IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001401
First-tier Tribunal No:
HU/53332/2022
IA/05224/2022

THE IMMIGRATION ACTS

Decision and Reasons Issued:
On the 08 August 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

MR ABDALLA ADAM
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Solomon of Counsel instructed by A&P Solicitors
For the Respondent: Ms J Isherwood Senior Home Office Presenting Officer

Heard at Field House on 6 June 2024

DECISION AND REASONS

Anonymity

1. No anonymity direction was made by the First-tier Tribunal. There was no application before me for such a direction. Having considered the facts of the appeals including the circumstances of the appellant, I see no reason for making a such direction.

Background

2. For ease of reference I refer to the parties as they were known in the First-tier Tribunal in other words the Secretary of State as the respondent, and Mr Abdalla Adam as the appellant.

3. The appellant is a national of Ghana. He appeals with permission from First-tier Tribunal Judge L K Gibbs against the decision of First-tier Tribunal

Judge Wilshire ("the Judge") promulgated on 19 February 2024 dismissing his remitted appeal against the respondent's decision dated 19 May 2022. The respondent refused his application for leave to remain based on the strength of his private life rights resulting from his long residence in the UK.

4. His initial appeal against the respondent's decision was allowed in a decision of First-tier Tribunal Judge Hussain dated 17 March 2023. The respondent appealed to the Upper Tribunal with permission granted by First-tier Tribunal Judge Mills on 8 June 2023. Upper Tribunal Judge Rimington and Deputy Upper Tribunal Judge Davidge sitting as a panel in a decision dated 25 July 2023 (the Upper Tribunal decision) set aside the decision of Judge Hussain and the appeal was remitted to the First-tier Tribunal with the only preserved finding being that the appellant will not face very significant obstacle to his integration on return. The Upper Tribunal decision noted at [10] in remitting the appeal that:

> "any calculation of residence will need to take as its starting point the agreed 2003 re-entry date evident on the passport … There being no challenge to the finding that the appellant would not face very significant obstacles to his integration on return [35], that finding is preserved. The First-tier Tribunal will need to conduct a fresh proportionality assessment as at the date of the remitted hearing."

The Grounds of Appeal to the Upper Tribunal

5. The appellant's grounds of appeal may be summarised as follows:

> Ground 1: the Judge erred in directing himself that that the appeal was remitted on the issue of long residence and the parties agreed the only issue was had the appellant shown continuity since 2003. The grounds assert that the Upper Tribunal had remitted the appeal for a fresh proportionality assessment and the position of the appellant was that his continuous residence in the UK for at least 20 years at the date of the remitted hearing was a relevant factor in evaluating proportionality.
>
> Ground 2: this ground specifies 8 separate errors asserting that the Judge erred in concluding that the appellant has not discharged the burden upon him to show he has lived in the UK without break since 2003.

Rule 24 Response

6. There was no Rule 24 Response

The Hearing

7. The matter came before me for a hearing on 6 June 2024. The appellant was represented by Mr Solomon and the respondent by Ms Isherwood. I had before me a Composite Electronic Bundle.

8. Mr Solomon adopted the grounds seeking permission to appeal as summarised above. Mr Solomon expanded on the first ground and submitted that the parties had agreed the appellant had last entered the UK in 2003, the Judge failed to carry out a proportionality and balancing exercise by weighing all relevant factors for and against the public interest/appellant and erroneously limited himself to considering whether the appellant has lived in the UK without break since 2003. Mr Solomon reiterated that notwithstanding the findings as whether the appellant had resided in the UK for a period of 20 years the Judge had failed to undertake a proportionality assessment.

9. In relation to the second ground, in summary, Mr Solomon submitted the Judge erred in failing to undertake a proper assessment of the evidence and failed in giving inadequate reasons for his findings on the evidence and concluding the appellant had no discharged the burden upon him to show he has lived in the UK without break since 2003.

10. In reply, Ms Isherwood on behalf of the respondent submitted that the appeal is opposed. In relation to the first ground, Ms Isherwood submitted that any error of law was not material as the evidence in this case is significantly lacking. She submitted that the appellant had failed to address the difficulties and discrepancies in his own evidence as identified by the Upper Tribunal decision at [5] and [6]. Ms Isherwood pointed out that the appellant had relied on the same bundle of evidence that had been before the Upper Tribunal and before Judge Hussain as noted by the Judge at [2].

11. In relation to the second ground, Ms Isherwood submitted that the Judge whilst noting it was agreed between the parties that the issue was whether the appellant had shown a continuity of residence since 2003 proceeded to make findings having considered all the evidence. Ms Isherwood reiterated that any error was not material given the lack of evidence from the appellant.

12. At the end of the hearing, I announced my decision that the decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. I now provide my reasons.

Decision on error of law

13. I acknowledge that appropriate restraint should be exercised before interfering with a decision of the First-tier Tribunal having regard to the judge's fact-finding task and his consideration of a variety of sources of evidence. What matters is whether the judge has demonstrably applied the correct approach and it should be assumed that a judge in a specialist jurisdiction such as this understands the law unless the contrary is shown. Nevertheless, I am satisfied that in this particular case, the Judge has erred in law and that the error is material. My reasons for this conclusion are as follows.

14. The scope of the appeal before the Judge was set out clearly in the Upper Tribunal decision as requiring a proportionality assessment as at the date of the remitted hearing whilst preserving the finding that the appellant would not face very significant obstacles to his integration on return.

15. I accept Mr Solomon's submission and find there is merit in the first ground in that the Judge fails in this decision to undertake any proportionality assessment. The Judge dismissed the appeal in a decision of under three pages. Although concision in decision writing is to be commended, in this case unfortunately, the Judge fell into error by failing to undertake any proportionality assessment.

16. The Judge correctly sets out the scope of the appeal at [1]. The Judge at [2] notes that the evidence before him was the same as that relied upon by the appellant before the Upper Tribunal and before Judge Hussain and that no witnesses attended the hearing although there were letters in support. The Judge summaries the appellant's oral noting the appellant's explanation for the gaps in his evidence. At [3], the Judge gives reasons for finding the appellant lacked credibility. At [4], the Judge considers the letter from Canonette Jeanette Meadway and makes findings on this letter. The Judge concludes the decision at [4], finding that "…the appellant has not discharged the burden upon him to show he has lived here without a break since 2003 as claimed."

17. Generally, in a human rights appeal, it is appropriate for a judge to begin with consideration of the Immigration Rules because a favourable conclusion under the Immigration Rules is dispositive of the appeal and a negative conclusion in that regard requires a further consideration of the appeal under Article 8 ECHR: TZ (Pakistan) v SSHD [2018] EWCA Civ 1109. In this case the Judge finds the appellant has not shown he has been resided in the UK for 20 years and treats this as determinative of the appeal. The Judge does not undertake any assessment under Article 8 and fails to undertake a proportionality and balancing exercise as required by s.117 of the Nationality Immigration and Asylum Act 2002.

18. In this case the only available ground of appeal was on human rights grounds. The Judge was obliged to consider whether the refusal of leave infringed the human rights of the appellant and anybody else affected by that refusal contrary to Article 8 of the ECHR. That assessment was to be conducted through the lens of the Immigration Rules, which the Judge found could not be met. It was also incumbent on the Judge to have regard to the public interest criteria by reference to s.117B of the 2002 Act and to provide adequate reasons for the conclusions reached taking into account all relevant factors.

19. I acknowledge there is no need in every case to follow the full step by step analysis recommended by Lord Bingham in R (Razgar) v SSHD [2004] 2 AC 368. Nor is it a requirement that judges adopt a 'balance sheet' analysis of proportionality, despite the repeated judicial encouragement of such an approach.

20. However the Judge in this appeal completely fails to undertake any wider assessment of Article 8, taking into account his findings as to the length of time the appellant has lived in the UK. The Judge fails to have regard to the public interest factors and take into account the factors relied on by the appellant as required by s.117 of the 2002 Act.

21. The second ground raises several issues challenging the Judge's finding that the appellant has not discharged the burden on him to show he has lived in the UK without break since 2003.

22. Contrary to what is asserts at paragraph 2.1 of the grounds, the Judge takes as his starting point the agreed 2003 re-entry date at [1] and then considers the evidence, making findings on the evidence. The Judge assesses the evidence and makes findings at [2] to [4]. There is no merit to the challenge at paragraph 2.1 of the grounds.

23. The challenge at paragraph 2.2 of the grounds to the description of the appellant's answers in cross examination as "unconvincing", without more does not indicate the application of a standard higher than the civil standard particularly in the light of the self direction at [4]. I find there is no error of law identified by paragraph 2.2 of the grounds.

24. There is merit to the challenge at paragraph 2.3 of the grounds on the basis of the Judge's failure to give reasons for finding it not credible that the appellant had not been ill for 12 years before 2015. The Upper Tribunal in MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC) gives the following guidance:

> "(1) It is axiomatic that a determination discloses clearly the reasons for a tribunal's decision.
>
> (2) If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. ..."

25. The Judge gives reasons for finding the appellant lacked credibility as he states at [3] that "his witness statement was very brief and gave little detail of his life in the UK over apparently 20 years". However, the Judge simply states he finds it is not credible that the appellant did not go to the doctor as he had not been ill for 12 years prior to 2015, without giving any reason for this finding. I find the lack of reasons for the finding to be an error of law.

26. Paragraphs 2.4 to 2.8 of the grounds challenge the Judge's decision on the basis that the Judge failed to give adequate reasons for findings and undertakes an inadequate assessment of various evidence such as the appellant's GP report, bank statements and letters of support. The guidance given by the Upper Tribunal in Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC) is relevant which states in the headnote that:

> "It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."

27. It is appropriate to consider the challenges at paragraphs 2.4, 2.6, 2.7 and 2.8 together as these are all challenges to the Judge's consideration of the evidence. At paragraph 2.4 of the grounds it is asserted that the Judge fails to adequately consider and reach findings on material matters namely the appellant's GP report. At paragraph 2.6 the grounds challenge the Judge's consideration of the letters of support. The challenge at paragraph 2.7 is to the Judge's failure to take into account the letter and witness statement from Rita Amoah who states she has known the appellant for more than 18 years. The grounds at paragraph 2.8 assert that Judge considered the letter from Canonette Jeanette Meadway in isolation and failed to consider the evidence as a whole.

28. There is merit in this ground as there is no mention in the decision of the GP report or the letter and witness statement of Rita Amoah which are both relevant to the issue of the length of the appellant's residence in the UK. The GP report provides evidence as to the appellant's address and medical problems noted by the GP from 2011 onwards. The Judge at [4] considers the letter from Canonette Jeanette Meadway in some detail noting that this is the most significant letter because of its source and the level of detail, however the Judge in focussing on this letter failed to consider the evidence as a whole. This failure amounts to an error of law. Ms Isherwood argued that any error of law was immaterial as the evidence was lacking and was insufficient to show the appellant had resided in the UK for 20 years. I consider below the issue of materiality of this error

29. The challenge at paragraph 2.5 of the grounds is that the Judge fails to consider the covering letter which accompanied the bank statements which states "your transactions 1st Jan 2003 to May 2022". The Judge considers the bank statements at [3] noting that the transactions shown start at 2015 and the appellant gave no explanation as to why there were no transactions prior to 2015. There is no covering letter accompanying the bank statements but the heading on the first page of the bank statements is "your transactions 1st Jan 2003 to May 2022". I find the Judge makes appropriate findings on the bank statements, giving reasons for his findings. There is no merit to this ground.

30. On the issue of materiality, I note the guidance offered by the Court of Appeal in SSHD v AJ(Angola) [2014] EWCA Civ 1636, which states:

> "There are two categories of case in which an identified error of law by the FTT or the Upper Tribunal might be said to be immaterial: if it is clear that on the materials before the tribunal any rational tribunal must have come to the same conclusion or if it is clear that, despite its failure to

refer to the relevant legal instruments, the tribunal has in fact applied the test which it was supposed to apply according to those instruments."[49]

31. I have considered whether, notwithstanding the errors identified above, I should allow the decision to stand. In order to adopt that approach as stated in AJ(Angola) , I would have to be confident that that any rational judge would have come to the same conclusion on consideration of the matters that were not reasoned in the decision, and back-fill the reasoning. I have decided against that approach for it would be improperly speculative. As presently constituted, my jurisdiction is not to reach findings of fact (see MA (Iraq) v Secretary of State for the Home Department [2021] EWCA Civ 1467 at [85]). My jurisdiction is only to decide whether the decision of the First-tier Tribunal involved the making of an error of law.

32. Taking all of the above into account, I conclude that the Judge erred as set out above and that the correct course is for me to set aside the decision of the First-tier Tribunal.

33. Having considered the representations from the parties and the Senior President's Practice Statement at paragraph 7.2, I find that the nature and extent of the further fact-finding required is such that the appropriate course is for the appeal to be remitted to the First-tier Tribunal for a hearing *de novo* with the only preserved finding being the finding at [35] of Judge Hussain's decision that the appellant would not face very significant obstacles to integration on return.

Notice of Decision

The decision of the First-tier Tribunal dismissing the appeal is vitiated by an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal for a hearing *de novo* before any Judge other than Judge Wilsher with the only preserved finding being that the appellant will not face very significant obstacles to his integration on return.

N Haria

Deputy Upper Tribunal Judge Haria
Immigration and Asylum Chamber
7 August 2024