Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17715/2019 (R)**

THE IMMIGRATION ACTS

Remote Hearing by Skype for Business	**Decision & Reasons Promulgated**
On 3rd November 2020	**On 9th November 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

HARNEK SINGH
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Jesurum, Counsel instructed by Lawrence & Co Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS (R)

Remote Hearing

1. The hearing before me on 3rd November 2020 took the form of a remote hearing using skype for business. Neither party objected. The appellant joined the hearing remotely. I sat at the Birmingham Civil Justice Centre. I

was addressed by the representatives in exactly the same way as I would have been if the parties had attended the hearing together. I was satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

The Background

2. The appellant's appeal against the respondent's decision of 14th October 2019 to refuse his application for leave to remain in the UK on private life grounds, was dismissed by First-tier Tribunal Judge Young-Harry for reasons set out in a decision promulgated on 16th January 2020.

3. The appellant is a national of India. He arrived in the UK on 11th May 1999, and upon arrival at Gatwick, he claimed asylum. That claim was refused in July 1999. It appears that no appeal was lodged against that decision and in September 1999 he was recorded by the respondent as an absconder. According to the immigration history set out in the respondent's decision, on 19th April 2016 the appellant applied for leave to remain outside of the immigration rules. That application was rejected in July 2016. In March 2017 he submitted a further application for leave to remain outside the rules. That application was refused by the respondent in November 2017. An appeal by the appellant against that decision appears to have been dismissed and the appellant had exhausted his

rights of appeal by 29th November 2018. On 11th June 2019 the appellant submitted a further application for leave to remain on private life grounds.

4. In the respondent's decision dated 14th October 2019, the respondent considered whether the requirements set out in paragraph 276ADE(1) are met by the appellant. The appellant claims he has lived in the UK continuously for over 20 years and therefore met the requirement in paragraph 276ADE(1)(iii) of the immigration rules. The respondent sought evidence to show that the appellant had lived in the UK continuously between 2000 and 2005 and during 2009. The respondent was not satisfied the appellant had provided sufficient evidence to substantiate his claim that he lived in the UK continuously during those periods.

5. The appellant's appeal was heard on 30th December 2019. There was no appearance at the hearing by or on behalf of the respondent. Judge Young-Harry heard evidence from the appellant and two witnesses. At paragraph [5] of her decision she also noted that she had been provided with a bundle of documents from the appellants representatives which included, *inter alia,* the appellant's witness statement dated 16th December 2019, a statement from the appellant's cousin, and various witness statements from supporting witnesses.

6. At paragraphs [10] and [13] of her decision Judge Young-Harry recorded that the respondent does not accept the appellant has been in the UK continuously since 1999. She noted the respondent contends that there are gaps in the appellant's residence between the years 2000 and 2005 and also during 2009.

7. At paragraph [14] of her decision the Judge refers to the evidence of the first witness, the appellant's cousin. He is referred to in the decision as "Mr Singh". I refer to him in this decision as Mr Jagjit Singh Sandhu. Having considered his evidence, the judge accepted that it is likely that the appellant was in the United Kingdom in January 2000. She appears to have rejected his evidence that the appellant attended a family wedding in

2005. She felt unable to attach weight to a photograph relied upon by the appellant to show his presence at that wedding because it was not clear when the photograph was taken and when the event occurred.

8. At paragraph [16] of her decision the Judge refers to the evidence of the second witness that was called to give evidence. He too, is referred to in the decision as 'Mr Singh', but I shall refer to him as Mr Jaswant Singh. His evidence is briefly set out at paragraphs [16] and [17] of the decision. At paragraphs [18] and [19], Judge Young-Harry said:

> "18. Contrary to Mr Singh's evidence *(this appears to be a reference to the evidence of Mr Jaswant Singh)*, the appellant relies on tenancy agreements in the bundle dated January 2003 and January 2004 signed by the appellant and Mr Singh. I find the production of these documents questionable, especially considering Mr Singh *(I can only assume that this is again a reference to Mr Jaswant Singh)* appeared to know nothing about them.
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> 19. I find it is entirely possible that the documents were produced and signed with backdated dates, for the purpose of supporting the appellant's appeal. Further, given Mr Singh did not have a single record of the appellant's presence in his property or the rent he paid, it seems strange the tenancy agreements were available. I attach no weight to these documents."

9. Judge Young-Harry went on to consider other documents before the Tribunal including two NHS medical cards, GP records and bank statements. At paragraphs [22] and [23] of her decision, the judge concluded:

> "22. I find the appellant has provided reliable documentary evidence to show that it is likely he was present in the UK in 2009. This is confirmed by activity shown on the TSB bank statements provided covering March and October 2009 in the appellant's name.
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> 23. Although I accept and acknowledge that those who have attained 20 years in the UK by living clandestinely, are not expected to have documentary proof of their presence throughout the 20 year period, given they have had to remain under the radar, it is telling that the appellant does have some documents covering a large proportion of the 20 years. However, he has failed to provide cogent, reliable documentary or oral evidence, to show that he was present in the UK between February 2000 and December 2004."

10. Having concluded that the requirements for leave to remain on the grounds of private life set out in the immigration rules cannot be met, Judge Young-Harry concluded that the decision to refuse the application for leave to remain does not disproportionately interfere with the appellant's Article 8 rights.

The appeal before me

11. The appellant advances two grounds of appeal. The first is that the decision of Judge Young-Harry is vitiated by procedural unfairness. The appellant relied upon the evidence of a number of witnesses to establish his continuous presence in the UK between 2000 and 2005 and during 2009. The appellant claims that procedural fairness demands that if the evidence of a witness is to be rejected, the witness must clearly be told that their evidence is in doubt, so that they may offer an explanation. Here, the respondent was not represented at the hearing of the appeal before the FtT, and neither the appellant nor Mr Jaswant Singh were asked about the tenancy agreements relied upon by the appellant or to address any concerns the judge may have had, regarding those documents. The second ground of appeal is that Judge Young-Harry failed to appropriately consider the evidence that was before the Tribunal. Several criticisms are made by the appellant.

12. Permission to appeal was granted by Upper Tribunal Judge Reeds on 24th June 2020. The matter comes before me to determine whether the decision of Judge Young-Harry is infected by a material error of law.

13. Mr Jesurum on behalf of the appellant submits that in her consideration of the evidence of the appellant and the two witnesses, Judge Young-Harry rejects evidence based on her concerns about the evidence that were not raised by the respondent, nor raised with the witnesses during the course of the hearing of the appeal. In short, the appellant and his witnesses were

not given an opportunity to address the concerns the judge may have had regarding the evidence, or any opportunity to provide any explanation, before the judge reached her conclusion that the tenancy agreements relating to 2003/4 were produced, signed and backdated the purposes of supporting the appeal.

14. There are a number of strands to the second ground of appeal. The appellant claims Judge Young-Harry erroneously proceeded at paragraph [24] to conclude that the appellant, having entered the UK illegally once, may well have re-entered the UK a second time in a similar way. Mr Jesurum submits that is a mistake of fact. The appellant had in fact entered the UK lawfully with entry clearance as a visitor, and claimed asylum on arrival. It is therefore erroneous to suggest that the appellant is someone that is quite capable of entering the UK unlawfully, leaving the UK at some unknown point, and re-entering the UK unlawfully. Furthermore, as the judge noted at paragraph [5] of her decision, the appellant relied upon various other written statements, and those statements are not addressed at all in the decision. Mr Jesurum drew my attention, in particular, to the witness statements made by Mr Gurpal Singh (page [C/16]), Hardeep Kandola (page [D/60]), Harbhajan Singh Sandhu (page [C/7] and [D/70) and Harpreet Kaur Badesha (page [D/66]). The witnesses attest to the appellant's continuous presence in the UK since 1999 but do not appear to have been considered by the judge at all. Mr Jesurum was not entirely sure whether any of those witnesses had attended the hearing of the appeal, or why they were not called to give evidence. He submits the evidence was relevant to the issues being considered by the Tribunal and although he quite properly and candidly accepts that it may have been open to the Judge to attach little weight to their evidence provided adequate reasons for doing so were given, the position here is that the judge does not refer to that evidence at all in reaching her decision.

15. Finally, Mr Jesurum submits that in considering the evidence adduced to support the appellant's claim that he had attended a family wedding in 2005, Judge Young-Harry referred at paragraph [15] of the decision to the photograph, but attached no weight to the photo because it was not clear when the photo was taken and when the event occurred. There was however a copy of the relevant invitation to the wedding at pages [E37/38] of the appellant's bundle.

16. In reply, Mrs Aboni relied upon the respondent's rule 24 response dated 26th August 2020. The respondent confirms that the appeal is opposed and submits that the grounds of appeal amount to no more than a disagreement with the findings of the judge that were open to her on the evidence before the First-tier Tribunal. The respondent submits the evidence of the appellant's residence in the UK "*is very thin"* and there was nothing that arose in the judge's consideration of the evidence before the Tribunal, that required the judge to put any concerns to the witnesses for clarification. Mrs Aboni submits the decision is not tainted by any procedural unfairness. The judge carefully considered the evidence of the appellant and the two witnesses called, and it was open to her to have concerns about the tenancy agreements relied upon by the appellant that the witness, Mr Jaswant Singh, who is said in the tenancy agreements to be the landlord, appeared to have no knowledge of. She submits the judge was not required to address each and every one of the witness statements or documents that were before the Tribunal, and, the judge gave proper and adequate reasons for her conclusion that on balance, the appellant has failed to show continuous residence in the UK for 20 years.

Discussion

17. I am satisfied that the decision of First-tier Tribunal Judge Young-Harry is vitiated by material errors of law and must be set aside.

18. Mr Jesurum refers to the rule in Browne v Dunne (1893) 6 R 67, HL which may be summarised in this way. Where the court is to be asked to

disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence. He also refers to the decision of the Court of Appeal in MS (Sri Lanka) v SSHD [2012] EWCA Civ 1548, in which the Secretary of State's representatives had declined to cross examine the appellant in the FtT and the UT. Maurice Kay LJ, with whom Munby and Tomlinson LJJ agreed, stated, at [14], that this had 'the necessary consequence that the Secretary of State must be taken to accept, or at least not to dispute, the appellant's factual account.'. In Markem Corp v Zipher Ltd [2005] EWCA Civ 267, Jacob LJ (with whom Mummery and Kennedy LJJ agreed) characterised the rule in Browne v Dunn as one of procedural fairness where a key witness had given evidence before the trial judge but had not been cross-examined on various matters which the judge had proceeded to hold against him.

19. Judges of the First-tier Tribunal are all too frequently required to determine appeals in the absence of any appearance on behalf of the respondent. What are now commonly referred to as the ‘Surenderan guidelines’, as they have subsequently evolved, provide guidance as to the conduct of hearings in which the respondent is unrepresented. Failure to cross-examine, will not always amount to an acceptance of the evidence, particularly where the witness has had prior notice of the intention to challenge that evidence. However, the Tribunal must undoubtedly act fairly and should give a witness an opportunity to comment on any adverse material in the evidence. Although the requirement of fairness does not impose a requirement that every point that may be decided against the appellant should first be put to the appellant or witness, where the judge considers a point to be important to the decision but it was not obvious, it is generally better to raise the point so that the appellant or witness has an opportunity to address the concerns the judge may have. In short, I accept that a party should be given an opportunity to deal with any issue that the judge may consider to

be determinative, or considers calls for some explanation. I accept, as Mr Jesurum submits, that in this context, the Tribunal has a reasonable inquisitorial function, and in the absence of the respondent, is entitled to put questions to a witness in order to clarify issues that the judge will need to deal with in the determination. The judge is entitled to ask questions either directly or through the appellant's representative, intended to seek an explanation for inconsistencies or to address points of concern, that become apparent on reading the papers or during the course of the hearing.

20. The issue for me is whether the findings of Judge Young-Harry are unsafe or unsustainable on the basis that the requirements of natural justice and procedural fairness have not been met. In my judgement, the requirement for procedural fairness was not met here. In paragraph [3] of his witness statement dated 13th December 2019, Jaswant Singh had claimed that following the refusal of the appellant's application, the appellant had contacted him to ask whether he had any record of the appellant living at his address. He claims that he looked through old paperwork and found 2 old tenancy agreements which he sent to the appellant to send onward to the court. Although the appellant did not make express reference to the tenancy agreements in his witness statement, the tenancy agreements were plainly before the First-tier Tribunal. At paragraph [16] of her decision, Judge Young-Harry records the evidence of Mr Jaswant Singh. When questioned he had stated that the appellant resided in his property in 2003. She goes on to state that ".. *however unusually he did not have any landlord records or documents to show who was occupying his property or that rent was paid."*. Mr Jaswant Singh was not given any opportunity to explain why he had claimed in his witness statement that he had found two old tenancy agreements that he had sent to the appellant, but in his evidence before the Tribunal, claimed that he did not have any landlord records or documents to show who was occupying the property or the rent that was paid. The judge was plainly concerned as to the provenance of the tenancy agreements relied upon by

the appellant, but neither the appellant nor Mr Jaswant Singh appear to have been given any opportunity to address the anomaly in the evidence. The evidence was relevant to the appellant's presence in the UK during a material time.

21. There is in my judgement also force in the submission made by Mr Jesurum that Judge Young-Harry appears to have had no regard to other statements that were plainly before the Tribunal. I accept, as Mrs Aboni submits that at paragraph [5] of her decision, the judge refers to the bundle of documents from the appellant's representatives that included various witness statements. I also accept that a Judge is not required to address every piece of evidence that is before the Tribunal, but the authors of the witness statements in broad terms, attested to the appellant's continuous presence in the United Kingdom since 1999. I quite accept that it may well have been open to the Judge to attach little weight to those witness statements, given that they are in very broad terms, and the authors do not appear to have attended the hearing, but the difficulty is that the judge simply does not engage with that evidence at all, and makes no reference to it in her decision. I cannot in the circumstances be satisfied that the judge considered that evidence.

22. In my judgement, the procedural unfairness and failure to have regard to material evidence is sufficient to establish that the decision of the First-tier Tribunal is vitiated by material errors of law and I do not in the circumstances, need to say anything further regarding the other matters relied upon by the appellant in the grounds of appeal settled by Mr Jesurum.

23. As to disposal, the assessment of a human rights claim such as this is always a highly fact sensitive task, and the appellant is entitled to have his claim properly considered by the FtT. The decision is tainted by procedural unfairness. In all the circumstances, as I am urged to do by the parties, I have decided that it is appropriate to remit this appeal back to

the F*t*T for hearing afresh with no findings preserved, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. The nature and extent of any judicial fact-finding necessary will be extensive.

Notice of Decision

24. The appeal is allowed. The decision of FtT Judge Young-Harry promulgated on 16th January 2020 is set aside, and I remit the matter for re-hearing de novo in the First-tier Tribunal, with no findings preserved.

25. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Signed **V. Mandalia** Date: 4th November 2020

Upper Tribunal Judge Mandalia