, Judge O'Garro, on 16th June 2020, but renewed permission was granted by

Upper tribunal Judge Norton-Taylor on 27th July 2020 on the following five grounds, starting with ground (2), the second ground comprising a number of elements:

14.1. Ground (2) - the FtT had arguably imposed an additional requirement that the appellant was present in the UK every single day from 1998, for 20 years. Instead, the FtT should have looked at all of the evidence in the round and even if there were short gaps, this was not determinative of the appellant's appeal. The implication of the FtT finding that the appellant was not continuously present was that he must have left the UK and re-entered, which was irrational. This ground was, therefore, a perversity challenge, based on the following passages in the FtT's reasoning:

14.1.1. the FtT's reference at §20 to the appellant being issued with an ARC card ignored the fact that ARC cards were only introduced in 2002 and the appellant had claimed asylum in 1998;

14.1.2. the FtT's reference at §21, to the appellant having satisfied those he worked for of his right to work, even if under a false identity, ignored the point that the appellant sought permission to work, which had only been granted in February 2014;

14.1.3. the FtT's adverse finding at §23 that the appellant failed to appeal against the refusal of his asylum claim ignored his solicitors chasing for an update and the fact that there could be many reasons for not appealing an adverse decision;

14.1.4. the FtT's finding about the appellant living in London for a period in 2002 was perverse and there was no documentary evidence from which it was possible to infer that the appellant had lived in London;

14.1.5. the FtT's finding that the lack of consultations with his GP undermined the documentary evidence of the appellant registering with a GP in 2003 was also perverse;

14.1.6. the FtT had perversely and impermissibly taken into account the appellant's initial use of a false identity, contrary to the authority of ZH (Bangladesh) v SSHD [2009] EWCA Civ 8.

14.2. Ground (3) - the FtT had erred in looking at the documentary evidence in isolation rather than evidence in the round. There was no requirement to focus narrowly only on official documents particularly where non-official, but independent documents, would suffice.

14.3. Ground (4) - the FtT had failed to make findings in relation to the appellant's oral evidence as to his continuous lawful residence.

14.4. Ground (5) - the FtT had impermissibly regarded the Immigration Rules as determinative of the appellant's appeal in respect of his private life, dismissing it because of the absence of compelling circumstances.

14.5. Ground (6) - the FtT had erred in considering the appellant's Article 8 appeal through the lens of the Immigration Rules, which had been rejected by the Supreme Court in the case of Hesham Ali v SSHD [2016] UKUSC, §44.

The hearing before me

The appellant's submissions

15. Mr Nasim relied upon, but did not reiterate, the detailed grounds. In relation to ground (2), the FtT had been critical of witnesses whom she described as having given evidence of the appellant living at the same address continuously, while if I considered the witness statements of Mr Rapinder Tanda, §3 at page [25] of the appellant's bundle ('AB') and Mrs Harbinder Kaur's statement at page [14], §2, neither had suggested they knew that the appellant had lived at the location for the entirety of the period. The same was true of correspondence from a supporter, Mr Rahul Hallan at page [111] AB.

16. Mr Nasim also referred me to the documents starting at page 67 AB, which comprised the respondent's GCID records produced in response to a data subject access request. Noting from those records suggested that the appellant was not contactable when the respondent had sought to contact him. Mr Nasim initially suggested that there was no reference to the appellant absconding, although it appeared later in the GCID notes that there was such a reference at page 77 AB. It was further irrational to speculate on what documentation the appellant would have provided to obtain work, prior to 2014, when he had only given evidence working "now and then."

17. In relation to medical evidence, I was asked to consider page 98 AB and in particular the problem of medical records being transferred from one surgery to another, the implication being that there was a lack of records because of the appellant's transfer between GP practices.

18. Referring back to the GCID records, at page 69 AB, it appeared that the appellant's representatives only, and not the appellant, had been informed of the refusal of the protection claim. It was also apparent that the appellant's solicitors were not initially aware of the decision, which was why they had chased (see page 70 AB). The FtT had failed to analyse this adequately when drawing adverse inferences on the basis of a lack of an appeal and late correspondence from the appellant's solicitors, as somehow indicating that he might be outside the UK.

19. It was further impermissible for the FtT to have restricted her analysis of the appellant's private life claim by reference to the Immigration Rules, without a wider free-standing Article 8 analysis.

The respondent's submissions

20. Mr Bates reminded me that the burden of proving continuous residence lay with the appellant. The respondent did not have to prove, nor did the FtT have to make findings, that the appellant had left the UK and in any event, it was certainly not irrational to entertain such a possibility. Just as the appellant had entered the UK on false identity documents, it was quite possible that he might have sought to leave the UK clandestinely, particularly as he would not necessarily be doing so to return to his country of origin, India, but had lived in Germany for the four years prior to coming to the UK. In the circumstances, he may well have decided to 'try his luck' in leaving the UK and the respondent was unlikely to be in the position to be able to prove this, particularly in the context of someone using a false identity.

21. The "ARC issue was a red-herring. The appellant's own witness statement, §3, page 1 AB referred specifically to "*when I arrived in the UK I gave my name and date of birth incorrectly…and that is what is written on my asylum documents issued to me at the time and my Asylum Registration Card (ARC).*" Whilst the FtT may have referred to the ARC card issued later, his analysis remained accurate; even if not an ARC card and under an assumed name, the appellant had asylum documentation, on his own case, issued at the time in 1998 and it was not irrational for the FtT to have considered the absence of such records or documentary evidence of working, even if illegally and under an assumed name.

22. In relation to the issue of not following up on his refused asylum claim, if the appellant's case was that he had been unaware of the decision for a year, the FtT was entitled to consider why his representatives had not informed him, and if they claimed ignorance, how this was consistent with the GCID record confirming delivery of the decision to them nearly a year earlier. If it were now suggested he had not been aware for a year because his solicitors had not informed him, there was no evidence from the appellant's solicitors at the time as to their delay (if at all) in informing the appellant.

23. The FtT reached her summary, at §28, which was based on adequate and sustainable reasons. The challenge on the basis of irrationality did not begin to get off the ground and the FtT unarguably considered the evidence in the round. The FtT was entitled to consider the appellant's use of a false identity, not because this made him ineligible on grounds of suitability (the refusal had not been on that basis) but as a factor in assessing the appellant's credibility and ZH (Bangladesh) did not prevent this.

24. Even if it were suggested, in relation to the remainder of the private life claim, that the FtT had impermissibly applied the Immigration Rules as a structure, rather than a starting point, the FtT had nevertheless gone on to carry out, at §§46 to 52, a classic 'Razgar' analysis in relation to proportionality and there was nothing beyond the fact of extended residence in the UK, which supported the appellant's claim.

Analysis and conclusions

25. Dealing first of all with ground (2), I do not accept that the FtT erred in impermissibly imposing an additional requirement either that the appellant was in the UK every single day from 1998; that there should be evidence of a formal nature as to such presence; or that the FtT had failed to consider all of the evidence in the round. What is clear from the concluding paragraph, §28, is that the FtT had considered all of the evidence in the round and was conscious not to look for or expect official documentation, but, as many Judges considering the same issue will need to do, she considered the nuances of the available evidence including the reliability of witness evidence; the gaps in evidence, and whether such gaps might be explicable. At §28, the FtT stated:

> *"Having considered the evidence, individually and in the round, I am not satisfied that the appellant has discharged the burden of proof that he has been continuously present in the United Kingdom since 1998. I am not satisfied that the witnesses accounts are reliable because of the inconsistencies about where he was living and their lack of knowledge of his London address. The appellant in evidence stated he had lived at the London address in 2002 but none of his witnesses knew that. There are gaps in their knowledge. There is a paucity of independent documentary evidence to support his claim which is remarkable given he claims to have been here for more than 20 years. He made no attempt to contact the Home Office about his outstanding asylum claim from 1998 to 2010 and made no attempt to alert Home Office that he had given a false name and date of birth until 2010. He has failed to account for why he did not chase this matter up sooner if he was in the United Kingdom seeking asylum because he was in fear of his life if returned. This along with his lack of knowledge of the refusal of his asylum claim and the permission to work granted in 2014 leads me to conclude that this part of his appeal must fail.*

26. I am conscious that the bar for a challenge of irrationality to succeed is a high one and to iterate again it was clear that the FtT considered not only the documentary evidence but the oral witness evidence, including that of the appellant, which she referred to at §16. The FtT was unarguably entitled to require the appellant to discharge the burden of proof in relation to continuous residence, and it was not necessary, as Mr Nasim at one stage suggested before me, for the FtT to make findings on specific periods of time when the appellant might have been outside the UK; where he might have gone, and the means by which he left the UK, when practically, it was unlikely that a person who had left the UK clandestinely would volunteer such evidence to the respondent or the FtT.

27. Not only did the FtT correctly require the appellant to discharge the burden of proof, but in my view, did so by applying the ordinary civil standard, assessing informal evidence, including oral witness evidence, on a nuanced and holistic basis, as reflected in §28.

28. Dealing with the criticism of the FtT at the various points set out in ground (2), first of all it was suggested the reference to the ARC at §20 must be erroneous because

ARCs were not first issued until 2002, many years after the appellant first claimed asylum in 1998. However, it is worth examining again what §20 says:

> *"The appellant asserts that he has been unable to supply a sufficiency of documentary evidence to support his claim as he did not have identification documents to allow him to open a bank account or obtain any other service. I do not accept that. Whilst I accept the arrived in the UK in 1998 without documents, as the Home Office record show, he had claimed asylum and would have been given an ARC card to allow him to obtain services. I remind myself that the appellant is capable and resourceful. He managed to travel all the way to the United Kingdom in 1998 and was prepared to deceive the authorities here about his true identity. He stated orally that he came to the UK from Germany and that he produced a driving licence with a false name and date of birth on it which was taken by the UKBA upon arrival. He has failed to provide any evidence that he could not have obtained documents to verify his true identity from the Indian authorities before 3 July 2019 when he was issued with a passport."*

29. I accept the force of Mr Bates's submission that taking the appellant's own witness statement, the appellant stated at §3 that he had been issued with an asylum document on claiming asylum in 1998, as well as an ARC at a later date, and the FtT was unarguably entitled to consider that the possession of such asylum document, even if the FtT referred to the document as an ARC, could have enabled him to obtain services, which would then generate further records.

30. In relation to the further criticism of the FtT at §21 in relation to the appellant only seeking the right to work in 2014 and only having worked from time to time, once again, the FtT's comments reflect the appellant's evidence, on his own case, that he had registration documents, even if under a false name, since 1998, and the FtT was entitled to draw an inference (which was by no means determinative of the appellant's appeal) that given his possession of such documentation and having worked, the absence of any records relating to such work were an omission which had a bearing on the appellant's claim to have been continuously resident in the UK. In my view, that was a factor that the FtT was entitled to take into account and it was not irrational for the FtT to have done so.

31. In relation to the criticism of the FtT's reasoning at §23 that the lack of an appeal by the appellant after his asylum application was refused cast doubt on his whereabouts, it is clear that the FTT considered at §22 the chronology of events; the decision refusing the asylum claim in December 2014, about which the appellant's representatives were sent, and signed for, the decision in January 2015, but afterwards chased for an update nearly a year later in December 2015; and the appellant also chased for an update. In these circumstances, the FtT was entitled to consider why there was such a delay, particularly when the appellant's representatives had been informed as early as January 2015. The FtT specifically considered the possibility that the appellant's solicitors may have failed to inform the appellant, but he had "*failed to provide any evidence from them to support his claim or any lack of knowledge of it*."

32. Mr Nasim suggests that the GCID records before the FtT indicated that the appellant's solicitors may have been unaware of the decision. However, as Mr Bates, in my view correctly, submitted it was open to the appellant to have adduced evidence from his former solicitors to that effect, and yet he had failed to do so, either by confirming that they were unaware of the decision or had, through negligence, failed to inform the appellant. The FtT was entitled to take into account the absence of such potentially available evidence, as part of an holistic assessment, particularly in the context of the paucity of other documentary evidence. The drawing of such an inference was not perverse.

33. In relation to the challenge based on the FtT's concerns about the appellant's witnesses, who were tendered as support for his contention that he was continuously living in the UK, while Mr Nasim criticises the interpretation of the witness evidence as being that they had lived with him continuously, that ignores what the FtT was entitled to take into account, namely that if the witnesses were tendered as supporting about the appellant's continuous presence in the UK but were unaware of his changed oral evidence that he had lived in London for a period, it was just as possible that the appellant was living outside the UK, and the witnesses, however honest, would have been similarly unaware. The FtT reflected that not only Ms Kaur, but both Mr Suhbinder Singh Tanda and Rapinder Singh Tanda were unaware that the appellant had lived in London (§18). The FtT regarded the gaps in their knowledge as a factor, alongside a number of other factors in §28, which I have already set out above. The FtT was, in my view, unarguably entitled to take into account the gaps in the witnesses' knowledge of the appellant's home, for a period, however genuine those witnesses might be, in the assessment of the appellant's continuous residence.

34. In relation to the challenge in relation to the FtT's reasoning about the absence of GP records, it is important to note that the FtT did not suggest that simply because there was a gap in the GP records, that the appellant was untruthful. It is important, once again, to consider what the FtT did state, at §§24 to 25:

> "*24. The GP medical records and NHS medical cards show that the appellant was issued with an NHS medical card on 27th of February 2003 and again on 14 March 2008. He was given an NHS blood and transplant letter on 17 October 2010. With the exception of these items, the appellant has not been able to supply a copy of his medical records for the period before 2012. This means that there are large gaps from 1998 to 2003; from 2003 until 2008 and from 2008 to 2010. I accept that the appellant was present in the United Kingdom at the time he registered for NHS care but without the records showing the consultations with his GP, I am not prepared to accept these cards and letters provide much support for his continuous residence in the UK.*
>
> *25. The appellant has produced his medical records from 2012. These show consultations with his GP intermittently from 2012 onwards and go some way to substantiated his claim…."*

35. The FtT was not discounting the records in their entirety or ignoring the fact of the GP registration in 2003. What the FtT was doing was placing more limited weight upon them because of the substantial gaps over many years whilst still noting that records could, in part, go some way to substantiating his claim. Once again, I find that that was an analysis unarguably open to the FtT to make and the challenge on grounds of irrationality does not begin to succeed.

36. In relation to the final element of the perversity challenge in relation to ground (2), the FtT did not in my err in dismissing the appeal because of the appellant's use of an assumed identity, particularly where as here, there was no challenge on suitability grounds. Instead, what the FtT did clearly, at §28, was to consider why the appellant would not have sought to admit his use of a false identity until 2010, when he had already made an asylum claim in 1998. She also took into account the fact that the appellant had not chased up on resolution of his asylum claim during the same 12 year period. The FtT was in my view unarguably entitled to take both into account as relevant factors and this was not in breach of the authority of ZH (Bangladesh).

37. I deal with grounds (3) and (4) together, the first asserting that the FtT had failed to consider the appellant's documentary evidence holistically, particularly in seeking formal documents; and the second challenges the lack of findings on the appellant's oral evidence. The answer to both challenges is the analysis at §§13 to 17, which leads up to the conclusions in §28. Those conclusions referred expressly to the evidence in the round, by reference to a number of factors, including the witness evidence of supporters and the inconsistency in the appellant's account, as recorded at §16 and which required an analysis of the appellant's oral evidence, beyond documentary evidence (whether formal or otherwise). Neither of the grounds discloses any error of law in the FtT's reasoning or conclusions and it was clear that the evidence was considered from a variety of sources (witnesses; wedding photographs and a marriage certificate; GCID notes; GP notes; and the appellant's current Indian passport).

38. In relation to the grounds (5) and (6) and the challenge to the Article 8 ECHR assessment, I noted, on the one hand, the FtT's analysis by reference to the Rules (specifically paragraph 276ADE) at §§ 30 to 36; and at [44], the FtT's comment that if the appellant could not meet the Rules, barring exceptional or compelling circumstances, it was unlikely that a different outcome would result from a proportionality exercise. Nevertheless, on the other hand, the FtT did then go in to consider a classic "balance-sheet" exercise, as endorsed by Hesham Ali, taking into account the statutory factors required by Sections 117A and B of the Nationality, Immigration and Asylum Act 2002, at §§46 to 53. These included the neutral factors of the lack of proficiency in English and the lack of financial independence; the limited weight attached to private life developed in the UK; the absence of family life in the UK; an acceptance of private life in the UK and the refusal being interference of such gravity to engage Article 8, but the FtT's conclusion that the interference was proportionate. When considering the FtT's reasoning by reference to the Immigration Rules, that reasoning has to be considered in the wider context of the analysis outside the Immigration Rules, in a proportionality assessment that is adequately explained

and discloses no error of law. In the circumstances, both grounds (5) and (6) take references to the Immigration Rules outside that wider context. When considered in context, the criticisms are not sustainable.

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.

Signed *J Keith* Date: 9th February 2021

Upper Tribunal Judge Keith