Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16703/2019

THE IMMIGRATION ACTS

Heard at Field House by video Conference on 30 November 2020 (V)	**Decision & Reasons Promulgated On 09 December 2020**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

FLORIN ZYBERAJ

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr E. Fripp, instructed by Rashid & Rashid Solicitors
For the respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 30 September 2019 to refuse a human rights claim.

2. First-tier Tribunal Judge Zahed ("the judge") dismissed the appeal in a decision promulgated on 20 March 2020.

3. The appellant appealed the First-tier Tribunal decision on the following grounds:

   (i) The judge erred in finding that the appellant did not produce sufficient evidence to show continuous residence in the written decision, when he had indicated at the hearing that he accepted he had been resident for 20 years.

(ii) The judge erred in failing to consider the arguments put forward on behalf of the appellant relating to the 'Suitability' criteria and/or the fact that the general grounds for refusal were not mandatory.

(iii) As a result, the judge erred in his assessment of the overall balancing exercise under Article 8.

4. Mr Philip Nathan, who appeared before the First-tier Tribunal admitted in the grounds that he did not take a note of the judge's indication and had no recollection of it. It is surprising that he did not take a careful note of such an indication in accordance with his professional duties if one was made. However, his instructing solicitor sent an interpreter to the hearing, who has made a brief statement confirming that their recollection is that the judge stated that he accepted that the appellant had resided in the UK for at least 20 years and asked the representatives to make submissions on the 'Suitability' criteria. A statement from the appellant's solicitor, who did not attend the hearing, says that he had taken instructions from the appellant who also said that he recalled the judge accepting that he had been resident for 20 years. It is unclear why a statement was not prepared in the appellant's name rather than producing third party evidence from his solicitor. No contemporaneous notes have been produced.

5. Further to the grant of permission First-tier Tribunal Judge Zahed was asked to comment on the assertions made in the grounds. A memorandum issued by Principal Resident Judge Kopieczek, which was sent on 21 October 2020, quoted the judge's response:

> "I do not recall that I stated to the PO that I have accepted that the appellate (sic) has satisfied me that he has lived continuously in the UK for at least 20 years. I note that the (sic) my ROP does not mention that and that the PO made submissions on it."

6. The judge's record of the proceedings noted that the Home Office Presenting Officer highlighted that the appellant did not produce any documentary evidence to show residence from 2006 to 2011. The brief summary of the respondent's submissions indicated that the Presenting Officer mentioned that the appellant said he had returned to Albania. It is likely that this was a reference to the two visits recorded in the decision letter in 2015. The note then records: "*Present over 20 years – Travelled to Albanian (sic) – no documentary evidence of 20 years.*". The note of the appellant's submissions states that counsel relied on his skeleton argument, stated that the appellant was resident for 20 years 5 months. In relation to the 'Suitability' requirements there is a note that there was no revocation of leave and no enforcement action for 2 years after May 2016. The judge noted reference to the case of *Balajigari & Others v SSHD* [2019] 1 WLR 4647 and submissions relating to the respondent's discretion.

7. Mr Tufan also produced a summary made by the Home Office Presenting Officer after the First-tier Tribunal hearing. The note does not appear to be a record of the proceedings. For example, it does not include a record of the questions and answers

nor a contemporaneous note of discussions or indications given by the judge. The summary indicates that the focus of the Home Office Presenting Officer's submissions was on the 'Suitability' requirement although it is noted that the Presenting Officer stated that "*no proof of continuous living in the UK has been provided*". The Presenting Officer summarised the appellant's representative as having submitted that the appellant had given evidence, supported by documents, to show that he had been present in the UK for a period of more than 20 years.

8. A face to face hearing was not held because it was not practicable due to public health measures put in place to control the spread of Covid-19. The appeal was heard by way of a remote hearing by Skype for Business with the parties' consent. All issues could be determined in a remote hearing.

Decision and reasons

9. In order to show a material error of law in the First-tier Tribunal decision Mr Fripp accepted that the appellant would need to succeed on both the first and second grounds. Even if the case was taken at highest and it was accepted that he was continuously resident for a period of 20 years he would still need to show that there was an error in the judge's findings relating to the 'Suitability' requirements. As indicated at the hearing, the third generalised ground relating to the overall balancing exercise under Article 8 is only likely to succeed if the first two grounds are made out, in which case the factors to be taken into account might have been weighed slightly differently.

10. In light of these observations it makes sense to deal with the second ground first. If the judge's findings relating to the 'Suitability' criteria are sustainable then it matters not whether he had accepted that the appellant had been resident for a continuous period of 20 years.

11. The thrust of the second ground, as argued at the hearing, was that the judge failed to consider the discretionary nature of the 'Suitability' provisions contained in paragraph S-LTR 4.1-4.3 of Appendix FM of the immigration rules. Paragraph S.LTR.4.1 states that an applicant "*may be refused on grounds of suitability if any of paragraphs S-LTR.4.2 to S-LTR.4.5 apply.*". The appellant accepts that he lied about his identity when he first arrived in the UK and maintained the false identity until 2016. It is not disputed that the appellant made false representations in previous applications and that the 'Suitability' provisions might apply.

12. The judge summarised the respondent's reasons for refusal and the appellant's response. He noted the main aspects of the appellant's evidence. The appellant accepted that he lied about his identity when he claimed asylum. The appellant explained that he did not have leave to remain and was unable to produce any formal documentary evidence to show that he was resident throughout the period. The judge noted other evidence in the form of a witness statement from the appellant's solicitor relating to another case. He also recorded the details of the GCID note which indicated that he was given Exceptional Leave to Remain (ELR) until his 18th birthday based on the false date of birth given on arrival. A further GCID note

from 2014 recorded the following reasons for granting a period of Discretionary Leave to Remain (DLR):

> "Mr Florjan Zyberi (sic) was previously granted ELR for 7 months up until his 18th birthday and his basis to remain in the UK is still the same, through fear of persecution in Kosovo. The applicant has resided in the UK now for 14 years 11 months and will have undoubtedly established a certain degree of private life, and claims that he has no known whereabouts to his family/friends back home in Kosovo therefore would be alone and vulnerable as a single young man in Kosovo."

13. Having set out the case put forward by both parties, and summarised the evidence, the judge went on to make his findings. He concluded that if the appellant had given his correct details, he would never have been granted ELR as an unaccompanied asylum-seeking child because he was not a minor at the time. If the respondent had known that he was an Albanian national, he would have been liable to removal to his home country. The judge went on to find that the appellant continued the deception that he was a Kosovan national when he applied for further leave to remain. The GCID note indicated that he was granted leave in 2014 primarily because it was thought that he was a Kosovan national who still claimed to fear persecution and that he did not have any family members there. Had it not been for his continued deception, he would have been liable to removal to Albania, where on his own evidence he continues to have family connections.

14. In assessing whether the human rights claim should have been refused under the 'Suitability' criteria the judge made the following finding:

> "23. I find that the respondent took into account that 16 ½ years of his residence in the United Kingdom was based on deception. I find that the deception was so great, where the appellant knew that if he had given his real identity he would have been returned to Albania and for such a length of time in which he was able to obtain further leave that allowed him to work in the UK and obtain a Travel Document that the respondent was entitled to find that the appellant did not meet the suitability conditions and that [the] application falls for refusal under suitability."

15. Nothing in this wording suggests that the judge proceeded on the basis that it was a mandatory provision. He considered whether refusal on 'Suitability' grounds was justified and gave reasons why it was. I accept that the judge did not specifically mention the fact that the provisions contained in paragraph S-LTR.4.1 of Appendix FM are not framed in mandatory terms. The mere fact of this omission is insufficient reason to find an error of law if no adequate reasons were given as to why discretion should have been exercised differently. On the face of it the appellant accepted that he was dishonest in the initial and subsequent applications for leave to enter or remain and it was open to the judge to find that the circumstances justified refusal under the 'Suitability' criteria.

16. The skeleton argument produced in support of the appellant's case before the First-tier Tribunal hearing submitted that the respondent erred in refusing the application with reference to paragraphs S-LTR.4.2 and 4.3 but the argument at [§8] does nothing more than assert that the provision is not mandatory. No reasons were particularised as to why discretion should have been exercised in the appellant's favour. At the

hearing before the First-tier Tribunal it appears that counsel argued that relevant factors might include the fact that (i) the respondent decided not to revoke DLR but instead let it expire; and (ii) then took no enforcement action for over 2 years.

17. At the hearing before the Upper Tribunal, Mr Fripp repeated the general submission as to the non-mandatory nature of refusal under paragraph S-LTR.4.1 of Appendix FM. When asked to identify what factors were put forward to the First-tier Tribunal that might justify the exercise of discretion he said (i) the appellant had been resident in the UK for a significant period of time; and (ii) the fact that he disclosed his true identity voluntarily should have been considered. Neither of those factors appear to have been argued before the First-tier Tribunal. Mr Fripp also referred me to the decision in *PS (paragraph 320(11) discretion: care needed) India* [2010] UKUT 440 in which the Upper Tribunal stated that the decision maker must exercise great care in considering whether to apply the general ground for refusal under paragraph 320(11) of the immigration rules.

18. Despite the shifting arguments put forward on behalf of the appellant, I find that none of the factors disclose any material error of law in the judge's findings relating to refusal under paragraph S-LTR.4.1 of Appendix FM.

19. The judge was aware of the appellant's immigration history, which was set out in his decision with reference to the evidence. It is not arguable that the fact that the respondent did not curtail the appellant's DLR or take action to remove him would have been sufficient reason to exercise discretion not to refuse the application on grounds of 'Suitability'. The appellant applied to transfer the conditions of his DLR to an Albanian passport in his real identity on 31 March 2016. The respondent refused the application on 26 May 2016 and a subsequent application on 22 August 2016. Little weight could have been placed on the fact this his leave was not curtailed when it was due to expire only a few months later, on 18 January 2017. The fact that the respondent did not take enforcement action only assisted the appellant to come closer to 20 years' residence. Neither of these factors would come close to making any material difference to the judge's conclusion that the deception was so great, and maintained over such a long period of time, that refusal was justified.

20. Mr Fripp's further points do not appear to have been argued before the First-tier Tribunal. In any event, they would not have made any material difference to the assessment. The fact that a person might have completed 20 years residence is not a reason to exercise discretion when the structure of the rules makes clear that the eligibility requirement of 20 years residence is still subject to refusal on grounds of 'Suitability'. Nor is the fact that the appellant voluntarily disclosed his real identity in 2016, 17 years after the initial deception, a matter that should count in his favour when he should not have lied to obtain leave to enter or remain in the first place. The decision in *PF (India)* does not assist the appellant. The comments of the Upper Tribunal were made in the context of a different set of provisions in the immigration rules, which exempted a certain category of family life cases from automatic refusal. It was in that context that the Upper Tribunal emphasised the need for caution when the Secretary of State sought to apply a different provision of the immigration rule to justify refusal when a person otherwise would not be subject to refusal. In this case,

there was ample reason to justify refusal under the 'Suitability' criteria given that the appellant admitted to a serious and long-standing deception.

21. For the reasons given above, I find that it was open to the judge to consider the serious nature of the deception and the length of time which the appellant maintained it when he concluded that refusal was justified with reference to the 'Suitability' requirements. None of the varying reasons put forward on behalf of the appellant would have made any material difference to his conclusion.

22. In light of my finding that the decision did not involve the making of a material error of law in relation to the judge's findings regarding 'Suitability', it is not necessary to come to any concluded view as to whether the judge did or did not express a firm view about the issue of 20 years continuous residence at the hearing. The evidence set out above [4-7] does not provide a clear picture. On the one hand there is evidence to suggest that the judge may have given the impression to the appellant and the interpreter employed by his representative that he might not need to be persuaded on that issue. This is supported to some extent by the judge's record of proceedings and the Presenting Officer's note, which indicate that there was an emphasis on the 'Suitability' requirements in submissions. However, the same documents indicate that some submissions may have been made about 20 years residence. If the judge did comment, it seems that it may not have been a clear or emphatic indication if the representatives went on to make oral submissions on the issue. In the end it matters not because even if there is an error of approach it would have made no material difference to the outcome of the appeal in so far as the judge's findings relating to paragraph 276ADE(1)(iii) of the immigration rules were concerned.

23. The third point relating to the overall balancing exercise under Article 8 was reliant on the first and second grounds succeeding. Except for his length of residence, the appellant did not raise any other significant issues that may have been relevant to the balancing exercise. The judge was required to take into account the public interest considerations contained in section 117B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"), which obliged him to give little weight to the appellant's private life in circumstances where he did not meet the requirements of paragraph 276ADE of the immigration rules. The same factors that justified refusal with reference to paragraph S-LTR.4.1 of Appendix FM were additional factors to weigh in the public interest in maintaining an effective system of immigration control.

24. It was not pursued at the hearing, but the grounds argued that the judge failed to consider the evidence relating to a similar case. The facts of a single non-related case were irrelevant to the individual assessment required in this case. Again, the same solicitor, who did not give evidence, made a statement about what happened in another case with little supporting evidence. On the face of it the case was different because it involved a decision to exercise discretion not to deprive British citizenship. No evidence was produced to show what evidence might have been before the respondent in that case, what the person's personal circumstances might have been, or whether there were any compelling circumstances in that case that might have

justified the decision not to deprive the person of citizenship. The evidence was not capable of making any material difference to the balancing exercise in this case.

25. For the reasons given about I conclude that the First-tier Tribunal decision did not involve the making of a material error on a point of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of a material error of law

The decision shall stand

Signed M. Canavan Date 02 December 2020
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email