Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11829/2013

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent	**Determination Promulgated**
On 14th November 2013	**On 28th November 2013**

Before

UPPER TRIBUNAL JUDGE COKER

Between

MAHMUDHUL HUSSAIN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hassan of Hamlet solicitors
For the Respondent: Ms E Martin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a citizen of Bangladesh born on 10th May 1978 appeals against a decision by First-tier Tribunal Judge Davda who, by a determination promulgated on 4th September 2013, dismissed his appeal against a decision of the respondent that he should be removed from the UK.

2. The challenges to that determination raised in the grounds for seeking permission to appeal, and upon which permission was granted are that the Judge failed properly to consider the appellant's Article 8 claim based on 15 years residence in the UK; found that Article 8 was not engaged by interference with the appellant's private life; failed to consider the appellant's case under the correct Immigration Rules namely paragraph 276B (long residence) as oppose to paragraph 276ADE; had erred in treating a bank statement as belonging to the appellant whereas it belonged to one of the witnesses and failed to have adequate regard to the appellant's medical condition.

3. There was no challenge to the facts as found by the judge, in particular:

   a. The appellant first came to the attention of the immigration authorities when he applied for leave to remain on 18th January 2008. He then came to their attention when encountered working illegally on 22nd May 2008 and was served with notice that he was liable to removal; he failed to report as required by temporary admission restrictions. He next came to the attention of the immigration authorities on 18th January 2011 when he requested a decision on his outstanding application and stated he wished to visit his mother in Bangladesh. He was asked to attend an interview on 22nd March 2011 but failed to attend. He was again encountered by immigration officials on 2nd February 2013 in the same restaurant where he had previously been encountered working;
   b. the first documentary evidence that corroborates the appellant being in the UK is an NMS medical card issued 30th September 2003;
   c. although claiming to have an excellent work record the appellant did not produce the names of any of the catering establishments that he claimed employed him in Exeter, Manchester, Glasgow, Swansea or Newcastle; he produced a level 2 award in Food Safety in Catering dated February 2011;
   d. Judge Davda placed no weight on the oral evidence of the appellant's witness Mr Maruf Ahmed;
   e. The judge did not place much weight on written evidence from four individuals who did not come to give oral evidence;
   f. The appellant produced no evidence of savings or that he sent money to his siblings in Bangladesh;
   g. The appellant has medical problems of inflammation of the gall bladder, small haemorrhoids, eczema, episodes of biliary colic; none are terminal and there was no evidence to suggest the appellant could not have appropriate treatment in Bangladesh;
   h. The appellant has failed to provide adequate evidence that he entered the UK in 1997 as claimed;
   i. The appellant has family in Bangladesh; the skills he has acquired in the UK including culinary and language skills will stand him in

good stead on return to Bangladesh; there was no evidence to suggest he would not be able to adjust to life in Bangladesh;

j. He does not meet the requirements of paragraph 276ADE of the Immigration Rules.

4. The application for leave to remain pre-dated the introduction of paragraph 276ADE and although the decision was taken after its introduction, the application should, in accordance with the transitional provisions, have been considered in accordance with paragraph 276B, since deleted. Before me Mr Hasan withdrew reliance upon that paragraph; he acknowledged that irrespective of which Rule was applicable to the appellant's appeal he could not meet the long residence requirements. This was so even if it were accepted that he had arrived in 1997 as claimed because the service of the enforcement notice in 2003 'stopped the clock'.

5. He did however assert that the appellant's case remained that he had arrived in the UK in 1997 as claimed. In the skeleton argument he submitted he also, in essence, referred to the failure of the judge to find that Article 8 was engaged, failed to make adequate findings as to the appellant's medical condition, that the appellant has lost all meaningful ties with Bangladesh, and that the Home Office has delayed reaching a decision on the appellant's case thus resulting in increased stronger ties in the UK. In oral submissions Mr Hasan submitted that although Article 3 was a high threshold, the appellant's medical condition was such that the appellant's removal would be a breach. I said I was not prepared to entertain such an argument: it had not been raised before in the grounds of appeal to the First-tier Tribunal, had not been raised before the First-tier Tribunal judge and nor had it been raised in the grounds seeking permission to appeal to the Upper Tribunal.

6. The judge plainly considered the application under paragraph 276ADE of the Rules which was an error of law, although this was no longer relied upon by the appellant. The judge also wrongly stated that Article 8 was not engaged. Where an individual has been in the UK for a considerable period of time (as here) it is plain that Article 8 is engaged and the significant issue is the proportionality of the decision to remove. I am satisfied that there has been an error of law by the judge in reaching her decision but the issue is whether the error is such that the decision be set aside to be re-made.

7. Although the judge stated that Article 8 was not engaged, she did then however assess the proportionality of the decision to remove. She relied upon her findings (summarised in paragraph 3 above) and found that his removal was proportionate.

8. The judge failed to make a finding as to when the appellant arrived in the UK and it was argued that without such a finding it was not

possible to properly consider the proportionality of any proposed removal. Whilst it is correct that she did not reach a decision as to when he had arrived she refers at length to the unreliability of the appellant's and his witnesses' evidence as to his arrival and that the first documentary evidence is from 2003. It would be unreasonable to expect any judge to pluck a date or month or year out on such evidence as was produced to her. Plainly she has reached her conclusion on the basis that he did not arrive in 1997, as he claimed, and that the earliest date upon which he was able to produce evidence of arrival was September 2003. She assessed this evidence alongside the fact that he had been served with an enforcement notice together with all the other evidence before her, including the inconsistencies and lack of coherence of some of his evidence, in reaching her decision.

9. In so far as delay was concerned, she makes no direct reference to the delay in the respondent reaching a decision on the appellant's application dated 14th December 2007 (received by the respondent on 18th January 2008) other than to set it out. But it is disingenuous of the appellant, at the very least, to rely on the respondent's delay in reaching a decision when he has failed to comply with reporting restrictions and failed to attend an interview. He had stated he wished to return to Bangladesh to see his mother, in March 2011, and yet failed to disembark. He could easily have done so; he knew that he was unlawfully in the UK. I am satisfied that the failure to take direct account of the delay by the respondent in responding to the application does not in any way mitigate in favour of the appellant.

10. Mr Hasan said that the major and significant element that the judge should have taken into account but did not was the appellant's length of residence, albeit an enforcement notice had been served in 2008. The judge has made a sustainable finding that the appellant did not arrive in 1997 as claimed. Her findings as regards the appellant's medical conditions, his family in Bangladesh, the extent and nature of his private life in the UK are unimpeachable. It would be extraordinary if unlawful residence in the UK following failure to comply with temporary admission conditions and failure to attend an interview, when considered with all the other evidence before her, could or would have led to any other conclusion than that the appellant's removal was proportionate.

11. I am therefore satisfied that although there was an error of law in the First-tier Tribunal judge's determination it was not such as to merit the setting aside of the decision.

Conclusions:

Although there was an error on a point of law it is not such as to merit the setting aside of the decision.

I dismiss the appeal; the decision of the First-tier Tribunal judge stands.

Date 14th November 2013

Judge of the Upper Tribunal Coker