



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/27086/2016

THE IMMIGRATION ACTS

Heard at Field House
On 16 August 2018

Determination Promulgated
On 18 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

BABOUARR NDOW
(ANONYMITY HAS NOT BEEN DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Allison, Counsel for Turpin & Miller Solicitors, Oxford
For the Respondent: Mr Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Gambia born on 23 December 1967. He appealed the respondent's decision of 29 November 2016 refusing him leave to remain in the United Kingdom on the grounds of 14 years long residence. The application was considered under paragraph 276ADE of the Immigration Rules. It should have been considered under the 14 years long residence Rule. The appeal was allowed on 29 July 2016 to the extent that the claim had to be reconsidered by the respondent. The respondent again refused the application. The appeal was heard by Judge of the First-Tier Tribunal Grimett on 25 January 2018 and was dismissed in a decision promulgated on 5 February 2018.
2. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Simpson on 11 June 2018. On the day of hearing there

was no application for an adjournment to enable the appellant's witnesses to attend. Notwithstanding the notice of hearing having been issued on 25 August 2017 for a full hearing on 25 January 2018 the Judge arguably, unfairly attributed undue weight to the witnesses' absence and attributed a lack of weight to the reasons given by the appellant orally concerning the absence of these witnesses and further the uncertainties introduced in preparing the appeal for hearing, as the appeal had been put on a float list with notice of this only being given out on 15 January 2018. On 18 January 2018 the appellant's representative requested by fax an adjournment or that the appeal be taken out of the float list, stating that the appellant intended to bring eight witnesses and be represented by Counsel and mentioned the appellant facing financial challenges because of his lack of status. The permission goes on to say that insufficient weight was attributed to the totality of documentary supporting evidence from third parties who all gave their numbers, ages and contact details with their IDs. Most of these witnesses were supporting the appellant concerning his period of residence in the UK between 1999 and 2005.

3. The permission goes on to state that the application should have been considered under the pre-9 July 2012 Immigration Rules. The appellant claimed he had entered the UK with a visit visa in 1999 and had overstayed. The permission states that arguably, undue weight was attributed to the assessment of his evidence and to the lack of any kind of documentary evidence and that an undue lack of weight was attributed to evidence that the appellant did produce, being his T-Mobile PAYG printout, HMRC records based on his false ID and photographs and more particularly there did not appear to have been an examination of the appellant at the hearing about the photographic evidence which he claimed spanned the years in contention going back to 1999. The permission goes on to state that although the Judge had been satisfied that the evidence supported the appellant having been in the UK from 2005 he then found that the appellant had tried to mislead the Tribunal (paragraph 34 of the decision) and even if he has been in the UK for 14 years it would be undesirable for him to be granted leave to remain. The permission states that arguably this conclusion was inadequately reasoned and/or having regard to the Record of Proceedings had arisen from a misconstruction of the appellant's oral evidence. The permission then states that there is a Robinson arguable error of law in omitting to carry out a Razgar-structured assessment and proportionality balancing exercise.
4. There is no Rule 24 response.

The Hearing

5. The Presenting Officer submitted that he has sympathy with the grounds of application. He submitted that when the history of the application is considered there were errors by the respondent in his original consideration of the case. The appellant's original application for leave to remain was made on 6 July 2012 and it was only on 23 December 2014 that a consent order was drawn up between the parties and the respondent accepted that the 14-year rule should have been applied so the case was reconsidered but was refused.

6. On 18 January 2018 the appellant's representative contacted the Immigration and Asylum Tribunal as the case was on a float list and the appellant intended bringing 8 to 12 witnesses to court to speak to his claim. This claim is based on the length of the appellant's residence in the UK and the representative stated that the evidence of these witnesses is therefore crucial. The appellant was also instructing Counsel at his own expense and a request for the case to be adjourned or taken off the float list was made by the appellant's representative.
7. This was not properly dealt with. The case was taken off the float list without the appellant's knowledge so on the date of the First-Tier Tribunal hearing only the appellant and Counsel and none of his witnesses attended. This was on 25 January 2018. The matter had previously come up for hearing in Sheldon Court on 22 July 2016 and at that time the appellant had attended with 10 witnesses who had all given up a day at work and by Counsel, paid for by the appellant and although the respondent conceded that the decision was unlawful, instead of proceeding with the appeal and hearing the appellant and his witnesses the Judge determined the appeal on the basis of legal submissions only and remitted the matter back to the respondent for a new decision. The witnesses did not attend on 25 January 2018 as they had had too short notice about this. The appellant had already paid for a barrister at that date so no further adjournment was requested. The decision by First-Tier Tribunal Judge Grimett accepted that the appellant has been in the United Kingdom since 2005. He refers to the very scant evidence of the appellant's time in the United Kingdom before 2005 and the failure of his witnesses to attend to support him. This was a significant reason for the Judge dismissing the appeal.
8. The Presenting Officer submitted that at the previous hearing in 2016, the witnesses had all attended and he submitted that Judge Grimett made a lawful decision and it was open to him to make that decision but based on the case of Charles [2018] HRUKUT 0089, had the witnesses appeared and had they given evidence the Judge's decision might well have been different. He submitted that he would have no objection to this claim being remitted to the First-Tier Tribunal for re-hearing on all grounds.
9. Counsel for the appellant accepted that that would be the correct procedure and I found that because of the circumstances of the case there is a material error of law in the Judge's decision. I find that had the witnesses attended to give their evidence the Judge might well have come to a different conclusion.
10. The Presenting Officer confirmed that he had no objection to the finding of fact at paragraph 29 of the decision being preserved, i.e. the Judge was satisfied that it is likely that the appellant has been in the United Kingdom since 2005.
11. The rehearing will therefore focus on the critical issue of whether Mr Ndow was resident in the UK between 1999 and 2005 and I direct that paragraph 29 of the previous decision be preserved.

Notice of Decision

As there is a material error of law in the First-Tier Judge's decision I direct that that decision is set aside apart from paragraph 29 thereof. None of the other findings in this decision are to stand other than as a record of what was said on that occasion. It is appropriate in terms of Section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 to remit the case to the First-Tier Tribunal for a fresh hearing.

The members of the First-Tier Tribunal chosen to consider the case are not to include Judge Grimett or Judge Borsada.

Anonymity has not been directed.

A handwritten signature in cursive script, appearing to read "Judge Murray".

Signed

Date 17 September 2018

Deputy Upper Tribunal Judge Murray