Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12983/2014

THE IMMIGRATION ACTS

Heard at Stoke	**Decision & Reasons Promulgated**
On 18 December 2014	**On 5 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR ARSHAD BAIG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Markus of Counsel
For the Respondent: Mr McVeety, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING A MATERIAL ERROR/ NO MATERIAL ERROR OF LAW

Introduction

1. The appellant is a citizen of Pakistan who is represented by Paragon Law of Nottingham. He was born on 27 April 1951. The appellant's immigration history is unclear but he claims to have arrived in the UK via Turkey and France in 1997. Unfortunately, it was not until 12 April 2012 that he submitted an application for leave to remain, it seems, on the basis that his rights under Article 8 of the European Convention on Human Rights (ECHR) would be infringed if he were to be removed from the UK. His application was considered under Appendix FM and paragraph 276ADE

of the Immigration Rules, which came into effect on 9 July 2012. It was refused on 1 July 2013.

2. The appellant was served with a notice that he would be removed as an illegal entrant pursuant to paragraph 8-10A of Schedule 2 of the Immigration Act 1971.

3. The appellant appealed to the First-tier Tribunal against that decision. His notice of appeal which was lodged on 13 March 2014. It seems that at the time of the notice of appeal was represented by a firm of solicitors (Armada Legal Services). That firm was subsequently investigated by the Office of the Immigration Services Commissioner. Members of that firm were subsequently struck off as solicitors and/or were found guilty of illegally providing immigration advice and services.

4. The respondent decided that the appellant had provided insufficient evidence of long residence in the UK. Indeed, by way of documentary evidence, he had only produced an electricity bill dated 25 February 2011. The respondent was not satisfied that the appellant had been resident in the UK for the required period. What the required period was is a matter that is extremely unclear. It was claimed by the appellant that he had been continuously resident for a period of fourteen years. His application was considered under Appendix FM and paragraph 276ADE (which deals with an application for leave to remain on grounds of a private life in the UK) as well as Article 8 of the ECHR itself. The respondent rejected the application on the grounds that he had not established the necessary period of continuous residence nor were any of the Articles in the ECHR engaged.

The First –tier Tribunal Proceedings

5. The appellant subsequently unsuccessfully appealed to the First-tier Tribunal. His grounds initially stated that the decision was incompatible with the appellant's Convention rights and also was contrary to the Immigration Rules. The appellant claimed to have become integrated into British society. He claimed to be involved at the local mosque and to undertake voluntary work. He also had a cardiovascular condition which would prevent him returning to any third world country.

6. The appeal came before Judge of the First-tier Tribunal Pacey (the Immigration Judge). Judge Pacey noted that the appellant had requested a paper determination of his appeal but had provided no evidence in support of his claim either to satisfying the requirements of the Immigration Rules or being allowed exceptionally to remain outside those Rules. The Immigration Judge was not satisfied that he met the requirements of paragraph 276ADE and had not provided independent evidence of probative value which would enable the Immigration Judge to conclude that the appeal fell to be considered outside the Immigration Rules. The appellant had only produced a very generalised statement and his medical condition was not such as to engage Article 3 of the ECHR. The

Immigration Judge regarded the appeal as being solely on human rights grounds. Accordingly, he dismissed the appeal.

The Upper Tribunal Proceedings

7. The initial grounds of appeal drafted, according to Mr Markus, by the appellant's former solicitors, asserted that the First-tier Tribunal had not attached sufficient weight to the substantial evidence of fourteen years' residence in the UK, had failed to have regard to the inadequacy of medical treatment in Pakistan, had failed to have regard to two photographs showing the appellant with mosque leaders and had applied an excessively high standard of proof to the determination of the appeal. In addition, the allegation was made that the Tribunal had been biased. Following the refusal of that application for permission revised grounds were filed and settled by Mr Markus. These state that the correct version of the Immigration Rules is 276A1. Unfortunately, because of frequent changes to the Immigration Rules I have found it difficult to find a copy of the relevant rule at the relevant date but have been assisted by Mr Markus who provided a bundle which included (at page 33) the relevant rule. By reading 276A1 with 276B, I understand that that the appellant had to show fourteen years' "continuous residence" in the UK before an application could be made for leave to remain here under the rules in existence before the 9th July 2012. The grounds of appeal state that the Immigration Judge decided the case against the wrong benchmark, i.e. twenty years continuous user under paragraph 276ADE rather than fourteen years. The appellant contends in his grounds that the Immigration Judge was wrong to apply the twenty year requirement incorporated into the Rules on 9 July 2012. Accordingly, there was a material error of law which required to be rectified.

8. I heard representations from the parties and a full note of those representations is contained in the Tribunal file.

9. The parties first of all confirmed that there was no issue about late service of the notice of appeal.

10. Mr Markus pointed out that the appellant had been advised and assisted by a solicitor who had since been struck off the register and convicted of a criminal offence. The appeal had not therefore been well prepared. The appellant provided information to the solicitors but they had "lost it". This included a video taken in 2011. The appellant had been told by his solicitors that they had submitted the application when they had not. The application was in fact not submitted until April 2012. At this point I was referred to the bundle of documents prepared. This included a letter at page 130, which refers to a number of enclosures. This asserts that the appellant had been involved in "running of the mosque" and "a great deal of voluntary work in the community". It also asserts that the appellant had been "here for over fourteen years". Unfortunately, the letter referred to did not make clear which Immigration Rule was relied on. Mr Markus accepted that his client could not meet the requirements of 276B of the Immigration Rules as it stood up to 8 July 2012 because his client did not

have sufficient knowledge of the English language as was required under 276B(iii) of that Rule. However, his client had ticked the box "long residence in the UK" in his application and the box "other purposes" (i.e. outside the Rules). He submitted that his client also me the requirements of 276A1. I understand 276A1 to require fourteen years continuous' residence whether or not that residence had been unlawful. It was submitted that the respondent had wrongly interpreted the application as being solely under Article 8 when in fact it was under the Immigration Rules also. Again I was referred to the grounds of appeal at page 46 in the bundle where the appellant asserted in his grounds of appeal to the First-tier Tribunal that the "decision is not in accordance with the Immigration Rules".

11. At this point Mr McVeety pointed out that his client could not consider such a vague application.

12. Mr Markus went on to explain the proper factual basis for the application. The appellant's former solicitors had carelessly ticked the box saying that he wanted a paper hearing. There was credible evidence from the appellant and his friends to confirm that he had in fact been in the UK for fourteen years at the date of that application. Mr Markus's instructions were that several documents were submitted but these are no longer available as they had, he speculated, been lost by the appellant's former solicitors. Unfortunately, he had not kept copies. Mr Markus concluded by saying there were therefore two errors of law:

    (1) The failure to deal with the Immigration Rules in force at the time of the alleged fourteen years' continuous residence (276A1 and B). In particular, the Immigration Judge had erroneously considered that twenty years' continuous residence was required, i. e. the relevant period for the purposes of paragraph 276ADE.

    (2) The failure to deal adequately with appeal under Article 8 application. The Immigration Judge made no findings as to the number of years the appellant had been in the UK and she should have done so. It was clear, Mr Markus submitted, that he had been in the UK for a long time. Alternatively, if the evidence did not appear satisfactory, the Immigration Judge should have directed an oral hearing.

13. Mr McVeety submitted that it was insufficient for the appellant to place full responsibility for preparation of the appeal into the hands of his legal representatives. The respondent had never seen any documentary evidence to support his alleged long residence in the UK, for example, no copies of any Inland Revenue documents had been produced and many documents evidencing residence, such as wage slips, can be obtained in copy form. This made it difficult to accept that the appellant had submitted documentation as he claims. Third, the documentation which fell short of establishing a full fourteen year period of continuous residence and was inadequate in any event.

14. Mr Markus then pointed out that his client did not either read or write English. He accepted that his client nevertheless had the burden of producing documentation but he referred to paragraph 14 of the grounds of appeal which he had settled where it states that there is no rule of English law by which a represented party is automatically fixed with the errors of his legal representative. There he refers to a number of authorities. This is a case in which the appellant cannot be said to be wholly responsible for what has occurred. He referred to page 33 of the appellant's bundle and submitted that paragraph 276A1 was the correct Immigration Rule. He then went on to make submissions as to the directions that would be necessary in the event that an error of law was found.

15. At the conclusion of the hearing I reserved my decision as to whether or not there was a material error of law.

Discussion

16. The appellant claims that he qualifies under paragraph 276A1 of the Immigration Rules, alternatively, that the respondent would be in breach of his protected human rights under the European Convention on Human Rights (ECHR), specifically Article 8 of the ECHR, in the event that he were removed from the UK.

17. The appellant was legally represented before the First-tier Tribunal to the extent that the notice of appeal with some supporting evidence was supplied to the First-tier Tribunal. It seems that the box on the appeal form indicating that he wished to have a paper determination of his appeal was ticked. This was presumably completed on the appellant's instructions.

18. I have considerable sympathy with the appellant because it seems that he was inadequately represented before the First-tier Tribunal by a firm of solicitors which is no longer in existence. However, one of the issues that I have to consider is the extent to which that inadequate representation caused the appellant to lose his appeal. The normal position is that a solicitor instructed on an appellant's behalf acts as his agent with ostensible authority to bind his client. Mr Markus points to certain authorities at paragraph 14 of his grounds of appeal which suggest that there is no rule of English law that a represented party is automatically and irrecoverably fixed with errors of his representatives. However, the difficulty the appellant faces is in setting out with any particularity what documents or other evidence he did supply to his solicitors. It seems to me to be insufficient simply to say that documents were supplied without saying what they were. Have any steps been taken to try and recover these documents by the Office for Supervision of Solicitors? I note that despite now instructing competent solicitors to act on his behalf, who have done everything they can to present the case favourably for their client, there is still no documentary evidence to support the claim that the appellant has been continuously resident in the UK for fourteen years. There were some photographs, which were considered by the Immigration

Judge at paragraph 11 of her determination but as she stated there was no indication as to when they were taken or who they feature. As far as the appellant's work is concerned, this seems to have consisted largely of voluntary work according to paragraph 10 of the determination. What has the appellant been living off for the last fourteen years? If he was working he must have been able to give an indication as to the name of his employer. He has still not done so in his most recent witness statement. If he was on benefits there would be a record of that with the Department of Social Security. No such record has been produced even in the bundle prepared for this hearing, which includes documents not before the First-tier Tribunal. The appellant does have testimonials in letter form from friends to state that they knew him in the late 1990s. But there is no corroborating evidence such as a tenancy agreement to confirm that the appellant lived in Derby during the relevant period. Did he pay council tax? Why is no record produced? The appellant claims that he can neither read nor write English which leads one to question whether he could have carried out any form of employment during this period. His NHS records begin in 2011 and refer to the fact that he speaks English. If he suffers from a heart condition why there are no NHS records for the period prior to 2011? Why no steps have been taken to establish from his GP whether he has any medical history prior to 2011? I note that the appellant, despite being unable to read or write English, has signed his witness statement.

19. The Immigration Judge dealt with the respondent's refusal and there was no basis whatsoever for her to direct an oral hearing when the appellant had not requested one. He may well not have had the resources to pay for such a hearing and appeared to be happy for the matter to be dealt with on the papers. The Immigration Judge dealt with the application for leave to remain as though it remain under paragraph 276ADE because the respondent in her refusal refused leave to remain on that basis. However, the Immigration Judge also considered Article 8 of the ECHR in substances at paragraphs 13-14 of her determination but noted the absence of any evidence supporting strong family links or a private life in the UK. It seems to me that that evidence is still wholly lacking. The appellant does not claim to be in any form of relationship in the UK and his failure to read and write would be a major impediment to integration within UK English society. In any event, the Immigration Judge noted at paragraph 9 of her determination that the appellant claimed to have been in the UK for fourteen years as I repeat that no evidence was supplied to support that claim other than the evidence summarised above. I regret to say that the evidence produced before this Tribunal provides very little additional substance to the 14-year claim.

20. I am satisfied that had the Immigration Judge been presented with cogent evidence that the appellant had been enjoying a private or family life in the UK over a sustained period, whether fourteen years or less, this would have been an important factor in her consideration of his claim under Article 8. She fully considered the ECHR in her determination but concluded that neither the requirements of Articles 3 nor 8 were met. I find that this was a conclusion she was entitled to come to on the evidence presented to her. Had the evidence now before this Tribunal

been presented to the First-tier Tribunal I have reached the clear conclusion that would not have made any difference to the outcome and it is still inadequate. Whilst I have sympathy with the appellant in the manner of his representation I am not satisfied that if he had competent representation he would be in any different position than that which he is now in. there simply was no cogent evidence to support the 14-year claimed period of continuous residence. I accept Mr McVeety's submission that if the appellant had have been in the UK for as long as fourteen years some documentary record would exist. Unfortunately, such records are still lacking.

21. For the above reasons, whilst there may have been a technical error in the reference to paragraph 276ADE both in the refusal and in the determination of the First-tier Tribunal, ground 1 which is the principal ground on which permission to appeal was given in this case, presupposes that the appellant had been in continuous residence in the UK for at least fourteen years at the date that the new Rules came into force on 9 July 2012. Given the lack of adequate evidence of this, such as would discharge the burden of proof which rests on him to a standard of balance of probabilities, it follows that the errors was immaterial.

22. I should add that I do not regard paragraph 276A1 of the Immigration Rules as necessarily being relevant in any event because it specifically refers to a person "seeking an extension of stay" .... This appellant was not seeking an extension of stay. He came to the UK illegally, by his own admission. He never had any right to be in the UK.

Notice of Decision

23. I consider that there is no material error of law in the decision of the First-tier Tribunal and that decision stands. Accordingly, the dismissal of the appellant's application for leave to remain in the UK on the grounds of long residence or under the ECHR stands dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

The appellant has not been successful in his appeal and I make no fee award.

Signed Date

Deputy Upper Tribunal Judge Hanbury