IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI -2022-001874
First-tier Tribunal No:
HU/51231/2021
IA/04725/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 19 December 2022

Decision & Reasons Promulgated
On the 14 February 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

HARVINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Daykin of Counsel instructed by Makka Solicitors
For the Respondent: Mr Whitwell , Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of First-tier Tribunal Judge Swinnerton, dated 2 February 2022, dismissing his appeal against the decision of the respondent dated 31 March 2021 to refuse his application for leave to remain in the UK on the basis of his private life.

2. Permission to appeal was granted by First - tier Tribunal Judge O'Brien in a decision dated 29 April 2022 on the basis of an arguable procedural unfairness as the Judge apparently rejects the evidence of the appellant's supporting witnesses notwithstanding that their evidence was unchallenged in cross examination.

3. Having found the above ground to be arguable, First - tier Tribunal Judge O'Brien granted permission on all grounds.

Anonymity

4. No anonymity direction was made by the First-tier Tribunal. There was no application before us for such a direction. Having considered the facts of the appeals including the circumstances of the appellant, we see no reason for making a such direction.

Background

5. The appellant is a national of India born on 5 February 1969. He claims to have arrived in the UK on 10 January 2000 with the help of an agent.

6. The appellant applied for leave to remain on the basis of his long residence on 6 March 2020.

7. The appellant claims to have lived continuously in the UK since his arrival in 2000, amounting to 20 years as at the date of application and to have maintained close relationships with friends in the UK throughout that period who attest to his residence.

The decision of the First-tier Tribunal

8. Ms Daykin appeared for the appellant at the First - tier Tribunal hearing.

9. The Judge did not accept that the appellant arrived in the UK in 2000 and therefore found that the appellant had not resided in the UK for a continuous period of 20 years.

10. The Judge also found that there are not very significant obstacles to the integration of the appellant in India. The Judge found that the facts of the case do not support a finding of any exceptional circumstances that would render removal of the appellant from the UK a disproportionate breach of his rights under Article 8 of the ECHR. The Judge dismissed the appeal.

The grounds of appeal to the Upper Tribunal

11. The grounds seeking permission to appeal challenge the Judge's findings on the issue of whether the appellant has lived in the UK for a continuous period of 20 years. There is no challenge to the findings as to very significant obstacles to integration or exceptional circumstances.

12. The grounds assert that only the appellant was subject to cross examination and none of the witnesses were cross examined so their evidence stood unchallenged. The Judge should not have acceded to the Respondent's representatives submission that the oral evidence provided by the witnesses as friends of the appellant was not impartial and little weight should be given to it.

13. The grounds submit that the Judge fell into error in two respects. Firstly, at [23] by only attaching some weight to the evidence of the 2 witnesses who claim to have known the appellant in the UK for over 20 years when the evidence was unchallenged; and secondly, by failing to provide reasons why no great or decisive weight was attributed to the evidence of the 2 witnesses when it stood unchallenged.

14. The respondent's position is set out in the Rule 24 response dated 22 June 2022. The respondent opposes the appeal on the basis that the Judge had directed himself appropriately, and provided adequate reasons for his findings. The respondent submits the Judge engaged with the documentary evidence and oral evidence of the appellant and 5 witnesses and gave adequate reasons for concluding the appellant had not been in the UK continuously for 20 years. The Judge took into account the evidence of the 2 witnesses who claimed to have known the appellant in the UK for 20 years. The Judge did not place no weight on this evidence but attached some but not great weight on it. It is submitted that in the absence of any independent corroborative evidence it was open to the Judge to find that the witness evidence could not be given decisive weight.

The Law

15. Sufficient reasons for decision must be given; mere statements that a witness was not believed are unlikely to be sufficient MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC). The Upper Tribunal in MK gives the following guidance:

> "(1) It is axiomatic that a determination discloses clearly the reasons for a tribunal's decision.
>
> (2) If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons."

16. Henry LJ in Court of Appeal in Flannery - v - Halifax Estate Agencies [2000] 1 All ER 373 made the following general comments on the duty to give reasons:

"(1) The duty is a function of due process and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties - especially the losing party - should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know …… whether the court has misdirected itself and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not"

17. It is well established that an appellate tribunal or court should exercise judicial restraint when reviewing findings of fact reached by a first instance judge. See the judgment of Haddon - Cave LJ in KM v Secretary of State for the Home Department [2021] EWCA Civ 693 (11 May 2021) at [77]:

The hearing

18. Ms Daykin adopted her grounds of appeal and submitted that the consequence of the respondent's representative declining to take the opportunity to cross-examine Ranjeet Singh and Satpal Singh Rayit, witnesses whose evidence was critical to the issue of whether the appellant had lived continuously in the UK for over 20 years, she must be taken to accept, or at least not dispute the factual account given, MS (Sri Lanka) v Secretary of State for the Home Department [2012] EWCA Civ 1548 and RR (Challenging evidence) Sri Lanka [2010] UKUT 274 (IAC).

19. Ms Daykin acknowledged that the Judge states "some weight" is attached to the evidence of the witnesses [23], however she submitted that in order to conclude that the appellant did not arrive in 2000 [24], the Judge in reality gave no or little weight to the evidence of the witnesses and failed to make an assessment of the credibility of the witness evidence and give reasons for arriving at that assessment AK (Failure to assess witnesses' evidence) Turkey [2004] UKIAT 00230.

20. For the Secretary of State, Mr Whitwell relied upon the respondent's Rule 24 response and submitted that notwithstanding the failure to cross examine the witnesses, the Judge takes into account all the evidence including the submissions. Mr Whitwell suggested a more holistic approach is required and the decision should be read as a whole. Mr Whitwell submitted that the Judge was fully cognisant of the limitation of the photographic evidence [21], the lack of corroborative evidence [22] and witness statements that are bare, and finds that there was insufficient evidence on a balance of probabilities in support of the appellant's claim to have been living continuously in the UK for over 20 years. Mr Whitwell submitted the question of weight is a matter for the Judge and in this case the Judge applies some weight albeit not decisive weight to the witness evidence [23]. Mr Whitwell acknowledged that the reasons given are limited and the Judge could have said more but he submits the reasons are adequate.

21. As to the disposal of the appeals in the event that we find there to be an error of law, Ms Daykin said that it follows from the grounds that the evidence is unchallenged and determinative so there is no justification for this appeal to be reheard as it would give the respondent an opportunity to fix the failure to cross examine. In the event that the Tribunal considered a rehearing was necessary, Ms Daykin was of the view that it would be difficult to preserve any findings and the whole decision should be set aside. Mr Whitwell indicated that, the respondent would want an opportunity to cross examine the witnesses and mindful of Paragraph 7 of the Practice Statement of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal he was neutral as to whether the appeal should be remitted to the First - tier Tribunal.

22. At the end of the hearing we reserved our decision.

Decision on error of law

23. We appreciate that judicial restraint should be exercised when examining the reasons given by the First-tier Tribunal Judge for his decision and that we should not assume too readily that the Judge misdirected himself just because not every step in his reasoning is fully set out. This is the guidance given by the Court of Appeal at paragraph [77] of KM v SSHD [2021] EWCA Civ 693.

24. Although the wording of the grant of permission to appeal suggests the failure to give reasons for giving no great weight to the witnesses' evidence amounts to procedural unfairness this is not what is asserted in the grounds seeking permission. Even if it had been, there was no prospect of it succeeding as there is no indication of any procedural unfairness in the decision. The evidential basis on which the Judge based his conclusions, cannot be said to be procedurally unfair.

Ground one:

25. It is well established that a submission that too much or too little weight has been given to a particular evidence does not raise an arguable point of law, the weight to be attached to evidence is a matter for the Judge. The first ground is not made out.

Ground two:

26. The law is as stated above. In reaching a finding as to whether the appellant had lived continuously in the UK for 20 years the Judge was required to consider the evidence and provide adequate reasons for the decision.

27. We have looked with great care at the decision of the Judge. An error of law based on findings of fact is one which the Upper Tribunal should be slow to make.

28. The Judge took into account the respondent had accepted the appellant has been in the UK since 2012. The Judge rightly acknowledged that those

who do not have immigration status have inherent difficulties in being able to provide official documentation to evidence their residence in the UK. The Judge considered the photographs but noted that they bear no date and the appellant's recollection as to the events featured in the photographs was unspecific and so they are limited value [22].

29. The Judge considered the evidence of the two witnesses Ranjeet Singh and Satpal Singh Rayit, whose evidence was pertinent to the issue of whether the appellant had lived continuously in the UK for over 20 years and attaches some weight to their evidence but not great weight and states it is certainly not decisive weight [23].

30. The witnesses were not cross-examined or questioned as to the veracity of their evidence and they were not given a chance to respond [19]. Fairness requires that if the evidence of a witness is to be rejected, that the witness be made aware of the assertion that the evidence is untrue will be made, and be offered the chance to give an explanation: Browne v Dunn (1893) 6 R. 67 (HL) per Lord Herschell L.C. at §70, as explained in Deepak Fertilizers & Petrochemical Ltd v Davy McKee (UK) London Ltd [2002] EWCA Civ 1396 per Latham LJ at §49-§50). It was incumbent on the Home Office Presenting Officer to cross examine the appellant's friends prior to submitting that they were not impartial and little weight should be given to their evidence.

31. The only finding relating to the two witnesses who said that they had known the appellant for 20 years is contained at [23]. Although the judge acknowledged that the evidence 'was accepted or unchallenged' he only attached 'some weight' to their evidence. However, no reasons are given to explain why only little weight was given to their evidence in those circumstances nor does there appear to be any finding to explain why their evidence was insufficient to discharge the burden of proof. If the judge accepted the respondent's submission that little weight should be given to their evidence because the witnesses were likely to be partial, no reasons of this kind were in fact given.

32. Reasons can of course be brief and need not be detailed, the ultimate test is obviously whether the reasons enable the losing party to understand the basis on which they have lost. It was open to the Judge to assess the witness statements and attach only some weight to them perhaps because as Mr Whitwell states they are bare or vague or lack detail. If this is what the judge did, it is not apparent from his findings. The witness statements are certainly very brief. Each witness statement contains only one paragraph of substance which deals with the issue. Ranjeet Singh states the appellant is a close friend of his from India and he recalls the appellant arrived in the UK in the millennium year. He states they continue to meet at the local Sikh temple and have met almost every month since his arrival in the UK. Satpal Singh Rayit states he first met the appellant when he attended the Gurdwara where he is a founding member and Trustee. He states that he remembers they met in January 2000 as it was the beginning of the year and he took a liking to the appellant because he helped to serve the community even on his first visit and he

invited the appellant to his daughters wedding which took place on 13 August 2000 and they meet almost every Saturday.

33. The assessment of credibility is obviously a matter for the First tier Tribunal Judge and any appellate body will be slow to interfere with that assessment. Although in this case there was a failure to cross examine the witnesses and thus there was no challenge from the respondent to their evidence, this does not absolve the Judge of the need to undertake his own assessment of the evidence and give reasons for his findings on the evidence.

34. Unfortunately, in this case the Judge failed to give any reasons to explain why he only gave 'some weight' to the evidence of Ranjeet Singh and Satpal Singh Rayit and as a consequence we find the reasons are inadequate. It follows therefore that the decision involved the making of an error of law and must be set aside.

35. As to disposal, having taken into account the submissions from the representatives as to whether the appeals should be remitted to the First - tier Tribunal, we consider there is sufficient evidence before us such that the decision can be remade in the Upper Tribunal without a rehearing. Mr Whitwell only suggested that a further hearing might be necessary if we found that there had been procedural unfairness, which we have not. Accordingly, we see, no reason to remit the appeal to the First-tier Tribunal. We retain the appeal in the Upper Tribunal and proceed to remake the decision.

Remaking

36. In remaking this decision, we have taken into consideration all the evidence before us.

37. The witness evidence of Ranjeet Singh and Satpal Singh Rayit was central to the appellant's case. The judge noted that the appellant might be unable to produce much in the way of formal documentary evidence due to his illegal status. The witnesses had prepared brief statements, but the essence of their evidence was straightforward. Both witnesses attended to give evidence before the First-tier Tribunal. If the core of their evidence was not accepted, or if there was any question mark about their partiality, they should have been cross-examined. They were not. It does not follow that the mere fact that someone is a friend suggests that they might be willing to lie in a court of law. In the absence of any cross-examination, or any other evidence to suggest that their evidence is unreliable, we find that it is more likely than not that they have both known the appellant in the UK since at least 2000 and see him on a regular basis.

38. In addition to the witness statements of Ranjeet Singh and Satpal Singh Rayit, we note that there was further evidence in support of the appellant's claim in the respondent's bundle. The is a letter from Satpal Singh dated 24 October 2020, he gives the same address as that given in the witness statement of Satpal Singh Rayit and is consistent with witness

statement of Satpal Singh Rayit. There is also a letter from Bhagwant Singh Rayit a Trustee of the Khalsa Centre Gurdwara in the respondent's bundle stating that the appellant has been attending the Khalsa Centre on a regular basis since January 2000 where he helps in the kitchen and eats as they serve free meals.

39. The respondent did not accept the letter from the Khalsa Centre as it does not list the dates the appellant attended within this period or provide any address details. The respondent rejected the letters of support as they are from unofficial sources and do not have any details that verify the Appellant's residence in the UK.

40. Ms Daykin in the grounds of appeal [11] states that although not reflected fully in the decision, Satpal Singh Rayit in his oral evidence in chief confirmed that the appellant attended his daughter's wedding on 13 August 2000 and helped out.

41. We accept the evidence of Ranjeet Singh and Satpal Singh Rayit, it is consistent with the letter from the Khalsa Centre.

42. Having considered all the evidence we find on a balance of probabilities that the appellant has lived continuously in the UK since 2000. Accordingly the appellant meets the requirements for a grant of leave under paragraph 276ADE(1)(ii)of the immigration rules. Of course, as the rules are met, and Article 8(1) has been engaged, satisfying the rules is positively determinative of the appellant's Article 8 appeal for the very reason that it would then be disproportionate for the appellant to be removed. TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109 [34].

Decision and Remaking

43. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

44. The appeal is ALLOWED on human rights grounds

TO THE RESPONDENT

FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable for the following reason. The appeal was allowed on the basis of the same evidence as was before the respondent.

Signed N Haria Date: 21 December 2022

Deputy Upper Tribunal Judge Haria

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.