Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18930/2019 (R)

THE IMMIGRATION ACTS

Remote Hearing by Skype for Business	**Decision & Reasons Promulgated**
On 10th November 2020	**On 17th November 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

RUDOPLH CONSTANTINE RHONE
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Wilson, JM Wilson Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS (R)

1. The hearing before me on 10th November 2020 took the form of a remote hearing using skype for business. Neither party objected. 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 is a national of Jamaica. He claims to have arrived in the UK in 1999. On 13th September 2012, he applied for leave to remain on Article 8 grounds. The application was refused on 28th August 2013. The decision did not attract a right of appeal. On 4th September 2019, the appellant made a further application for leave to remain in the UK on the basis of his private life. The appellant claimed to have lived continuously in the UK for 20 years. The application was refused by the respondent for reasons set out in a decision dated 6th November 2019. The respondent concluded that appellant has failed to establish that he has lived continuously in the UK for at least 20 years and he could not therefore meet the requirement set out in paragraph 276ADE(1)(iii) of the immigration rules. The appellant's appeal against that decision was dismissed for reasons set out in a decision of First-tier Tribunal Judge O'Hagan promulgated on 17th January 2020.

3. The appellant was not represented at the hearing of the appeal. His evidence before the First-tier Tribunal is summarised at paragraphs [7] to [11] of the decision of Judge O'Hagan. The appellant provided the Tribunal with a copy of his passport and in cross examination, it was put to the appellant that the endorsements on the passport demonstrate that he left

the UK and returned in 2000, 2001 and 2002. The appellant denied that he had ever left the UK, and his evidence was that the endorsements on his passport merely showed that he was registered with the respondent.

4. The Judge's findings and conclusions are set out at paragraphs [14] to [44] of his decision. Judge O'Hagan found that the appellant is likely to have developed a private life of sufficient intensity to engage Article 8. At paragraph [17] he said:

> "… I say that because, whilst I reject his claim to have been here continuously since 1999 for the reasons I will give I find it likely that he has been here continuously since February 2002…"

5. Judge O'Hagan considered the evidence relied upon by the appellant in support of his claim that he has been living in the UK since 1999. He considered the evidence to be lacking and was surprised how sparse the evidence was. At paragraph [26] Judge O'Hagan states:

> "I have considered the evidence that I do have. The most significant is the appellant's passport. That shows that he entered the United Kingdom on 12th July 1999 as he claims. The difficulty is that it shows that he re-entered on 2nd February 2000 with leave until 14th December 2000, and then on 22 March 2001 with leave until 31st October 2001, and finally on 8th February 2002 with leave until 7th November 2002. Mr Khalfey pointed this out to the appellant during the hearing. He firmly denied having left the United Kingdom after he arrived in July 1999. His explanation for these stamps in his passport was that the college stamped his passport. I reject that explanation. I do so because it makes no sense. As Mr Khalfey said, colleges do not have access to Home Office visa systems, nor do they have any reason to stamp an individual's passport."

6. At paragraph [30], Judge O'Hagan said:

> "The only sensible explanation for the stamps in the passport is the obvious one; the appellant came to the United Kingdom in 1999, 2000, 2001 and 2002 with leave as a visitor. On the first three occasions, he returned to Jamaica, obtained further leave, and re-entered the United Kingdom. On the last occasion, he overstayed, and has been here ever since. That analysis also fits in with the documentary evidence, sparse as it is. In particular it is consistent with the fact that the earliest piece of evidence is the P60 for the year 2002/2003. I find, on the balance of probabilities that this is what happened. I am satisfied that the appellant has continuously lived in the United Kingdom since 8th February 2002."

7. Judge O'Hagan therefore concluded that the appellant has failed to establish that he has lived continuously in the UK for at least 20 years. For reasons set out at paragraphs [33] to [36] of his decision, Judge O'Hagan also rejected the claim that there would be very significant obstacles to the appellant's integration into Jamaica. Having found that the requirements of the immigration rules cannot be met, the judge had regard to the public interest and concluded that the public interest outweighs the private interests of the appellant such that his removal is not disproportionate and in breach of Article 8.

The appeal before me

8. The appellant claims Judge O'Hagan proceeds upon a mistake as to fact. It is said that the endorsements on the appellant's passport in 2000, 2001 and 2002 give the appellant leave to remain as a student, and do not provide for leave to enter, as the judge appears to believe. The appellant has provided clearer copies of the endorsements on his passport. The first is an endorsement stamped on the appellant's passport on 12th July 1999 that grants leave to enter the United Kingdom for six months. The second is an endorsement stamped on the appellant's passport on 2nd February 2000 that grants leave to remain in the United Kingdom until 14th December 2000. The third is an endorsement stamped on the appellant's passport on 22nd March 2001 that grants leave to remain in the United Kingdom until 31st October 2001. The fourth is an endorsement stamped on the appellant's passport on 8th February 2002 that grants leave to remain in the United Kingdom until 7th November 2002.

9. Permission to appeal was granted by First-tier Tribunal Judge Buchanan on 20th May 2020.

10. At the hearing before me, Mrs Aboni quite properly acknowledged that the endorsements that appear on the appellant's passport establish that the appellant was granted leave to enter the UK in July 1999, and, the three subsequent endorsements establish that he was then granted

further leave to remain until 7th November 2002. Although it was not before the FtT, she confirmed that she has had the opportunity of reviewing the respondent's previous decision of 28th August 2013. In that decision, the respondent appears to have accepted that the appellant was granted leave to remain in the UK as a student until 2002. She submits that a copy of the appellant's passport was not provided until the morning of the hearing and it would appear that the stamps endorsed on it, have been mis-read. Quite properly, she accepts that the FtT Judge appears to proceed upon a mistake as to fact.

11. I am quite satisfied that the decision of Judge O'Hagan is vitiated by a material error of law and must be set aside. I accept Judge O'Hagan proceeds upon a mistake as to fact. Judge O'Hagan appears to proceed upon the basis that the stamps placed in the appellant's passport show that he was granted leave to enter the UK in 2000, 2001 and 2002, whereas it is quite clear that the appellant arrived in the UK in July 1999 and was granted six months leave to enter. He was then granted further leave to remain as a student in 2000, 2001 and 2002. Leave to enter is granted to a person who is outside of the UK, whereas leave to remain is granted to a person who is present in the UK.

12. As to disposal, in my judgement the appropriate course is for the decision to be remade by me in the Upper Tribunal. Judge O'Hagan found, at paragraph [30] of his decision, that the appellant has continuously lived in the United Kingdom since 8th February 2002. The respondent does not challenge that finding. The respondent has acknowledged that following his arrival UK July 1999, the appellant was granted further leave to remain until November 2002. There is no evidence that the appellant ever left the UK between July 1999 and November 2002. I find that the appellant has established that he has lived continuously in the UK since July 1999 and that he meets the requirements set out in paragraph 276ADE(1)(iii) of the immigration rules.

13. The only ground of appeal available to the appellant is that the respondent's decision is unlawful under s6 of the Human Rights Act. Given the length of the appellant's residence in the UK, Article 8 is plainly engaged. I find that the decision to refuse the appellant leave to remain may have consequences of such gravity as potentially to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved.

14. I have found that the appellant meets the requirements for leave to remain on the grounds of private life on the basis that the appellant has lived continuously in the UK for at least 20 years. The appellant arrived in the United Kingdom on 12th July 1999 and the requirement set out in paragraph 276ADE(1)(iii) of the immigration rules was met in September 2019, when the applicant made his application. I have had regard to the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the Secretary of State's side of the scales to show that the refusal of the claim could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules.

15. Having regard to the policy of the respondent as expressed in the immigration rules, and in the absence of any countervailing factors in the public interest that weigh against the appellant, I am satisfied that on the facts here, the decision to refuse leave to remain is disproportionate to the legitimate aim of immigration control. In the circumstances I allow the appeal on Article 8 grounds.

Notice of Decision

16. The appeal is allowed and the decision of First-tier Tribunal Judge O'Hagan promulgated on 17th January 2020 is set aside.

17. I remake the decision and allow the appeal on Article 8 private life grounds.

Signed **V. Mandalia** Date 10th November 2020

Upper Tribunal Judge Mandalia