IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006694
First-tier Tribunal No:
HU/51007/2021
IA/06788/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7th June 2024

Before
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between
ALHASSAN SURAGE
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr H Kannangara, Counsel, instructed by Sipio and Co
For the respondent: Mr D Wain, Senior Presenting Officer

Heard at Field House on 29 May 2024

DECISION AND REASONS

Introduction

1. The appellant, a citizen of Ghana, appeals against the decision of First-tier Tribunal Judge G Richardson ("the judge"), promulgated on 9 June 2022 following a hearing on 22 April of that year. By that decision, the judge dismissed the appellant's appeal against the respondent's refusal of his human rights claim.

2. Permission to appeal was granted by the First-tier Tribunal 7 September 2022. It is unclear to me why it has taken so long for this case to progress through the system.

3. The relevant history can be summarised as follows. The appellant originally came to the United Kingdom in 1991 as a visitor. He overstayed and then unsuccessfully claimed asylum in 1993. For reasons which have not been explained, he was made the subject of a deportation order in July 1998. In consequence thereof, the appellant was removed from the United Kingdom 12 May 1999. On what for present purposes I will describe as an unknown date in 2000 (I will return to this issue later), the appellant re-entered the United Kingdom in breach of the deportation order. On his case, this occurred on 1 January of that year and he has resided in this country continuously ever since. It is common ground that the appellant made an application for leave to remain on 2 October 2000 and that this was refused on 21 May 2004.

4. It was the appellant's claimed long residence which formed the basis of the human rights claim made on 20 May 2020 by way of an application for leave to remain based on private life outside of the Immigration Rules (no family life issues have ever been raised by the appellant).

5. In refusing that claim on 26 of March 2021, the respondent did not accept the claimed continuous residence, although no reasons for provided for that conclusion. It was expressly stated that there were no suitability issues. The respondent concluded that there would be no very

significant obstacles to the appellant re-integrating into Ghanaian society. Finally, it was concluded that there were no exceptional circumstances.

The judge's decision

6. The judge identified the three issues to be determined as: (a) whether the appellant had resided continuously in United Kingdom for 20 years or more, with reference to paragraph 276ADE(1)(iii) of the Rules (as they then stood - the equivalent provision is now contained in Appendix Private Life, which was introduced in March 2022, although paragraph 276ADE(1) still applied in the appellant's case because the date of his application); (b) alternatively, whether paragraph 276ADE(1)(vi) could be set aside with reference to the very significant obstacles test; and (c) alternatively, whether removal to Ghana would violate Article 8.

7. The judge summarised the evidence before him, noting the attendance of four supporting witnesses.

8. Referring to the parties' submissions, the judge recorded that the Presenting Officer and focused his attention on the period 2002-2009 because the absence of evidence relating to those years was "most telling". The Presenting Officer raised concerns with the witnesses' evidence. On the appellant's behalf, Counsel had submitted, along with other points, that photographs contained in a supplementary bundle were supportive of the claimed residence between 2000 and 2020.

9. At [15] the judge did not accept that the appellant had arrived in this country on 1 January 2020 because the use of his own passport would have alerted the attention of the immigration authorities given that the appellant's the subject of a deportation order. The judge appeared to accept that the appellant had been in this country in 2002 on the basis of GP records: [16]. In the same paragraph, the judge referred to the

respondent's May 2004 refusal of the appellant's October 2000 application and then stated that, *"... It would appear that at this point [the appellant] had no contact with the respondent as he decided not to sign on as required, possibly fearing that he might face removal*." The judge was unimpressed by the witnesses' evidence and placed little weight on the letter from an individual who had not attended the hearing: [16]-[17].

10. The photographic evidence referred to previously was dealt with very briefly at [18], it being said that they included "*nothing*" to show that the appellant was in the United Kingdom between 2002 and 2009. At [19], the judge appellant's submission that it was implausible that the appellant could have left the United Kingdom again and then re-entered during the 2002-2009 period. The judge concluded that the unlawful re-entry following the 1999 deportation indicated that the appellant might have been able to find a way of achieving several re-entries.

11. Accordingly, the judge concluded that the appellant had failed to demonstrate 20 years' continuous residence in this country.

12. The very significant obstacles issue was addressed at [21]-[24], with the judge concluding that the threshold had not been met. That particular conclusion is not the subject of challenge before me.

13. In respect of the required Article 8 exercise outside of the limited scope of the Rules, the judge said only this: "*The appellant has failed to provide any further evidence which would go towards his appeal being allowed outside of the immigration rules under article 8 ECHR and I can find no basis for allowing the appeal on this ground*."

14. The appeal was accordingly dismissed.

The grounds of appeal

15. Two grounds of appeal were put forward. First, it was said that the judge failed to undertake any or any adequate proportionality exercise under Article 8, with reference to [25]. Secondly (although this ground should probably have constituted the first), the judge had (a) failed to address relevant evidence on the 20 years' residence issue, (b) failed to take account of the difficulty in obtaining supporting documentary evidence for a person unlawfully in this country, (c) failed to make necessary findings of fact in relation to when the appellant had re-entered following his deportation in 1999 and what his period of residence actually was, and (d) wrongly accepted the respondent's speculative submission as to the appellant's ability to leave and then re-enter this country on multiple occasions.

16. Permission was granted on both grounds.

Rule 24 response

17. The respondent did not provide a rule 24 response in this case.

The hearing

18. At the outset of the hearing, Mr Wain conceded that the judge had erred as alleged in the first ground of appeal. It was accepted that, notwithstanding the conclusions on the 20 years' residence issue, the judge had failed to undertake an adequate proportionality exercise under Article 8.

19. Mr Wain did, however, oppose the second ground of appeal.

20. Mr Kannangara submitted that the respondent had in fact accepted that the appellant was in United Kingdom at some point prior to making the application at the beginning of October 2000 and the judge should have expressly found that as a fact. The photographs referred to at [14]

were, it was submitted, important evidence. They indicated that the appellant had been in this country in 2003, 2004, in 2005. In addition, a letter from the respondent to the appellant's local MP had stated that, following the May 2004 refusal, the appellant had "then absconded". This suggested that the appellant had been in contact with the respondent prior to that point, which in turn supported residence within the disputed period of 2002-2009.

21. Mr Wain confirmed that the appellant had not made a Subject Access Request for information relating to contact with the respondent at the relevant time. The burden had been on the appellant to prove his case. There had been no further applications made to the respondent between May 2004 and June 2009. The judge had considered the evidence as a whole and had been entitled to reach the conclusion that he did in respect of the long residence issue. The photographs had not been referred to in the appellant's skeleton argument and it was not clear that they had been specifically referred to at the hearing.

22. When I pressed Mr Wain about possible contact between the appellant and the respondent prior to the May 2004 refusal, he informed me that the appellant had "stopped reporting" at that point in time.

23. At the end of the hearing I reserved my decision.

Conclusions

24. I am satisfied that the respondent's concession in respect of the first ground of appeal was properly made. Indeed, it corresponds with my provisional view that the judge had not adequately addressed Article 8 outside the context of the Rules. On the assumption that there was private life and that Article 8(1) was engaged, the judge was required to do more than simply state that there been a failure to provide any further evidence which would justify allowing the appeal.

25. Accordingly, the appellant's appeal succeeds in respect of the first ground.

26. In respect of the second ground of appeal, I remind myself of the need to exercise appropriate judicial restraint before concluding that there has been a material error in the judge's decision. I have read that decision sensibly and holistically. In so doing I have also done my best to ascertain what evidence and/or submissions were specifically addressed leading up to and including the hearing below.

27. The judge was entitled to essentially reject the witnesses' evidence and indeed there has been no specific challenge to that finding. It is implicit in the judge's overall assessment of the long residence issue that he also deemed the appellant's own evidence to be unreliable. This all forms part of the context in which to consider the challenges which have been put forward by the appellant.

28. Having regard to the documentary materials before the judge and what is said at [20]-[21] of the grounds of appeal, I am satisfied that it was the respondent's position that the appellant had been in the United Kingdom at some point in 2000 prior to 2 October, when he made the application for leave to remain. Whilst that did not of course mean that the appellant was here on 1 January 2000, as claimed, it was in my view a relevant fact accepted by the respondent which should, in the absence of express and cogent reasons to the contrary, have been acknowledged by the judge. In the event, there was no finding as to when the appellant re-entered the United Kingdom.

29. On the basis that the respondent had accepted presence in this country prior to 2 October 2000, the judge's failure to have made a finding on the point was an error. Standing alone, it is not a material

error because there was a dispute as to the continuous nature of the residence with specific reference to the period 2002-2009.

30. With the above in mind, I turn to the photographs. I am satisfied that they were before the judge (contained in the supplementary bundle) and that they were referred to, at least in oral submissions: [14]. I acknowledge that they do not appear in the list of evidence referred to in the appellant's skeleton argument (the ASA) and that is not indicative of the clear and comprehensive presentation of a case before the First-tier Tribunal: see, for example, Lata (FtT: principle controversial issues) India [2023] UKUT 00163 (IAC).

31. It is clear that the photographs show the appellant. Only three are potentially relevant. The first to which I was referred showed the appellant in what appears to be a photographic shop. A sticker on the door of the shop was for the "Back the Bid" campaign which led up to the 2012 Olympic Games been awarded to London in July 2005. Mr Kannangara submitted that this was at least indicative of the appellant being in the United Kingdom prior to July 2005.

32. That the sticker was on the shop door did not necessarily mean that the photograph was taken in 2005 or the preceding years. It could have simply been left on after the Games were awarded to London. Further, I cannot be *certain* that the specific point made by Mr Kannangara about the significance of the photograph had been put to the judge (he did not appear below). Having said that, the photographs were referred to before the judge and it is in my judgment unlikely that the one in question would have been overlooked: after all, it was one of only three which were potentially capable of supporting the appellant's claim (the others simply being photographs of him in various locations without any temporal point of reference). I also take account of the fact that Counsel who appeared below also drafted the grounds. It would have

been contrary to their professional duties to the Tribunal to provided misleading assertions in the grounds.

33. The second photograph is relevant because of its reverse, which confirms a printout date of 2003. I am satisfied that the front of the same photograph shows the appellant and that it seems clear that it was taken in the United Kingdom. Again, whilst I cannot be certain that this was specifically pointed out to the judge, it is likely that it was.

34. The third photograph is similar to the second, albeit that the printout date is given as 2005. Again, I am satisfied that the judge was probably referred to it.

35. In light of the above, I am satisfied that the judge either overlooked the potential significance of the photographs, or failed to explain why, if he had considered them, they added "*nothing*" to the appellant's claim. Although they clearly would not have covered each and every year in respect of the period 2002-2009, they might have gone to show residence within that block and that in turn could have been relevant to the overall assessment of continuous residence.

36. I conclude that the judge has erred in respect of his consideration of the photographs.

37. The final point relates to the respondent's refusal of the appellant's October 2000 application. It is clear that the decision was issued in May 2004. It is unclear as to how that decision was served on the appellant. In any event, the letter to the appellant's MP, dated 17 June 2013 (which is referred to in the grounds), states that the appellant "then absconded" following the refusal of his application. Although it is unclear whether the judge had this letter in mind or whether he gleaned the information from another source, he took the view that the appellant had ceased reporting to the respondent as required: [16]. At the hearing before me, Mr Wain

confirmed that the appellant had indeed ceased reporting from May 2004.

38. The relevance of the above is that it appears to have been accepted that the appellant was reporting up until May 2004, which in turn would have placed him in the United Kingdom prior to that date and (applying uncontroversial general knowledge) that that presence would have been such as to accommodate regular reporting events. The judge did not appear to factor this into his overall assessment of the appellant's claimed residence. In the context of this case, that was an error.

39. The errors I have identified above do not relate to the entire period between 2002 and 2009. However, I am satisfied that taken together they are material. The evidence relating to the errors was capable of demonstrating residence in the United Kingdom of a more sustained nature than the judge appears to have accepted. Indeed, in the absence of clearer findings, it is difficult to discern what residence the judge did in fact accept.

40. Overall, I am satisfied that the second ground of appeal is made out.

41. In the exercise of my discretion, I set the judge's decision aside.

Disposal

42. If all that had to be redetermined was the proportionality exercise under Article 8, I would have retained this appeal in the Upper Tribunal. However, there will now need to be a full fact-finding assessment of the appellant's claimed long residence in this country. Although I acknowledge that certain findings have not been challenged, it is not appropriate to preserve anything from the judge's decision: to do otherwise would create artificial difficulties when this case comes to be looked at again.

43. I conclude that remittal to the First-tier Tribunal is the appropriate course of action.

Anonymity

44. No anonymity direction has been made in this case thus far and there is no basis on which to do so now.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal.

Directions to the First-tier Tribunal

1. This appeal is remitted to the First-tier Tribunal (Taylor House hearing centre) to be heard by a judge other than First-tier Tribunal Judge G Richardson;

2. There are no preserved findings of fact;

3. On remittal, the First-tier Tribunal will be concerned with: (a) whether the appellant can demonstrate at least 20 years' continuous residence in the United Kingdom; or (b) whether there would be very significant obstacles to his reintegration into Ghanaian society; or (c) whether removal would violate Article 8.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 30 May 2024