



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05458/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC
On April 3, 2019

Decision & Reasons Promulgated
On April 23, 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR TALIBOUYA BARROW
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Gilani, Legal Representative

For the Respondent: Mr Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Gambia and claimed to have arrived in the United Kingdom on October 30, 1992. On October 4, 2014, the appellant applied to remain in the United Kingdom outside of the Immigration Rules on compassionate grounds, but this was refused on December 24, 2014 with no right of appeal and an application for reconsideration of that decision was rejected on June 4, 2015.
2. On August 7, 2015, the respondent served the appellant with a notice of liability for removal and placed him on reporting restrictions. He lodged an application for asylum on June 1, 2016 but this was treated as withdrawn on January 11, 2017 as he

failed to comply with the processing of his claim. He was subsequently detained on February 8, 2017 and applied to remain on human rights grounds on February 19, 2017.

3. The respondent refused that application on February 27, 2017 on the grounds:
 - (a) He had failed to identify any claim under Appendix FM of the Immigration Rules.
 - (b) In rejecting his claim under paragraph 276ADE HC 395 the respondent rejected his claim to have been in the United Kingdom since 1992 and found there were no “very significant obstacles” to his reintegration into life in the Gambia.
 - (c) The respondent considered his claim under paragraphs 276A-276D HC 395 but concluded that as the respondent only accepted, he had been in this country since October 2014 he failed to meet the 10-year continuous lawful residence role set out in paragraph 276B HC 395.
4. The appellant left the United Kingdom on March 8, 2017.
5. The appellant lodged an appeal of March 31, 2017 under section 82(1) Nationality, Immigration and Asylum Act 2002 and his appeal came before Judge of the First-tier Tribunal Robertson on May 10, 2018 who in a decision promulgated on July 2, 2018 dismissed his appeal.
6. Permission to appeal was sought on July 13, 2018 and permission to appeal was granted by Judge of the First-tier Tribunal Simpson on August 8, 2018. The matter came before me on January 7, 2019 for an error of law hearing and after hearing submissions from Ms Gilani I concluded there had been an error in law.
7. I adjourned the matter and directed the appellant’s representatives should make enquiries with HMRC and the appellant’s bank, if possible, to verify what he was claiming about both his National Insurance numbers and what evidence, if any, was used to open the account. I stressed the failure to obtain such evidence would not be fatal to his appeal, but it could assist him.
8. I also indicated that if the appellant could demonstrate he had been in this country since 1997 then unless Sections L-LTR 1.1 to 2.2 and S-LTR 3.1 and 4.5 of Appendix FM applied then the appellant would satisfy paragraph 276ADE(1)(iii) HC 395.
9. No anonymity direction is made.

PRELIMINARY ISSUES

10. Ms Gilani indicated to me that neither she nor her client had contacted either HMRC or the bank to clarify the issues raised following the last hearing. Ms Gilani stated she intended to argue that if the respondent alleged the documents were false then he bore the burden of proof.

11. I pointed out to Ms Gilani that the respondent was not arguing they were forgeries but was inviting the Tribunal to consider the same in the round which was different to alleging they were forgeries.
12. Mr Howells confirmed that no reliance was placed on Sections L-LTR 1.1 to 2.2 and S-LTR 31.1 and 4.5 of Appendix FM of the Immigration Rules but submitted the respondent did not accept the appellant had been here since February 20, 1997 and therefore the appellant could not succeed under paragraph 276ADE(1)(iii) HC 395.

SUBMISSIONS

13. Mr Howells relied on the decision letter and submitted the appellant had failed to demonstrate he had accrued 20 years continuous residence prior to the date of his application. Whilst he claimed to have entered the United Kingdom in 1992, he had made no application to regularise his status until 2014. Whilst there was evidence of him being here since 2004 there was insufficient evidence to support his claim he had been residing here continuously prior to that date and in particular between 1997 and 2004.
14. The FTT Judge had given little weight to the evidence of the witness and the adverse finding on the witness evidence (see paragraph 8 of the FTT Judge's decision) had not been challenged.
15. This Tribunal had to consider today's appeal on the documents before it. Whilst there were almost 500 pages of evidence most of those documents were from 2003 onwards and there were only a small number of documents (at pages 36-44a) from prior to 2003 and they took the form of sporadic wage slips and envelopes.
16. The appellant claimed these documents were provided by his friends, but he had adduced no reliable evidence to support this claim especially as the FTT Judge had rejected the witness evidence at the FTT hearing.
17. The wage slips he had provided contained three different national insurance numbers and whilst he claimed he had been given a temporary national insurance number between 1997 and 2004, many (between 1997 and 2003) were not compatible with a policy document relied on by the appellant because they had too many numbers (8 instead of 6). He now blamed the employer for putting too many numbers in the temporary number but had adduced no evidence to support his claim these numbers were attributable to him. As there was no reliable evidence of residence prior to 2003 he could not satisfy paragraph 276ADE(1)(iii) HC 395.
18. Mr Howells further argued that he could not succeed under paragraph 276ADE(1)(vi) HC 395. At paragraph 37 in the decision of Treebhawon and others (NIAA 2002 Part 5A-compelling circumstances test) [2017] UKUT 12 (IAC) the Tribunal looked at paragraph 276ADE(1)(vi) HC 395. The Upper Tribunal made clear there was an elevated threshold and Mr Howells submitted there was no evidence he satisfied this elevated threshold or that he would be unable to return to Gambia (he was now living there).

19. Finally, if the appellant's appeal was considered outside of the Immigration Rules he argued Section 117B(4) of the 2002 Act must apply as he was here unlawfully and this outweighed his claim that refusing him entry was disproportionate.
20. Ms Gilani invited me to allow his appeal. In response to Mr Howell's submission on the wage slip on page 36 she submitted the employer had simply used his full date of birth, which the document she relied on suggested was acceptable. If there was an error, it had been made by the employer.
21. The appellant had been unable to forward the papers himself because he was not allowed to appeal in-country and he had asked his friends to contact the landlord. His friend had given evidence in the First-tier Tribunal and this should be considered when assessing the weight to attach to the documents. Banking practices had changed from what they were 20 years ago.
22. If forgery was alleged, she submitted the respondent bore the burden of proof and relied on RP (proof of forgery) Nigeria [2006] UKAIT 00086 in which the Tribunal said that an allegation of forgery needs to be proved by evidence and by the person making it. A bare allegation of forgery, or an assertion by an Entry Clearance Officer that he believed the document to be forged can in these circumstances carry no weight. The respondent had not obtained a DVR report and had not satisfied the burden of proof placed on him.
23. Alternatively, she submitted he had nowhere to go in Gambia and no source of income and was living a life of poverty in Gambia albeit there was no up to date statement or evidence from him.

FINDINGS

24. I indicated during the hearing that the appellant's strongest argument was under paragraph 276ADE(1)(iii) HC 395 because he had now been living in the Gambia since March 2017 and had failed to provide any evidence that there were "very significant obstacles" capable of engaging paragraph 276ADE(1)(vi) HC 395.
25. The only written evidence provided by the appellant was contained in two statements-one contained in Appendix A on page 1 (dated April 30, 2018) and the other attached to the Rule 15 application and dated December 16, 2018). Neither statement addressed his situation in the Gambia or how he was supporting himself. Following the decision in Treebhawon I was not persuaded by Ms Gilani that paragraph 276ADE(1)(vi) HC 395 would be engaged.
26. The key issue was whether the appellant had demonstrated he had been living here since 1992 and more importantly had he been living here continuously since 1997. He had to demonstrate 20 years continuous residence in this country before the date he submitted his current application. The respondent did not dispute he had adduced evidence of working (he had not leave at the time) post 2003/2004 but argued there was no reliable evidence of him being here continuously prior to that date.

27. Having earlier found an error in law in the way the FTT Judge had addressed this issue, I had adjourned this case for further evidence.
28. The respondent did not accept, the pay slips, contained on pages 36-44a of the appellant's bundle, were reliable. Ms Gilani argued that the respondent had to prove the pay slips were forgeries, but I disagreed with that submission because that was not the respondent's case.
29. Mr Howell's case was that no weight could be attached to these documents because they were inconsistent with the evidence of what was required which was not the same as saying they were forgeries. It had been open to the appellant's solicitors to contact the HMRC to clarify the payslips or information. An answer from them may have assisted the appellant.
30. I have looked at the relevant payslips which are contained between pages 36 and 44a. They can be summarised as follows (date order):

| Page | Date | Amount showed |
|------|------------|--|
| 44 | 25/02/1994 | He was paid £1450 gross with no additional cumulative totals apart from £1450. The payslip had M14 as week for payment and tax code 810L. The National insurance number was [TN~B]. It was sent to him at [51 ~ London E6] |
| 43 | 29/12/1995 | He was paid £1450 gross with no additional cumulative totals apart from £1450. The payslip had M48 as week for payment and tax code 810L. The National insurance number was [TN~B]. It was sent to him at [51 ~ London E6] |
| 42 | 26/4/1996 | He was paid £1450 gross with no additional cumulative totals apart from £1450. The payslip had M40 as week for payment and tax code 810L. The National insurance number was [TN~B]. It was sent to him at [51 ~ London E6] |
| 41 | 29/08/1997 | He was paid £1450 gross with no additional cumulative totals apart from £1450. The payslip had M48 as week for payment and tax code 810L. The National insurance number was [TN~B]. It was sent to him at [51 ~ London E6] |
| 40 | 31/05/1998 | He was paid £1800 gross with no additional cumulative totals apart from £1800. The payslip had M5 as week for payment and tax code 810L. The National insurance number was [TN~B]. It was sent to him at [Flat # 41 ~ London E7] |
| 39 | 20/01/1999 | He was paid £1800 gross with no additional cumulative totals apart from £1800. The payslip had M13 as week for payment |

| | | |
|----|------------|---|
| | | and tax code 810L. The National insurance number was [TN~B]. It was sent to him at [Flat # 41 ~ London E7] |
| 38 | 30/06/2000 | He was paid £1800 gross with no additional cumulative totals apart from £1800. The payslip had M30 as week for payment and tax code 810L. The National insurance number was [TN~B]. It was sent to him at [Flat # 41 ~ London E7] |
| 37 | 30/03/2001 | He was paid £1800 gross with no additional cumulative totals apart from £1800. The payslip had M30 as week for payment and tax code 810L. The National insurance number was [TN~B]. It was sent to him at [Flat # 41 ~ London E7] |
| 36 | 29/11/2002 | He was paid £1800 gross with no additional cumulative totals apart from £1800. The payslip had M59 as week for payment and tax code 810L. The National insurance number was [TN~B]. It was sent to him at [Flat # 41 ~ London E7] |

31. In assessing how much weight can be attached to these documents I make the following findings:
- (a) There is only one wage slip for each year between 1994 and 2002. These cannot show continuous residence.
 - (b) The wage slips suggested he earned only the sum stated on them up to and including the date on the wage slips. There were no cumulative totals on any of those wage slips. There was nothing to suggest he earned anything more in those years.
 - (c) The tax codes were all the same between 1997 and 2002 namely 810L. I found this surprising because tax codes change in line with increases in taxable allowances issued by the government. Such an alteration in code did not appear on any of the aforementioned wage slips despite them spanning a seven year period.
 - (d) The code for payment week/month bore no relevance to when the date of payment, for example, the payment week for 25/2/1994 was M14.
32. The FTT Judge had rejected the witness evidence as unreliable and the NI numbers did not match the information in the guidance which suggests they should have six numbers and not 8 that most of these did. There were also multiple NI numbers issued to him albeit I accept that two such numbers reflected his date of birth.
33. The issue was whether weight could be attached to the above payments and I find in the absence of additional evidence from HMRC and taking into account the issues raised above I am satisfied the respondent was entitled to raise concerns about these documents.

34. As I am not satisfied the appellant has been in this country continuously from February 20, 1997 (working or otherwise) he cannot demonstrate he meets paragraph 276ADE(1)(iii) HC 395. He does not meet the Immigration Rules.
35. The remaining issue concerned whether there were exceptional or compelling circumstances justifying a grant under article 8 ECHR. He had been in this country unlawfully all his life. Any private life was created whilst here unlawfully. Section 117B(4) of the 2002 Act applies and little weight can be attached to this private life.
36. He has no other private life of any nature but does have a life in Gambia as evidenced by the fact he has re-established himself since returning in March 2017.
37. I do not find it would be disproportionate to refuse him entry or leave to re-enter and remain here.

DECISION

38. Although I previously found an error of law and I set aside the First-tier Tribunal's decision, I have remade the decision and I dismiss the appeal on human rights grounds.

Signed

Date 12/04/2019



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I do not make a fee award because I have dismissed the appeal.

Signed

Date 08/04/2019



Deputy Upper Tribunal Judge Alis