Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32575/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 June and 5 September 2014	**On 16 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TAWEE UTHAIWAN

Respondent/Claimant

Representation:

For the Appellant:	Mr T Wilding (23 June) and Mr L Tarlow (5 September), Specialist Appeals Team
For the Respondent/Claimant:	Mr D Aihe, Legal Representative, Wise Step Immigration Specialists

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision by the Secretary of State to refuse to grant him leave to remain on the grounds of long residence. The

First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is required for these proceedings in the Upper Tribunal.

2. The claimant is a national of Thailand, whose date of birth is 2 January 1971. On 29 June 2012 Talk Visa Immigration Specialists applied on his behalf for ILR in accordance with "the long residence policy". The claimant entered the UK on 15 June 1996 from Thailand. He had remained in the UK ever since. If he was denied discretionary leave, he would be at his wits' end. He did not have any ties, accommodation or employment in Thailand. He had no connections there, having been in the UK for the past fourteen years. He had set up his own business here, and he had contributed to the UK economy.

3. On 27 August 2013 the Secretary of State gave her reasons for refusing the application. He had arrived in the United Kingdom on 16 June 1996 with valid entry clearance as a student. He had entry clearance in this capacity until 31 June 1997. On 23 September 1997 he applied for asylum by post. He was invited to attend an asylum interview on 8 October 1997, but failed to attend the interview. So his asylum claim was refused on 14 November 1997 with no right of appeal. He was served with a form APB104B (decision to make a deportation order) on 11 September 1998 on the grounds that he had remained in the United Kingdom without valid leave. He was given a right of appeal against the service of this notice, which he failed to exercise. The deportation order was subsequently signed against him on 15 October 1998.

4. He had applied for settlement on the basis of long residence on 13 April 2011. The application was treated as a request to revoke the deportation order. His application was refused on 24 November 2011 with a right of appeal. IS15A and IS15B notices were also served, triggering an in-country right of appeal against the decision to remove the appellant. The decision and notices were sent to his former representatives, Greenland Lawyers. However he had again failed to lodge an appeal against this decision.

5. His application for settlement on the basis of long residence made on 29 June 2012 had been initially refused on 10 January 2013, with no right of appeal. On 25 January 2013 he was served with a form IS15A (notice to a person liable to removal), informing him of his immigration status and liability to detention or removal from the United Kingdom. Following the submission of further representations, submitted in the form of a judicial review, the application had now been reconsidered.

6. As a deportation order had been made against him, his representations had been treated as an application to revoke that order. His case has therefore been considered under paragraphs 390 to 391 of HC 395.

7. Enforcement action against him was commenced on 11 September 1998 with the service of form APB104B. The time that he had spent here since he was notified of the enforcement decision could not benefit him under the criteria of paragraph 276B.

Paragraph 276B(i)(b) stated that any period of residence which was accrued after the service of removal directions, or a notice of intention to deport a person from the United Kingdom, shall not count towards the length of residence of a person. So the appellant had been unable to demonstrate fourteen years lawful and/or unlawful residence in the United Kingdom as defined in the Rules.

8. His application had nonetheless been considered under Article 8 ECHR. Paragraph A277C and Appendix FM of the Rules set out the criteria the government expects a person to fulfil in order to establish a right to remain in the United Kingdom on the basis of their family (or private) life. These are that the application will be considered under R-LTRP.1.1(a), (b) and (d) and/or R-LTRP.1.1(a), (b) and (d), and EX.1 of Appendix FM and paragraph 276ADE to DH of the Rules. The appellant had failed to demonstrate that he had lived continuously in the UK for at least twenty years. Furthermore whilst he claimed to have not lived continuously in Thailand for seventeen years, he had resided there for the majority of his life; so it was not accepted that he would have severed all ties to Thailand, including social, cultural and family ties.

The Hearing Before, and the Decision of, the First-tier Tribunal

9. The claimant's appeal came before Judge Herbert OBE sitting at Taylor House on 23 December 2013. The claimant was represented by Mr Aihe, and the Secretary of State was represented by Ms McAllister, a Home Office Presenting Officer. The claimant gave oral evidence that he had come to the United Kingdom on 15 June 1996 to study English. He had lived with his mother and younger brother in a flat in London. He was being supported at the time by his cousin in Thailand. He said he was unable to go back to study in Thailand, and he wanted to stay with his mother and younger brother for a while. It was suggested to him that he should apply for asylum. He was later told this was not a good idea, and it was for that reason he did not turn up at the asylum interview. He had lost contact with his solicitors, and was never served with a notice of deportation, although he was aware that he had remained here without any permission.

10. At paragraph 5 of his subsequent determination, the judge held that it was not formally disputed by the Secretary of State that the claimant had been continuously resident. Their submission was that on the balance of probabilities it was more likely than not that the deportation notice had been served on the solicitor or on the appellant. Therefore time had stopped running, and he could not take advantage of the long residence Rule.

11. At paragraph 7 the judge held that the claimant had produced fairly comprehensive documentation to show that he had lived in the United Kingdom consistently since 1996. There was also no evidence before him as to how the claimant might have left without any form of travel document or passport. It was perfectly plausible that the claimant was able to survive without recourse to public funds:

> Similarly I am not satisfied that the [claimant] was served with a deportation notice nor that his solicitors were either. The [claimant] genuinely did not seem to be aware of this notice having been served.

12. The judge went on to hold that the claimant thus satisfied all the material requirements of long residence, and he allowed the appeal under the Rules.

13. He also considered the appeal under Article 8. He referred to the five-stage test set out by Lord Bingham in **Razgar UKHL [2004]**. He found that removal of the claimant now would cause grave consequences for him given that he had established a significant private life in the United Kingdom based around his family ties and his long residence here. He found that the removal of the claimant would be disproportionate to the need to maintain immigration control given the serious consequences he would face "vis-à-vis the comparison of the state generally and the maintenance of immigration control in particular".

The Grant of Permission to Appeal

14. On 2 April 2014 First-tier Tribunal Judge Mark Davies granted permission to appeal to the Secretary of State for the following reasons:

> 2. The judge has made findings that the deportation order was not served on the [claimant] without explanation. The [claimant] was aware that he remained in the United Kingdom without leave and the judge appears to have given that evidence no weight whatsoever.
>
> 3. The judge finds the removal of the [claimant] would have grave consequences but does not explain what those circumstances would be or the evidence that he has taken into account in coming to that conclusion.
>
> 4. The grounds of the determination do disclose an arguable error of law.

The Hearing in the Upper Tribunal

15. At the hearing in the Upper Tribunal, Mr Wilding developed the arguments raised in the application for permission to appeal. In reply, Mr Aihe said that Ms McAllister had told the Tribunal that she was not 100% sure that the deportation notice had been served on the claimant. Her case was only that it was likely to have been served on him on the balance of probabilities. There was no evidence of postage, and it was open to the judge to find that the deportation order had not been served either on the claimant or on his solicitors. With regard to the Article 8 claim, he pointed out that the claimant's mother and stepfather had attended to give oral evidence in accordance with their witness statements in the claimant's bundle. But he had not needed to tender them as witnesses, as Ms McAllister said she did not have any questions for them in cross-examination. Although the judge did not expressly consider Rule 276ADE, on the evidence the claimant came within Rule 276ADE as he no longer had any ties to Thailand.

Reasons for finding an Error of Law

16. The claimant had a strong motive to misrepresent the truth with regard to the service of the deportation order, as its service on him was fatal to his claim under paragraph 276B. Moreover, the claimant knew at all material times that his immigration status was irregular, and that he was known by the authorities to have an irregular status. For he had presented an asylum claim at a time when he was an overstayer, and he had failed to show up for an asylum interview. In these circumstances, I consider the judge did not give adequate reasons for holding that the claimant had not personally been served with the deportation order, or that it had not been brought to his attention.

17. But I consider the judge's error was more egregious in respect of the finding that the deportation order had not been served on the claimant's solicitors or on the last known address which the claimant had given to the authorities. Since, the claimant admitted that he had gone to ground, no inference adverse to the Secretary of State could reasonably be drawn from the fact that the claimant's solicitors had not notified the claimant of the receipt of a deportation order, assuming it was served on them, rather than on the claimant at his last known address.

18. The case law provided by Mr Aihe to the First-tier Tribunal included **Syed (Curtailment of leave – notice) [2013] UKUT 144 (IAC)** in which Upper Tribunal Judge Spencer held that the Immigration (Notices) Regulations 2003 did not apply to a decision under the Immigration Act 1971, as it was not an immigration decision within the meaning of Section 82 of the Nationality, Immigration and Asylum Act 2002. Accordingly, the Secretary of State had to be able to prove that notice of such a decision was communicated to the person concerned, in order for it to be effective. Communication would be effective if made to a person authorised to receive it on that person's behalf, but the Secretary of State could not rely upon deemed postal service.

19. It was not clear whether this authority influenced the judge's thinking, but it undoubtedly pointed him in the wrong direction. Unlike the decision under consideration in **Syed**, the enforcement notice relied on by the Secretary of State in this case was an immigration decision within the meaning of Section 2 of the 2002 Act, and therefore it was governed by the Immigration (Notices) Regulations 2003. Accordingly, postal service of the deportation order on the claimant's nominated solicitors, or the posting of the deportation order to the claimant's last known address, was proper service, whether or not the claimant actually received the deportation order, or was made aware of it by his solicitors.

20. In short, the judge's finding on the issue of service of the deportation order is inadequately reasoned and unsafe.

21. The judge's approach to the resolution of the alternative claim under Article 8 ECHR was also flawed. The judge needed to consider the claimant's position under Appendix FM and Rule 276ADE of the Rules, before embarking on a freewheeling Article 8 assessment. The finding that the removal of the claimant would constitute a

disproportionate interference with his private life rights was ostensibly based entirely on what the claimant would be losing in terms of the private life which he enjoyed in the United Kingdom. While this was undoubtedly a highly relevant consideration, the central focus of Rule 276ADE(vi) is whether the applicant has lost all effective ties to the country of return such that he cannot be expected to lead an adequate private life there.

22. In conclusion, the decision of the First-tier Tribunal contains an error of law, such that it should be set aside and remade.

The Continuation Hearing on 5 September 2014

23. At the continuation hearing, I received oral evidence from the claimant, his mother and stepfather.

24. Mr Aihe reported a concession by Miss McAllister at the hearing in the First-tier Tribunal that the deportation order had only been served to the file. I asked Mr Tarlow to check the file, to see what it contained. He produced two documents from the file which were not considered at the hearing in the First-tier Tribunal. I arranged for copies to be made of these documents.

25. On 3 September 1998 Mr Mantel wrote to Time Consultancy Services in respect of the appellant's immigration status. His application for asylum had been refused, and he had been advised of the reasons for that decision. A copy of the letter advising him of the reasons was attached. Mr Mantel continued:

> Having regard to relevant factors, the Secretary of State decided to make a deportation order against him under Section 51 of the Immigration Act 1971. In accordance with paragraph 3(1) the Immigration Appeals (Notices) Regulation 1984 formal notice of the decision (together with the appropriate appeals forms) had been sent to Mr Uthaiwan at 8 Peterchurch House, Commercial Way, London SE15 1NF, which is his last place of abode as known to the Secretary of State.

26. The next document on the file was the decision to make a deportation order (application for asylum refused) dated 11 September 1998. This referred to the fact that on 25 September 1997 Time Consultancy Services had applied on his behalf for asylum, and the application had been refused. Accordingly, the Secretary of State had therefore decided to make an order by virtue of Section 3(5) of the Immigration Act 1971 to give directions for his removal to Thailand, the country of which he is a national, and which most recently had provided him with a travel document.

27. The next document in the file is the deportation order signed on 15 October 1998 (D1 of the Home Office bundle).

28. The final relevant document in the sequence is a file note made on 15 March 1999 by Mr Mantel, the writer of the letter of 3 September 1998. He records that the claimant is now listed as a missing deportee. He asks that the claimant's details be circulated on the police national computer. Underneath his signature, there is a typed stamp stating that the subject is wanted on police national computers, and that the

Metropolitan Police should be informed immediately should the subject come to notice.

29. At the bottom of the page, there is a separate manuscript file note made on 12 May 1999 by L. Duff. He says that the claimant's details have been circulated as being the subject of a deportation order.

30. In his closing submissions on behalf of the Secretary of State, Mr Tarlow submitted that the inference to be drawn from the file note was that the deportation order had been served on the appellant at his last known address. So the clock would have been stopped. The appellant's alternative claim under Article 8 was stronger. Nonetheless, the claim should not succeed. The appellant came here as a student, and had then deliberately gone to ground. It was in the public interest that he should be removed.

31. In reply, Mr Aihe drew attention to the fact that there was no covering letter with the deportation order, whereas there had been a covering letter to the claimant's former solicitors with respect to the APP104(b) notice of 11 September 1998. He submitted that on the balance of probabilities there had been no attempt to serve the deportation order on the appellant. Accordingly, the clock had not been stopped, and the appellant qualified for leave to remain under the old Rule. Alternatively, the appellant qualified for leave to remain under Rule 276ADE, as it would be unduly harsh to require him now to resume a private life in Thailand. He had no friends or relatives there, and had been away a very long time. In the further alternative, the appellant's removal would be disproportionate, having regard to the strength of his ties to the United Kingdom.

Discussion and Findings

32. Under paragraph 276B(i)(b) an applicant who was seeking ILR on the grounds of continuous unlawful residence had to show that he had at least fourteen years' continuous residence in the United Kingdom,

> excluding any period spent in the United Kingdom following service of notice of liability to removal or notice of a decision to remove by way of directions under paragraphs 8 to 10A, or 12 to 14, of Schedule 2 to the Immigration Act 1971 Act or section 10 of the Immigration and Asylum Act 1999, or of a notice of intention to deport him from the United Kingdom

33. Following the interrogation of the Home Office file, I readily accept Mr Aihe's submission that the deportation order itself is likely to have been served to the file, and that there was no attempt made to serve the order on the appellant at his last known address. But the language of Section 276B(i)(b) makes it clear that the clock stops with the service of a notice of intention to deport, and not from service of the deportation order itself. This is consistent with the fact that it is the notification of a liability to deportation or removal that triggers a right of appeal.

34. Having had the benefit of receiving oral evidence from the claimant, I am prepared to accept that he did not receive the enforcement notice dated 11 September 1998. I am also satisfied that the claimant by this time had deliberately gone to ground, and had deliberately not kept in touch with his solicitors or with the Home Office so that his current whereabouts were known. On the balance of probabilities, the Home Office did what they said they were going to do in the letter of 3 September 1998, and served the enforcement notice on the claimant at his last known address. I am further satisfied that this was proper service for the purposes of stopping the clock. Accordingly, the claimant has not discharged the burden of proving that he qualifies for leave to remain under the old Rule, which was still in force on 29 June 2012, the date of his application for ILR.

35. On one interpretation of the Court of Appeal decision in **Edgehill and Another v the Secretary of State for the Home Department [2014] EWCA Civ 402**, I should proceed immediately to a conventional Article 8 assessment, and should ignore the appellant's position under the new Rules. The justification for such an approach is that the appellant's Article 8 claim should not be assessed by reference to a more onerous Rule than is properly applicable to his case, having regard to the fact that he made his application for ILR before the new Rules were introduced, and the Secretary of State expressly represented that a case such as his would be assessed under the old Rules.

36. However, I am not invited to follow this interpretation of **Edgehill**, and it would be potentially disadvantageous to the appellant to exclude the new Rules from consideration. While he has not accrued twenty years' unlawful residence, he potentially qualifies for leave to remain under Rule 276ADE(1)(vi) on the ground that he has been absent from Thailand for so long that he can no longer be said to have effective ties to this country, and there would be very significant obstacles to his re-integration.

37. Having given careful consideration to this claim, I am not ultimately persuaded that the claim is made out. Firstly, it is not satisfactorily established that the appellant has no relatives or family friends remaining in Thailand. He may have lost touch which his father, who divorced his mother before she came to the UK on her own sometime before 1994. But it does not follow that the appellant would not be able to find his father if he went back to Thailand, and made enquiries. His mother said that she had heard that her two siblings had gone to live in Laos. When asked to clarify the source of her information, she said it was her cousin in Thailand who had told her. This would indicate that there are at least extended family members on her side of the family that the appellant could make contact with on return to Thailand. The appellant's mother then said that the person concerned was not really a cousin, but was a neighbour in Bangkok; and a long time ago she had ceased to have contact with that person, when she could not get through to that person on the telephone.

38. The evidence of her husband indicated that there are likely to be people remaining in Bangkok who are known to the claimant's mother. Following his marriage to the claimant's mother in 2002, Mr Williams had accompanied her on a visit to Thailand

on two occasions. The second occasion was in 2004. Whilst he did not meet any of her relations, and by implication she did not do so either, he said she met someone who she went to school with.

39. In his oral evidence, the claimant confirmed that he spoke Thai as well as English, and that he was a skilled painter and decorator. He had been born and brought up in Bangkok, and had been a student there. He also used to work in Bangkok. He serviced air conditioners in big department stores. The claimant came to the United Kingdom in 1996, when he was aged 25. He had thus spent all his formative years in Thailand, and he had also established an independent life in Thailand long before he came here. For his mother had come to London some years before, and on his own account his father had moved out of Bangkok to somewhere in the countryside.

40. It is necessary to distinguish between his mother's ties to Thailand and his own ties, but I consider that the claimant is likely to be able to carry on an adequate private life in Bangkok, and that he still has some effective ties to Thailand, notwithstanding his lengthy absence from the country. The claimant can reasonably look to his mother and stepfather for practical support and financial assistance in re-establishing himself in Bangkok. Even if the claimant does not have any relatives in Bangkok, it is likely that his mother has some contacts there to whom he can turn for assistance in re-establishing himself. It is also likely that the claimant will be able to renew contact with some of the people that he used to associate with in Bangkok, either in an educational or work environment. In short, there would not be very significant obstacles to the claimant's re-integration.

41. In conclusion, I find that the claimant does not qualify for leave to remain on private life grounds under Rule 276ADE. Turning to an Article 8 claim outside the Rules, I accept that the threshold for the engagement of private life rights is relatively low, and that questions 1 and 2 of the **Razgar** test should be answered in the claimant's favour with regard to the establishment of private life in the United Kingdom. Although the claimant lives under the same roof as his mother and stepfather, I do not consider that he enjoys family life with them or with his younger brother for the purposes of Article 8. There is no evidence the relationship between the claimant and any member of his immediate family goes beyond normal emotional ties.

42. On the issue of proportionality, it is necessary to take into account of the new statutory guidance on the public interest contained in Section 117B of the 2002 Act as amended by Section 19 of the Immigration Act 2014. It is in the claimant's favour that he can speak English, but under subsection (4) little weight should be given to a private life that is established by a person when the person is in the UK unlawfully.

43. Although the claimant is understandably very keen to remain here with his immediate family, and his immediate family are very keen that he should stay here, his case does not disclose sufficiently compelling or compassionate circumstances such as to render the proposed interference a disproportionate one.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal is dismissed under the Rules and under Article 8 ECHR.

Signed Date

Deputy Upper Tribunal Judge Monson