Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09517/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 January 2020	**On 05 February 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR JASVIR SINGH BHOOT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Nadeem, Dassaur Solicitors
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Jasvir Singh Bhoot, is a citizen of India, born on 16 April 1974. He appeals against a decision of First-tier Tribunal Judge NMK Lawrence promulgated on 5 September 2019 dismissing his appeal against a decision of the respondent to refuse his human rights claim made on the basis of his long residence, dated 16 May 2019.

Factual background

2. The applicant claims to have resided in the United Kingdom since 1995. His case is that he meets the criteria in paragraph 276ADE(1)(iii) of the Immigration Rules for a grant of limited leave to remain on long residence grounds. The respondent did not accept that the appellant had demonstrated that he had been continuously resident for the requisite 20 years.

3. The judge accepted that the appellant had resided in the United Kingdom for most of the time since 1995 but was not satisfied that he had been resident from 2012 to 2013, and in 2016. The judge was concerned at the absence of documentary evidence covering those periods. Part of the appellant's case was that he had instructed a firm of solicitors in the past in an attempt to regularise his status, but that they had since destroyed his documents. The appellant had provided a number of supporters' letters to the respondent in his human rights application. Only one of his supporters attended the hearing, Balkar Singh, his priest.

4. The judge found the appellant to lack credibility, in part because the appellant had not pursued an appeal against the refusal of his asylum claim. He rejected as not credible the suggestion that the appellant's former solicitors would have destroyed the appellant's documents in their possession. The judge rejected Mr Singh's evidence; he had only provided a statement on the morning of the hearing, "and there was no need for him to attend as a replacement for the other witnesses, including the appellant's own brother." The appellant's case had been that he had fallen out with his brother, who had refused to cooperate with the appeal proceedings.

Permission to appeal

5. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison on the basis it was arguable that the judge erred by rejecting the suggestion that the appellant's former solicitors would have destroyed the appellant's files, given it is "common practice" that files can be destroyed by solicitors after six years. It was arguable that the judge's reasons for rejecting Mr Singh's evidence were inadequate.

Discussion

6. At the outset of my analysis, it is important to recall that the jurisdiction of the Upper Tribunal in this context is limited to considering whether the decision of the First-tier Tribunal involved the making of an error of law. It is not possible to appeal on a point of fact. However, certain findings of fact may be infected by the making of an error of law, and thus be subject to the appellate jurisdiction of this tribunal. For example, in R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982, the Court of Appeal outlined a number of errors of law which can arise in relation to findings of fact. These include making perverse or irrational findings on a matter or matters that were material to the outcome and failing to give reasons, or any adequate reasons, for findings on material

matters. It is only within those confines that this tribunal can interfere with the finding of fact reached by a judge below.

7. There is no merit to the suggestion that the judge fell into error when considering the appellant's former solicitors' claimed document destruction practice. Not only was there no evidence before the judge concerning the claimed "common practice" of which he was supposed to be aware, but the appellant's evidence concerning the significance of the solicitors' destruction of his records or documents he had provided to them concerned his residence prior to 2010, which was not in dispute. It was common ground that the appellant had resided here between 1995 and 2012. Any documents in the possession of the appellant's solicitors could only have gone to the period prior to 2012: see [9] of the appellant's statement dated 19 August 2019 from before the First-tier Tribunal.

8. In any event, the judge had not been provided with any evidence, or legal argument concerning document retention obligations imposed upon the solicitors' profession. I do not consider that it may simply be assumed that judges should take judicial notice of the internal document retention policies adopted by law firms and others in the legal profession. Practices will vary. It was not irrational for the judge to approach this matter in this way. It was for the appellant to prove his case.

9. Turning to the second ground of appeal, concerning the judge's treatment of Mr Singh's evidence, it is necessary to consider what the judge said in more detail. He noted at [10] that Mr Singh had "not provided a written statement until the morning of the hearing." Mr Singh's statement ahead of the First-tier Tribunal hearing had been provided in handwritten form. The handwritten statement provided by Mr Singh appears to have been drafted on the morning of the hearing.

10. The judge continued:

> "[Mr Singh] appears to have been a person who came very late in the day to provide evidence for the gap in the evidence. He told me that he met the appellant in a temple in 2010 and has seen him practically every day since. [The presenting officer] asked him what was it that made him remember [when] he first met the appellant in 2010. Mr Singh told me that that was the year he entered the UK as a priest. He claims he still is a priest. I do not find it credible that Mr Singh saw the appellant practically every day since 2010. If he has there is no logical reason why he did not provide written evidence prior to the hearing."

11. There is, in principle, nothing wrong with a judge being concerned about the provenance of witness evidence on these grounds. Where a witness has provided a written account, the circumstances, and timing, of the account are relevant factors which a judge assessing the credibility of that evidence may take into account. The judge on this occasion was entitled to express concern, and to factor such concern into his credibility analysis, about the timing of the witness statement. This was

not an account that had been provided to the respondent as part of the application process. It had not been included in the extensive bundle of documents which were before the First-tier Tribunal. If, as the appellant claimed, he had seen Mr Singh almost daily since 2010, it was entirely reasonable for the judge to expect such a significant and central aspect of his case to have been advanced to the Secretary of State as part of the application process, or at the very least when the bundle was prepared for the First-tier Tribunal. It would have enabled the respondent to consider her position in advance of the hearing. Instead, the respondent and the tribunal were ambushed. It was, therefore, entirely appropriate for the judge to express concerns about the evidence being produced at the last minute.

12. It was also open to the judge to express concerns about the contents of the statement provided by Mr Singh. Taken at face value, his evidence was that he had seen the appellant virtually daily for a period of – by the time of the hearing in late August 2019 – over nine and a half years.

13. Mr Nadeem submits that the judge gave no reasons for his credibility concerns on that basis. I accept that the judge gave only brief reasons at [10]. He gave further reasons, at [13]:

> "I do not find it credible that Mr Balkar Singh could truthful [*sic*] vouch that he saw the appellant practically every day since their first meeting in 2010… I do not find it credible, on a human level, that he could have possibly seen the appellant every day since 2010."

14. Brief reasons can be sufficient reasons. For Mr Singh to have seen the appellant daily for a period of 9 and a half years would be a considerable undertaking. It was a significant claim for Mr Singh to make, involving many thousands of daily meetings. Such frequency and regularity of contact would be a significant feature in the lives of both individuals, on any view. Strikingly, however, as set out above, the evidence of Mr Singh was entirely omitted from the supporting materials the appellant submitted to the respondent, and from the bundle prepared by the appellant – who has been legally represented throughout – for the First-tier Tribunal. There was no mention of Mr Singh in the appellant's witness statement. The judge was entitled to consider that the evidence submitted by Mr Singh may not have been accurate, or would otherwise attract little weight, in view of the seemingly tall nature of the account that it provided, when combined with the circumstances of his statement's admission.

15. One aspect of the judge's treatment of Mr Singh's evidence is troubling. The judge continued at [10] in these terms:

> "There is no need for him to attend as a replacement for the other witnesses, including the appellant's own brother." (emphasis added)

16. In contrast to what the judge held here, there was every reason for Mr Singh to attend the hearing; he was a witness the appellant sought to rely on for oral evidence. The other character/long residence witnesses had not attended, so the appellant secured another witness who, on his case, provided testimony which supported his case. Although the judge was entitled to outline his legitimate credibility concerns about the evidence of Mr Singh, the judge was unnecessarily critical and sceptical about his attendance at the hearing. It was not open to the judge to assert, without any reasons, that there was "no need" for Mr Singh's attendance at the hearing. The appellant was advancing a case and brought a witness in support. It may be that the judge meant that, in view of the lack of weight he ascribed to Mr Singh's evidence, he did not need to attend the hearing; he should not have bothered attending, so to speak. The difficulty is that, if that is what the judge meant, he did not say so.

17. I consider that the judge gave weight to an immaterial matter, namely the attendance of Balkar Singh in the place of the other witnesses who had authored letters in support of the appellant.

18. The question then arises as to whether the above error of law was such that the decision must be set aside. In my view, the error was not material. The judge's criticism of the appellant attending in place of the appellant was otiose. He did not need to express himself in that way concerning Mr Singh's attendance at the hearing, but he was entitled to ascribe little weight to the contents of his evidence, for the reasons given above.

19. I therefore reject Mr Nadeem's submissions that the judge erred in relation to his treatment of Mr Singh's evidence.

20. Mr Nadeem submits that the judge failed to have regard to the statements and letters of support from the absent witnesses. None of the letters support the appellant's case that he was resident in the United Kingdom in the disputed years, 2012, 2013 and 2016. Taken at their highest, they demonstrate that the authors have known the appellant for relatively lengthy periods of time. For example, a Charan Sekhon wrote on 16 March 2018 that he had known the appellant for "nearly 6 years". No other detail is provided, for example concerning the appellant's location during the disputed years, and the context in which the author of the letter purportedly saw the appellant during that time. The letter does not assist the appellant. Similar considerations apply to the other letters. Nothing, therefore, turns on the judge's treatment of the letters as they do not speak to the disputed periods.

21. Mr Nadeem submits that the judge's analysis concerning whether there were exceptional circumstances such that the appellant's removal to India would be unjustifiably harsh was inadequate. I disagree. Mr Nadeem did not advance any submissions concerning particularly significant aspects of the appellant's private life which would merit a

different approach on this issue. On the appellant's case, he spends a lot of time with the Indian diaspora community and is a regular at the temple. He still speaks the language. While he will undoubtedly struggle upon his return, at least initially, there was nothing before the judge which necessitated a different conclusion on the issue of Article 8, whether in relation to the presence of "very significant obstacles" to the appellant's integration in India under paragraph 276ADE(1)(vi) of the Immigration Rules, or leave outside the rules.

22. The decision of Judge Lawrence did not involve the making of an error of law on a material matter.

Notice of Decision

This appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law on a material matter.

No anonymity direction is made.

Signed *Stephen H Smith* Date 28 Jan 2020

Upper Tribunal Judge Stephen Smith