Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05978/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 October 2019	**On 11 October 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

ZU CHAO WENG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Ó Ceallaigh, counsel instructed by Londonium Solicitors
For the Respondent: Mr P Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Kaler, promulgated on 17 June 2019. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 12 August 2019.

Anonymity

2. No direction has been made previously, and there is no reason for one now

Background

3. On 29 September 2011 the appellant applied for leave to remain on long residency grounds in a false identity, that of a failed asylum seeker referred to as BXL, who made an asylum claim in March 1997. When detained on 23 March 2015, the appellant claimed to have illegally entered the United Kingdom during 1997 by ship. He made a human rights' claim in the name "Zuchao Weng", born in 1965. That claim was refused and certified as clearly unfounded. The appellant lodged seven sets of further submissions between 2016 and 2017, all of which were rejected under paragraph 353 of the Immigration Rules.

4. On 8 February 2018, the appellant sought leave to remain on human rights grounds in his own identity of Zu Chao Weng, born in 1969. It is the refusal of that application, by way of a decision dated 15 March 2019, which is the subject of this appeal. The substance of the appellant's human rights claim is that he relied upon his long residence as well as his relationship with a British partner, namely (BBL). The respondent noted the appellant's claim to have entered the United Kingdom on 9 May 1997 but commented that this had "never been confirmed with evidence." The respondent decided that the appellant could not meet the immigration status eligibility requirement because of his claim to have remained in the United Kingdom without valid leave for 7580 days. It was accepted that the appellant had a genuine and subsisting relationship with his partner but not that there were any insurmountable obstacles to family life continuing outside the United Kingdom. It was suggested that the appellant could apply for the correct entry clearance to return to this country. The application was refused with reference to R-LTRP 1.1(d)(ii) and (iii) of Appendix FM as well as 276ADE(1)(iii), (iv), (v) and (vi) of the Rules.

The hearing before the First-tier Tribunal

5. Following the hearing before the First-tier Tribunal, the judge accepted that the appellant had been residing in the United Kingdom since 1997 and working throughout most of that time, in differing identities. Nonetheless, she identified a gap in the evidence between 2003 and 2005 as well as inconsistencies in the oral evidence she heard and concluded that his residence was not continuous. Accordingly, the judge concluded that the appellant could not meet the requirements of 276ADE(1)(iii) or indeed all the requirements of any of the relevant Rules. She concluded that his Article 8 claim was not sufficiently strong to outweigh the public interest in immigration control.

The grounds of appeal

6. The grounds of appeal argued that the judge misdirected herself as to the oral evidence and that there were no inconsistencies. Reference was made to counsel's note of the proceedings.

7. A further misdirection identified was that of the judge's failure to refer to and make findings regarding the unchallenged evidence of BBL's daughter to the effect that the appellant was known to her since 2001 and that he had been living in the United Kingdom for 20 years. An additional challenge was raised to the judge's findings that BBL had not been truthful to the psychologist.

8. Permission to appeal was granted on the basis sought.

9. The respondent did not file a Rule 24 response.

The hearing

10. Mr Ó Ceallaigh submitted that the error of law concerned one key finding that the appellant had not established residence in the United Kingdom for the two financial years, covering 2003-2005. He made the following points. The judge failed to record the appellant's evidence correctly and she had failed to consider the witness evidence. In relation to the judge's recording of the evidence, at [18], she had wrongly noted that the appellant's oral evidence was that he had moved in with his wife before 2003. As the judge further noted, this was unlikely, as this was when the appellant's wife was living with her late husband. In the same paragraph, the judge had also noted the oral evidence of the appellant and written evidence of his wife that the appellant moved in with her in 2007/8. These findings were internally inconsistent. At [21] the judge applied the wrong test in saying that it could not be ruled out that the appellant may have left the UK between 2003 and 2005 and re-entered. The attendance note of counsel who presented the appeal listed the evidence taken and at no point had the appellant suggested that he had moved into his wife's home when her husband was alive. Counsel's note was more plausible than the judge's conclusions in that the note was internally consistent.

11. Mr Ó Ceallaigh stated that in any event, the events under consideration were now around fourteen years old. The appellant's adult stepdaughter K attended the hearing before the First-tier Tribunal and was cross-examined. Her evidence was that she had known the appellant since she was a child and that she knew him at the time of the period under consideration. There were also several other statements from people who had known the appellant for between fifteen and nineteen years. Furthermore, there was evidence from the appellant's home village committee which said that he had not returned there since 1995 and which confirmed that his parents were deceased. The latter point was relevant to the judge's finding that the appellant had family in China. The judge was wrong to reject the evidence of the appellant's wife regarding the feasibility of accompanying the appellant to China. The wife was from Vietnam, was a grandmother and there was unchallenged evidence that she suffered from a mental health condition.

12. For the respondent, Mr Singh said the following. The issue was the gap in residence and if an error was found in relation to the first ground, the remaining grounds need not be considered. The appellant's stepdaughter was aware that the appellant was in

the country continuously and, if accepted, this would mean that there was no need to look at the judge's consideration of the psychological report of the appellant's wife.

13. As he was without a verbatim note from the presenting officer who attended the hearing before the First-tier Tribunal, Mr Singh was unable to assist further.

Decision on error of law

14. In view of the contents of the attendance note of Mr Alexander Swain of counsel which makes no reference to the appellant living with his wife prior to 2007, which I could see no reason to reject, I accept that the judge erred in her recording of the oral evidence. Her record was inconsistent both the appellant's written and oral evidence and in fact made no sense as this would have meant the appellant living with his wife while her late husband was still alive. This error led to the judge finding that the appellant had not been honest about his presence in the United Kingdom between 2003-2005, a period when there was no supporting documentary evidence. The judge further erred in failing to consider the evidence of the appellant's stepdaughter K who is now aged 32. In her statement, she said that he was a family friend from 2001 and that he became her stepfather in 2007. That statement went unchallenged during the hearing. The evidence of the stepdaughter was clearly relevant and ought to have been taken into consideration by the judge in considering whether the appellant had given a credible account of being resident in the United Kingdom during 2003-2005. In these circumstances, I find that the judge made a material error of law and her findings relating to this period are set aside.

Remaking

15. Having found a material error of law, I proceeded to remake the decision, with all findings preserved other than those relating to the period 2003-2005. I invited further submissions from the representatives. Mr Ó Ceallaigh argued that it was clear that the appellant was residing in the UK either side of 2003-2005. The evidence of the appellant, his wife, stepchildren and other witnesses was consistent, plausible and pointed to continuous residence in the United Kingdom. In addition, his village committee in China confirmed that he had not returned there since 1995. It was far more likely that the appellant was residing in the UK than he briefly left. There was no reason for him to leave, no indication that he would take such a risk and no suggestion that he was able to come and go. There was no suggestion that he had left the UK at any time, all the evidence pointed one way.

16. In reply, Mr Singh stated that the only issue was whether I was satisfied that the appellant was present in the UK for twenty years including 2003-2005, bearing in mind that there were no official records for that time. He drew my attention to the evidence of the appellant's wife and supportive witness statements which covered that period of time. Nothing else was suggestive of the appellant leaving the UK. Mr Singh was content to leave the decision in my hands.

17. At the end of the hearing, I allowed the appeal on human rights grounds on the basis that I accepted that the appellant had resided in this country continuously for twenty years.

Decision on remaking

18. I adopt the unchallenged findings of First-tier Tribunal Judge Kaler set out at [15] of her decision as follows; "*I accept on the basis of the documentary evidence that the Appellant has been in the UK since sometime before 20/08/1997. I accept that the Appellant had entered the UK 20 years before he submitted the application.*" Furthermore, at [24], the judge summarises her findings as follows; "*I find that the Appellant has established that he entered the UK in 1997 and that he worked from 1997 until the tax year ending in April 2003. He was present in the UK and there were no breaks in continuous residence. I am also satisfied he worked in the tax year commencing April 2005 onwards and has been present in the UK.*"

19. I have carefully considered the period from April 2003 until April 2005, when it is acknowledged that there is no confirmation from HMRC that the appellant was employed in the United Kingdom. The appellant's explanation for the absence of documentary evidence for this period can be found in counsel's note of the hearing, that he was working part-time and not paying any tax during this period. I can see no reason to reject this explanation and indeed Mr Singh did not ask me to do so. The appellant also relies upon a number of witnesses to his residence in the United Kingdom. These include his wife and her children, who have known him since 2001 when he visited their home as a guest of their late husband/father. A number of other witnesses have written to confirm that they have known the appellant to be living in the United Kingdom for more than 15 years and in one case for more than 19 years. There is also the evidence from the village committee in China which confirms that the appellant has not returned there. In addition, there is a complete absence of any evidence to suggest that the appellant has left the UK since his arrival in 1997. Furthermore, there is no plausible reason for him to have done so.

20. Considering all the evidence, I accept that the appellant has resided in the UK continuously since 9 May 1997, a period of more than twenty years. According to the decision of 14 March 2019, the appellant's application did not fall for refusal on the grounds of suitability. In these circumstances, I find that he can meet the requirements of paragraph 276ADE(1)(iii) of the Rules.

21. It is not in dispute that the appellant has developed a private and family life in the United Kingdom. He has resided and worked in the United Kingdom since 1997. Furthermore, he has been in a relationship with his wife for more than a decade and they married in 2015. Nor is it in dispute that the decision to remove the appellant would amount to a substantial interference with his private and family life and that Article 8 is engaged. Owing to the appellant's ability to meet the requirements of the Rules, it cannot be said that such interference is in accordance with the law.

22. I am obliged to have regard to the factors set out in section 117B of the 2002 Act. I have taken into consideration that the maintenance of effective immigration controls

is in the public interest, that the appellant's private and family life was developed at a time when he was unlawfully present in the United Kingdom, that he worked without permission and using an identity other than his own and that he does not speak English.

23. The appellant is aged 50, is financially independent, his parents are deceased, he has lived in the UK for 22 years, he has a longstanding relationship with his wife who is a British citizen of Vietnamese origin, he has stepchildren and step-grandchildren. The appellant's wife lost her late husband suddenly and in tragic circumstances which, according to medical evidence, has adversely affected her mental health. The appellant meets the requirements for a grant of leave on the basis of his unlawful, continuous, residence of in excess of 20 years. In these circumstances, the proposed interference is disproportionate to the legitimate end of the maintenance of an effective system of immigration control.

Conclusions

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

I set aside the decision to be re-made.

I substitute a decision allowing the appeal on human rights grounds (Article 8).

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 no fee award for the following reason. At the time of the appellant's human rights application insufficient evidence had been provided to demonstrate the length and continuous nature of the appellant's residence in the United Kingdom.

Signed Date: 9 October 2019

Upper Tribunal Judge Kamara