Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27249/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 October 2017	**On 17 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

RASHEL AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Shah, Solicitor
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge Cockrill promulgated on 27 January 2017 dismissing his appeal on both immigration and human rights grounds against the respondent's decision made on 16 July 2015 refusing his application for indefinite leave to remain in the UK.

Background

2. The appellant is a citizen of Bangladesh born on 26 June 1983. He claims to have made an unlawful entry into the UK in December 1992 as a minor. He did not seek to regularise his status until he made an application for indefinite leave to remain on the basis of continuous residence (14 years) under what was paragraph 276B of the Immigration Rules (HC 395) on 20 February 2007. I shall refer to the Immigration Rules as they stood up to 8 July 2012 as "the old Rules". This application was refused on 16 July 2015.

3. The reasons for the decision are set out in a decision letter of the same date. While the respondent noted that with effect from 9 July 2012 and the implementation of HC 194 ("the new Rules"), the provision to grant indefinite leave to remain on the basis of 14 years residence had been removed from the Immigration Rules, she proceeded to consider whether the appellant met the requirements of the old Rules as his application was submitted prior to the implementation date of 9 July 2012. The respondent referred to the old Rules and noted that paragraph 276B(i) provided inter alia as follows:

> "(b) he has had at least 14 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 or section 10 of the Immigration and Asylum Act 1999, or of a notice of intention to deport him from the United Kingdom; and.."

4. By reference to the above provision the respondent stated that her records did not indicate that the appellant had been served with any Notice(s) as defined within the old Rules. The respondent concluded that while she was satisfied of the appellant's residence from 2007, there was insufficient evidence to demonstrate that he had been resident in the UK continuously since December 1992.

5. The respondent then proceeded to consider the new rules and concluded that the appellant did not satisfy the requirements for leave to remain under Appendix FM as there was no evidence to suggest that he qualified thereunder in any category. As for the provisions of paragraph 276ADE, setting out the requirements for leave to remain on the grounds of private life based on residence in the UK, she was not satisfied that the appellant could meet any of those requirements either. She also considered whether there were exceptional circumstances that would make it appropriate to allow the appellant to remain in the UK outside the Rules, but was not satisfied that removal would result in sufficiently harsh consequences to make removal disproportionate.

6. On 29 July 2015 the appellant appealed to the First-tier Tribunal on the grounds that he met the requirements for leave to remain for continuous residence and that his removal would be contrary to Article 8 of the ECHR.

7. While the appeal was pending the appellant married a British citizen on 4 June 2016. In consequence, additional grounds of appeal were lodged by the appellant's representatives on 28 June 2016 in reliance on paragraph of EX.1(b) of Appendix FM.

The Hearing before the First-tier Tribunal

8. The appeal was first listed for substantive hearing on 18 October 2016 before First-tier Tribunal Judge Brown. At the outset of the hearing the appellant's representative brought to the attention of Judge Brown the Appellant's relationship with a British citizen. The record of proceedings is not clear, but the appellant's representatives state in their written submissions to this tribunal that Judge Brown acceded to a joint application by the parties for an adjournment to enable the respondent to consider this issue.

9. The appeal next came before Judge Cockrill (hereinafter "the judge") on 19 January 2017. The judge noted the history of the proceedings and records at [24] that at the previous hearing the respondent "*did not give consent for that new matter to be considered.*" The judge however noted at [25] that, "*Nonetheless, it would appear that there was a joint application for an adjournment to enable that new issue to be considered by the Respondent.*" The judge proceeded to note that the respondent had failed to take any action since the last hearing and he accordingly decided to proceed restricting the issues before him to that of long residence [27]. While the decision is silent on the applicable statutory framework, the appeal proceeded on the basis that the old rules applied.

10. The judge heard evidence from the appellant. The judge was satisfied of the appellant's residence in the UK from 1 January 2002 onwards as this was confirmed by his medical records, and the issue boiled down to whether the appellant had established his residence from 1992 to 2002. While the judge observed the appellant was a minor when he claimed to have entered the UK in 1992, he concluded at [58] that the "*complete absence of satisfactory evidence from anyone to confirm that the Appellant has been here does fundamentally undermine the credibility of the Appellant's case*" and found that supporting letters were insufficient to prove his residence from 1992 to 2002 at [59].

11. Accordingly, the judge found that the appellant had not established that he had lived in the UK for a continuous period of 14 years and thus concluded that the requirements of paragraph 276B of the old Rules were not met. The judge briefly considered and concluded that the appellant did not qualify for leave on private life grounds pursuant to paragraph 276ADE of the new Rules or outside of the Rules contrary to Article 8 of the ECHR. Accordingly, the appeal was dismissed.

The Grounds and Submissions

12. In the grounds of appeal, it is argued that the judge erred in excluding consideration of the appellant's claim under EX.1(b) of Appendix FM. It was further argued that the judge's analysis of the evidence was inadequate in relation to his claim under paragraph 276B of the old Rules, and that, he failed to assess the interference with the

appellant's family life with his British citizen spouse in considering Article 8 of the ECHR.

13. Permission to argue these grounds was granted by the First-tier Tribunal on 2 August 2017.

14. The respondent was unable to file a Rule 24 response as she was not in possession of the decision of the judge.

Consideration of the Issues

15. I heard submissions from both representatives the detail of which is recorded in my record of proceedings. I have taken those submissions into account together with the written submissions lodged by Mr Shah on behalf of the appellant. I consider that the judge erred in law and that his decision must be set aside. I have tarried somewhat in reaching a decision due to the troubling features of this case which the parties have not addressed either before the judge or before me. In consequence, I consider the appropriate course is to remit the appeal to the First-tier Tribunal for a rehearing on all issues. I reach that conclusion for the following reasons.

16. First, I consider the contention that the judge's decision to proceed with the hearing involved a procedural impropriety giving rise to unfairness. I consider this ground first as it affects all that follows.

17. As I stated earlier, by the time the appeal was listed for hearing the appellant's circumstances had changed in that he had married a British citizen and the respondent and the tribunal were notified of this change in the appellant's additional grounds lodged on 28 June 2016. Mr Shah submitted that this issue was highlighted as a "new issue" before Judge Brown. There appears to be no dispute between the parties that this indeed was a "new issue" and that consent would be required pursuant to section 85(5) of the 2002 Act as amended by section 15 of the Immigration Act 2014 introduced on 20 October 2014.

18. The question of whether the respondent did give consent for this new issue to be considered is, however, contradictory and unclear.

19. Mr Shah submits that the respondent gave consent before Judge Brown and the hearing was adjourned for the respondent to consider the issue. Mr Tufan referring to his file minutes submitted that consent was not given and this appears to accord with what the judge (Judge Cockrill) stated at [24], but this does not sit comfortably with what he stated with reference to the position before Judge Brown at [25], namely, "*that there was a joint application for an adjournment to enable that new issue to be considered by the Respondent.*"

20. While the position before me is therefore unsatisfactory, it appears from what the judge stated at [25] that the mutual understanding of the parties was that consent was given and the appeal was adjourned for the respondent to consider the appellant's change in circumstances. Given the ambiguous references in the Decision

as to whether or not consent was granted and the representations made before me, I cannot exclude that as a possibility. That possibility feeds into two errors. First, the judge's decision to proceed with the hearing failed to consider the principles of fairness. While the judge was entitled to note the respondent's lack of progress in considering this issue, his decision does not demonstrate that he considered whether it was fair to proceed with the hearing when it appears that the respondent gave consent, or that any enquiry was made from the respondent to explain her lack of progress. In the circumstances, I consider that the judge's consideration of whether it was appropriate to proceed was inadequate.

21. Second, I consider that if consent had been given the lack of progress did not preclude the judge from considering the issue and he erred in failing to do so. That failure, in turn, infects the judge's consideration under the new Rules and under Article 8 of the ECHR.

22. I further agree with Mr Shah that the judge's consideration of Article 8 was inadequate in that he failed to factor into his assessment of proportionality the Respondent's delay in deciding the application from 2007 to 2015. The delay is considerable and I cannot exclude the possibility that this may have made a difference to the outcome.

23. I do not, however, accept Mr Shah's submissions that the judge erred in his consideration of the old Rules in the manner contended. The grounds argue that the judge applied a higher standard of proof than a balance of probabilities by requiring witness testimony to confirm the appellant's residence prior to 2002. I consider that this submission is without merit. The judge was clearly aware of and applied the correct standard of proof. He was entitled to take notice of the lack of witness testimony considering the letters of support that had been adduced, which he considered, and the contention in the grounds that he did not to do so is incorrect. I consider that there was no irrationality in the judge's approach in this regard. The grounds further contend that the judge in finding that the appellant had established his residence from 2002 and thereby had accrued 13 years, 6 months and 15 days residence, erred in failing to apply the "near miss" principle. This challenge is also without merit as there is no "near miss" principle under the Rules

24. However, as I observed at the hearing, and following some discussion between the parties, it was agreed there was an obvious error in that if as the judge found the "clock started in 2002", by the date of hearing the appellant had accrued 14 years under the old Rules, which the judge failed to acknowledge. If that was so, the parties canvassed the view that the tribunal may be able to remake the decision as no public policy ground was taken by the respondent but, on reflection, I am not satisfied that I should do so without further enquiry as the position is again unclear and contradictory. While Mr Tufan stated that there was no evidence that a Notice of liability for Removal had been served on the appellant, which would have the effect of stopping the clock, he indicated that the respondent records do refer to such a document. In contrast, the appellant's grounds and written submissions clearly state that a Notice of liability for Removal was served on the appellant on 16 July 2015. If

that is the case, the effect would be to stop the clock and the appellant would not have accrued 14 years by that date.

25. In summary, I accept that the judge's decision is vitiated by error of law for the reasons asseverated above and the appeal requires a rehearing.

Decision

26. The decision of the First-tier Tribunal did involve the making of an error of law and is set aside. The judge's finding that the appellant has proved his residence from 2002 is preserved. The appeal is remitted to the First-tier Tribunal for a rehearing on all issues by a different judge.

Directions

(i) The respondent is directed to clarify in writing within 21 days of receipt of this decision whether the appellant's marriage to a British citizen constitutes a "new issue" and, if so, whether she gives consent to the new issue being considered by the First-tier Tribunal. If consent is not given she is to provide written reasons.

(ii) If the respondent does consent she has a further 21 days to file and serve her response setting out her position on the new issue.

(iii) The parties are to confirm whether a notice of liability for removal was served on/received by the appellant within 21 days of receipt of this Decision.

(iv) Any further evidence relied upon by the parties shall be filed and served with the other side no later than 7 days prior to the date of the hearing.

(v) The appellant is to inform the tribunal whether an interpreter is required for the rehearing within 21 days of receipt of this Decision.

No anonymity direction was made by the First-tier Tribunal.

Signed Date: 15 December 2017

Deputy Upper Tribunal Judge Bagral