IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003785
First-tier Tribunal No: HU/51642/2022
IA/02539/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 1 March 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Ali Ait Youseef
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr S Hingora, of Counsel, instructed by Black Antelope Law.
For the respondent: Mr. D Lindsay, Senior Presenting Officer.

Heard at Field House on 19 December 2022

Decision

1. The appellant is a national of Algeria born on 15 February 1957. He appeals against a decision of Judge of the First-tier Tribunal Rothwell who, in a decision promulgated on 13 July 2022 following a hearing on 28 June 2022, dismissed his appeal on human rights grounds (Article 8 ECHR) against a decision of the respondent dated 3 March 2022 which refused his application of 21 December 2020 for leave to remain in the United Kingdom on the basis of his private life in the United Kingdom.

2. The issue in this appeal is whether, on the judge's findings, the appellant had lived in the United Kingdom continuously for a period of at least 20 years as at the date of the hearing and, if so, whether the judge erred by failing to find that the decision was

disproportionate in assessing proportionality in the balancing exercise in relation to the appellant's Article 8 claim.

The respondent's decision

3. It is important to note that the respondent's decision letter states that the appellant's application for leave to remain under para 276ADE(1) of the Immigration Rules *"does not fall for refusal on grounds of suitability in Section S-LTR of Appendix FM"*. The respondent proceeded to note, inter alia, that the earliest documentary evidence of the appellant's residence in the United Kingdom was dated April 2002 and that there were no documents which demonstrate that the appellant was in the United Kingdom prior to that date. The decision letter proceeds to state: *"You have therefore lived in the UK for 18 years 8 months and it is not accepted you have lived continuously in the UK for at least 20 years".* The respondent therefore considered that the appellant did not satisfy the criteria in para 276ADE(1)(iii) and proceeded to consider para 276ADE(1)(vi) but concluded that there were no very significant obstacles to his reintegration in Algeria.

4. Finally, it is important to note that the decision letter noted that the appellant claimed to have resided and worked in the United Kingdom under the names of Zakaria Djamel Ziam and Abdenacer Boudjelti. The decision letter then states that "*Whilst evidence has been provided that these individuals have been present in the United Kingdom during this time, it has not been adequately demonstrated that you are the same person as these individuals*".

The judge's decision

5. The judge heard oral evidence from the appellant and two other witnesses – Mr Benoumechiara and Mr Nemouchi. The judge said, in terms, that she did not find Mr Benoumechiara reliable (para 40) and that she placed little weight on the evidence of Mr Nemouchi (para 43). She gave her reasons at paras 37-40 (in respect of Mr Benoumechiara) and paras 42-43 in respect of Mr Nemouchi. It is clear from her reasoning at paras 44-45 that she also had difficulties with the credibility of the appellant's evidence.

6. There was documentary evidence that the judge considered as follows: (i) at para 41, a letter dated 5 December 2020 from a Mr Abdelhani Taji; (ii) at para 46, documentary evidence produced by the appellant in the name of Mr Abdenacer Boudjelti, an identity he said he had assumed from February 2009 until October 2020; (iii) at para 47, documents from the NHS in the appellant's real name; and (iv) at para 47, letters from friends, including Mr Mamouni.

7. Mr Hingora relied heavily upon para 47 of the judge's decision. However, it is necessary to consider para 47 of the judge's decision's in context and, for that reason, I quote paras 36-48 of the judge's decision, which read:

> "FINDINGS:
>
> 36. I have applied the balance of probabilities when making my findings of fact. The burden of proof is on the appellant.

37. The first issue is whether the appellant has had continuous residence from 2000. The first evidence that the appellant relies upon is the oral evidence from Mr Benoumechiara who states that he met the appellant in an Algerian café in Harlesden in 2000. In his letter dated 10/12/2020 he states that they first met through a mutual friend. There is a discrepancy here, and it was not for me to enter the arena to question Mr Benoumechiara about this discrepancy. I asked Mr Benoumechiara about how he could remember he met the appellant in 2000 at the café, and he said he knew it was the end of 2000, but he did not say how he remembered that. I do not find that I can rely upon this evidence, about how long he has known the appellant, because there is a discrepancy about how they met, and I cannot see how he can remember the date, if he cannot give an accurate account of how they met.

38. Mr Benoumechiara states in his letter that "Ali also known as Zakaria," this is *[sic]* first name of Zakaria Djamel Ziam, which is the first false document bought by the appellant. Mr Benoumechiara said in evidence-in-chief that Mr Ziam was the name that the appellant used to work at Asda, although later in his evidence he said he also knew the appellant by his real name, Mr Ziam, Abdenacer Boudjelti and Sid Ali.

39. But Mr Benoumechiara said that the appellant worked with him at Asda from 2009 in the name of Mr Ziam. He said he was the appellant's boss and they worked together before he left and went to work at another store. The appellant said in oral evidence that from 2008, but in his witness statement he said it was from 2009, that he used the name of Mr Abdenacer Boudjelti, as he needed to obtain another false identity to obtain a better job, because the national insurance number linked to name of Mr Ziam was only temporary. These are discrepancies about the name and the date, and I did not enter the arena, which is not my role. This also leads me not to place weight upon the evidence of Mr Benoumechiara as I do not find him to be a reliable witness on the key issues before me.

40. The next evidence relied upon by the appellant are the documents relating to Mr Zakaria Ziam. These are from April 2002. Mr Boudjelti was aware of the name of Mr Ziam, as he mentioned it on oral evidence, but I have not found that Mr Benoumechiara reliable, so the fact that he has stated he knows the appellant by "Zakaria" or Mr Ziam, does not lead me to find that these documents belonged to the appellant and that they were the same person. The appellant has provided these documents, but there are ways that he could have obtained them, as he has been able to obtain two false French passports.

41. There is a letter from a Mr Abdelhani Taji dated 05/12/2020 where he states that Mr Zakaria Djamel Ziam was working for him at the same company LAFORNAIA LTD from May 2003 to September 2006 as a packer. Mr Taji has not attended to give oral evidence, so I place less weight on his letter. Further the letter is not on headed notepaper, and it could have been typed by anyone. He has not stated that he has been shown a photograph of the appellant and that he recognises him as Mr Ziam. I place little weight upon this evidence.

42. Mr Nemouchi gave oral evidence. He adopted his letter, dated 15/12/2020 where he states that he met the appellant in London through a mutual friend. He makes no reference in that letter to them having met at the Algerian café, or that they lived together in Dollis Hill, which I find is a very important aspect. I cannot see why he did not mention these important aspects in his letter, and he only referred to them in oral evidence. He only referred to this in oral evidence because it was not true, otherwise he would have mentioned it in his letter. He was attempting to assist the appellant.

43. Mr Nemouchi said in oral evidence that he was aware the appellant had used false names, but he gave no further details. So, he does not assist the appellant in corroborating that he is Mr Ziam and Mr Boudjelti or the length of time the appellant has been in the United Kingdom, and I place little weight on his evidence.

44. The appellant said in oral evidence that when he used the document in the name of Mr Ziam, he was given a temporary national insurance number. He said that he needed to have another identity to be able to move jobs and obtain better work. But he states in his witness statement he stayed at the first job at Oporto Patisserie from September 2000 until February 2002, and then was able to move jobs to Bagatelle Concept in March 2002 to February

2003, and from 2003 until September 2006 he worked for La Fornaia Ltd. Then for an agency called Response Recruitment from November 2006 until January 2008, and then from January 2008 to June 2008 he worked for Best Connection Group ltd *[sic]*. It is clear that the appellant was able to move jobs using the documents in the name of Mr Ziam without difficulty, even though there was a temporary national insurance number. I do not accept his reasons for not using the documents in the name of Mr Ziam after February 2009. It is more likely that the documents he obtained in the name of Mr Ziam only went up to 2009.

45. Further the appellant said he did not keep the identity document in the name of Mr Ziam, and he threw it away. I cannot see why he did that, as he would need it as evidence to prove that he was the same person.

46. The appellant has produced evidence in the name of Mr Abdenacer Boudjelti from February 2009 until October 2020. He has not produced this identity document which would show that Mr Boudjelti was also the appellant. As I have found above, I do not accept that Mr Boudjelti and the appellant were the same person, as Mr Benouechiara has stated that he knew the appellant as Mr Ziam when he worked at Asda, whereas the appellant said he worked there as Mr Boudjelti. In addition, the appellant was able to obtain false identities on two occasions, and there is no reason why he would not obtain false documents to show he has been employed here.

47. The appellant has produced documents from the NHS in his real name, and I accept these documents. They show that the appellant was in the United Kingdom in 2002, and attended A&E. Further I accept that Mr Benoumechiara and Mr Nemouchi have know *[sic]* the appellant, and are friends, as otherwise they would not have attended the Tribunal to give oral evidence. He has also produced other letters from friends, Mr Mamouni states that he has known the appellant since 2005, but he did not attend the Tribunal to give oral evidence. So, I place less weight on this evidence. But when I assess this evidence in the round and apply the balance of probabilities, I do not find that at the date of the application the appellant has proved that he has had continuous residence in the United Kingdom for twenty years.

48. On balance for the reasons, I have given above, I do not find that the appellant has been in the United Kingdom continuously for twenty years and fulfils paragraph 276ADE (1) (iii)."

8. At para 49, the judge said that, in the alternative, she did not find that there were very significant obstacles to the appellant's reintegration in Algeria.

9. The judge considered Article 8 at paras 51-55, which read:

"51. Therefore, assessing the appeal through Article 8. The appellant entered illegally, and he has bought false documents. He states that he used false identities to work, and the of *[sic]* case ZH (Bangladesh) accepts that applicants may use false documents to gain work. But the appellant's case is that he bought the second identity to obtain better work, when it appears from his employment history, he had no difficulty obtaining work from 2000 until 2009. I find that this goes heavily against him, as employers need to know who they are employing for security reasons. Mr Graham is correct that this is a criminal offence.

52. I cannot assess if the appellant speaks English, as he gave evidence in Arabic. There seems no reliance upon public funds. This is a neutral matter.

53. The appellant's private life has been formed when he has been here illegally and his situation has been precarious, and I place little weigh *[sic]* on this.

54. I have not accepted that the appellant has continuously been in the United Kingdom for twenty years at the date of the application. He has developed a private life, and he has friends here. When I balance the appellant's situation against the public interest, I find that his removal to Algeria would not be disproportionate.

55. I dismiss the appeal on human rights grounds."

The grounds

10. The appellant's grounds contend that the judge accepted that the appellant has been resident in the United Kingdom since 2002 based on the documentary evidence of his NHS hospital admission dated 18 April 2002 which (the grounds contend) is consistent with the respondent's decision and that, although the judge did not accept that the appellant had been resident in the United Kingdom since 2000, the appellant had been resident in the United Kingdom for 18 years and 8 months as at the date of his application, as stated in the decision letter. The judge should have determined the appellant's Article 8 claim by reference to his position as at the date of the hearing. By the date of the hearing, the appellant had lived in the United Kingdom continuously for a period of at least 20 years and he therefore satisfied the criteria in para 276ADE(1)(iii). The fact that the appellant satisfied the 20-year continuous residence criteria in para 276ADE(1)(iii) has a material bearing on the Article 8 claim. In support, the grounds rely upon the headnote in OA and others (human rights; 'new matter'; s.120) [2019] UKUT 65, para 34 of the Court of Appeal's judgment in TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109, paras 7 and 55 of GM [Sri Lanka] v SSHD [2019] EWCA Civ 1630 and the headnote in MM (Article 8 – family life – dependency) Zambia [2007] UKAIT 00040.

Submissions

11. Mr Lindsay accepted the submission at para 7 of the grounds that the judge had accepted that the appellant had been resident in the UK from April 2002, although he also submitted, subsequently, that the judge had not made a finding that the appellant has been resident continuously in the United Kingdom since April 2002. However, he submitted that this was not material because the appellant could not satisfy para 276ADE(1), in that, he had not accumulated 20 years' continuous residence as at the date of application. Thus, it was still the case, in relation to the proportionality exercise under Article 8, that he did not satisfy the requirements of the Immigration Rules, in Mr Lindsay's submission. The Upper Tribunal said in OA, in the context of para 276B of the Immigration Rules that it would be a "*new matter*" requiring the consent of the Secretary of State if an appellant accumulates 10 years' continuous lawful residence during the course of the appeal. In Mr Lindsay's submission, the "*new matter*" issue is not reached in the instant case because the issue in OA concerned para 276B which does not stipulate that the applicant must have had 10 years' continuous lawful residence as at the date of application, whereas it is clear that it is necessary to show residence for a continuous period of 20 years as at the date of application for the purposes of para 276ADE(1)(iii).

12. Mr Lindsay informed me that, if the appellant made another application for indefinite leave to remain, the Secretary of State would need to make background checks. Such checks would not be conducted unless the appellant makes another application. He could only submit that the judge did not materially err in law. In his submission, the judge was alive to the appellant having lived in the United Kingdom for at least 20 years and she did not make any material error of law in her proportionality balancing exercise under Article 8.

13. In response, Mr Hingora took me through the cases that were relied upon in the grounds and which I have set out above. Although Mr Hingora accepted that the judge had not made a finding, in terms, that the appellant had lived in the United Kingdom continuously for at least 20 years as at the date of the hearing, he submitted that she was aware that para 276ADE(1)(iii) required continuous residence. Given her acceptance of the evidence of the appellant's admission into hospital in April 2002 and her reasoning at para 47 of her decision, it followed (in his submission) that, on her findings, the appellant was continuously resident in the United Kingdom for at least 20 years as at the date of the hearing. In this regard, he relied upon the fact that Mr Benoumechiara and Mr Nemouchi gave evidence that they were friends with the appellant; they had kept in touch and had regularly seen each other.

14. Mr Hingora submitted that, in carrying out the proportionality balancing exercise, the judge should have taken into account her finding that the appellant had lived in the United Kingdom continuously for a period of at least 20 years. He submitted that the judge's decision on the appellant's Article 8 claim was fatally flawed because she failed to appreciate and take into account that the appellant satisfied the criteria in para 276ADE(1)(iii) as at the date of the hearing. The caselaw makes it clear that this militates against the proportionality of the decision. Given that the appellant satisfied para 276ADE(1)(iii) as at the date of the hearing, there was no public interest against him.

15. Mr Hingora submitted that it was irrational to require the appellant to make another application for indefinite leave to remain. He asked me to set aside the judge's decision and proceed to re-make the decision by allowing it because (in his submission) there was no need for a further hearing. He drew my attention to the fact that the decision letter accepted that there was no issue as to whether the relevant suitability requirement was satisfied. There was no reason to go behind this or the respondent's acceptance in the decision letter that the appellant had accumulated 18 years 8 months of continuous residence as at the date of his application.

16. I reserved my decision.

Assessment

17. Although it is clear that the judge had difficulty with the credibility of the evidence of Mr Benoumechiara, Mr Nemouchi, the appellant and other evidence before her, the fact is that, at the commencement of the hearing before me, Mr Lindsay accepted the submission at para 7 of the grounds that the judge found that the appellant had been resident in the United Kingdom since April 2002. However, he later submitted that the judge had not made a finding that the appellant has been resident in the United Kingdom *continuously* since April 2002.

18. Therefore, the first issue is whether the judge made a finding, in terms or implicitly, that the appellant had lived in the United Kingdom continuously since April 2002.

19. I am satisfied that the judge implicitly found that the appellant has been resident in the United Kingdom continuously since April 2002, for the following reasons:

(i) The judge was plainly aware that, in assessing the appellant's Article 8 claim, she had to decide first whether he satisfied relevant criteria in para 276ADE(1)(iii). She was plainly aware that the issue in this regard was not only whether the appellant had accumulated residence for a period of at least 20 years as at the date of application but also whether such residence was continuous. She began her assessment at para 37, the first sentence of which reads: "*The first issue is whether the appellant has had continuous residence from 2000*". She specifically stated, in the last sentence of para 47 of her decision, that she did not find that "*at the date of the application the appellant had proved that he had had continuous residence in the United Kingdom for twenty years*". The word "*continuously*" is also mentioned at para 48.

(ii) Furthermore, given that the judge found that, as at the date of application, the appellant had not accumulated 20 years' continuous residence, it makes no sense to infer that, if the date by which the period of 20 years' of continuous residence had to be satisfied shifted to the date of the hearing, she would have made a finding that, the appellant's residence was not continuous. There is nothing in her reasoning that indicates that she considered that the evidence showed that the appellant's residence was not continuous.

20. Before I consider whether the judge erred in law by failing to take into account in her assessment of proportionality her (implicit) finding that the appellant had accumulated 20 year's continuous residence as at the date of the hearing, it is necessary to recall the following:

(i) As is well-established, if an individual satisfies criteria under the Immigration Rules for the grant of leave, then that is a weighty matter in the individual's favour in the assessment of proportionality. If, on the other hand, an individual does not satisfy the requirements of the Immigration Rules, a wider examination of the individual's circumstances is necessary and all relevant factors must be considered in the assessment of proportionality. In the instant case, the judge found that the appellant had not accumulated 20 years continuous residence as at the date of his application and therefore he did not satisfy para 276ADE(1)(iii).

(ii) The Tribunal in OA made it clear that, if an individual accumulated the necessary period of continuous lawful residence as required under para 276B of the Immigration Rules during the appeal proceedings, this would be constitute a "*new matter*" that required the respondent's consent. There is nothing in the judge's decision to show that the respondent had consented to the judge deciding the appellant's Article 8 claim solely on the basis that he had accumulated 20 years' continuous residence by the date of the hearing. Accordingly, the judge would not have had jurisdiction to allow the appellant's appeal *solely on the basis* that he had accumulated 20 years' continuous residence as at the date of the hearing, even leaving aside the fact that the opening words of para 276ADE(1) make it clear that the criteria set out in paras 276ADE(1)(iii) must be satisfied as at the date of the application for leave to remain.

21. I am satisfied that the judge did take into account the appellant's overall period of residence in the United Kingdom as at the date of the hearing in her assessment of the proportionality balancing exercise in relation to Article 8, for the following reasons:

(i) For the reasons given at para 20 above, it was necessary for the judge to assess proportionality on a wider basis, i.e. taking into account all relevant factors.

(ii) That is precisely the approach that the judge took. I say this because:

(a) The judge specifically took into account that the appellant did not satisfy the criteria in para 276ADE(1)(iii) as at the date of his application, in the first sentence of para 54.

(b) At paras 53 and 54, she took into account that he has developed private life in the United Kingdom.

(c) There is simply no reason to think that she did not have in mind his overall length of residence as at the date of the hearing. Just as it is implicit that she made a finding that the appellant has lived in the United Kingdom continuously since April 2002, I am satisfied that it is implicit that she took into account his overall length of residence as at the date of the hearing in assessing proportionality.

(d) The judge took into account that the appellant had used false identities and considered the explanations he gave for his use of false identities.

22. I reject Mr Hingora's submission that there was no reason to go behind the fact that the respondent had accepted in the decision letter that the appellant met the suitability requirement. It is clear from the decision letter that the respondent did not accept the appellant's claim that he had lived and worked in the United Kingdom under the names Zakaria Djamel Ziam and Abdenacer Boudjelti. However, on the judge's findings, the appellant is someone who had used false identities in order to work. At para 51, she rejected the appellant's explanation for buying the documents in the second identity.

23. Accordingly, on the judge's findings, it was no longer a forgone conclusion that the appellant satisfied the suitability criteria in para 276ADE(1)(i) notwithstanding that the respondent stated that he did in the decision letter. The judge would therefore have materially erred in law if she had allowed the appellant's Article 8 claim simply because he had accumulated 20 years' continuous residence as at the date of the hearing.

24. It is clear (para 51) that the judge placed significant weight, as she was fully entitled to do, on the appellant's purchase of documents in the second false identity which she said "*goes heavily against him, as employers need to know who they are employing for security reasons*". Having conducted a wider examination of the appellant's circumstances, the judge plainly found that the weight of the public interest in favour of the decision was outweighed by the factors that went in his favour, including the overall length of his residence.

25. For all of the reasons given above, the judge did not materially err in law. This appeal is therefore dismissed.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside.

This appeal to the Upper Tribunal is dismissed.

Signed: Upper Tribunal Judge Gill Date: 9 January 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email