Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40088/2013

THE IMMIGRATION ACTS

Heard at Birmingham, Sheldon Court	**Determination Promulgated**
On 5th September 2014	**On 12th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ABDUL KHALIQUE
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Taj Shah (Solicitor)
For the Respondent: Mr D Mills (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Hawden-Beal promulgated on 4th March 2014, following a hearing at Birmingham on 17th February 2014. In the determination, the judge dismissed the appeal of Abdul Khalique. The appellant subsequently

applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Bangladesh, who was born on 20th January 1974. He appealed against the decision of the Respondent Secretary of State dated 13th September 2013 to refuse his application for leave to remain in the UK on the basis of long residence under paragraph 276B, 276ADE, Appendix FM, and Article 8 of the Human Rights Convention.

The Appellant's Claim

3. The Appellant's claim is that he has been living in the UK continuously for fourteen years such that he qualifies to remain in this country under the long residence Rule. The Respondent contests this on the basis that he could not prove continuous residence for a period of fourteen years. He had no partner or child in the UK. He had not lived here for twenty years. He was not a minor who lived here for at least seven years. He was not aged between 18 and 25 years. Finally, that his social, family and cultural ties remained with his home country.

The Judge's Findings

4. The judge observed how the Appellant had entered the UK on a visit visa in 1994, and he had leave to remain from September 1994 until March 1995. Since then he has been here without any valid leave. The judge heard evidence that the Appellant had not returned back to Bangladesh since he came to this country in 1994. His only family in Bangladesh was his 70 year old mother and the wife of his brother who was working in the Middle East (paragraph 14). The Appellant could not recall where he lived in the UK when he first arrived. But he did stay with his aunt in 2009 (paragraph 16). He used to live at restaurants where he worked. His first job was in Somerset and he lived in a three to four bedroom flat with other restaurant staff. He then worked in Taunton for two and a half years, and then Bristol, where he worked and lived until 1998. He went to Illminster, where he stayed for eighteen months and then to Dursley, before he moved to a house owned by his aunt in Birmingham. He did not pay towards bills in Birmingham. He said he had payslips and he had P60s. He did not have a national insurance number (paragraph 16). He was always paid cash in hand. He still does not have a bank account.

5. The Appellant went on to explain that he moved in with his aunt in 2003, where she moved to her present address, and prior to this date he used to stay with her on his days off when he had no work. Evidence from the Appellant's aunt, Shaheada Begum, also confirmed most of these facts, including that the Appellant had not been to Bangladesh since he came to the UK in 1994. The judge recorded that, "She said that she maintained contact with the Appellant when he had a day off or when he had no work

which is when he came to stay with her. When he did work he lived at his place of work. She confirmed that she knew he was coming to the UK in 1994 and that he had been sponsored by a man in Bangladesh" (paragraph 19). The aunt also confirmed that the Appellant had been working in Bristol and Somerset and at "other different places and that he lived down there for as long as he had a job there" (paragraph 20).

6. The third witness giving evidence before the judge was Mr Shah Kabili, who claimed he was distantly related to the Appellant and that they came from the same village. This witness "said that after he arrived here in 2003 he used to contact the Appellant very often and see him every three to four months in Birmingham city centre. He did not know where he lived when he was working" (paragraph 22).

7. The fourth witness before the judge was Mr Mohammed Yesuf Miah, who confirmed that the Appellant was his father's sister's son. His evidence was that,

> "He first saw him in 1995 and that he used to see the Appellant at his aunt's house and that the Appellant came to his house on his days off approximately twice a month. He said the Appellant had not been out of the UK since he had known him. He said that the Appellant's aunt had lived at her address for ten to fifteen years and that she had been living there when he came to the UK in 1987. He said he knew that the Appellant had not left the UK since he had been here but then admitted that after the first visit he did not know where the Appellant had gone and he did not know where the Appellant was in between his regular visits" (paragraph 23).

8. The final witness before the judge was Mr Tariq Akhter, who confirmed before the Tribunal that "he had known the Appellant since 1999 when they had worked together for one and a half years to three years at a restaurant in Illminster called the "Rajput Indian Restaurant". He said that "they still keep in contact by telephone at least twice a week and they meet for coffee every two to four weeks" (paragraph 24).

9. It was against this background that the judge applied the law to the facts and properly concluded that the Appellant could not meet the requirements of paragraph 276B(1)(a) because he had not been lawfully in the UK for ten years. However the judge also found that "there is insufficient evidence to satisfy me that he has been here for a continuous period of fourteen years as required under paragraph 276B(1)(b)". This was because the Appellant

> "has only produced payslips and P60 for 1995 and even though he claims to have worked as recently as November 2013 he has no other documentary evidence to show that he has been in the UK since that time. I note that he submitted his passport and wageslips and P60 with his original application but it now appears that those documents had been lost by the Respondent" (paragraph 25).

10. The judge was careful to note that the fourteen year Rule, as it then was, "did not encourage overstayers to declare themselves to the authorities and that as a result of their lack of status, it would be difficult for them to provide evidence of this stay in the UK" but nevertheless held that, "the evidence called by the Appellant in support of his claim is not consistent or credible".

11. The reasons that the judge gave for this conclusion was that there was, on the one hand, "A distant relative who came here in 2003 and therefore has no knowledge of matters before that date and did not keep in touch until he came here but is sure he has not left the UK". The judge held that his evidence "is of little help because it only covers the last ten years or so, when the Appellant himself acknowledges that he cannot show ten years' lawful residence." The judge also held that, on the other hand, "I have a nephew who claims that he saw the Appellant regularly at his aunt's house, an address she has lived at for at least ten to fifteen years and the address she was living at when he came to the UK in 1987". Of this the judge concluded, "I place no weight on this evidence at all for the simple reason that the aunt herself did not come to the UK until 1987" (paragraph 26).

12. The judge's conclusions with respect to the evidence heard from the witnesses was that, "Although all of the witnesses are positive that the Appellant has not left the UK since he came here in 1994, none of them have seen him every day or every week to be certain of that. They only saw him when he was not working or when he had a day off" (paragraph 27).

13. Finally, the judge then added that, "Even if I am wrong and the Appellant has been here continuously since 1994, that does not mean that a grant of leave to remain is automatic" because the Respondent has to consider matters in relation to the public interest (paragraph 28). The judge also held that there were no compassionate circumstances put before the judge and that the Appellant was a fit and healthy man who came here deliberately to work and to remain in the UK and had paid no tax or contributed in any positive way to the UK economy (paragraph 29).

14. In relation to human rights issues, the judge held that the Appellant could not succeed under the Rules that came into effect in July 2012, such that Appendix FM and paragraph 276ADE have no application to the current state of affairs (paragraph 32). The Appellant had established a private life, but this was only evidence as from 2010 onwards when his application was submitted (paragraph 33).

Grounds of Application

15. The grounds of appeal suggest that the judge had fundamentally erred in the appreciation of the facts before her, especially given that Mr Mohammed Yesuf Miah first came to the UK in 1987 on a settlement visa to join his parents, such that he would have been in a position to vouch for

the presence of the Appellant in the UK (see paragraph 6). The grounds also state that the judge had mixed up the arrival date of the auntie with that of the Appellant. They further state that the judge had erred in imposing a requirement that witnesses had to vouch for a person's presence in the UK for every day of the week in order to comply with the requirements of continuous residence.

16. On 20th May 2014, permission to appeal was granted by the Upper Tribunal on the basis that the judge's conclusions at paragraph 26 of the determination are difficult to follow. This is where the judge evaluates the evidence of the respective witnesses as against each other, drawing attention to the distant relative who came here in 2003 and the nephew who said that he saw the Appellant regularly at his auntie's house. In giving permission, the Tribunal held that the judge may have been suggesting that the distant relative and the auntie have given contradictory evidence because the distant relative claims to have seen the Appellant at the home of the Appellant's aunt and that this was the same home that the aunt was living in when the distant relative arrived in 1987. The judge had stated that, "I place no weight on the evidence at all for the simple reason that the aunt herself did not come to the UK until 1987". However, in granting permission, the Tribunal said that "that does not disclose any inconsistency in the evidence and if there was an inconsistency, it is unclear what it was".

17. On 5th June 2014, a Rule 24 response was entered by the Respondent Secretary of State to the effect that the finding of inconsistencies was a matter for the judge.

Submissions

18. At the hearing before me on 5th September 2014, Mr Taj Shah, who had appeared as a representative at the hearing in the Tribunal of Judge Hawden-Beal, also appeared now and submitted that the recording of the evidence by the judge was erroneous. He referred to his own handwritten notes of the hearing and asked me to compare these with the judge's Record of Proceedings. I have done so. In this case the Record of Proceedings by the judge is comprehensive and detailed and had been much assisted by this. Subject to this, Mr Shah relied upon the Grounds of Appeal. Mr Shah did make two further submissions before the Tribunal.

19. First, the judge had made factual errors with respect to the evidence at paragraph 23 of the determination. The Appellant's nephew, Mr Mohammed Yesuf Miah, had come to the UK in 1987 when he was 9 years old, and he did not say that he had seen the Appellant's aunt living at her address for ten to fifteen years. It was not the evidence before the Tribunal that the Appellant's auntie had come to the UK in 1987. I have checked the Record of Proceedings and this indeed appears to be so. Mr Shah submitted that the judge had assumed that, because Mr Mohammed Yesuf Miah had arrived in 1987, his aunt had also arrived at that date as well. This was not the evidence.

20. Second, the judge failed to make specific findings of fact in relation to the other witnesses who gave evidence, such as the Appellant's work colleague, Mr Tariq Mohammed Akhter, who attended to give evidence, and stated that he knew the Appellant since 1999 in the UK. Mr Shah submitted that this would cover the Appellant's residence in the UK for thirteen years until the date of the enforcement decision. It was irrelevant that he had an employment contract and that the Appellant did not. Finally, Mr Shah submitted that the findings at paragraph 26 were difficult to follow that no weight could be placed on the evidence because the aunt herself did not come to the UK until 1987.

21. For his part, Mr Mills submitted that he did not have the Record of Proceedings in himself, but in any event, the main question was whether such errors that there were, were material errors.

22. Second, the judge had evaluated the evidence perfectly properly at paragraph 27 of the determination and was right to conclude that "the witnesses … had to concede that they did not know where the Appellant was when he was not in Birmingham and even if they did talk to him on the telephone they only had his word for where he actually was at that given time." None of the witnesses could say for sure where the Appellant was for fourteen years. There were also long periods when he was not working.

23. In reply, Mr Shah submitted that the auntie had already been in the UK in 1984 when she came as a spouse (see paragraph 27) and she had not said that there was a long gap between seeing the Appellant and speaking to him next on the telephone. What she had said was that he was working away and that on his day off would come to visit her. There was no evidence that the Appellant had actually left the UK.

Error of Law

24. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside this decision and remake the decision. My reasons are as follows.

25. First, there is the evidence of Mohammed Yesuf Miah, the Appellant's nephew, who came to the UK in 1987 and gave evidence that he had seen the Appellant "regularly at his aunt's house" (paragraph 27). The judge was wrong to discount this evidence. The evidence was discounted because the judge wrongly stated that the auntie had also come to the UK only in 1987.

26. Second, the judge referred to the other witnesses, without making findings of credibility with respect to each one of them, and broadly concluded that, "they only saw him when he was not working or when he had a day off" (paragraph 27) thereby implying that it was necessary to have detailed day-to-day knowledge on a regular basis of the Appellant for the

purposes of the fourteen year long residence Rule. This is not so. This elevates the standard far higher than is required. The standard is on a balance of probabilities.

27. Third, the judge's analysis at paragraphs 28 and 29 shows how the standard is raised unjustifiably. It is not the case (see paragraph 28) that if the Appellant has been here continuously since 1994 that still does not mean that he would have the right to remain here. It is true that the public interest must be taken into account, but barring any criminality or anything that renders a person to be unworthy of leave in this country, the long residence Rule operates by way of a "concession" to confer the benefit of residence in the absence of prior leave having been granted. It is equally wrong to say that the consideration of "compassionate circumstances" or the fact that the Appellant came here "deliberately to work and remain in the UK even though he knew perfectly well after March 1995 he had no right to be here" (paragraph 29) is a relevant consideration.

28. The case law is clear. In 2001 Sullivan J held that "the fourteen year concession is by definition applicable to those who have been guilty of some breach of immigration controls" (see **Popatia and Chew [2001] Imm AR 46**). It is unfortunate that the long residence Rule is often misapplied because of the breach of immigration controls. Second, Lord Justice Hooper has cautioned against the literal application of the long residence Rule in terms that, "if applied too literally [it] would automatically exclude in the public interest from the long residence Rule many who, absent other factors, are intended to have the benefit of the Rule and who have (I believe) in the past enjoyed it" (see **Aissaoui v SSHD [2008] EWCA Civ 37** at paragraph 33). What is said by the judge at paragraphs 27 to 29 goes beyond this. This is to say nothing of the factual mistake made at paragraph 26.

Remaking the Decision

29. I have remade the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the reasons I have set out above.

30. First, the evidence of Mohammed Yesuf Miah, who was nine years old, when he came to the UK in 1987 was that he had seen the Appellant come and go from his auntie's house. It was wrong to discount this evidence on the basis that the auntie herself did not come to the UK until 1987.

31. Second, there was other evidence from other witnesses, and the judge held that, "all of the witnesses are positive that the appellant has not left the UK since he came here in 1994" (paragraph 27) and it should reasonably be assumed from this, given that this test is on a balance of probabilities, that the Appellant remained in the UK for the duration of the time from when he arrived to when he applied for indefinite leave to remain. The Appellant was, after all, working at various places in

Somerset, in Bristol, and elsewhere. However, he was consistently keeping in touch with his auntie, and even visiting her on his days off, and this evidence is entirely credible and not improbable in the least. It is a stretch of imagination to assume that during this time he would have returned to Bangladesh only to re-enter again and make contact with his auntie.

32. Accordingly, I am satisfied that paragraph 276B(1)(b) is met. The Appellant has produced payslips and his P60 for 1995. It is also not entirely insignificant that his wage slips and P60 were submitted with the original application, "but it now appears that these documents have been lost by the Respondent" (paragraph 25). As against this, there were witnesses who confirmed that they had seen him working at the Rajput Indian Restaurant.

33. Since I found that the Appellant complies with the Immigration Rules, it is unnecessary for me to decide whether he satisfies the requirement of freestanding Article 8 jurisprudence. It is incorrect to say that because the Appellant has established a private life this is "only by virtue of the length of time he has been in the UK" (paragraph 33), and that for this reason alone has to be discounted.

34. The Appellant's relatives and friends in this country, who attended in their numbers to give evidence on his behalf is testament to his private life rights in this country, not to say of the work that he has done, the wage slips he has received, and the P60. It is unnecessary for me to decide the issue of Article 8, however, since the Appellant succeeds under the Immigration Rules.

Decision

35. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

36. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 11th September 2014