IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004881

First-tier Tribunal Nos: HU/50067/2021
IA/03131/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 March 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Mr ROFIQUL ISLAM
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik, Counsel instructed by Lextel Solicitors
For the Respondent: Mrs A Nolan, Home Office Presenting Officer

Heard at Field House on 25th January 2023

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of First-tier Tribunal (FtT) Judge Peter-John White (the judge) who dismissed the appellant's appeal on 24th December 2020 to refuse his human rights claim based on Article 8 of the ECHR.

2. The sole ground of appeal is that the judge erred in law in departing from the concession made by the Secretary of State in the decision under appeal as to the appellant's length of residence in the United Kingdom.

The grounds for permission to appeal

3. It is submitted in the grounds of appeal that in the decision the Secretary of State made a clear and unambiguous concession that the appellant had lived in the United Kingdom continuously since 1st June 2001. The Secretary of State, inter alia, said:

> *"You state that you have resided in the UK for 19 years and 6 months, having claimed to have entered on 01 June 2001.*
>
> *...*
>
> *You are aged 41 years old and have resided in the UK for a continuous period of 19 years and 6 months. Therefore, you are unable to meet paragraphs 276ADE(1)(iii), (iv) and (v).*
>
> *...*
>
> *As you have resided in the UK for over 19 years, it is accepted that you have established a private life, ...*
>
> *...*
>
> *has been determined that despite your 19 year residence in the UK, that you would be able to re-establish a private life upon return to your country of origin as you have not demonstrated that there would be any significant obstacles to re-integration. ...".*

4. The judge despite the Secretary of State's clear concession as to the appellant's residence held that the appellant had not lived here for a continuous period of twenty years and dismissed the appeal.

5. The judge gave two reasons justifying his departure from the concession set out at [13]:

> *"13. There are in my judgment two answers to this submission. The first is that a notice of decision is not akin to a pleading in civil proceedings, by which a party is thereafter likely to be bound. If the respondent wishes to alter or add to the reasons for a decision there is always a discretion to permit that. It may well be, if the application is made only at the hearing, that justice will require the grant of an adjournment, so that the new ground can be properly formulated and the appellant be given the opportunity to respond. That in turn may have costs consequences. The second point is that in the review, which is dated 13th October 2021, the respondent expressly says that it is accepted that the appellant has been here continuously since his first application in July 2006 but it is not conceded that he has been here since June 2001. The respondent did thereby make clear that this was a matter in issue, and the appellant has included in the bundle evidence to address the issue. I therefore remain of the view that the date of arrival is a matter at large and awaiting my decision on the evidence, rather than on any form of estoppel".*

6. The first reason given by the judge is that the notice of decision is not binding as in civil proceedings and if the Secretary of State "... wishes to alter or add to the reasons there is always a discretion to permit that".

7. In principle, this, the grounds submitted, is valid but in this case the Secretary of State made no application to depart from the concession. No application was made prior to the hearing or even at the hearing. If the Secretary of State had made an application to withdraw the concession, and if the judge had granted it, the appellant would have considered his position and decided how to proceed. But as no application was made by the Secretary of State, the judge did not decide at the hearing whether to allow the Secretary of State to withdraw the concession made in her decision. It is only in its written decision that the judge had decided to depart from the concession which it was submitted was too late.

8. The second point made by the judge was that the Secretary of State in her review had accepted the appellant had been here since July 2006 but it was not conceded that he had been here since June 2001. The judge stated that the review made it clear this was a matter in issue but there are a number of difficulties with this.

9. The two reasons given by the judge were inconsistent. First the judge stated that the Secretary of State should make an application, and none was made, and secondly the judge proceeded on the basis that the Secretary of State could simply depart without making an application. There was ample authority for the proposition that the Secretary of State is required formally to apply to withdraw a concession. See **Kalidas (agreed facts – best practice) [2012] UKUT 00327 (IAC)**.

10. Secondly, it was not sufficient for the Secretary of State merely to raise the point in a review and expect the judge and the appellant to treat it as a formal withdrawal of a concession. **AM (Iran) v Secretary of State for the Home Department [2018] EWCA Civ 2706** at [44] held this:

> *"44. In my view the Secretary of State's application to withdraw the concession made before the UT cannot easily rely on principles of justice and fairness, particularly when it is sought to do so in a belated and informal way. One would expect those who seek to withdraw a concession to explain both promptly and frankly why the concession was made, why it was mistaken and why it is now just and fair that they be allowed to withdraw it. It is striking that when the application for permission to appeal to the UT from the UT decision was made, the Secretary of State's newly instructed and experienced counsel (who was not the counsel instructed before this court) did not seek assert that there was a mistake or seek leave to withdraw the concession".* [my underlining]

11. A formal and timely application by the Secretary of State to withdraw a concession was essential. Any application must be decided by the judge prior to or at the appeal hearing so the appellant knows the position. No such application was ever made by the Secretary of State and at no stage did the Secretary of State explain why the concession was made in a notice of decision and why it was just and fair to be allowed to withdraw it. The Secretary of State was represented at the hearing, but it was not submitted on her behalf that the concession was a mistake and did not make an oral application to the judge to withdraw the concession.

12. Third, the review filed by the Secretary of State is a review of the appellant's skeleton argument and evidence. It is not opportunity for the Secretary of State to withdraw any concessions in an informal way without seeking the judge's permission and providing necessary details as required by **AM (Iran)** at [44].

13. Fourth, the judge failed to consider the matters set out in AM (Iran) in deciding whether to allow the Secretary of State to withdraw the concession made in the notice. The judge did not engage with those matters as set out at all. Without prejudice to the submissions made, the appellant submits that the judge was obliged to engage with all those matters and announce his decision allowing the Secretary of State's to withdraw her concession at the hearing. It is simply unfair to do so for the first time in a decision dismissing the appeal. Further, it is an error of law to ignore those relevant matters in the decision.

14. Fifth, and without prejudice to the submissions made by the Secretary of State's review, the review did not state the Secretary of State was no longer satisfied as to the appellant's residence in the UK since 1st June 2001. The reading of the review was, with respect, flawed. Contrary to the judge's review, the review did not make it clear that the appellant's residence was in issue at the appeal.

The Hearing

15. Mr Malik submitted that the sole ground of error in law was the judge departing from the concession. No application had been made prior to the hearing or indeed at the hearing that the concession made by the Secretary of State in her decision letter was withdrawn. The judge should have considered the position if an application had been made and he did not. The first time the judge indicated that he allowed an application to raise the point of withdrawing the concession was in the decision. There was no such application. The review did not constitute an application and there was a requirement that the Secretary of State should formally apply. It was insufficient to raise the point merely in the review of the skeleton argument. In this case there was no issue regarding any type of mistake.

16. Even if there were a formal application and the review was construed as such there was no engagement at all by the judge of the considerations in **AM (Iran)**.

17. Mrs Nolan submitted that it was not accepted a concession was made. She referred me to the decision letter and suggested that the Secretary of State was merely reciting the claim made by the appellant as to the nineteen years' residence.

18. At the First-tier Tribunal the judge relied on the Rule 24 of the Tribunal Procedure Rules 2014 and this was undertaken in the respondent's review. At the hearing the point on concession was raised and the appellant was given the necessary opportunity to raise the issue. At [3] of the review dated 13th October 2021 it is clearly not conceded that the appellant has been in the UK since 2001. The respondent's review also considered the evidence to establish the length of residence at [7] and [8] and there was no cogent evidence.

19. It was not accepted that the appellant's entry was in 2001 and it is unclear why evidence was produced for the hearing, as the judge pointed out, specifically to deal with that issue and detailed submissions were made on that point if this was not in issue; on this basis thus the judge proceeded.

20. Mrs Nolan referred to **Rauf v Secretary of State for the Home Department [2019] EWCA Civ 1276**, [28]. It was clear that the appellant was able to make submissions and the judge was invited to accept the previous FtT decision of Judge Housego as set out at [8] and [10]. As per [28] of **Rauf** the appellant had not been denied an opportunity to make representations about the concession, the appellant had that opportunity.

21. Mr Malik responded that the decision letter clearly showed that it was not just a recitation of the appellant's claim but showed that there was consideration. Mrs Nolan had made no submissions on what had appeared at page 9 of the Secretary of State's decision which clearly stated the appellant had resided in the UK for over nineteen years and it was accepted that he had a private life. This was not merely a repetition of the appellant's claim. I was also invited to look at the third paragraph of the decision letter on page 9 which clearly stated in terms that the appellant had been in the UK for nineteen years.

22. If this was an application to withdraw the concession the judge was obliged to decide it at the outset of the hearing. There was no application made at any stage and Mrs Nolan's submissions were directly contrary to three different authorities that there had to be an application to withdraw a concession. In **Rauf** there was a withdrawal of a concession and it was well settled that there had to be an application and that if a concession is made it was ultimately for the judge to decide.

23. There was no engagement with [11] and [12] of his (Mr Malik's grounds) such that there should be a formal application and an explanation of why it was made and why it was just and fair to withdraw it. The Secretary of State was not saying there was a mistake made, it was merely saying that no concession was made. That was incorrect.

24. Further, there was no answer to the submission made in [14] of the grounds. Even if there was an application to withdraw there was no engagement as to the relevant matters by the judge and that made the decision wrong in law.

Analysis

25. The law is well settled in the event of a concession; a formal and timely application should be made to withdraw a concession on the facts, as per **AM (Iran)**, **Kalidas (agreed facts – best practice) [2012] UKUT 00327** and **IM (Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 626.**

26. As stated at [44] in **AM (Iran)**

> *"One would expect those who seek to withdraw a concession to explain both promptly and frankly why the concession was made, why it was mistaken and why it is now just and fair that they be allowed to withdraw it".*

27. At [28] of **Rauf v Secretary of State for the Home Department** held:

> *"The principle to be applied was extracted from a decision of Goldring LJ in NR (Jamaica) v SSHD [2009] EWCA Civ 856 which is summarised at [18] of CD (Jamaica) in the following terms:*

> *'The real question that the tribunal had to determine was whether all the essential issues in the case could fairly be resolved by allowing the concession to be withdrawn or whether the prejudice was such, and the damage to the public interest such, that the Secretary of State should not be allowed to withdraw the concession'".*

28. At page 8 of the reasons for refusal letter the Secretary of State set out the appellant's claim and stated "From the information provided it is noted that you claim to have entered the UK on 01 June 2001" but the respondent then recited paragraph 276ADE(1) of the Immigration Rules. Underneath those Rules the Secretary of State specifically states:

"You are aged 41 years old and have resided in the UK for a continuous period of 19 years and 6 months. Therefore, you are unable to meet paragraph 276ADE(1)(iii), (iv) and (v)".

29. The decision letter proceeds "In considering whether you would qualify for limited leave to remain under paragraph 276ADE(1)(vi), it is noted that you entered the UK when you were 22 years old".

30. It is clear from the reasons for refusal letter, therefore, the relevant sections, which I have underlined, that a view was taken on the age of the appellant and his period of residence in the UK and a conclusion reached in relation to each of the immigration rules. That was in relation to paragraph 276ADE(1)(iii) as to whether the appellant had lived continuously in the UK for at least twenty years. As he had not resided for 20 years or for half his life, further to paragraph 276ADE(1)(iv) he was considered unable to meet paragraph 276ADE.

31. Again, at page 9 the refusal letter states "As you have resided in the UK for over 19 years it is accepted you have established a private life". ... "It has been determined that despite your 19 year residence in the UK, that you would be able to re-establish a private life upon your return to your country of origin".

32. Nevertheless, the judge recorded at [11] of his determination in relation to a previous FtT decision touching on the appellant's length of residence in the United Kingdom, that Judge Housego found "The appellant came to the UK unlawfully on a date unknown, as an economic migrant, and has remained in the UK since". The judge stated "Accordingly I find that, subject to a further submission made by Mr Malik, the date of the appellant's arrival is a matter at large on which I do need, given the date of the hearing before me, to make a finding".

33. The hearing took place on 3rd March 2022. The judge found at [12] and [13] (which I repeat for convenience) as follows:

> *"12. That further submission was that the respondent had consistently accepted, before Judge Housego and in the current refusal letter, that the appellant came here in June 2001. The references to his length of stay here and to his age on arrival only made sense on that basis. At no point had the respondent expressly challenged that date. He referred me to Rule 24 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. That requires the respondent, at paragraph (1), to provide to the Tribunal a copy of the notice of decision and any other*

> *document provided to the appellant and giving reasons for the decision and further, at paragraph (2), if the respondent wishes to change or add to the reasons in the documents provided under paragraph (1) he must provide a statement to the Tribunal and the other party of whether he opposes the appellant's case and the reasons for such opposition. In the absence of such further statement he submitted that the respondent was bound by her own acceptance of the June 2001 arrival.*
>
> *13. There are in my judgment two answers to this submission. The first is that a notice of decision is not akin to a pleading in civil proceedings, by which a party is thereafter likely to be bound. If the respondent wishes to alter or add to the reasons for a decision there is always a discretion to permit that. It may well be, if the application is made only at the hearing, that justice will require the grant of an adjournment, so that the new ground can be properly formulated and the appellant be given the opportunity to respond. That in turn may have costs consequences. The second point is that in the review, which is dated 13th October 2021, the respondent expressly says that it is accepted that the appellant has been here continuously since his first application in July 2006 but it is not conceded that he has been here since June 2001. The respondent did thereby make clear that this was a matter in issue, and the appellant has included in the bundle evidence to address the issue. I therefore remain of the view that the date of arrival is a matter at large and awaiting my decision on the evidence, rather than on any form of estoppel".*

34. In relation to the reasons for refusal letter, the judge does not specifically state no concession was made in the refusal letter but seems to consider that the matter remained at large and even if a concession was made that the respondent can simply alter her position. The judge needed to be clear, particularly in the circumstances of this particular decision letter, on that point of concession.

35. Secondly the judge needed to consider the matter of the mode of withdrawal and whether, in the light of the authorities, whether there had been an application to withdraw the concession. That should have been canvassed at the hearing.

36. Rule 24 specifically notes at [24(3)] that:

> *"The documents listed in paragraph (1) and any statement required under paragraph (2) must be provided in writing within 28 days of the date on which the Tribunal sent to the respondent a copy of the notice of appeal and any accompanying documents or information provided under rule 19(6)".*

37. The difficulty with the Rule 24 notice as served in this case is that it does not expressly make any reference to a withdrawal of any concession, or an application to do so; it simply makes a blanket denial in relation to residence and states "With no evidence of legal entry it is not conceded that the appellant has been in the United Kingdom since January 2001, although it is accepted the appellant has continually resided in the UK since his first application to the Home Office dated 13th July 2006". That was a clear contrast to the decision letter under appeal.

38. Even if the Rule 24 notice is a vehicle which may be used to make an application to withdraw a concession, and Mr Malik contends that it is not, that was not clear on the face of the notice.

39. The judge in response to the review merely states first that the respondent if she wishes to alter or add to the reasons to a decision, then there is a discretion to permit that, but the appellant should be given the opportunity to respond. The judge did not address at the hearing the questions of timeliness or prejudice.

40. On the one hand therefore, the judge appeared to be stating that there was a concession but that an application did need to be made to withdraw it [13].

41. On the other hand the judge appeared to find that through the Rule 24 notice the Secretary of State could simply informally withdraw any concession. The judge's decision adopted a conflicting approach. Despite there being no formal application in accordance with the relevant authorities, the judge treated the review of Mr Malik's skeleton argument as a response from the appellant on the issue but failed to engage properly with the matter of application for withdrawal of concessions and failed to apply relevant principles.

42. I find a procedural error in the decision for the reasons given. The grounds of appeal are well made Effectively the judge failed to follow relevant caselaw. As I pointed out at the hearing if there was a procedural error in this matter it should be remitted back to the First-tier Tribunal for determination and that was agreed by both Mr Malik and Mrs Nolan.

43. For the reasons I have set out I find a material error of law and the matter should be remitted to the First-tier Tribunal.

Helen Rimington

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber

16th February 2023