IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005193
First-tier Tribunal No: HU/52088/2021
IA/07039/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

DJIENTO BAKISI BASILUA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms T White, Counsel, instructed by Ali Levene Solicitors LLP
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 21 February 2023

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Tozzi promulgated on 13th August 2022 dismissing his appeal against the decision of the Secretary of State dated 6th August 2020 refusing his application for leave to remain in the UK based upon his private life.

2. The hearing was a hybrid hearing in Field House. Mr Tufan appeared in person. Ms White, the Appellant and the instructing solicitor appeared by video link. I heard submissions from Ms White and Mr Tufan and I reserved my decision.

Background

3. The Appellant claims to have arrived in the UK on 7th March 2000 and claimed asylum. The claim was refused on 19th December 2000. The Appellant lodged a human rights claim on 9th January 2001, that application was refused and an appeal against that was dismissed. A further application was made on 6th April 2006 and was refused on 27th September 2006. An asylum claim lodged on 25th August 2012 was refused on 4th September 2012 and a further human rights

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application was refused on 15th October 2014. An appeal on human rights grounds succeeded and leave to remain was granted from 7th May 2015 to 7th November 2017. The Appellant made a family and private life application on 1st November 2017 which was voided, and a second application was made on 2nd November 2017. The Respondent refused that application on 6th August 2020, that decision is the subject of this appeal.

4. The Respondent refused the application on the basis that the Appellant did not meet the requirements of paragraph 276ADE(1), inter alia, on the basis that he had lived in the UK for seventeen years and seven months at the date of application and it was not accepted that he had lived continuously in the UK for at least twenty years. The Respondent considered that the Appellant had not met any of the other requirements of paragraph 276ADE(1). The Respondent went on to consider whether there were exceptional circumstances to warrant the grant of leave to remain outside the Immigration Rules under Article 8 and considered that there were none.

First-tier Tribunal Decision

5. The First-tier Tribunal Judge noted that at the hearing the Presenting Officer objected to the Appellant raising the claim that he had been resident in the UK for twenty years at that stage, maintaining that this was a new matter and recording that the Respondent refused consent for the Tribunal to consider this route. The Presenting Officer stated that the Respondent made no concession as to continuous residence of twenty years or more at the time of the hearing. The judge noted that Ms White, who represented the Appellant at the First-tier Tribunal, conceded not to progress with this route as a freestanding matter but invited the Tribunal to take into account the Appellant's length of time in the UK when considering proportionality.

6. The judge found that the Appellant no longer had a relationship with his former partner and her dependent children. The judge noted that the Appellant had not established that he had any friends in the UK or was involved in community activities.

7. The judge took into account two letters from the Appellant's claimed employers noting that they were inconsistent and finding "On balance, whilst I accept that the Appellant might have worked as a porter in 2017, I am not satisfied that he has worked in the same role up to 2021 or beyond, given my concerns above and the fact did not have status to do so once his leave expired" [39].

8. The judge found that the Appellant's credibility was low. The judge considered paragraph 276ADE(1)(vi) but found that the Appellant was an overstayer following his leave ending on 7th November 2017 and that he will not face very significant obstacles to integration into life in DRC.

9. The judge went on to consider proportionality including an assessment of Section 117B. The judge took into account a number of factors against the Appellant including that he is an overstayer and that little weight is to be attached to the private life he has established in the UK. The judge concluded at paragraph 53:

> "Considering everything in the round, I am satisfied, in the particular circumstances of this appeal, that the balance weighs against the Appellant and the refusal decision is proportionate to the legitimate aim of maintaining immigration control. The public interest

requirements set out above, outweigh the impact on the Appellant's Article 8 rights if removed".

The Challenge to the First-tier Tribunal Judge's Decision

10. There are a number of contentions in the Grounds of Appeal. There is some overlap, in summary it is contended:

- The judge misdirected herself in finding that the Appellant's claim to have resided continuously in the UK since his arrival was not accepted. It is contended that the issue of the continuity of the Appellant's residence was raised for the first time at the hearing and that it was not put in issue in the reasons for refusal letter (ground 1, 4 & 5).

- The judge erred in her interpretation of the two letters from the Appellant's employers. It is contended that the letter from Sake No Hana dated 13th October 2017 and the letter from Hakkasan dated 16th November 2021 are in fact from the same employer and are not contradictory (ground 2).

- The judge erred in finding that the Appellant had no status after his leave expired on 7th November 2017, in fact the Appellant had section 3C leave as he applied for further leave to remain on 2nd November 2017, before the expiry of his leave to remain (ground 2).

- Although the judge asserted that there were significant inconsistencies, she only identified one, which was the evidence about contact with the Appellant's family in the DRC. The other alleged inconsistency relates to the Appellant's employers letters which it is contended was an error (ground 3).

- the Appellant accepted that he could not rely on paragraph 276ADE(1)(iii) because he had not been in the UK for twenty years at the date of the application. Instead, his case was that by the date of the decision, and certainly by the date of the appeal, he had been in the UK for over twenty years and that a new application under paragraph PL.5.1. would be entitled to succeed and this was crucial to the assessment of proportionality. It is contended that the judge failed to assess that case or to make a finding as to whether or not the Appellant might have left the UK after March 2000 (ground 5).

11. The Appellant's application for permission to appeal was granted by First-tier Tribunal Judge Buchanan on 24th October 2022. Judge Buchanan considered it arguable that the judge erred in concluding that the Appellant was an overstayer after his leave to remain expired on 7th November 2017.

12. The appeal therefore came before me to determine whether the decision contains an error of law. If I conclude that it does, I then have to decide whether the decision ought to be set aside in whole or in part depending on the error found. If I set aside the decision, I must either remit the appeal to the First-tier Tribunal for re-hearing or re-make the decision in this Tribunal.

Discussion

13. The judge made two clear errors of fact in her decision. She concluded at paragraph 39 that there was a conflict between the two employment letters submitted by the Appellant. The first was from a restaurant called Sake No Hana dated 13 October 2017 and states that the Appellant had been employed as a

Head Kitchen Porter there since 3rd July 2015. The second was from Hakkasan Group dated 16th November 2021 confirming that the Appellant had been employed by the company since 3rd July 2015 as a Head Kitchen Porter. It is clear from reading both letters and from an examination of the payslips that these are the same company. This was accepted by Mr Tufan at the hearing before me. Accordingly, the judge's finding that she was not satisfied that the Appellant was employed in the same role up to 2021 or beyond was based on a mistaken reading of the letters and payslips.

14. This error was compounded by the judge's second error in relation to the Appellant's status after 2017. Mr Tufan accepted at the outset of the hearing before me that the judge's conclusion that the Appellant was an overstayer after 7th November 2017 was wrong. He accepted that the Appellant's application for further leave to remain was received by the Home Office on 2nd November 2017. He submitted a letter dated 5th September 2018 from the Home Office to the Appellant's representative confirming that the application was received on 2nd November 2017 prior to the expiry of his leave on 7th November 2017. Therefore the Appellant had leave to remain under Section 3C and was not an overstayer. This information was before the judge as I note that the first page of the Respondent's First-tier Tribunal bundle states that the Appellant made an in time application for further leave to remain in the UK on 2nd November 2017.

15. The judge referred to the Appellant's status as an overstayer on three occasions. At paragraph 39, after considering that there was a discrepancy as to the Appellant's employer's letters, the judge found that she was not satisfied that the Appellant had worked in the same role up to 2021 or beyond given her concerns in relation to the letters, and the fact that he did not have status to work "once his leave expired". It is clear therefore that these two errors went to the judge's findings at paragraph 41-42 that the Appellant's credibility was low.

16. The judge further referred to the Appellant's status as an overstayer at paragraph 44 of the decision where she said "the Appellant has lived for many years in the UK, but is an overstayer following his leave ending on 7 November 2017". The judge took this into account in finding that the Appellant had not demonstrated that there were very significant obstacles to his integration into life in the DRC.

17. The judge made reference to the Appellant's status as an overstayer again in her proportionality assessment where, at paragraph 52 she said "against the Appellant, I consider that he is an overstayer and little weight is to be attached to the private life he has established in the UK".

18. I have considered Mr Tufan's submissions that these are not material errors. He submitted that, as indicated by the judge at paragraph 27 of the decision, where she took account of the decision in **TZ (Pakistan) [2018] EWCA Civ 1109**, the Appellant could not meet the Rules therefore the appeal fell on the proportionality assessment outside of the Rules. In Mr Tufan's submission, the Appellant, to succeed in a proportionality assessment, would have to show that there would be consequences which would be unjustifiably harsh. He submitted that on a straightforward proportionality assessment the Appellant cannot succeed irrespective of the errors made by the judge. The Appellant's leave to remain was always precarious, therefore in his submission Section 117B(4) and (5) apply so as to mean that in the proportionality assessment the judge could not attach weight to the Appellant's private life.

19. I reject Mr Tufan's submission, I accept Ms White's submission that the whole decision was infected by the judge's mistake. Not only is it referred to in the paragraphs highlighted above, but also in other ways throughout the decision, for example at paragraph 51 where the judge found that due to the skeletal nature of the information provided and the credibility concerns the Appellant had not established how many years he lived in the UK. However it is clear that there was limited basis to the credibility concerns expressed. Further, as indicated by Mr Tufan at the hearing, the Respondent took issue with the length of residence at the date of application, not with the continuity of the Appellant's residence in the UK. Therefore, the judge could and should have made a clear finding as to the length of residence at the date of hearing. This factor would have been relevant in her proportionality assessment. Accordingly, in the circumstances I find that the judge's error in relation to the status of the Appellant after 2017 is a material error. As the error was repeated throughout the decision and formed the basis of much of the decision I consider it appropriate to set the decision aside.

20. At a hearing before me Mr Tufan accepted that the Respondent did not contest the Appellant's claim that he has been resident in the UK continuously since March 2020. In these circumstances the parties agreed that it was appropriate for me to remake the decision on the basis of the evidence before me should I decide that there is a material error of law in the Tirst-tier Tribunal's decision.

Remaking the decision

21. At the hearing before me Ms White did not make any submission that the Appellant could meet the requirements of the Immigration Rules. I therefore consider the appeal under Article 8 outside of the Immigration Rules. I take account of the documents before the First-tier Tribunal including the Respondent's bundle, the Appellant's bundle and the Appellant's Skeleton Argument.

22. I accept that the Appellant entered the UK illegally and did not have any leave to remain until granted leave on human rights grounds on 7th May 2015 to 7th November 2017. As he made an application for further leave to remain on 2nd November 2017, I accept that he has had section 3C leave since that date. Therefore at the date of hearing the Appellant was without any leave to remain between his entry on 7th March 2000 and 7th May 2015, but he has had leave to remain since 7th May 2015.

23. On the basis of the letters from the Appellant's employers I accept that he has been employed as a and then the Appellant is required to make a fresh application for leave to remain on the basis of his private life based on 20 years residence, the section 3C leave will expire and he will be unable to work whilst the Respondent considers his application. Mr Tufan did not dispute this contention.

24. There is inadequate evidence of any ongoing relationship between the Appellant and his former partner or her children. Therefore I consider the Article 8 claim on the basis of the Appellant's private life only.

25. I undertake the Article 8 assessment in accordance with the guidance in **R v SSHD ex parte Razgar [2004] UKHL 27**. The Appellant has not provided any evidence of any ongoing family life in the UK. He has been here since 7th March 2000 so he will have established a private life. His removal would interfere with that private life. It is not argued that any Immigration Rules apply therefore his

removal would be in accordance with the law and I accept that his removal would be necessary in a democratic society.

26. I turn then to proportionality. I undertake that assessment in light of the evidence and submissions before me.

27. In the course of his submissions, Mr Tufan accepted that it is not the Secretary of State's case that the Appellant has left the UK since he arrived on 7th March 2000. It is instead the Secretary of State's case that the Appellant did not meet paragraph 276ADE(1)(iii) at the date of the application. He accepted that, as the Appellant has now been in the UK for over twenty years he should succeed in a new application under paragraph 276ADE, but the application under consideration here was made in 2017 and the requirements have to be met at the date of the application. At that time, as set out in the reasons for refusal letter, the Appellant had been in the UK for seventeen years and seven months. He accepted that the Respondent took three years to make the decision, but in his submission the Rules could not be satisfied at the date of application.

28. In undertaking the proportionality exercise I take into account the factors set out in section 117B of the Nationality Immigration and Asylum Act 2002 and I balance the public interest considerations against the factors relied upon by the Appellant. I weigh the following factors in the public interest:

- The Appellant cannot meet the requirements of the Rules. He cannot meet paragraph 276ADE (1)(iii) as he had not lived continuously in the UK for 20 years at the date of the application. Whilst it could be argued that he would face difficulties in the DRC, there is no evidence that he would face very significant obstacles to his reintegration there.

- The Appellant's stay in the UK was unlawful between his arrival in March 2000 and the grant of leave in 2015 after which his stay was precarious therefore I attach little weight to the private life he has developed in the UK (section 117B (4) and (5)).

29. In the Appellant's favour I take account of the following factors:

- The Appellant can speak English (section 117B (1)) and is financially independent (section 117B (2)). I recognise that he can obtain no positive right from either of these factors but these do not count against him.

- In light of the fact that the Appellant claimed asylum on 7th March 2000 and it is not contended by the Respondent that the Appellant left the UK at any time since then, at the date of the hearing the Appellant had been in the UK continuously for almost 23 years.

- The Appellant had been resident in the UK for 17 years and 7 months when he applied for leave to remain. At the date of hearing before me he had been in the UK for almost 23 years. I acknowledge that there is no 'near-miss' principle applicable to the Immigration Rules, and failure to comply with the Rules, even by a small margin, does not give rise to a presumption that a person falling just outside the policy should be treated as though they were within it or be given special consideration for that reason (**Miah and others v Secretary of State for the Home Department [2012] EWCA Civ 261 (7 March 2012) [2013] Q.B. 35**). However the length of the Appellant's residence in the UK is a weighty factor outweighing the public interest.

- The Appellant's application for leave to remain was made on 2nd November 2017 but the Respondent did not make a decision until 6th August 2020, almost three years later. The Appellant continued to work and establish his private life during this period. By the time the Respondent made the decision the Appellant had been in the UK for 20 years. This is a weighty factor outweighing the public interest in this case.

- Given the concessions made by Mr Tufan and the fact that no suitability issues are raised in the reasons for refusal letter, I accept that any application made now under Appendix Private Life is very likely to be granted on the basis of the Appellant's residence for over 20 years. As set out above the Appellant will no longer have leave to remain whilst any application is processed and will no longer be able to work to support himself. I consider this to be a weighty factor outweighing the public interest in refusing the Appellant's application at this stage.

30. I find that the factors raised by the Appellant outweigh the public interest for the reasons set out above. I attach particular weight to the Appellant's length of residence, the delay on the part of the Respondent, the concessions made at the hearing and the likely outcome of an application under the equivalent provisions if an application were made today.

Notice of Decision

For the foregoing reasons my decision is as follows:

- **The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and I set aside the decision.**

- **I remake the decision by allowing the Appellant's appeal on human rights grounds.**

Anne Grimes

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6th March 2023