Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08284/2019**

THE IMMIGRATION ACTS

Decided under Rule 34	**Decision & Reasons**
On 1st February 2022	**Promulgated**
	On the 28 February 2022

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR ARUN KUMAR
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Rule 34

1. I have considered, firstly, whether it is appropriate to determine the appeal to the Upper Tribunal without a hearing. Rule 34(1) confers a power to do so. By r34(2), I am required to consider the views of the parties. Both parties have confirmed in writing that they invite the Tribunal to deal with the matter on the papers, without a further hearing. The respondent does not oppose the appeal for the reasons set out in her position statement dated 17th January 2022. I am satisfied that it is in

accordance with the overriding objective and the interests of justice for there to be a timely determination of the appeal and having regard to the cost and resource implications, taking into account the position adopted by the respondent, it is entirely appropriate for the decision to be remade on the papers.

The appeal

2. The appellant is an Indian national. His appeal against the respondent's decision of 23rd April 2019 to refuse his application for leave to remain in the UK on Article 8 grounds, was dismissed by First-tier Tribunal Judge Hawden-Beal for reasons set out in a decision promulgated on 5th September 2019.

3. The appellant was granted permission to appeal by First-tier Tribunal Judge Beach on 7th January 2020. Following a hearing before Upper Tribunal Judge Blundell on 9th February 2021, the decision of Judge Hawden-Beal was set aside for reasons set out in a decision promulgated on 17th February 2021. Upper Tribunal Judge Blundell found the decision of the First-tier Tribunal Judge is vitiated by a material error of law and that the appropriate course is for the decision to be remade in the Upper Tribunal. At paragraphs [21] and [22] of his decision, Upper Tribunal Judge Blundell said:

> "21. In this case, there are two competing versions of the fact. On the respondent's version, the appellant is a man who entered unlawfully and has remained unlawfully present in the United Kingdom despite the refusal of successive applications. On the appellant's version of events, he is a man who entered the UK and claimed asylum promptly, only to wait for nine years for a decision on his application and then to wait a further 11 years (and counting) for a decision under the Legacy programme. If the truth is as claimed by the respondent, it might easily be submitted that the appellant should return to India and join the entry clearance queue. If the truth is as claimed by the appellant, you might submit with equal cogency that the usual public interest in immigration control has been diminished significantly by the respondent's inaction over the course of two decades.
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> 22. For those possibly overly lengthy reasons, it is not possible to hold that the judge's failure to come to grips with the unusual immigration history in this case was immaterial to the outcome. The chronology asserted by Ms

> Solanki was directly material to the assessment of proportionality and the Judge's assessment of Article 8(2) ECHR cannot stand as a result of her error."

4. Upper Tribunal Judge Blundell recorded at paragraph [24] of his decision that both advocates had invited him to set aside the judge's decision and to retain the matter in the Upper Tribunal for remaking. He adopted that course and at paragraph [25] said:

> "25. As foreshadowed at the start of this decision, there is now a live disagreement between the parties about the appellant's immigration history. Mr Melvin – the Senior Presenting Officer who drafted the respondent's reply under rule 24 - undertook some research in preparing that document. In it, he contends that the appellant was not notified of the outcome of his asylum claim in 2010 but in 2001; the same year in which he claimed asylum. He also states that the appellant was notified reasonably promptly of the outcome of the Legacy consideration. The difficulty - as I suggested to the advocates before me - is that this is currently nothing more than assertion. Whilst I have a partial picture of the chronology from the material in the appellant's supplementary bundle, what is clearly required is chapter and verse of the appellant's dealings with the respondent (and vice versa) in relation to his asylum claim and the Legacy programme. It is only when evidence is adduced by the respondent in support of her stance that the full picture will be known. This will then either become a case of serious delay which has an impact on the public interest immigration control or, potentially, a case of no delay whatsoever and a lengthy period of unlawful presence in the UK."

5. Upper Tribunal Judge Blundell went on to make directions for the filing and service of further evidence from both parties and for the matter to be relisted in the Upper Tribunal thereafter, for a *de novo* of the Article 8 ECHR claim as a whole. He directed that the appeal will be listed for a face-to-face hearing on the first available date.

6. In a letter dated 13th April 2021 to the Tribunal and the respondent from the appellant's representatives, they confirmed that they had discovered a 'Home Office, Older Live Cases Unit letter dated 10th March 2014' stating that the appellant's case had been fully reviewed and the outcome was that the appellant had no basis to stay in the United Kingdom. They confirmed that in light of that evidence, the appellant would not be arguing the 'delay point'. They explained that the appellant has a lengthy immigration history that the appellant had struggled to

understand at points. They confirm however that the appellant continues to rely upon the principle set out in Chikwamba v SSHD [2008] UKHL. That is, only comparatively rarely, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad.

7. In the letter dated 13th April 2021, the appellant's representatives also indicated that the appellant would shortly meet the requirements in paragraph 276ADE of the immigration rules on the basis that the appellant claims he has lived continuously in the UK for at least 20 years. They indicated their intention to write to the respondent inviting her to reconsider her decision. The Tribunal was provided with a copy of the letter dated 13th April 2021 sent to the respondent making representations to the effect that the requirements of paragraph 276ADE of the immigration rules are met by the appellant.

8. The respondent replied by letter dated 25th November 2021. The respondent did not accept on the basis of the evidence provided, that the appellant has demonstrated 20 years continuous residence in the United Kingdom. The respondent noted that although the appellant claims to have entered the United Kingdom in July 2001 and made a postal asylum claim, the appellant had failed to pursue that claim or maintain contact with the respondent for several years. The appellant came to the notice of the respondent following a routine vehicle check carried out by police on 25th March 2005. The respondent noted that on 1st April 2005, the appellant was served with a 'Notice to a Person Liable to Removal' (IS.151A) and when interviewed via an interpreter, the appellant stated that he last entered the UK in September 2003. Furthermore, the respondent noted that her records show a voluntary departure on 3rd November 2016 and that the appellant had renewed his Indian passport on 13th April 2021. The respondent concluded that there remains a reasonable doubt as to the duration of the appellant's residence in the United Kingdom.

9. The matter was listed for a resumed hearing before me on 14th December 2021. On that day, counsel for the appellant (Ms P Solanki) applied for an adjournment following some preliminary discussions with the Presenting Officer (Mr C Bates), so that the appellant could provide the respondent with the evidence relied upon by him to support his claim that the requirements of leave to enter as a partner set out in Appendix FM and Appendix FM-SEE are met, such that the appellant's removal from the UK would in any event be disproportionate. I adjourned the hearing having been persuaded that disclosure of the relevant evidence to the respondent was capable of resolving the appeal. On behalf of the appellant. Ms Solanki had indicated that if the respondent were to accept that an application for entry clearance by the appellant is bound to succeed, the appellant is likely to take a pragmatic view and unlikely to invite the Tribunal to make findings regarding the dates between which the appellant has resided in the United Kingdom. I made directions for the appellant to serve upon the respondent the relevant documents relied upon, and for the respondent to file and serve a position statement in reply.

10. The matter was listed for hearing before me on 1st February 2022. In accordance with the directions previously made, the respondent filed and served a position statement dated 17th January 2022.

11. The respondent continues to rely on the earlier position statement of 25th November 2021 insofar as the appellant claims that the requirements of paragraph 276ADE(1)(iii) of the immigration rules are met. However, the respondent confirms that having received and considered the further evidence from the appellant, including the original English Language certificate from Trinity College and bank statements endorsed by the issuing bank, the respondent concedes that the appellant would satisfy the entry clearance requirements for leave to enter as a partner in the event that a valid entry clearance application was made. The respondent accepts on the balance of probabilities:

a. The appellant and his partner are in a genuine and subsisting relationship involving co-habitation of greater than 2 years.
b. An application by the appellant would not fall for refusal on any suitability grounds.
c. The appellant has passed an appropriate English language test from an approved provider at an approved test centre.
d. The Appellant would satisfy the requisite income threshold via the combination of his partner's annual employment income and savings.

12. The respondent concedes, therefore, that notwithstanding the dispute between the parties as to whether the requirements of paragraph 276ADE(1)(iii) are met, the public interest would be outweighed under Art 8 outside the immigration rules in a proportionality assessment, in expecting the appellant to leave the UK solely to lodge a valid application for entry clearance that would, on balance, succeed.

13. In light of the concession made by the respondent, the respondent indicated to the Tribunal that she does not object to the appeal being determined on the papers without the need for a further hearing. By email sent to the Tribunal on 17th January 2022, the appellant's representatives confirmed they have reviewed the respondent's Position Statement and they invited the Tribunal to allow the appeal on the basis proposed by the respondent. They said that in the interests of saving costs for all parties involved, the appeal should be disposed of on the papers without the requirement for attendance at a CMR hearing.

14. In light of the concessions made by the respondent, the appellant does not ask me to reach any decision as to whether the requirements of paragraph 276ADE of the immigration rules are met by the appellant. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The fact that the immigration rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair

balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules.

15. As to the human rights claim on Article 8 grounds, I adopt the approach set out by Lord Bingham in Razgar [2014] UKHL 27. The respondent accepts the appellant is in a genuine and subsisting relationship with his partner. Article 8 is plainly engaged. I also find that the decision to refuse the appellant leave to remain may have consequences of such gravity as potentially to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved. The appellant's ability to satisfy the immigration rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

16. I remind myself that section 117A Nationality, Immigration and Asylum Act 2002 requires that in considering the public interest question, I must (in particular) have regard to the considerations listed in section 117B. I acknowledge that the maintenance of effective immigration controls is in the public interest. I also acknowledge in particular that little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully. Factors such as the appellant's ability to speak English and financial independence, do not weigh in favour of the appellant, but are neutral.

17. Whether the applicant is in the UK unlawfully or is entitled to remain in the UK only temporarily, the significance of that consideration depends on what the outcome of immigration control might otherwise be. For

example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in Chikwamba v Secretary of State for the Home Department.

18. In my judgement on the particular facts of this case, the concession made by the respondent that the public interest would be outweighed under Art 8 outside the immigration rules in a proportionality assessment in expecting the appellant to leave the UK solely to lodge a valid entry clearance application that would on balance succeed, is one that is properly made. I am satisfied that the refusal of leave to remain is disproportionate to the legitimate aim of enforcing immigration control.

19. It follows that the appeal is allowed.

Notice of Decision

20. The appeal is allowed on Article 8 grounds.

Signed **V. Mandalia**
Upper Tribunal Judge Mandalia

Date: 1st February 2022