**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Number: PA/02814/2019

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 3 January 2020** | **On 10 January 2020** |

**Before**

**UPPER TRIBUNAL JUDGE BLUNDELL**

**Between**

**GUO QIANG NONG**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Lam, instructed by Sparrow & Trieu Solicitors
For the Respondent: Mr Jarvis, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant is a Chinese national who was born on 20 February 1970. He appeals against a decision which was issued by First-tier Tribunal Judge Freer on 27 August 2019, dismissing his appeal against the respondent's refusal of his protection and human rights claims.

**Background**

2. The appellant was born in Vietnam to Chinese parents. When he was around eight years old, he and his parents fled from the Vietnam War as 'Boat People' and returned to China. He lived in China from 1978 to 1997, at which point he moved to the Gambia to work as a chef. After four years in Gambia, he moved lawfully to Ireland, where he lived until May 2002. He then entered the UK unlawfully, on board a coach from

the Republic of Ireland. He remained in the UK unlawfully thereafter. He was encountered and given Temporary Admission in 2010. In 2013, he made an unsuccessful application for leave to remain. He was listed as an absconder in 2016. On 22 October 2018, he was encountered at Belfast Docks, at which point he was detained. He claimed asylum on 10 January 2019. Following interviews which took place in January and February 2019, his claim for asylum (which was based primarily on his adherence to the Christian faith) was refused. He appealed against that refusal to the First-tier Tribunal.

**The Appeal to the First-tier Tribunal**

3. The appeal came before Judge Freer ("the judge") on 14 August 2019. The appellant was represented by Mr Lam of counsel, as he was before me. The respondent was represented by a Presenting Officer. The judge noted that the appellant wished to rely only on human rights grounds before him, and that he did not seek to contend that his removal to China would place the UK in breach of its international obligations under the Refugee Convention: [5].

4. At [9]-[28], the judge described the evidence before him. At [29]-[32], he recorded the submissions made by the representatives. At [33]-[41], the judge made the following findings. He did not consider the appellant to have been a persuasive witness: [33]. He gave weight to the evidence given by one of the witnesses, who was able to confirm that the appellant had been in Sheffield from May 2016 to May 2019: [34]. He was also able to accept that the appellant was in the UK from 2005 to 2008 although he considered there to be an 'evidential gap' in relation to the period 2008 to November 2010: [35]. The judge described the appellant's asylum claim as an 'exaggerated legal claim' which had not been pursued before him: [36]. There was inadequate evidence to show that the appellant was unable to find work in China: [37]. Despite the presence of a large extended family, there was no evidence of a family life in the UK: [38]. The appellant could be financially supported by his sister or the large extended family in the UK in the event that he was returned to China: [39]. The appellant would be able to pursue his Christian worship in China: [40]. The appellant could not establish that he would encounter very significant obstacles to his reintegration to China: [41].

5. The judge then turned to Article 8 ECHR. He did not consider that the appellant had established continuous residence in the UK for either 20 years or 14 years (which period used to suffice to receive settlement under the Immigration Rules): [42]. It was not clear to the judge why the appellant could not return to the Gambia: [43]. The judge noted that the appellant was said by the respondent to have made various applications from the Republic of Ireland in the period 2002-2004 and he noted that the appellant had entered the UK unlawfully at some point between 2004 and 2010: [45]-[46]. Considering the vagueness of the evidence, the judge considered that he was only able to find that the appellant had 'been here at most for about 13 or 14 years but the continuity thereafter is not clearly established.': [47]. Had the judge been able to find that the appellant had been continuously present in the UK for more than fourteen years, he would have found a 'tapering

down' of the public interest 'on the basis that 14 years used to be good enough': [47]. Considering the extent of the public interest in the appellant's removal, the appellant's removal was a proportionate course: [48]-[54].

**The Appeal to the Upper Tribunal**

6. A single ground of appeal was advanced in the application for permission to appeal. It was submitted that the judge had made a mistake regarding an established and objectively verifiable fact as to the appellant's length of residence. There were two sources of incontrovertible evidence which showed that the appellant had entered the UK in 2002 and had remained here since. There was a stamp from the Irish authorities showing that he had left the Republic in May 2002 and his UK medical records showed that he had been in regular receipt of NHS services since that time. The judge had overlooked all of that evidence in concluding that the appellant had only been in the UK for thirteen or fourteen years. Had he turned his mind to that evidence, the judge would have accepted that the appellant had been in the UK for seventeen years and this difference was material, it was submitted, to the assessments undertaken in relation to paragraph 276ADE(1)(vi) of the Immigration Rules and Article 8 ECHR.

7. At the outset of the hearing before me, I asked Mr Jarvis whether he had seen the appellant's medical records. I asked that question because I had located these records separately from the bundles filed by the respondent and the appellant. There was a manuscript endorsement on the top of this separate bundle, indicating that it was, or had been, Annex P of the respondent's bundle. Mr Lam helpfully indicated that the papers I was showing to Mr Jarvis were actually the same documents as appeared at Annex P, albeit that they were in a slightly different order. Mr Jarvis required a little time to consider these documents, which I duly gave him.

8. After Mr Jarvis had considered the medical records, I considered their significance with the assistance of the advocates. I did so because, as the judge had noted, it had been said by the respondent in the letter of refusal and on the front page of her bundle that the appellant had been in the Republic of Ireland between 2002 and 2004. There were documents in the respondent's bundle which indicated that the appellant had made UK Work Permit ("UKWP") applications in Dublin in 2003. I asked Mr Lam whether it was said by the appellant that he had been in the UK when these applications were made, or whether he had actually been in Eire at the time. Mr Lam confirmed, on instructions, that the appellant's case was that he had been in the UK from May 2002 onwards and that it had been incorrectly stated to UKWP that he was in Eire at the time.

9. I asked Mr Jarvis whether he was prepared to accept that this was indeed the case. Having considered the UK medical records with care, Mr Jarvis indicated that he was prepared to accept on behalf of the respondent that the appellant had been in the UK from May 2002 onwards. He noted that the medical records showed that the appellant had been in receipt of regular care from the NHS from 2002 onwards.

It was more likely than not that the appellant had been in the UK during this period, and that the suggestion that he had been in the Republic of Ireland between 2002 and 2004 had been a falsehood. In the circumstances, Mr Jarvis felt constrained to accept that the judge had proceeded on a factually incorrect footing when he concluded that the appellant had not shown continuous residence since May 2002. As matters stood before the judge in August 2019, Mr Jarvis accepted that the appellant had been continuously resident in the UK for more than seventeen years. He accepted that the judge had erred in law in concluding otherwise, since that conclusion was contrary to the established and objectively verifiable facts.

10. I had considered the medical evidence with some care in advance of the hearing and was able to indicate immediately that I accepted Mr Jarvis's concession in this regard. I then turned to Mr Lam to ask him to outline how it was said that the error of law into which the judge had fallen was material to the outcome.

11. Mr Lam made three submissions. He submitted, firstly, that the error into which the judge had fallen had coloured his assessment of whether there were very significant obstacles to the appellant's re-integration to China. Whilst he had not sought to advance any separate criticism of the judge's analysis of that question at [36]-[41], it was clear that the appellant's length of residence in the UK was relevant to the question of his re-integration to his country of nationality. It was to be recalled in that connection, submitted Mr Lam, that the appellant had lived a somewhat nomadic life and was not simply returning to the country in which he had always lived prior to his entry to the UK. He had been born in Vietnam and had lived in five different countries during his life.

12. Mr Lam's second submission was that the judge's error was relevant to the wider Article 8 ECHR assessment, since length of residence in the expelling country was always a relevant consideration in such an assessment. Where, as here, the judge had proceeded on a false footing as to the length of residence in the host state, the Article 8 ECHR decision was necessarily flawed as a whole. Thirdly, as a separate but related submission, Mr Lam noted that the judge had proceeded on the basis that there would be a 'tapering down' of the public interest in the event that the appellant could establish more than fourteen years' continuous unlawful residence. Since that length of residence had now been established, it necessarily followed that the balancing exercise undertaken by the FtT was vitiated. If, as was clearly shown to be the case, the appellant had been present in the UK for considerably more than fourteen years, the public interest in the appellant's removal was significantly reduced.

13. Mr Lam submitted that the correct course, in the event that I found there to be a material error of law, was for the appeal to be remitted to the FtT for rehearing afresh. I asked whether there was any reason why that course was necessary, when the facts had either been found by the FtT or were agreed by the parties, and Mr Lam submitted that the appellant should be given the opportunity of having a further hearing at which oral evidence could be called.

14. On behalf of the respondent, Mr Jarvis submitted that the error of law which was accepted to have occurred was not material to the outcome and that the appeal to the Upper Tribunal fell to be dismissed.

**Discussion**

15. It is regrettable that the judge fell into error regarding the appellant's length of residence in the United Kingdom. It was clear that the respondent had assumed, as a result of the WPUK applications to which I have referred, that the appellant had been in the Republic of Ireland when those applications were made. Equally, however, it should have been clear to the judge - as a result of the extensive medical records - that there was cogent evidence to show that the appellant was in the United Kingdom between 2002 and 2004. There is no reference to that evidence in the judge's decision. It appears simply to have been overlooked, leading the judge to embark on a fact-finding enquiry which is now accepted on all sides to have been unnecessary. It is clear beyond doubt that the appellant was receiving extensive assistance from the NHS from 2002 onwards. He was plainly in the UK at that time, and Mr Jarvis now quite properly accepts that he has been continuously resident in the UK since May 2002.

16. As I have recorded above, Mr Lam submitted that the judge's error as to the appellant's length of residence was material to the outcome of this appeal for three reasons. For the reasons which follow, however, I come to the clear conclusion that the error was not a material one. In reaching that conclusion, I bear firmly in mind what was said by Hooper LJ (with whom Tuckey and Rix LJJ agreed) at [15] of IA (Somalia) [2007] EWCA Civ 323; [2007] Imm AR 685: "in public law cases, an error of law will be regarded as material unless the decision-maker must have reached the same conclusion without the error."

17. Mr Lam submitted that the judge's error as to the appellant's length of residence vitiated his assessment of whether there were very significant obstacles to his reintegration into China. It is to be recalled, however, that the judge made relatively detailed findings about the circumstances to which the appellant would be returning in China. He concluded, as I have recorded above, that the appellant would be able to find employment there; that he would be able to practise his faith in China; and that he would in any event be supported by his network of family support in the UK. The grounds make no complaint about any of this analysis. The judge's approach was in accordance with the holistic enquiry required by Kamara [2016] 4 WLR 152 and Parveen [2018] EWCA Civ 932 and, as Mr Lam was constrained to accept in his realistic submissions, it is difficult to quantify how this analysis can properly be said to be tainted by the erroneous calculations as to length of residence. In my judgment, the assessment was not tainted in any way, and the judge would have reached precisely the same conclusion under paragraph 276ADE(1)(vi) if he had understood chronology correctly.

18. Mr Lam's second submission is rather more meritorious. Recalling that an individual's length of residence in the host country is one of the factors to which the ECtHR has regularly made reference in such a context (Uner v The Netherlands (2007) 45 EHRR 14, at [57], for example), he submits that it cannot be said with confidence that the judge would have come to the same decision on Article 8 ECHR if the correct length of residence in the UK had been understood. Again, however, I do not see how the additional period of residence would have made a difference to the judge's assessment in this specific case. It is not said, for example, that some important event took place during the period of residence which the judge discounted. The judge concluded that the appellant has no family life in the UK but he accepted that there was a protected private life. He took account of the appellant's family members in this country and the other aspects of his private life but he concluded that the private life, such as it was, was outweighed by the public interest in the appellant's removal. Had the judge correctly understood the appellant's length of residence, the essential components of the enquiry would have been same. The outcome would, to my mind, have certainly been the same even if the judge had taken account of the three years of additional unlawful residence and reliance on the NHS. As Mr Jarvis noted in his concise submissions, the statutory presumption (Rhuppiah [2018] UKSC 58; [2019] 1 WLR 5536 refers, at [49]-[50]) would be that the private life accrued during such unlawful residence would be given little weight and there are no particularly strong features of the appellant's private life which begin to displace that presumption, even if the appellant's length of residence is correctly understood.

19. Mr Lam's third submission was made in reliance on the judge's conclusion that the appellant would be placed in an advantageous position if it was to be held that he had accrued more than 14 years continuous lawful residence. Mr Lam reminded me of what had been said about 'near miss' cases at [54]-[58] of SS (Congo) [2015] EWCA Civ 387; [2016] 1 All ER 706. On analysis, however, Mr Lam accepted that this could not properly be said to be a 'near miss' case of the kind considered by the Court of Appeal in SS (Congo) or by the Supreme Court in MM (Lebanon) [2017] UKSC 10; [2017] 1 WLR 771. The reality, even on the correct calculation, is that the appellant remains more than two years short of the twenty years' continuous residence required by paragraph 276ADE(1)(iii) of the Immigration Rules. There is no proper basis for a submission that the appellant is so close to that requirement that there is a reduction in the weight which would ordinarily be attached to immigration control considerations.

20. Correctly understood, the point taken by the judge (and adopted by Mr Lam) was not that the appellant was close to twenty years' residence. It was that the appellant would be in a better position under Article 8 ECHR if he could establish that he met the old requirement for ILR under paragraph 276B of the Immigration Rules. The judge proceeded on the basis that there would be a 'tapering down' of the public interest if the appellant could establish such a length of residence because such a period 'used to be good enough'.

21. As I suggested to Mr Lam at the hearing, this conclusion was not related to any 'near miss' principle; it is simply an invocation of the position which previously existed under the Immigration Rules. As Mr Lam eventually accepted, that was straightforwardly an error on the part of the judge. The Immigration Rules are to be applied as they stand at the date of hearing unless the contrary intention appears: Odelola [2009] UKHL 25; [2009] 1 WLR 1230. The Immigration Rules were amended so as to remove the relevant part of paragraph 276B as long ago as 9 July 2012. The appellant had only accrued ten years' residence in the UK at that time and the fact that he has subsequently accrued more than fourteen years is of no significance to the assessment required by Article 8(2) ECHR whatsoever. In law, there is certainly no 'tapering down' of the public interest when an individual crosses a threshold which previously existed in the Immigration Rules. It is not clear why the judge proceeded on that basis but it is clear that he was in error in doing so. The appellant cannot claim any such advantage in the scales of proportionality by accruing more than fourteen years' unlawful residence.

22. It is for these reasons that I accept the submission made by Mr Jarvis. Whilst the judge erred in relation to the appellant's length of residence, the outcome in the appeal would have been the same but for that error.

23. I add this. I asked Mr Lam at the conclusion of his submissions what relief he sought in the event that I agreed with him that the judge's error was material to the outcome of the appeal. He submitted that the correct relief was a hearing de novo before another judge. Had I decided that the judge's error was material to the outcome, I would not have acceded to that submission.

24. As I have set out at some length, the judge made relevant findings regarding the appellant's circumstances in the UK and on return to China. It was not suggested before me that these primary findings were in any way flawed, or that matters had moved on. The only error was as to the appellant's length of residence. Had I found there to be a material error, I would have proceeded to remake the decision on the appeal on the correct factual footing. Had I done so, the outcome would have been the dismissal of the appeal. Although the appellant has family here, he does not enjoy a protected family life with them. Although he is able to speak some English and is not a burden on public funds, there is a cogent public interest in his removal. He has remained in the UK unlawfully for many years and has taken extensive advantage of the NHS, a fact which speaks cogently in favour of his removal: Akhalu [2013] UKUT 400 (IAC). He employed repeated deception (as to his place of residence) in the applications he made to WPUK in 2002-2004. There are no particularly strong features of his private life which are capable of outweighing the presumption that little weight should be attached to his private life. Had I been with Mr Lam on the question of whether the judge erred materially in law, there would have been no reason to convene a further hearing, whether before the FtT or the UT, because the findings of fact already made would have mandated the dismissal of the appeal on Article 8 ECHR grounds.

**Notice of Decision**

The First-tier Tribunal erred in law but that error was not material to the outcome of the appeal. The appeal to the Upper Tribunal is accordingly dismissed.

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

06 January 2020