Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: AA/00474/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on:**
On 17 June and 8 August 2013	**8 August 2013**

Before

Upper Tribunal Judge Kekić

Between

Balbir Singh
(Anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation

For the Appellant:	Mr S Rasul, Legal Representative (on 8 August) Mr Z Malik, Counsel (on 17 June)
For the Respondent:	Ms E Martin, Senior Home Office Presenting Officer (on 8 August) Mr L Tarlow, Senior Home Office Presenting Officer (on 17 June)

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission on 22 April 2013 by Upper Tribunal Judge Deans in respect of the determination of First-

tier Tribunal Judge Broe dismissing the appeal of the appellant following a hearing at Hatton Cross on 15 February 2013.

2. The appellant is an Indian national born on 2 April 1960. He appeals against the decision of the respondent on 9 January 2013 to give directions for his removal and to refuse his asylum and human rights claim.

3. The appellant did not pursue his asylum claim at the hearing but relied upon Article 8 in terms of his private life and the legacy policy. No anonymity order was made by the First-tier Tribunal Judge and none was sought then or before the Upper Tribunal.

4. The grounds argue that the judge erred in considering the appeal under the new Immigration Rules when he should have assessed it under the old rules, the application having been made prior to 9 July 2012. It is argued that the appellant has completed 14 years' residence in the UK and that his appeal should have been allowed.

Appeal hearings

5. The appeal first came before me on 17 June 2013. The appellant was present on that occasion as he was when the hearing resumed on 8 August. The submissions were translated to him with the assistance of the court interpreter.

6. I heard submissions from Mr Malik who expanded on his grounds and referred me to the implementation section of HC 194 which supported his submission that the application should have been considered under paragraph 276B(i)(b) of the old rules rather than under 276ADE. In the absence of any evidence from the respondent that any earlier notice of liability to removal had been served, he submitted that the appellant had shown that he had spent more than 14 years in the UK (from November 1995 when he arrived until the service of the IS 151A in January 2013). His appeal should be allowed.

7. Mr Tarlow sought time to make enquires as to whether a previous IS 151A had been served and on the resumption of the hearing confirmed that whilst there was nothing to be found on the Home Office database, the port should have a record as the appellant had been recorded as an absconder. He sought an adjournment in order to make enquiries of the port and to obtain any evidence that may exist.

8. Mr Malik opposed the adjournment on the basis that the respondent had had time to provide such evidence and had not done so. He submitted that if I disagreed with him on that, I should set aside the determination of the First-

tier Tribunal Judge in any event as he had made an error of law by dealing with the appeal under the old rules.

9. I considered that setting aside the determination at this stage was premature as if Mr Tarlow's enquiries revealed that an IS 151A had been served earlier, then regardless of the judge's error the outcome of the appeal would remain the same. I considered that the issue of whether such a notice had been served was crucial to the appeal and I therefore granted the adjournment notwithstanding the respondent's tardiness at submitting such evidence earlier. A date of 8 August, that being the first available date, was obtained.

10. At the resumed hearing the appellant was represented by Mr Rasul. Ms Martin represented the respondent. She submitted a computer print out to show that the appellant had been served notice of liability to removal as an illegal clandestine at the ASU on 17 April 1996 (i.e. at the time of his interview) by I McDonald, authorised by R Ingham.

11. I then heard submissions. Mr Rasul argued that the judge erred in considering the new rules and that Article 8 should have been considered.

12. Ms Martin submitted that there was no error of law. She submitted it was immaterial that the judge had considered the new rules because he had also considered Article 8 and applied the Razgar test. He accepted the appellant had a private life here and in so doing took note of his residence here but concluded that removal was proportionate because the appellant had a wife and children in India whom he continued to support, that he could be reunited with them and that he would be able to receive medical treatment if necessary for his high blood pressure in India. She submitted that despite the argument in the permission to appeal application that paragraph 276B should have been considered, that had not been part of the appellant's grounds of appeal to the Tribunal and so the judge could not be in error for failing to consider a case that was never argued before him. However, in any event his failure to do so did not matter because the appellant had been served as an illegal clandestine on 17 April 1996. The clock stopped then as the old rules excluded the period of residence following service of liability to removal.

13. Mr Rasul then asked for an opportunity to take instructions from the appellant. This was granted. He then submitted that the appellant's instructions were that he had not received any notice. He also queried why it had not been served at the last hearing to which Ms Martin replied that the appellant had not raised paragraph 276B as an issue before the First-tier Tribunal and so there had been no necessity to supply the evidence of service.

14. Mr Rasul then requested more time to take instructions and consult his colleagues. I agreed to put the case to the back of my list so as to allow him the time he sought.

15. On resuming the hearing, Mr Rasul submitted that he relied on the grounds for permission to appeal. He argued that the respondent's evidence did not bear any signature and when it was pointed out to him that it was a computer printout he replied that "anyone" could have printed something like this. He then adduced a copy of EB Kosovo [2008] UKHL 41 and argued that there had been a delay in the decision making which had disadvantaged the appellant because the previous rules may have been more supportive. He concluded his submissions by relying on the grounds.

16. Ms Martin asked to respond. She submitted that the delay point did not assist the appellant given the service of the notice and the fact that it was accepted that the new rules did not apply to the appellant's case. She repeated that the appellant had not relied on the long residency rule as part of his case before the First-tier Tribunal. Even if he had, he was served with a notice of liability to removal in 1996. The judge had considered Article 8 and had applied the Razgar test. It was open to him to make the findings he did.

17. Mr Rasul was given the opportunity to respond. He chose simply to rely on the grounds.

18. At the conclusion of the hearing I reserved my determination which I now give.

Findings and Conclusions

19. I have carefully considered all the evidence and the submissions of the parties before arriving at my decision.

20. The First-tier Tribunal Judge plainly erred in his consideration of the appellant's Article 8 claim in that he relied on paragraph 276ADE which was not in force when the appellant made his application. The transitional provisions make it clear that any application made prior to July 2012 shall be decided under the old Immigration Rules. The appellant's application was made in March 2009 so the new provisions of the rules with regard to Article 8 and private life were not applicable in this case.

21. I next consider whether this error is such that the decision should be set aside and re-made. I find that it is not, for the following reasons.

22. The application made by the appellant was on asylum and human rights grounds. There was no application made under the Immigration Rules and

paragraph 276B was not relied upon at all when the appellant lodged his appeal against the refusal of asylum. The submissions made to the judge do not disclose any reliance upon it either. There was therefore no obligation on the part of the judge to consider the Immigration Rules.

23. It could be argued that notwithstanding the above, if the appellant had met the requirements of the rules as regards long residency, that the judge should have considered that as part of the Article 8 balancing exercise. There are several points to be made in reply. First, residency alone does not mean an appellant meets the requirements of the rules. There is also a requirement that the public interest be considered and the respondent has raised the issue of the appellant owing over £38,000 to the NHS. Second, given the service of the notice of liability to removal (if that is accepted) the appellant could not have brought himself under the rules in any event. Third, the judge did take into account that the appellant had been here since 1995 when reaching his Article 8 conclusions.

24. Linked to the long residency argument is the issue of whether and when the appellant was served with notice of liability to removal or removal directions. Following the adjournment of the last hearing in June, the respondent has provided a computer print out to show that the appellant was served notice as an illegal clandestine on 17 April 1996 when he had his asylum interview. It was submitted for the appellant that he had not received it and essentially that the respondent had fabricated the evidence. I do not accept that. If I am to decide between the evidence of the appellant who made an unmeritorious asylum claim and then chose to remain here unlawfully for over 14 years and the Secretary of State who has provided a detailed computer print out confirming service, I have no hesitation in giving more weight to the latter. I therefore find that the appellant was made aware of his liability to removal when he claimed asylum and that he could not have met the requirements of paragraph 276B (i)(b) even if his application had been made and considered under that provision.

25. The argument made under EB Kosovo, that the delay in the decision making took away from the appellant the right to make an application under the long residency requirements of the old rules, falls away as a result of my finding that the appellant was served as an illegal in 1996. The delay, which was considered by the judge, did not disadvantage the appellant in that way as he had never indicated that he would have applied under the rules and in any event even if he had, he would not have succeeded. No other evidence was produced or called to show that the additional three years strengthened the appellant's ties to the UK in any way. This is the only criticism made of the judge's Article 8 findings. No challenge is made to the other reasons given for the conclusion that removal was not disproportionate.

26. Finally, Mr Rasul argued that the appellant should have been permitted to remain under the legacy policy. This, however, is not an issue that was raised in the permission application. In any event, it is unclear why the legacy policy would apply to the appellant given that he did not have an outstanding asylum application; his was decided before the policy came into effect.

27. In conclusion, whilst I accept that the judge was wrong to have found the respondent had properly applied paragraph 276ADE to the appellant's case, I have found for the reasons set out above that this error does not invalidate his decision and require that I set it aside.

Decision

28. The First-tier Tribunal did not make an error of law such that requires the determination to be set aside and the judge's decision to dismiss the appeal is to stand.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

8 August 2013