IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06976/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 December 2014	**On 29 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RACHID ZEROUAL
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the Appellant: Mr T Melvin, Specialist Appeals Team
For the Respondent/Claimant: Mr M Saleem, Counsel instructed by M & K Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal the decision of the First-tier Tribunal allowing on Article 8 grounds the claimant's appeal against the decision by the Secretary of State to refuse to grant him leave to remain on the grounds of long residence, and to remove him from the United Kingdom as an illegal entrant. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is required for these proceedings in the Upper Tribunal.

2. The claimant is a national of Morocco, whose date of birth is 21 August 1978. He claims to have entered the United Kingdom secretly and illegally in December 1997. On 25 November 2007 he was arrested on suspicion of illegal entry, and taken to Charing Cross police station. He told the police that his name was Abdo Shkouny, and gave his date of birth as being 21 or 22 July 1975. He stated under caution that the last time he entered the UK was in July or August 2007 at Heathrow Airport, arriving from Tangiers. On the same day, the claimant was fingerprinted and served with a form IS15A, informing him of his liability to detention and removal. The form was served on the claimant in the name of Abdo Shkouny. According to the IS minute sheet at section G of the Home Office bundle, the next day the claimant told the police that he had given them incorrect details, and that his true identity was that of Rashid Zeroual, with a date of birth of 23 August 1978. He was given temporary release to report to Becket House on the same day, and then to be notified. He was asked to provide evidence of identity, nationality and status when he reported, and the minute said that his papers would be withdrawn in the event that he did not have leave to be in the UK.

3. On 26 September 2012 the claimant's solicitors applied on his behalf for ILR under paragraph 276B of the Immigration Rules. They provided a different version of the claimant's immigration history than that which had been provided by the claimant to the police in 2007.

4. The claimant was fingerprinted again on 11 December 2012, and it was determined that he was the same person as the person who had been apprehended by the police on 20 November 2007, and served with an IS15A notice. His details had changed slightly from those provided on 26 November 2007, in that his first name was now spelt "Rachid" not "Rashid"; and his date of birth was now given as 21 August 1978.

5. The claimant's application for leave to remain on long residence grounds was refused on 15 January 2014. The Secretary of State strongly disputed the claimant's of his immigration history. She not only relied on the contents of his interview with the police, but also on the fact that Home Office records showed that a visit visa was issued to a person named Rachid Zeroual with a date of birth of 3 October 1975 in December 2003. There was also another visit visa issued to a person of the same name (with a date of birth of 5 October 1971) in January 2011. Moreover the visit visa was issued in Rabat, Morocco.

6. In any event, paragraph 276B had been deleted from the Immigration Rules in July 2012. Even if his application was to be considered under this deleted paragraph in the Rules, he had failed to demonstrate fourteen years continuance residence in the UK.

7. His application had been considered in line with paragraph 276ADE of the Rules on the basis of his implied private life. But he had not lived continuously in the UK for at least twenty years; nor had he lived continuously in the UK for less then twenty years but had no ties

(including, social, cultural or family) with the country to which he would have to go if required to leave the UK. On any view he had resided in Morocco for the majority of his life, and it was not accepted he would have severed all ties with Morocco. He submitted several letters of support, implying that he had formed a private life with friends here. However, his presence in the UK was not essential for him to enjoy his ties with his friends. We could continue relationships with his friends from overseas through modern channels of communication. He considered all the circumstances in the particular case, he had not provided sufficient evidence which might justify allowing him to remain here exceptionally. There were no sufficiently compelling or compassionate circumstances to justify allowing him to remain in the UK outside the Rules. His application was thus refused under paragraph 322(1) of HC 395 as amended.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. The claimant's appeal came before Judge Clough sitting at Hatton Cross in the First-tier Tribunal on 8 August 2014. Both parties were legally represented. In his subsequent determination, the judge accepted the evidence given by the claimant and supporting witnesses that he had been continuously resident in the UK since 1997. The judge applied the five point **Razgar** test. In the issue of proportionality, the judge held as follows at paragraph 15:

> I find it would be disproportionate to that end to remove the [claimant]. This is because he has been in the UK since 1997 and has established himself both in his personal relationships and by working. He has worked at entry level jobs such as kitchen porter, building and cleaning. He obtained documents, albeit false ones, that allowed him to legally work and pay tax and he has done so since 2006. The [claimant] has established his life in the UK. He has been, and is, financially independent and speaks fluent English. Even taking into account the direction in Section 117B(iv) of the Immigration Act 2014, in that little weight should be given to a private life established while his immigration status was unlawful and precarious, I consider it would be disproportionate to remove him.

The Application for Permission to Appeal

9. A member of the Specialist Appeals Team settled the Secretary of State's application for permission to appeal to the Upper Tribunal. Having found that the claimant could not qualify for leave to remain under the Rules, it was only if there might be arguable good grounds for granting leave to remain outside the Rules would it be necessary for the judge to proceed and consider whether there were compelling circumstances not sufficiently recognised under them, applying **Nagre v The Secretary of State for the Home Department [2013] EWHC 720 (Admin)**. The judge had failed to identify any good grounds for granting leave to remain outside the Rules or any compelling circumstances not sufficiently recognised under them. The fact the claimant had been illegally working with the use of fraudulent documents went towards the public interest in removing the claimant. Reliance was also placed on **Nasim & Others (Article 8)**

[2014] UKUT 0025 (IAC) where it was recognised that Article 8 had limited utility in private life cases that were far removed from the protection of an individual's moral and physical integrity. In short, the First-tier Tribunal Judge materially misdirected himself in finding that removing the claimant would be a disproportionate interference with his private life.

The Grant of Permission to Appeal

10. On 3 November 2014 First-tier Tribunal Judge Foudy granted permission to appeal as it was arguable that the judge had given insufficient reasons for concluding that it would be disproportionate to remove the claimant, particularly in the light of his use of false documents and identity.

The Hearing in the Upper Tribunal

11. At the hearing before me, Mr Melvin developed the arguments advanced in the grounds of appeal, and Mr Saleem mounted a stout defence of the decision. He submitted that the judge's approach was in accordance with the relevant jurisprudence, including **Patel & Others v Secretary of State for the Home Department [2013] UKSC 72**, **R On the Application of Ganesabaln v Secretary of State for the Home Department [2014] EWHC 2712 (Admin)** and **R (On the Application of Halimatu SO Adiya & Others v The Secretary of State for the Department [2014] EWHC 3919 (Admin)**.

12. After hearing extensive submissions from both parties on the error of law question, I ruled that an error of law was made out. I gave my reasons for so finding in short form, and my extended reasons are set out below.

Reasons for Finding an Error of Law

13. Rule 276ADE does not represent a complete code with regard to a private life claim under Article 8 because, unlike the deportation Rules, there is no "exceptional circumstances" provision. But it comes close to being a complete code, and so some consideration of why the claimant could not bring himself within Rule 276ADE was a necessary precursor to an adequate proportionality assessment outside the Rules.

14. Mr Saleem relied on the following passage in Lord Carnwath's speech in **Patel and Others** at paragraph [54]:

> The most authoritative guidance on the correct approach of the Tribunal to Article 8 remains that of Lord Bingham in **Huang**. In the passage cited by Burnton LJ Lord Bingham observed that the Rules are designed to identify those to whom "on grounds such as kinship and family relationship and dependants" leave to enter should be granted, and that such Rules "to be administratively workable, require that a line be drawn somewhere". But that was no more than a starting point for the consideration of Article 8. Thus in Mrs Huang's own case, the most relevant Rule (Rule 317) was not

satisfied, since she was not, when the decision was made, aged 65 or over and she was not a widow.

15. Mr Saleem submitted that, by parity of reasoning, Judge Clough was entitled to take the claimant's failure to satisfy the requirements of Rule 276ADE as merely a starting point in his freewheeling Article 8 assessment outside the Rules. But the Rules under discussion in **Patel & Others** were ordinary Immigration Rules, not the family and private life Rules introduced in the summer of 2012 to provide an almost complete code for Article 8 claims. Thus, following **Nagre**, the failure by an applicant to bring himself within the family or private life Rules is not merely a starting point in the Article 8 assessment. In many cases it is dispositive of the Article 8 claim in its entirety, and in those cases where it is not, the decision maker cannot simply substitute his or her own view for that of the Secretary of State as to how the balance should be struck.

16. The decision of the First-tier Tribunal Judge discloses a clear error of law, as there is insufficient recognition in the reasoning process that in Rules laid before Parliament it has been decided that illegal entrants such as the claimant should not acquire leave to remain on long residence and/or private life grounds until they have accrued twenty years unlawful residence (discounting any periods of imprisonment). The judge had to ask himself what it was about the claimant's circumstances which justified him being granted Article 8 relief outside the Rules, when he fell short of twenty years unlawful continuous residence. In effect the judge advanced reasons for granting the claimant relief which would be no different to those which would apply in the vast majority of cases to claimants who had managed to remain here unlawfully for twenty years.

17. Moreover, the judge's reasoning was flawed as identified in the grounds of appeal. The claimant had not worked legally, because he had only been able to obtain work through the use of false documents. It was also not the case that the claimant was financially independent. On his own evidence, he had been reliant upon the charity of friends for his maintenance and accommodation since he had been forced to stop working illegally in September 2013.

The Remaking of the Decision

18. On the issue proportionality, it is a consideration in the claimant's favour that he can speak English, and that he could probably find work to maintain and accommodate himself if granted permission to do so. But his long residency here has been entirely unlawful, and there are aggravating features in the claimant's immigration offending. He used false documents to work illegally, and he gave two different false names and identities to the police in November 2007 when arrested as a suspected illegal entrant. Although he gave what is now accepted to be his real name the following day, he never provided the police or the UK Border Agency with sufficient information to verify his claimed identity, thus frustrating the ability of UKBA or the Home Office to remove him. In any

event, although not expressly provided for in Section 117B of the 2002 Act, the fact that the claimant was put on notice of his liability to detention and removal in 2007 means that he had no legitimate expectation thereafter of acquiring ILR on the grounds of long residence under the fourteen year Rule, let alone under the new twenty year Rule.

19. In conclusion, I find that the decision appealed against is proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal against the refusal of ILR on the grounds of long residence is dismissed under the Rules and also on Article 8 grounds outside the Rules.

Anonymity

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

Signed Date **29 December 2014**

Deputy Upper Tribunal Judge Monson