Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43305/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 6th May 2014	**On 16th May 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

BASHARAT HUSSAIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Iqbal of Equity Law Chambers
For the Respondent: Mr Diwnycz, HOPO

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Hillis made following a hearing at Bradford on 4th February 2014.

Background

2. The Appellant is a citizen of Pakistan born on 6th June 1969. He says that he arrived in the UK illegally since 1997 and has lived here ever since. He applied, on 6th July 2012, for leave to remain on the basis of long-term residence in the UK under paragraph 276 of HC 395. He was refused both on the grounds that the Secretary of State was not satisfied that he had established the period of residence claimed in the UK, and because she was not satisfied that there would be any breach of the UK's obligations under Article 8 of the ECHR by his removal.

3. The Appellant provided an ESOL certificate in order to demonstrate that he had sufficient knowledge of the English language and sufficient knowledge about life in the UK in accordance with Appendix KOLL. Accordingly the issue of his English language competence was not raised by the Respondent in the refusal letter.

4. The judge formed the view, having heard the Appellant try to give evidence in English, that, whilst there was no persuasive evidence that the ESOL certificate was not genuine, having seen him at the hearing and taken his testimony of how he entered the UK and his unlawful use of forged document and illegal work here, that he had failed to show that the document was one on which any evidential weight could be attached. He said that the ESOL certificate was not persuasive evidence to show that he had sufficient proficiency in the English language.

5. The judge noted that the Appellant had submitted no official documentation to establish that he had been in the UK since 1996 as claimed. Three friends gave oral evidence on his behalf but they were vague in their knowledge of when the Appellant arrived in the UK and he was not satisfied that he had been here for the length of time claimed.

6. With respect to Article 8, he said that the Appellant had very limited interaction with people here and had illegally entered the UK to work illegally. It was proportionate for the appeal to be dismissed on Article 8 grounds in addition to failing under the Rules.

The Grounds of Application

7. The Appellant sought permission to appeal on the grounds that the judge's reasoning was perverse. The long residence Rule is effectively an amnesty for illegal entrants and to use the evasion of immigration control as a reason to dismiss the appeal would be to defeat the purpose of the Rules (ZH Bangladesh [2009] EWCA Civ 8).

8. The Appellant relies upon the ESOL certificate - the judge had given a confusing account of why he had placed no evidential weight upon the document. A credible certificate had been presented confirming the fact that the Appellant had achieved the required level of English. The Secretary of State had accepted that the English language requirements had been met and the judge accepted that the document was not forged.

9. Permission to appeal was granted by Judge Shaerf for the reasons stated in the grounds. Judge Shaerf observed that notwithstanding the permission the Appellant might wish to consider every carefully his position in the light of the dearth of evidence to support his claim.

Submissions

10. Mr Iqbal relied on his grounds and essentially submitted that the judge's error with respect to the English language certificate, and his emphasis on the Appellant's history of illegality, had tainted his approach to the witness evidence which had been dealt with cursorily in the determination.

11. Mr Diwnycz stated that, according to the Presenting Officer's minute, she had raised the issue during the hearing. The judge was at liberty to assess whether the original certificate was evidence that the Appellant could comply with the requirements of the Rule, despite the evidence of the tester.

Findings and Conclusions

12. It seems that the Presenting Officer did raise concerns about the ESOL certificate at the hearing. At paragraph 43 of the determination he said that there was no application for an adjournment due to the issue having been raised. Moreover the judge stated that, following the hearing, the Respondent served documentation in respect of the ESOL certificate on the Tribunal and on the Appellant's solicitors. The judge said that he had heard nothing from the solicitors and did not know whether they had seen the documentation. He decided that it would not be fair to include it in his deliberations and therefore set it aside.

13. Accordingly it is clear that all parties were aware that this was a live issue in the appeal.

14. The judge said that the Appellant elected to give his evidence throughout in Urdu via the interpreter. He said that it was immediately apparent to him that he was wholly reliant on the interpreter and had virtually no understanding of English at all. Following consultation with his solicitor the Appellant said that he wished to give evidence in English where he could, and in Urdu via the interpreter where he felt more comfortable. He confirmed his identity and date of birth in English and adopted his witness statement as his evidence-in-chief. He also said that his father and siblings were in Pakistan and he remained in contact with them, in English. Thereafter made his replies in Urdu using the interpreter.

15. The judge concluded that there was no evidence which established that the ESOL certificate was not a genuine document. However he said that he could attach little evidential weight to it because

> "I have taken into account that the Appellant would be nervous giving evidence at the hearing and that English is not his first language but conclude, having seen him at the hearing and taken his testimony of

how he entered the UK and his unlawful use of forged documents and illegal work in this country, that he has failed to show the document is one on which any evidential weight can be attached."

16. The judge did not have evidence before him from ESOL about what is expected of an applicant at the level required to satisfy the Immigration Rules. He therefore had no benchmark against which to measure the Appellant's struggle to give evidence in English. Clearly the Appellant preferred to give his evidence in Urdu, no doubt because it was very important to him to ensure that he was properly understood. The fact that he did so should not be used against him as a basis for finding that the ESOL certificate could not be relied upon. Still less could the judge rely upon his previous use of forged documents and illegal work in the UK. The judge had already found that the certificate was not a forgery. In referring to the Appellant's immigration history the judge took into account an irrelevant consideration and thereby erred in law.

17. That aspect of his decision is set aside.

18. Mr Iqbal's argument is that that error, combined with the judge's reliance upon the Appellant's illegal entry, tainted his approach to the evidence of long residence in the UK.

19. The submission is not made out. The Appellant bears the burden of proof to establish the length of residence claimed. He provided no official documentation whatsoever. The judge properly considered the oral evidence of the witnesses.

20. The first said that he first met the Appellant on 7th January 1996. The judge was wholly entitled to state that he could give no persuasive reason as to why he remembered the specific date after such a long passage of time and on that basis not to regard the evidence as persuasive.

21. The second witness said that he had known the Appellant since March or May 2000. This application was made in July 2012. The date of decision is 2013. Mr Iqbal submitted that since this was a in-country appeal evidence up to the date of hearing should be taken into account. That is correct. However the issue before the judge was whether the Respondent had made a lawful decision at the time that it was made. That question can be decided by reference to post decision evidence, but the Appellant can only succeed in this appeal if he establishes that the decision made was not in accordance with the Immigration Rules. At the time the Appellant applied for indefinite leave on the basis of fourteen years, the second witness could only confirm twelve years' residence. The judge was therefore wholly entitled to discount it as evidence.

22. With respect to the third witness again the judge said that he gave no persuasive testimony as to how he remembered that he first met the Appellant in January 1997. Furthermore the witness said that he went to Pakistan annually for periods of up to six weeks at a time and could not

say that the Appellant was in the UK during those periods. His knowledge of the Appellant's personal circumstances was limited.

23. The judge was entitled to place little weight on the oral evidence of the witnesses and to comment on the fact that there was no documentary evidence at all. He properly considered what other evidence had been adduced to substantiate the claim. He did not dismiss the appeal, as alleged, on the basis that the Appellant had entered illegally and therefore his word could not be relied upon.

24. There is no basis for concluding that the mistake in respect of the ESOL certificate had any impact on his consideration of the evidence of long residence.

Decision

25. The appeal is dismissed.

Signed Date

Upper Tribunal Judge Taylor