



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: UI-2022-000050

HU/50747/2021; IA/02636/2021

THE IMMIGRATION ACTS

**Heard at Field House
On the 28th June 2022**

**Decision & Reasons Promulgated
On the 01st September 2022**

Before

**UPPER TRIBUNAL JUDGE BLUM
DEPUTY UPPER TRIBUNAL JUDGE LEWIS**

Between

**Md. Abdul HAMED
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Martin of Counsel instructed by Taj Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is an appeal against a decision of First-tier Tribunal Judge Anthony promulgated on 21 October 2021 dismissing the appeal of Mr. Muhammad Abdul Hamad against a decision of the Respondent dated 4 March 2021 refusing a human rights claim.

2. The Appellant is a citizen of Bangladesh born on 19 March 1981. He claims to have arrived clandestinely in the UK on 15 March 1999 and to have resided here continuously ever since.
3. His first apparent contact with the Respondent was on 31 January 2008, when he was encountered at a restaurant in Selly Oak, Birmingham, and subsequently served with documents as an illegal entrant.
4. Since that time, the Appellant has made a number of applications attempting to regularise his status in the United Kingdom, which are listed in the cover sheet to the Respondent's appeal bundle before the First-tier Tribunal. It is unnecessary to set out the full history of applications here. Suffice to say, most recently the Appellant made a human rights claim on 27 April 2020 on the basis of his Article 8 'private life' in the United Kingdom.
5. The application was made by way of an online application form completed on 27 April 2020. In the application form it was stated, amongst other things, that the Appellant resided at Jalalabad Mosque and Islamic Centre in Selly Oak. In response to the question 'When did you start living at this address?' it was written "*June 2007*". (However, this latter feature of the application form was not a matter drawn to our attention by either representative, and was not noticed by the Tribunal until the preparation of this document: see further below.)
6. The application was supported by a letter from the Appellant's, representatives dated 10 July 2020. The application letter indicated that particular reliance was placed on paragraph 276ADE(1)(iii) of the Immigration Rules; in the alternative paragraph 276ADE(1)(vi); and otherwise Article 8 of the ECHR as a freestanding provision.
7. Under a heading 'Accommodation', the representatives' letter stated: "*Our client is currently residing at Jalalabad Trust (Mosque). This property is owned by Jalalabad Trust and the committee members agreed to allow our client to stay in the Mosque without any charge*". Reference was made to a supporting letter dated 28 February 2020 from the Chairman of the Trust, Mr Fozor Ali.

8. Mr Ali's letter, on the letterhead of Jalalabad Trust and signed as 'Chairman', states, in part: *"I can confirm that the committee members agreed that [the Appellant] can stay at the Mosque as we did not wish for him to become homeless. The Mosque does not charge him any rent or other expenses"*. Further, Mr. Ali stated that he had *"known [the Appellant] since the year 2000 as he regularly attends prayers at the mosque, and he regularly volunteers as a helper for the Mosque"*.
9. Further supporting evidence provided with the application included a number of other letters and statements testifying to the Appellant's length of residence. Particularly pertinent for present purposes are:
 - (i) Letter dated 24 February 2020 from Mr Amir Azadi, who described himself as a trustee of the local mosque. Mr Azadi stated: *"I have known [the Appellant] since December 1999. I met him at the local mosque of which I am a trustee. I see him regularly a few times in the week when I go to the mosque for prayers"*.
 - (ii) Letter dated 11 January 2020 from Mr Mohamed Rahman, a police constable. He stated: *"I have known [the Appellant] in a social capacity for over 15 years now"*.
10. Under cover of letter dated 18 January 2021 the Appellant's representatives forwarded further supporting evidence to the Respondent, which included a letter signed on 11 January 2021 from Mr Hafiz Foyzur Rahman, the Imam at the Jalalabad Trust since 2001. Mr. Rahman stated: *"I met [the Appellant] in 2001 when I first came to the mosque. He has been attending prayers regularly since I met him. He is very helpful to our community as he often volunteers to help the mosque."*
11. It is to be noted from the foregoing documents that neither Mr Azadi (a trustee) nor Mr Hafiz Rahman (the Imam) expressly referred to the Appellant living at the mosque. Further, none of the supporting letters/statements offered a date for the commencement of the Appellant living at the mosque.
12. The Respondent refused the Appellant's application for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 4 March 2021.
13. In essence, the Respondent did not accept that the Appellant had established the length of residence claimed, and concluded that he had

therefore not shown that he met the requirements of paragraph 276ADE(1)(iii). Further, the Respondent did not consider that there would be very significant obstacles to the Appellant's integration into Bangladesh were he to return there (paragraph 276ADE(1)(vi). Moreover, the Respondent did not accept that there were any other any exceptional circumstances or other circumstances that would render the Appellant's removal a contravention of rights under Article 8.

14. The Appellant appealed to the IAC.
15. The appeal was heard by way of a CVP / hybrid hearing at Birmingham on 22 September 2021. The Appellant gave oral evidence and called in support four witnesses including Mr Azadi, Mr Ali, and Mr Mohammed Rahman. Witness statements were drafted in similar terms to the letters provided in support of the application: Mr Azadi deposed to knowing the Appellant since December 1999, and also stated that the Appellant had attended his wedding in September 2004; Mr Ali repeated that he had known the Appellant since 2000, and that "*the committee members agreed that [he] can stay at the Mosque*", although neither the date of such agreement nor the date of commencement of residence were given; Mr Rahman acknowledged that he could not confirm that the Appellant had arrived in the UK in March 1999 because he had only known him for the last 16 years.
16. It is apparent from the decision of the First-tier Tribunal that in his oral evidence Mr Ali stated that the Appellant had been living at the mosque since 2000: "*Mr Ali states that the appellant approached him in 2000 for help with accommodation and the mosque has accommodated the appellant from then until now*" (paragraph 38).
17. As far as we can see this is the first express reference to a date of commencement of living at the mosque from any of the supporting witnesses. It is discrepant with the Appellant's own statement - "*June 2007*" - on the face of the application form. However, as noted above, we were not alive to this discrepancy at the time of the hearing, and neither does it appear to have featured in submissions or discussion before the First-tier Tribunal; the apparent discrepancy is not mentioned in the decision of the First-tier Tribunal. (See further below.)
18. The First-tier Tribunal Judge refused the Appellant's appeal for the reasons set out in the 'Decision and Reasons' promulgated on 21 October 2021.

19. The Appellant sought permission to appeal to the Upper Tribunal which was in the first instance refused by Designated Judge Shaerf on 29 December 2021. A renewed application for permission to appeal was granted by Upper Tribunal Judge Lindsley on 22 February 2022.
20. The Appellant's Grounds of Appeal sought to challenge Judge Anthony's evaluation of both paragraph 276ADE(1)(iii) and paragraph 276ADE(1)(vi). Judge Lindsley commented "*The findings in relation to paragraph 276ADE(1)(vi) of the Immigration Rules were unarguably rationally open to the First-tier Tribunal*". However, it was considered that the Grounds in respect of paragraph 276ADE(1)(iii) were arguable. Accordingly the focus of submissions before us was on the Appellant's claimed period of residence in the UK.
21. The Respondent has not made a Rule 24 response.

Consideration of 'Error of Law' challenge

22. The Grounds of Appeal set out the issue over length of residence: the Respondent accepted that the Appellant had been resident in the UK continuously from the time of the encounter at the restaurant in Selly Oak in January 2008; accordingly, in dispute was the period from March 1999 until January 2008; more particularly in the context of seeking to establish 20 years continuous residence, the period 2001 to 2008.
23. In referring to the Grounds of Appeal Judge Lindsley, in the grant of permission to appeal, summarised two aspects of the challenge in these terms:

"It is argued that the evidence of Mr F Ali, chairman of the Jalalabad Mosque who said that the appellant had lived in the mosque from 2000 ought to have been given weight and that the reasons for not doing so were irrational. It is also argued that the evidence of Mr MA Rahman, a police officer, ought to have been found to show the appellant to have lived in the UK since 2003/4 and not been discounted simply because it did not go back to 2001."
24. Having characterised the challenge in respect of paragraph 276ADE(1)(vi) as 'unarguable', Judge Lindsley went on to state this:

“The findings in relation to paragraph 276ADE(iii), the appellant’s claimed 20 plus year residence, are forensically written and cover all evidence however I find the grounds to be arguable. It is arguable that the conclusions are ultimately unlawful in that they arguably unreasonably require corroborating documentary evidence which could quite reasonably not exist, for instance records of one doctors visit in 2000 and minutes of meetings and lists of volunteers at a mosque from a period of over 13 years ago. It is also arguable that there is a failure to consider the likely honesty of a chairman of a mosque when deciding the weight to be given to his evidence, and an unrealistic expectation of precision in recollections of dates from lay witnesses for a period two decades in the past. Ultimately there is an arguable failure to consider the evidence fairly in the round.”

25. We are grateful for the helpful and succinct manner in which Mr Martin articulated the key points in the appeal. We are similarly grateful for the helpful and realistic approach of Ms Everett in focusing upon what she perceived as the strongest of the Appellant’s grounds. Ms Everett acknowledged that the Judge’s approach to the evidence of Mr Rahman was ‘problematic’ in that there did not appear to be a clear finding on the evidence. Although Ms Everett did not concede the materiality of any such error, she also acknowledged that the issue of materiality was ‘difficult’.
26. We are satisfied that there was a material error of law such that it is necessary to set aside the decision of the First-tier Tribunal.
27. Mr Rahman's evidence was addressed in the Decision at paragraph 49. The Judge summarises the evidence to the effect that Mr Rahman had *“first met the appellant at the mosque in 2003 or 2004 but he could not be more precise than that”*. The Judge observed *“I find it curious that Mr Rahman did not meet the appellant until 2003 or 2004”*, before adding *“In any event, I find his evidence does not take matters much further as he is not able to confirm the appellant’s presence in the UK prior to 2003 or 2004. In order for the appellant to meet the requirements paragraph 276ADE(1)(iii), the appellant needs to demonstrate that he has lived in the UK continuously for 20 years”*.
28. We accept that this passage does not contain a clear finding on Mr Rahman’s evidence: there is some scepticism expressed - *“I find it curious...”* - but this does not amount to an express rejection of the evidence. However, neither is there any express acceptance of the evidence. The evidence is in substance marginalised because it does not

go to the whole requisite 20 year period. In isolation this may not be objectionable. However we are persuaded that the failure to consider the other evidence in the appeal from a perspective that includes a clear finding on Mr Rahman's evidence renders this deficiency material.

29. The issue of 'materiality' in effect becomes a question of whether or not the evidence of the other witnesses - and in particular Mr Ali and Mr Azadi - might have been perceived differently in the event of a clear finding that Mr Rahman's evidence that the Appellant had been present in the UK at least as early as 2003 or 2004 was reliable.
30. In our judgement it cannot be discounted that an acceptance of Mr Rahman as a credible / reliable witness would have provided a different prism for a consideration of other testimonies. For example, the significance of the absence of any corroborating documentary evidence from the chairman and a trustee of the mosque for the period 2000 to 2008 might have been accorded less weight if it was accepted that the Appellant had likely been in the UK by at least 2003/2004.
31. We recognise that this means that the Decision must be set aside. In setting aside we wish to acknowledge that there is much in the Decision that is otherwise rational and well-reasoned.
32. We do not accept the criticism that the Judge failed to consider, or failed to follow the principles in **ZH (Bangladesh) [2009] EWCA Civ 8**, recognising that a person who has been unlawfully in the UK may have difficulties obtaining documents to support their presence; nor do we accept that there was any contravention of the guidance to be derived from **Khan [2016] EWCA Civ 416**. On the contrary, the Judge manifestly did not determine the case solely because of an absence of documentary evidence, but gave very careful consideration to the available evidence and evaluated its probative value.
33. We also acknowledge that in our judgment, the evaluation of the railway tickets produced by the Appellant was rational and sustainable. Yet further, it seems to us that a rejection of the Appellant testimony and supporting documents in this regard would appropriately inform an evaluation of the Appellant's overall credibility: in substance the Judge concluded that the Appellant had submitted as evidence documents with which he did not have a relationship - *"I can only conclude that the train tickets for Charlton within the bundle does not belong to him"* (paragraph 28); see

similarly paragraph 29; and see the conclusion "*the appellant's evidence regarding the train tickets is unreliable*" (paragraph 30).

34. Nor did we find any scope for criticism of the Judge's observations at paragraph 31 in respect of the absence of any supporting evidence of a medical visit to Selly Oak medical centre in 2001. We do not read that paragraph as indicating that the Judge expected as a requirement supporting medical evidence or other corroborating evidence of the visit; rather the Judge considered it a matter adverse to the Appellant that no attempt had been made to explore whether such evidence that might reasonably exist was available.
35. We can also understand why the Judge, for the reasons articulated at paragraph 39, might have thought that in the ordinary course of events there would be some sort of record of the Appellant's presence at the mosque - either as a volunteer or a resident. The evidence was to the effect that the mosque committee had agreed to his residence - which might suggest some sort of discussion that might have been minuted. It might also be thought that such a prolonged period of residence at the mosque as claimed, of a person who was present in the UK unlawfully, might have been the subject of some sort of discussion in order to establish the basis of his destitution with a view to offering guidance be it spiritual or practical. However, it is not clear to us to what extent these matters were properly explored in either examination-in-chief or cross-examination: beyond the denial of there being any such records available, it is not clear to what extent the reason for there being no such records available was explored.
36. Ultimately these matters will need to be revisited, and reconsidered in the full context of clear findings of the reliability and credibility of each of the witnesses. In revisiting such matters the next decision-maker will no doubt want to take into account the discrepancy that we have identified in the body of this Decision: that in his application form the Appellant referred to starting to live at the mosque from June 2007, whereas at the hearing - seemingly for the first time - the date of commencement of residence at the mosque was stated by Mr Ali to be 2000.
37. In this latter regard, given that the discrepancy was not seemingly identified before the First-tier Tribunal we did not consider it appropriate to reconvene the hearing to explore the matter further in the context of our deliberation on 'error of law'.

38. For completeness we note that Mr Martin – quite properly in our judgement – did not seek to rely upon the submission included at paragraph 5 of the Grounds of Appeal that the First-tier Tribunal “*should have given some weight to the evidence given by Mr Fozor Ali as he is a man of religion...*”. Mr Martin acknowledged that it would not be appropriate to attempt to evaluate the weight to be given to the evidence of any particular witness by reference to some categorisation based on religious or other beliefs, and suggested that what was more significant was whether a witness might be said to be a person ‘of good standing’.
39. Be that as it may, for the reasons identified above, the decision of the First-tier Tribunal must be set aside for error of law. The nature of the error is such that a further hearing is required with all issues at large; on balance the most appropriate forum will be the First-tier Tribunal.

Notice of Decision

40. The decision of the First-tier Tribunal contained a material error of law and is set aside.
41. The decision in the appeal is to be remade further to a hearing in the First-tier Tribunal before any judge other than First-tier Tribunal Judge Anthony with all issues at large.
42. No anonymity direction is sought or made.

Signed:

Date: **10 July 2022**

Deputy Upper Tribunal Judge I A Lewis