Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13759/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 April 2018	**On 25 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MR ANTHONY MBIYU MURATHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Solanki, Counsel, instructed by Pickup Scott Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellant to the decision of First-tier Tribunal Judge Heatherington (the judge), promulgated on 12 July 2017, in which she dismissed the Appellant's appeal against the Respondent's decision of 17 May 2016, refusing his human rights claim, which had in turn been made on 21 April 2016.

2. That human rights claim was essentially based on two matters: first, the Appellant's long residence in the United Kingdom, such that paragraph 276ADE(1)(iii) of the Rules was satisfied; second, that the Appellant had a genuine and subsisting parental relationship with a child in the United Kingdom. In refusing the claim, the Respondent had not accepted that child was either in the United Kingdom, or if they were, that the Appellant had a relationship with them. In addition, the Appellant's continuous residence in this country since his claimed entry in 1992 was rejected on the basis of insufficient evidence.

The judge's decision

3. The judge's findings of fact are set out at [10.3] of her decision. At [10.3(a)] the judge finds that the Appellant did not have a genuine and subsisting parental relationship with his daughter. At [10.3(b)] she effectively finds that the evidence before her was enough to show that the Appellant had lived continuously in the United Kingdom between 1992 and 1997, and then from January 2002 until the present day. However, at [10.3(c)] the judge finds that the Appellant could not account for the four years between 1998 and 2001. There was a lack of documentary evidence covering this period and the judge observes that she had some sort of particular knowledge arising from her unidentified work (presumably from outside of the Tribunal) that border controls in this country are "ineffective" and that the Appellant might have been able to leave this country and re-enter at some point during this four year period. In [10.3(d)] a witness, Ms Mbiyu, is referred to. The judge says nothing about any adverse view of her credibility but then concludes that she was "not persuaded" by the witness's evidence. Then at [10.3(e)] she states that: "I cannot rely on his [the Appellant's] evidence to be credible or trustworthy, considering the lack of documentary evidence and the evidence as a whole. I am not satisfied that the Appellant has made out his claim". The judge goes on to look at other issues in the context of the Article 8 claim outside the scope of the relevant Rules. She concludes that there was nothing compelling in the case.

The grounds of appeal and grant of permission

4. The succinct grounds essentially make three points: first, that the judge effectively required documentary evidence about residence, and was wrong to have done so; second, the judge failed to give any reasons for rejecting the evidence of Ms Mbiyu; third, the judge entirely ignored the evidence of another witness, Mr Jefar.

5. Permission was initially refused by the First-tier Tribunal but then granted by Upper Tribunal Judge Perkins on 25 January 2018.

The hearing before me

6. Ms Solanki relied on the grounds of appeal with reference to [10.3(c)] and [10.3(e)]. She submitted that the judge had effectively treated the absence of documentary evidence covering the four-year period to be decisive or at least to carry an impermissible degree of weight. Alternatively, there was an absence of adequate reasons as to why the lack of documentary evidence for this period was deemed so important when there had been no reasons provided as to why the Appellant's own evidence was unreliable and/or that a gap in the documentary evidence between 2004 and 2005 had not resulted in an adverse finding on the continuity of residence. In respect of the witness's evidence, Ms Solanki reiterated what is said in the grounds.

7. Mr Tufan did not seek to oppose the Appellant's challenge with any vigour. He recognised that the judge had failed to deal with Mr Jefar's evidence at all and did not seek to argue that there were any reasons provided for rejecting the evidence of Ms Mbiyu either. He accepted that the evidence from both witnesses was potentially

material to the core issue in the appeal, namely the Appellant's lengthy continuous residence in this country.

Decision on error of law

8. As I announced to the parties at the hearing I conclude that there are material errors of law in the judge's decision.

9. In my view the judge erred in her approach to the issue of documentary evidence. It was clearly the case that she accepted the existence of documentary evidence covering a period both before and after the four year gap in question (see [10.3(b)]). It is also the case that a gap in that evidence for 2004/2005 had not prevented her from concluding the existence of continuous residence for that time. In light of this, the fact that the Appellant had not been lawfully resident in the United Kingdom and the difficulties in obtaining formal documents as a result (as acknowledged in case law including the judgment in Khan cited in the grounds of appeal), the judge has either effectively required corroborative documentary evidence of the Appellant or has provided insufficient reasons as to why the absence of such evidence was, if not fatal, of such significance in the Appellant's case.

10. Of more importance, is the judge's approach to the witness's evidence. I conclude that the errors here are of themselves sufficient to render the decision unsustainable. Having read the witness's evidence for myself I am satisfied that it was relevant to the core issue of continuous residence, including the period in question. With reference to [10.3(d)] there is no suggestion, at least no adequate reasons provided, as to why Ms Mbiyu's evidence was deemed to be untruthful or unreliable in any way. There is no adequate reason given as to why the judge was "not persuaded" by the witness's evidence. In respect of Mr Jefar, there is simply no reference to his evidence whatsoever. There are no other findings which would, of themselves, have rendered his evidence immaterial to the core question in the appeal.

11. In light of these errors I set aside the judge's decision.

Re-making the decision

12. Both representatives were agreed that I should re-make the decision on the evidence now before me. That evidence includes the following:

    (a) the bundle which was before the First-tier Tribunal;

    (b) a supplementary bundle, which was also before the First-tier Tribunal, including the evidence of Ms Mbiyu and Mr Jefar;

    (c) two Abbey National passbooks, admitted by me and without objection under Rule 15(2A) of the Upper Tribunal (Procedure) Rules 2008 in the name of the Appellant and showing numerous transactions between the period 21 July 1999 and 1 September 2001, and again between 18 November 2004 and 28 November 2005 (copies of this evidence are now on file).

13. Ms Solanki submitted that the appeal should be allowed outright with reference to paragraph 276ADE(1)(iii). The Appellant had shown more than twenty years' continuous residence in the United Kingdom as at the date his human rights claim was made in April 2016.

14. Mr Tufan had nothing to add. He confirmed that he was making no challenge to the passbook evidence.

Findings of Fact

15. I make the core finding of fact: it is more likely than not that the Appellant arrived in the United Kingdom in 1992 and has resided here continuously ever since. I make this finding based upon the following matters.

16. First, there is no reason whatsoever to disturb the finding of the judge that the documentary evidence shows continuous residence between 1992 and 1997. Having seen the evidence for myself this includes the making of an asylum claim and a conviction relating to a driving offence in 1996. For my part I am more than satisfied that the evidence as a whole supports the fact of continuous residence throughout this period.

17. Second, there is also no reason to disturb the finding by the judge that the Appellant has been continuously resident in the United Kingdom from January 2002 to the present day. This is fully supported by documentary evidence originally before the First-tier Tribunal but also now by the second of the two passbooks which clearly shows numerous transactions (both deposits into the accounts and withdrawals at ATMs) during the course of 2004 and 2005. I accept that these transactions were all undertaken by the Appellant himself.

18. Third, the gap of four years between 1998 and 2001 has, I find, been satisfactorily addressed. The first passbook shows numerous transactions during the period 1999 to 2001. I accept that the transactions were undertaken by the Appellant himself. In addition, it is a fact that numerous sources of documentary evidence have been provided in respect of the previous period and a subsequent period. Given that there is no requirement for corroborative documentary evidence, and taking everything into account, there is more than enough before me to draw a perfectly reasonable inference that the Appellant was in the United Kingdom continuously during this period. I specifically reject the suggestion that the Appellant had somehow managed to leave the country and re-enter at any time.

19. Fourth, there is nothing in the Appellant's own evidence to materially undermine any of the evidential sources before me. Indeed, I have no reason to doubt the reliability of his evidence in any way.

Conclusions

20. I turn to paragraph 276ADE(1)(iii) of the Rules. These Rules are put in place by the Respondent and show where she believes the fair balance to have been struck as

between the important public interest on the one hand, and the rights of individuals on the other. There is no suggestion by the Respondent in this case that the Appellant need show anything more than the satisfaction of relevant provisions in order to succeed in his Article 8 claim.

21. I have found that the Appellant was residing in the United Kingdom continuously from 1992 to the present day. That means, at the time he made his human rights claim on 21 April 2016, he had already been in this country for twenty-four years. On that basis the provision under the Rules is met. The Appellant is entitled to succeed on this basis alone.

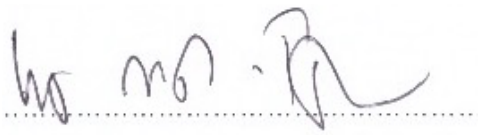
22. There is no need for me to go on and consider the wider Article 8 issues outside the context of the Rules.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I re-make the decision by allowing the Appellant's appeal. The Respondent's refusal of the Appellant's human rights claim is unlawful under Section 6 of the Human Rights Act 1998.

No anonymity direction is made.



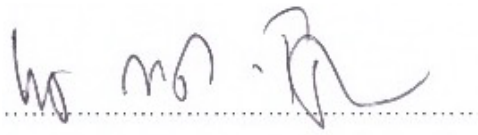
Signed Date: 23 April 2018

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a reduced fee award of £70.00. Although the Appellant has succeeded, the case required an appeal hearing and relevant evidence in the form of the passbooks was only adduced late in the day.



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Deputy Upper Tribunal Judge Norton-Taylor