



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29051/2012

THE IMMIGRATION ACTS

Heard at Birmingham
On 10 May 2018

Decision and Reasons promulgated
On 05 June 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KAI ZHAO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Walsh instructed by Stevens & Richard Solicitors LLP
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Robertson promulgated on 21 September 2017 in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant, a citizen of China, was born on 16 September 1964. The Judge sets out a detailed immigration and procedural history in relation to the appellant; noting he arrived on 3 December 1996, has been granted various periods of leave to remain as a student until 31 May 2000 after which no further applications were

made until an application for indefinite leave to remain on the basis of long residence which was refused on 24 February 2011 without a right of appeal. The applicant then applied for indefinite leave to remain on the basis of long residence on 3 February 2012 claiming to have 10 years continuous lawful residence and 14 years continuing residence which was refused by the respondent. The Judge refers to numerous previous hearings before other judges in relation to this application which eventually came before the Judge following orders the Court of Appeal and remittal of article 8 ECHR matters by a Deputy Judge of the Upper Tribunal.

3. The Judge sets out a key finding at [26] in the following terms:
 26. On the evidence, in the round, on the balance of probabilities, I find that the Appellant has failed to discharge the burden of proof to establish that he was resident in the UK between 31 May 2000 and October 2002. I would add that whilst I have not taken into account the findings of fact made by DUTJ Juss, my own findings on the evidence before me have not differed from his findings on the gap in the evidence before me.
4. The Judge therefore finds the appellant had been in the United Kingdom from 3rd December to 1996 to 31 May 2000, a period of 3 ½ years, and then from October 2002 to the date of the hearing appeal of approximately 14 years and 10 months. Although the Judge notes this is not the 20 years provided for in paragraph 276ADE(1)(iii) this is still a considerable period of time. The Judge notes the appellant has a number of friends who live in the UK and that this is a claim based upon article 8 private life as the appellant has no family in the United Kingdom. The Judge at [27] notes that although submissions were not made in relation to paragraph 276ADE(1)(iv) the appellant would find it very difficult to establish that he would face very significant obstacles to his reintegration into life in China.
5. The Judge notes at [14] the following: “At the beginning of the hearing, it was accepted by both representatives the remit was article 8 only”.
6. Drawing together the threads of the Judge’s findings and thoughts she writes as follows at [30]:
 30. I find, taking into account the various factors, on balance, that the decision to refuse the Appellant leave to remain is proportionate when the public interest factors as set out above are balanced against the interference caused to his private life. In making this decision, I have read the witness statements of the Appellant and his friends, and the letter submitted by friends in support of his appeal and I appreciate the length of time that the Appellant has lived in the UK. However, the Appellants friends in the UK are adults and there is no reason why he cannot continue such friendship by modern means of communication. There was little evidence of ties to the wider community. He has no family in the UK and his parents reside in China. My attention was not drawn to any compelling reasons which would tip the balance in favour of the Appellant in the proportionality assessment.
7. The Judge found it follows from the above that the appeal was dismissed pursuant to article 8 ECHR.
8. The appellant sought permission to appeal asserting the Judge erred in law in that she applied the wrong set of immigration rules as can be seen from [12] of her decision. It is argued the application was made on 12 December 2011 under the

phased-out paragraph 276B(i)(b) of the Immigration Rules which was in force on 8 July 2012. The grounds submit the error is material as the appellant met the requirements of paragraph 276B(i)(b) at the date of the hearing of his appeal before the Judge on 23 August 2017 as accepted by the Judge in [27].

9. The grounds also assert the Judge's approach to the appellants article 8 appeal within the Immigration Rules that came into force on 9 July 2012 was erroneous and not in accordance with the law. The Judge's findings regarding remittance receipts not being translated are said to be baseless as the receipts are in dual language, both English and Chinese, and at [25] the Judge appears to have assumed the appellant could have left the UK illegally, entered China illegally, left China illegally, and then re-entered the United Kingdom illegally which is said to be an assumption without the support of any evidence in the circumstances of the case and is therefore irrational and not in accordance with the law.
10. Permission to appeal was granted by another judge of the First-tier Tribunal on the basis it was said the Judge erred in applying the wrong set of immigration Rules as per the pleaded grounds.

Error of law

11. The appellant sets out in his grounds a copy of paragraph 276B of the Rules which was in force on 8 July 2012 in the following terms:

The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

- (i)
 - (a) he has had at least 10 years continuous lawful residence in the United Kingdom; or
 - (b) he has had at least 14 years continuous residence in the United Kingdom, excluding any period spent in the United Kingdom following service of notice of liability to removal or notice of the decision to remove by way of directions under paragraphs 8 to 10A, or 12 to 14, of Schedule 2 to the Immigration Act 1971 was section 10 of the Immigration and Asylum Act 1999, or of a notice of intention to deport him from the United Kingdom; and
- (ii) having regard to the public interest there are no reasons why would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
 - (a) age; and
 - (b) strength of connections in the United Kingdom; and
 - (c) personal history, including character, conduct associations and employment record; and
 - (d) domestic circumstances; and
 - (e) previous criminal record and the nature of any offence of which the person has been convicted; and
 - (f) compassionate circumstances; and
 - (g) any representations received on the person's behalf.

12. The respondent, in her Rule 24 response, of 11 April 2018 asserts that even if the Judge did consider the application under the incorrect Rules the grounds are incorrect in stating that the appellant met the requirements of paragraph 276B of the Rules in place at the time of the applicant's application, as the appellant had

- been served with a section 10 notice on 3 December 2012 which meant the applicant could not meet the requirements as the grounds allege as he would only be able to demonstrate 10 years residence in the United Kingdom.
13. In *Majid v SSHD (2008) EWHC 2750 (Admin)* the Secretary of State for the Home Department argued, in effect, that the clock had stopped running for the purposes of the old 14 year long residence rule after service of an IS151A. The appellant argued that the IS151A was invalid. Ouseley J held that the SSHD's position was set out in a decision letter. It was not necessary for the SSHD to append this to the Notice. The crucial point was the claimant be told he must go and at the same time understand what the right of appeal was. Those crucial requirements for the purposes of paragraph 276B were met.
 14. Also in *AA (DP3/96 – Commencement of Enforcement action) Pakistan [2007] UKAIT 00016* the Tribunal held that, for the purposes of DP3/96, service of a notice of intention to deport or service of illegal entry papers amount to decisions that 'stop the clock'. Time spent in the United Kingdom following such service will not be counted.
 15. As the appellant was served with a section 10 notice on 3 December 2012 the clock stopped at that date prohibiting him from accumulating any further applicable time, hence limiting him to 10 years and not the required 14 years continuous residence from 2002.
 16. In *Edgehill and another v Secretary of State for the Home Department [2014] EWCA Civ 402*, in determining appeals against refusals to grant the appellants ILR it was held that, subject to one caveat, it was not lawful to reject an application, made before 9 July 2012 under Article 8 of the Convention, in reliance upon the applicant's failure to achieve 20 years' residence as specified in paragraph 276ADE(iii) of the new Immigration Rules as introduced by the Statement of Changes in Immigration Rules which came into effect on 9 July 2012. The caveat was that "mere passing reference to the 20 years requirement in the new rules will not have the effect of invalidating the Secretary of State's decision. The decision only becomes unlawful if the decision maker relies upon rule 276ADE (iii) as a consideration materially affecting the decision".
 17. The decision in *Edgehill* is, however, limited to applications made before 9 July and decided before 6 September 2012. In *Singh v SSHD: Khalid v SSHD [2015] EWCA Civ 74*, it was held that the ratio in *Edgehill* only applied to applications made before 9 July 2012 and decided before 6 September 2012 (i) When HC 194 first came into force on 9 July 2012, the SSHD was not entitled to take into account the provisions of the new Rules (either directly or by treating them as a statement of her current policy) when making decisions on private or family life applications made prior to that date but not yet decided. That is because, as decided in *Edgehill*, "the implementation provision" set out at para. 7 above displaces the usual Odelola principle; (ii) But that position was altered by HC 565 – specifically by the introduction of the new paragraph A277C – with effect from 6 September 2012. As from that date the SSHD was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE–276DH in deciding private or family life applications even if they were made prior to 9 July 2012. The result is that the law as it was held to be in *Edgehill* only obtained as regards decisions taken on pre 9 July 2012 applications in the two-month window

- between 9 July and 6 September 2012; (iii) Neither of the decisions with which we are concerned in this case fell within that window. Accordingly, the Secretary of State was entitled to apply the new Rules in reaching those decisions. Applications determined on or after 6 September 2012 were governed by the Rules as amended by HC 194 and HC 565.
18. *Singh* settled the difficulties that had arisen in trying to reconcile *Edgehill* and *Haleemudeen v SSHD [2014] EWCA Civ 558*.
 19. In *KI (Nigeria) v SSHD [2015] EWCA Civ 255*, following *Singh v SSHD [2015] EWCA Civ 74*, when considering an application for indefinite leave to remain in the UK in March 2013 which had been originally made in May 2004, the Secretary of State had been right to consider the application by reference to the Immigration Rules as amended with effect from 6 September 2012 rather than in accordance with the Rules as they stood before 9 July 2012. The position was also confirmed in *R (on the application of Rajibul Islam) [2015] EWCA Civ 312*. In *R (on the application of Taylor and Owusu-Akyeaw) [2015] EWHC 3526 (Admin)* it was held that the Court was bound by the reasoning in *Singh [2015] EWCA Civ 74* to conclude that the Secretary of State had been entitled to take into account the provisions of Appendix FM of the Immigration Rules in deciding two applications for leave to remain under Article 8 of the ECHR which had been made prior to the implementation of Appendix FM on 9 July 2012.
 20. In this appeal the decision under challenge is dated 29 November 2012 meaning the Judges reference to the application of the new rules at [12] by reference to 276ADE and Appendix FM is not an arguably erroneous self-direction.
 21. Mr Mills also referred to an earlier decision of First-tier Tribunal Judge Simpson promulgated on 5 March 2013 in which the Judge was also considering an appeal against refusal of leave on article 8 ECHR grounds. Judge Simpson at [18] found “*Having considered very carefully all the papers and all the evidence before me, I am unable to reach a different conclusion from that reached by the Respondent. When looking at the evidence in the round the Appellant has failed to discharge the burden on him approving to the balance of probabilities that he was resident in the UK during the period 2000 to 2003*”.
 22. This finding was not the subject of a contrary or adverse finding by Deputy Upper Tribunal Judge Parkes in his decision dated 19 September 2016 and therefore, a preserved finding from the earlier appeal.
 23. The Judge at [7] noted Judge Simpson’s decision and the above finding and the reason for such a finding which was that whilst the appellant was able to provide documentary evidence for the period before and after the period referred to by Judge Simpson he was not able to provide any reliable evidence for that period. Some evidence provided had been rejected by Judge Simpson who found one witness, a Mr Tidman, to have been “economical with the truth” and that the “assertion that the Appellant worked for his former wife and lived under the same roof during the 2002 – 2003 period is untrue”.
 24. The Judge records an issue that arose before her first as to the exact scope of the previous decisions and whether previous findings have been preserved and at [9 (II)] that “it is clear from the grant that what was in issue was that there was no criticism of Judge Simpson’s findings of fact before DUTJ Juss, but he nevertheless ignored them and made his own “markedly different findings” without any explanation as to why the findings of Judge Simpson were flawed”. The Judge

notes at [11] she advised the parties that the decision of Judge Simpson will be the starting point for the findings of fact in relation to Article 8. There is no recorded objection and the hearing proceeded on that basis.

25. There was clear evidence before the Judge therefore of the existence of a gap in the appellants period of continuous residence in the United Kingdom.
26. The Judge considered the evidence provided in support of the claim the appellant had been present in the United Kingdom throughout the relevant period including the remittance receipts. The Judge finds at [24]:
 24. As to the remittance receipts, these are not translated. Whilst the dates can just about be seen, the receipts are described as an 'Inward Remittance', which suggests that the receipts was created when the funds were received by the Appellant's parents, not when they were sent by him. Receipts do not show the country from which they were sent.
27. It is correct to note that the receipts appear to have both English and Chinese characters on but this does not answer the Judge's findings in relation to the content of those documents.
28. The Judge notes the challenge in the grounds at [25], raised during the course of the proceedings, but the Judge gives ample reason for why submissions were not found to be determinative. The Judge also notes, as did Judge Simpson the appellant's ability to provide documentary evidence for large periods of time but not for all the period that he claimed to have been in the United Kingdom. On this occasion it appears to be from May 2000 to October 2002. This has not been shown to be a finding outside the range of those reasonably open to the Judge on the evidence.
29. It is also the case that whilst some of the receipts are stamped indicating the place of origin of the funds, those for the disputed period are not stamped which also casts doubt upon their authenticity.
30. The Judge clearly considered the evidence with the required degree of anxious scrutiny to ensure all outstanding matters had been resolved. The appellant was unable to succeed under the Immigration Rules which is why the matter was to be determined under article 8 ECHR outside the Rules only. The Judge considered the nature of the protected rights in a properly structured manner. The Judge gives adequate reasons for findings made and so the weight to be given to the evidence was a matter for the Judge.
31. The issues on which permission to appeal was sought and granted have not been shown to disclose any arguable error in the decision of the Judge. The Judge was not satisfied the appellant was able to succeed on any immigration rule and Mr Walsh, in his reply to Mr Mills, accepted that the decision of the Court of Appeal in *Singh & Khalid* had not been overturned and accepted the order of the Court of Appeal in this case but argues that although Judge Robertson had the power to consider the period of residence when she did so it was necessary to do so properly and lawfully, and the findings regarding residence are irrational and not properly undertaken. It was argued there is the need to look at the context of the decision.
32. Mr Walsh accepted that if article 8 ECHR was the only issue [12] decision was correct.

- 33. Despite his best efforts, I do not find the appellant's representative has established any arguable legal error material to the decision of the Judge. In a very carefully written determination the Judge was at pains to ensure she understood everything that had gone before, previous findings and reasons for the same being overturned, and the strict terms of the remittal to the First-tier Tribunal.
- 34. The appellant fails to establish his case to the appropriate burden. The Judge clearly considered all matters adequately and disagreement with the outcome or desire for a more favourable conclusion does not establish arguable legal error material to the decision, or any arguable irrationality in the approach taken or conclusions by the Judge, sufficient to enable the Upper Tribunal to interfere in this judgment.
- 35. No arguable legal error material to the decision of the Judge has been made out. The decision shall stand.

Decision

- 36. **There is no material error of law in the Immigration Judge's decision. The determination shall stand**

Anonymity.

- 37. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 4 June 2018