IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000142
First-tier Tribunal Nos:
HU/57215/2022
IA/10507/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

Karnail Ram
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr N Ahmed, Ishwar Solicitors
For the Respondent: Ms T Rixom, Senior Home Office Presenting Officer

Heard at Field House on 22 March 2024

DECISION AND REASONS

1. The Appellant is a citizen of India whose date of birth is recorded as 1st January 1976. On 4th September 2021 he made application for leave to remain in the United Kingdom on the basis of private life. On 4th October 2022 a decision was made to refuse the application and the Appellant appealed to the First-tier Tribunal.

2. The appeal was heard on 20th October 2023 by First-tier Tribunal Blackwell sitting at Nottingham.

3. In issue were:

(a) Paragraph 276ADE(1)(iii) of the Immigration Rules: whether the Appellant had been continuously resident in the United Kingdom for at least twenty years. The Secretary of State accepted that there was sufficient evidence of the Appellant's presence in the UK between 2003 and 2006 and 2013 and 2023. However, the Secretary of State was not satisfied that the Appellant had been in the United Kingdom for twenty years because there was no

documentary proof of his presence between 2001 and 2003 and 2006 and 2013 from an objective source such as a doctor or hospital or other reliable source.

(b) Paragraph 276(1)(vi) ADE of the Immigration Rules: whether there would be significant obstacles to A's integration in India.

(c) Outside the Rules Article 8 ECHR: family/private life.

4. The Secretary of State accepted that Article 8 was engaged and that the Appellant enjoyed both family life and private life in the United Kingdom. Hence if the Immigration Rules were met then the Appellant's claim would succeed.

5. In a decision dated 27th October 2023 Judge Blackwell dismissed the appeal.

6. Not content with that decision, that Appellant made an in-time application to appeal to the Upper Tribunal. In summary, it is the Appellant's case that there was evidence which went to the issue of whether the Appellant had been in the United Kingdom for twenty years as contended by him, to which no regard had been had by Judge Blackwell.

7. On 12th January 2024 First-tier Tribunal Judge Chowdhury granted permission observing:

> *"The judge found that the Appellant had continuously resided in the UK for the period 2006 to 2013 as per paragraph 23 of the decision. It is arguable that the judge failed to consider the subject access disclosure records of the Home Office which evidenced the Appellant being present in the UK during 2003. This error is arguably material because the judge did not consider the Respondent's evidence of his presence in the UK in 2003 when assessing the Appellant's credibility that he had in fact resided in the UK since 2001. The findings arguably have been materially tainted as a result."*

8. In fact there is no issue that the Appellant was in the United Kingdom in 2003 because he was arrested on 8th May 2003. The gap, from the Respondent's point of view, was evidence relating to his claimed arrival on 10th May 2001.

9. Mr Ahmed challenged the approach of the judge. His first point to me was that there was no requirement for independent evidence, as suggested by the judge in his decision. That is right, there is no requirement for independent evidence, but there is a requirement for sufficient evidence, and it is a matter for the judge to determine whether or not, in his or her view, the evidence is sufficient R (Iran) [2005] EWCA Civ 982. In this case, the judge has given sufficient reasons for finding that the evidence was lacking. That is set out at paragraphs 14 and 15:

> *"…he was asked how he supported himself. He said that he worked in the garden and also attended the temple for support. It would have been open to him to bring witnesses, who he would have encountered during the 20 year period while he claims he was in the UK, to corroborate this. He has not done so. No explanation has been provided as to why the only witness was his brother, whose evidence, being a family member, does not carry the same weight which an independent witness would carry.*

Further, the evidence of more witnesses, even if family, would carry greater weight. In the appellant's witness statement he says that he was in the UK since 2001 and cites attending a birthday party of his cousins sister's child in Kettering, which was also attended by PS, his brother-in-law. At many children's birthday parties photographs are taken: no photographs have been exhibited. But even in the absence of photographs it would presumably have been possible to have witness statements from those who attended the party. Also those individuals might have attended the Tribunal.

10. Mr Ahmed then suggested that there was no material difference between the judge finding evidence lacking until 2003 and other periods where evidence could be said to be lacking, but in my judgment, there was a difference.

11. The difference was that once in the United Kingdom it would have been challenging for him to leave and then return making it more likely that he was present in the United Kingdom during any later periods. The approach of the judge was one that was open to him.

12. Where I am with Mr Ahmed, however, is in the argument that the judge should have gone on, having found that the Immigration Rules were not met, which they were not, because at the date of the application, the Appellant had not met the twenty year Rule and therefore I make no criticism whatsoever of the decision of the Secretary of State; the decision of the Secretary of State at the time the decision was made was completely correct, but the judge was required, this being a human rights case, to look at the situation as it was at the date of the hearing. There is no dispute that at the date of the hearing, the Appellant had been in the United Kingdom for twenty years.

13. What underpins human rights cases is the five-stage test in **Razgar**. The fifth test is one of proportionality, but one needs to look in my judgment in this particular case, at the fourth test. I set out the five stage test:

(1) Will the proposed removal be an interference by a public authority with the exercise of the Applicant's right to respect for his private and/or family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) If so, is such an interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

14. It seems to me one just needs to look at the fourth test in **Razgar**. The Secretary of State asserts that the public interest gives way to an application by a person such as this Appellant on the same factual matrix once that person has reached twenty years in the United Kingdom. In those circumstances it cannot

be said that the interference was necessary because the Secretary of State does not contend plead public interest if an Appellant reaches twenty years.

15. Ms Rixom suggested that on that basis somebody who had been in the United Kingdom for nineteen years or eighteen years or sixteen years or fifteen years might be able to make the same argument as this Appellant and asked rhetorically, "When does one draw the line?"

16. Certainly, it is the case that there is no such thing as a near miss. That was established a long time ago in the case of **Miah**. But this is not about a near miss. This is about a person who has actually met the requirement of the Rule as at the date of the hearing. If a person falls short of twenty years prior to a hearing, then subject to any rights of appeal it is open to the Respondent to remove that person.

17. The Rule of course requires consideration as at the date of the application. Even so, if I am wrong about the fourth test, certainly the fifth test weighs in favour of the Appellant because it cannot, in my judgment, be proportionate once the Appellant has met the requirement of the Rule in this type of case for the matter to be sent back at public expense, for the matter to be reconsidered when another case might be considered by a caseworker at a time when we are told there is a backlog of work for an inevitable result. Ms Rixom importantly took no point that about any "new matter" and accepted that there were no suitability requirements or the like standing in the way of an unsuccessful future application were the appellant to make one, were I to dismiss this appeal.

18. I shall be careful not to quote **Chikwamba** because it comes with a number of safeguards, caveats and the like but certainly, on the facts of this case, it comes very close to being Kafkaesque if this appeal were not allowed because there is no other objection raised by Ms Rixom and the Secretary of State other than the fact that the twenty years was not met as at the date of the decision of the Secretary of State.

19. If I am to remake the decision of the First tier Tribunal then regard is to be had to section 117B but the fact that this appellant has all but met the 20-year rule for all the reasons I have set out above mean that in those circumstances the appeal is allowed and falls to be remade.

20. On the basis that the Appellant has now met twenty years, there is in my view no legitimate public interest to be served, on the particular facts of his case, in not doing anything other than allowing the appeal, which I do.

Notice of Decision

21. The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside and remade, such that the appeal of the First-tier Tribunal is allowed on human rights grounds.

22. I am not making a fee award because the decision of the Secretary of State, at the time when the decision was made, was correct.

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 March 2024