IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006340

First-tier Tribunal No: HU/53855/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

21ST September 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Xiu Qi Zhang
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr A. Gilbert, Counsel instructed by Lisa's Law Solicitors
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

Heard at Field House on 29 August 2023

DECISION AND REASONS

1. The central issue in this appeal concerns the appellant's claim to have resided in the UK (unlawfully) for a continuous period of 20 years following his arrival in 2000.

2. This is an appeal against a decision of the Secretary of State dated 25 September 2020 to refuse a human rights claim made by the appellant, a citizen of China born in 1973.

3. The appeal was originally heard and dismissed by First-tier Tribunal Judge Mulholland by a decision and reasons promulgated on 15 December 2022. By a decision promulgated on 23 June 2023, sitting on a panel with Deputy Upper Tribunal Judge Hutchinson, I set the decision of Judge Mulholland aside, with certain findings of fact preserved, and directed that the appeal would be remade

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in the Upper Tribunal. The Error of Law decision made by found in the **Annex** to this decision.

4. The proceedings resumed before me, sitting alone, on 29 August 2023, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. The appeal was originally brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

Factual background

5. On 10 February 2018, the appellant made a human rights claim to the Secretary of State. On his case at that stage, he had lived in the UK for 18 years and would face very significant obstacles to his integration in China. It would be disproportionate to remove him.

6. The claim was refused on 25 September 2020; the appellant did not meet any of the Article 8 'private life' criteria then contained in para. 276ADE of the Immigration Rules, and there were no exceptional circumstances such that it would be unduly harsh for him to be removed to China.

7. The appellant's appeal to the First-tier Tribunal was heard on 15 November 2022. By that stage, he claimed to have accrued at least 20 years' continuous lawful residence, thereby meeting the substantive requirements of para. 276ADE(1)(iii) of the Immigration Rules, as then in force. The focus of the hearing before Judge Mulholland, therefore, was whether the appellant could establish a total of 20 years' continuous residence by reference to the date of the hearing.

8. In findings of fact that were not challenged by the Secretary of State, and which were preserved by the Error of Law decision (see para. 39), Judge Mulholland found that the appellant had been in the UK from May 2000 to March 2002, in 2006, from 2008 to 2009, in 2014 and in 2017 and 2018 onwards. The judge had rejected the appellant's case to have been in the UK in the intervening years and dismissed the appeal.

9. The focus of the resumed hearing lay was the appellant's case concerning the intervening years in relation to which the First-tier Tribunal found that he was not present in the UK. As set out below, in the event, the disputed years as agreed by the parties were narrower in scope.

The law

10. This is an appeal brought on the ground that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998.

11. The essential issue for my consideration is whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellant to be removed, in light of the private life he claims to have established here. This issue is to be addressed primarily through the lens of the Immigration Rules, and also by reference to the requirements of Article 8 of the Convention directly (see *Razgar* [2004] UKHL 27 at [17]). The Rules relevant to this case are contained in paragraph 276ADE(1)(iii) of the Immigration Rules:

> "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> […]

> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment)…"

12. Para. PL. 5.1.(a) of Appendix Private Life has since replaced para. 276ADE(1)(iii). It provides:

> "PL 5.1. Where the applicant is aged 18 or over on the date of application:
>
> > (a) the applicant must have been continuously resident in the UK for more than 20 years; or
> >
> > (b) where the applicant has not been continuously resident in the UK for more than 20 years, the decision maker must be satisfied there would be very significant obstacles to the applicant's integration into the country where they would have to live if required to leave the UK."

13. In addition, Part 5A of the 2002 Act sets out a number of relevant public interest considerations.

14. While it is for the appellant to establish that Article 8(1) is engaged, it is common ground that it is. It is therefore for the Secretary of State to establish that any interference in the appellant's Article 8(1) rights is justified under Article 8(2); in these proceedings, the means by which she does so is by pointing to the requirements of the Immigration Rules, and to the public interest in the maintenance of effective immigration controls, which is (amongst others) a statutory consideration in section 117B(1) of the 2002 Act. The standard of proof is the balance of probabilities.

The hearing

15. The appellant and the witness Xiao Pin Pan adopted their statements and were cross-examined. They each participated in Mandarin, speaking through an interpreter.

16. Mr Gilbert also relied on a speaking note, summarising his submissions.

17. I do not propose to summarise the entirety of the evidence and the submissions I heard but will do so to the extent necessary to reach and give reasons for my findings of fact, below.

Findings of fact: appellant continuously present in the UK for 20 years prior to the hearing

18. Mr Gilbert invited me to find that the appellant had been resident for the twenty years preceding the resumed hearing before me, that is, since 29 August 2003, and to assess Article 8 outside the rules on that basis. Mr Tufan agreed. I agree and shall therefore adopt that approach.

19. Mr Tufan and Mr Gilbert also agreed that the disputed years, in relation to which there was no documentary evidence or no preserved findings of fact, were 2003, 2005 to 2007 and 2013 ("the disputed years"). I agree with this narrowing of this issues. For 2004 the appellant has provided a copy of a hand-completed notice of Temporary Admission dated 1 April 2004. It was therefore open to the parties to agree between themselves that the appellant has demonstrated his presence in the UK in 2004. In relation to 2010 to 2012, the appellant made further submissions in each year. Again, it was open to the parties to agree that the appellant had demonstrated his presence in the UK on those years. Similarly, for

2015 the appellant has produced a further temporary admission notice: see page 232 of the bundle.

20. By way of a preliminary observation, those living in the UK unlawfully for lengthy periods may legitimately struggle to produce documentary evidence of their residence at the time. Their lives are often characterised by informal arrangements and unlawful working. They exist in the undocumented shadows of society. Consequently, a lack of documentary evidence covering each year is not necessarily fatal to a claim to have been present at the material times. Much turns on the credibility of this appellant and his witness.

21. The appellant's written and oral evidence was, put simply, that he has resided in the UK continuously since his arrival in 2000. He accepts that there is no documentary evidence concerning the disputed years, but he maintains that it was more likely than not that he remained in the UK throughout the entire period under consideration, rather than having (on the Secretary of State's case) having left and re-entered clandestinely.

22. The appellant also relied on the written and oral evidence of Ms Pan, a friend whom he has known since 2005. Her oral evidence was consistent with the appellant's; they met while working at the same Chinese takeaway run by a man called Sun. Under cross-examination, they provided broadly consistent accounts: Sun had since died, the appellant moved to Cambridge some time after working with Ms Pan, and they had stayed in touch. Although they were not close, they saw each other at key times of the year, such as for birthdays and new year celebrations, and had seen each other at least each year since 2005.

23. I found both witnesses to be credible. The appellant gave straightforward, consistent answers, as did Miss Pan. They were internally and externally consistent when pressed in cross-examination. The appellant was able to describe what he was doing in the years in question, where he lived, and, in relation to his home in Cambridge, the surrounding buildings, namely the church he then attended.

24. Miss Pan revealed, albeit after some initial reluctance, that the appellant is working at the moment. It is to her credit that she revealed what she thought was a point which would undermine the appellant's case or otherwise expose him to the risk of punishment. Her evidence was not challenged under cross-examination to the extent it appeared to have been challenged before Judge Mulholland.

25. I find to the balance of probabilities standard that the appellant was present during each of the disputed years. I accept his oral evidence in this respect, and, concerning 2005 onwards, that of Ms Pan.

26. While I note Mr Tufan's submissions that there could have been further supporting witnesses, I do not consider that fact to undermine the credibility of the appellant and Ms Pan to a fatal extent. It is often the case that there could be "more" evidence; my role is not to speculate as to what additional evidence there could be, but to make findings of fact based on the evidence that has been relied upon. I accept that the appellant will have lost contact with some of those he has met throughout the course of his lengthy unlawful residence.

27. The reality is that, as Mr Gilbert submitted, it is more likely than not that the appellant continued to live in his relatively sheltered existence, working in a Chinese takeaway, rather than having managed to leave the country and re-enter clandestinely on repeated occasions without having been apprehended, bearing

in mind the total number of years of his accepted residence pursuant to the preserved findings of fact and the agreement of the parties. The disputed years represent a minority of the appellant's total residence in the UK. I find that the balance of the evidence is that it is more likely than not that the appellant has been present throughout each of the disputed years. He has resided in the UK continuously since 2003.

28. That finding is not dispositive of the appeal, however, since on any view the appellant had not accrued 20 years of continuous residence by the time he submitted the application in February 2018, which was a requirement of the rules as then in force, pursuant to para. 276ADE(1)(iii). Para. PL 5.1.(a) of Appendix Private Life also requires an applicant to have accrued 20 years of continuous residence as at the date of application.

29. There is no suggestion the appellant meets any other provisions of the rules; Mr Gilbert did not submit, for example, that there would be "very significant obstacles" to his integration in China.

30. The appellant cannot succeed under Article 8 on the basis that he meets the rules.

Article 8 outside the rules

31. To determine whether it would be disproportionate under Article 8(2) ECHR to remove the appellant from the UK, I will adopt a balance sheet approach.

32. Factors in favour of removing the appellant include:

   a. The maintenance of immigration controls is in the public interest.

   b. The appellant does not meet the full requirements of the Immigration Rules.

   c. The appellant does not speak English.

   d. While there is no evidence that the appellant has relied expressly on public funds, he appears to have worked illegally, and has used a number of public services, including health services.

   e. The appellant's private life was established during the currency of lengthy unlawful residence. It attracts little weight.

33. The appellant's side of the scales include the following considerations:

   a. The appellant has, on my findings of fact, accrued 20 years' continuous residence. That is the threshold set by the Secretary of State in para. PL 5.1.(a) of Appendix Private Life denoting when the Secretary of State accepts that it would be unjustifiably harsh for an individual to be removed in light of the longevity of their residence.

   b. The Secretary of State has not raised (and did not raise at the hearing) any suitability-based concerns militating against a grant of leave to remain.

34. While the appellant's residence has hit the 20 year point during the currency of these proceedings, it is not his fault that it took over two and a half years for the Secretary of State to take a decision on his initial human rights claim, nor that the remaining stages of the proceedings took so long.

35. In my judgment, it would be disproportionate to remove the appellant in light of the fact he meets the substantive requirements of the Immigration Rules, namely the 20 year requirement. I accept that he did not meet that requirement at the date of application, but the question of the Article 8 proportionality of his prospective removal must be determined by reference to the length of residence which the Secretary of State, through the Immigration Rules, accepts is the point at which such removal becomes disproportionate. While it could be said that the appellant should make a further application, based on these findings of fact, the question for my consideration is whether to remove the appellant from the UK at the date of the hearing would be disproportionate. In light of the length of his residence it would be.

36. The appeal is allowed.

Notice of Decision

The decision of Judge Mulholland involved the making of an error of law and is set aside.
I remake the decision by allowing the appeal on human rights grounds.
I make no fee award.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 Aug. 23

Annex – Error of Law decision

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-006340

First-tier Tribunal No: HU/53855/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated

…………………………………

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

XIU QI ZHANG
(ANONYMITY DIRECTION NOT MADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Gilbert, Counsel
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 26 April 2023

DECISION AND REASONS

1. The appellant is a citizen of China born on 16 July 1973. He appeals against a decision of First-tier Tribunal Judge Mulholland (the judge) promulgated on 15 December 2022, dismissing his appeal against the decision of the Secretary of State (the respondent) dated 25 September 2020, to refuse the appellant's human rights application, made on the basis of private life under Paragraph 276ADE(1) of the Immigration Rules and under Article 8 ECHR.

Factual Background

2. The appellant arrived in the United Kingdom on 23 May 2000 and claimed asylum on arrival. That claim was refused by the respondent on 28 June 2001 and the appeal dismissed on 22 March 2002.

3. On 15 August 2001, the appellant made a human rights application which was refused. A further application was made on 9 June 2010 which was refused on 5 November 2014, with no right of appeal. On 16 November 2015 the matter was reconsidered with the decision to refuse the application with no right of appeal upheld on 26 November 2015.

4. The appellant made a further application for leave to remain on 17 October 2018, on the basis of his private life under paragraph 276ADE of the Immigration Rules and under Article 8. The respondent refused that application on 25 September 2020 on the basis that the appellant did not meet the requirements of paragraph 276ADE(1)(iii)-(vi) of the Immigration Rules because he was not under 18 years old, or between the ages of 18 and 25 at the date of application. It was also noted that the appellant had lived in the UK for 18 years at the point of application and the respondent was not satisfied that the appellant had lived in the UK continuously for 20 years at the date of application. The respondent was further satisfied that there were not very significant obstacles to the appellant's integration into China, if required to leave the UK.

5. The respondent did not accept that there were any exceptional circumstances in the appellant's case which would render the refusal a breach of Article 8 such that would result in unjustifiably harsh consequences or that the appellant otherwise qualified for a grant of leave to remain outside the Immigration Rules on the basis of compassionate factors. The respondent considered the documentary evidence provided by the appellant including NHS letters and Home Office correspondence and concluded that the appellant had failed to comply with immigration reporting requirements and could not therefore rely on those reporting events to establish his time in the UK. The respondent considered that the appellant had provided insufficient evidence to demonstrate that he has resided in the UK continuously for 20 years.

6. The respondent was further satisfied, considering the appellant's medical conditions that there was treatment available in China, including for diabetes, which the appellant is diagnosed as suffering from. Considering AM Zimbabwe [2020] UKSC 17 the respondent concluded that the appellant had failed to demonstrate that returning to China would result in intense suffering due to an irreversible decline in his health or a significant reduction in life expectancy.

7. The appellant appealed. The judge noted that the appellant relied on Article 8 on the basis of his health and period of residence in the UK, 18 years at the time of application and more than 20 years at the date of hearing, to demonstrate that there would be very significant obstacles or unjustifiably harsh consequences if the appellant were to be returned to China.

8. The judge had before him the stitched bundle comprising 285 pages. This comprised: the appellant's bundle which included a chronology, skeleton argument, witness statement of the appellant, letter in support from Xiao Pin Pan, letter of support from Cambridge Chinese Community Centre, and from Peter

Trinh, photographs and medical records, home office documents retained by the appellant, previous appeal documentation and his subject access file; and the respondent's bundle which included information about the appellant's applications and decisions, medical information, photographs and letters in support.

9. The judge heard oral evidence from the appellant and his witness together with submissions from both parties. The appellant maintained that he had not left the UK since entering on 23 May 2000 but had moved house many times and had lost a lot of documentation. Ms Pin Pan gave evidence that she had known the appellant since 2005 and that they had kept in touch regularly since then.

10. The judge noted that the appellant could not succeed under the long residence Immigration Rules as he could not demonstrate that he was continuously present in the UK for over 20 years at the date of the application. It was submitted relying on Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 that if the appellant could demonstrate that he was bound to succeed under the Immigration Rules there was no public interest in requiring him to return to China to make an entry clearance application.

11. The judge proceeded to examine therefore whether the appellant had provided a sufficiency of evidence to demonstrate that he had been continuously present in the UK for 20 years or more. The judge set out his examination of that evidence from paragraphs [18]–[36].

12. The judge accepted at paragraph [34], that the appellant had submitted some documentary evidence to show he had been present at times since 2000, with the exception of the years 2003, 2005 to 2007 and 2013. At paragraph [36] the judge again noted that the appellant had not produced supporting documentary evidence for the years 2003, 2005 to 2007 and 2013 and having considered the appellant and Ms Pin Pan's evidence, the judge did not accept that she was in close contact with him continuously from 2005 as claimed, the judge noting that neither the appellant nor Ms Pin Pan mentioned anything about the appellant's failure to report or be at his address when Immigration Officers attended or that he breached his bail conditions.

13. The judge was not satisfied therefore that the appellant had demonstrated that he was present in the UK continuously from 2000. The judge was further not satisfied that the appellant had demonstrated that there would be very significant obstacles to the appellant's integration into China or that the appellant's appeal could otherwise succeed under Article 8. The judge dismissed the appellant's appeal.

Grounds of appeal

14. The grounds argued that the judge erred with respect to the assessment of the witness evidence at paragraph [36]:

    a. There was a failure to summarise the material parts of the evidence;

    b. The judge failed to provide adequate reasons to support the rejection of the witnesses' credibility, including no discussion of if or how the appellant and his witness were inconsistent in their evidence;

c. Failure to make a finding as to whether the appellant's oral evidence was truthful or not;

d. Procedural unfairness in rejecting the evidence of Ms Pan on the basis of failure to mention enforcement actions against the appellant when this was not put to her;

e. Contradictory finding at [36] in holding that the appellant failed to explain his avoidance of interaction with the Home Office when faced with removal actions, when it was recorded that he had explained that avoidance was in the face of action to detain or remove him [35] and [30];

f. Taking into account an irrelevant matter in rejecting the appellant's credibility for not providing evidence in chief about the 2018 breach of bail conditions (and the grounds assert there was no cross examination on this) where it was earlier accepted by the judge that the appellant had been in the UK from 2017 at paragraphs [32]-[33]. Alternatively, the judge failed to provide adequate reasons for the rejection of his claim for not talking to the 2018 breach, in light of the judge's earlier findings.

15. The grounds further argued that the findings had the appearance of being skewed by its preliminary finding at [23]. Further, and in the alternative, the judge at [23] failed to give adequate reasons why the appellant's physical possession of a document posted in 2004 was not good evidence of his physical presence in the UK to take receipt of that document at that date.

16. Permission to appeal was granted by First-tier Tribunal Judge Lodato.

Submissions

17. Mr Gilbert submitted that where the judge found at paragraph [21] that it was accepted that there was no supporting evidence for the years 2003 and 2004, this was not strictly correct. The judge went on to analyse the evidence particularly at paragraph [23] which Mr Gilbert submitted was flawed as the judge 'attached great weight to his failure to report in April 2004'. The judge failed to provide adequate reasons why he disregarded the appellant's physical possession of the document issued by the respondent in 2004, requiring the appellant to report in April 2004, as evidence of the appellant's presence, notwithstanding that the appellant did not act on that document. It was Mr Gilbert's submission that this preliminary finding at paragraph [23], skewed the judge's subsequent findings and Mr Gilbert drew our attention to the list of documents in the Reasons for Refusal letter (at page 8 of the respondent's bundle) provided by the appellant, which included that 1 April 2004 temporary admission letter. It was submitted that it was crucially important that the Tribunal had accepted, at paragraph [20], that the appellant was present in 2002. It was accepted that there was no evidence of presence in 2003. Mr Gilbert submitted that a reasonable inference ought to have been made that given that the appellant had received the 1 April 2004 letter, that he was in the UK to receive it. It was accepted that the appellant did not have documentary evidence of his presence in 2005. The judge at [24] noted that the respondent's records showed that the appellant had notified a change of address in December 2006 (the records showing at page 128 of the stitched bundle, that this was notified by his representatives, and that the respondent updated their records and issued new reporting conditions).

18. Mr Gilbert submitted that there was a failure by the judge in the assessment of Ms Pin Pan's evidence which the judge summarised at paragraph [12] as Ms Pin Pan having known the appellant since 2005 and that they had kept in touch regularly. It was submitted that the judge did not record the details of that evidence including where it was consistent with the appellant's evidence in relation to providing the name of their mutual friend, nor did it record her evidence of the level of their contact (it being submitted she had stated it was face to face every few months, as well as contact by telephone). Nor was it recorded that Ms Pin Pan knew it to be 2005 as she had just arrived, nor was it recorded that she had never known the appellant to have left the UK. Mr Gilbert submitted that the lack of detail was insufficient to enable the Tribunal to be satisfied that the judge had directed himself properly to material aspects of the evidence. The judge failed to explore to what extent the evidence of the appellant and Ms Pin Pan was consistent or inconsistent but instead at paragraph [36] relied on the failure of both witnesses to mention the appellant's breach of his bail conditions or his failure to report or be at his address when Immigration Officers attended.

19. In relation to that failure to report/not be at his address and breaching of bail conditions, the judge recorded at [30] and [31] attendance at the appellant's address on 1 April 2016 by police and on 24 June 2018 by Immigration Officers. It was submitted that the judge, in assessing credibility had incorrectly focussed on one adverse aspect of the evidence. He had also failed to make findings as to whether or not the appellant was telling the truth and it was submitted that it was procedurally unfair not to put to Ms Pin Pan the question of her not mentioning the enforcement actions. The judge failed to explain why Ms Pin Pan's said lack of knowledge was relevant to her or the appellant's credibility.

20. The judge recorded at [35] that the appellant had accounted for his lack of interaction with the Home Office and his failure to comply with reporting restrictions due to him not wanting to leave the UK and that he chose not to interact with the authorities given that he was issued with a notice that he was liable to be removed in 2004. Mr Gilbert submitted that the judge's subsequent finding, at [36] that neither the appellant nor Ms Pin Pan mentioned anything:
'about the appellant's failure to report or be at his address when Immigration Officers attended or that he breached his bail conditions',
was difficult to square with what the judge said at [35], where the judge recorded why the appellant did not report/interact with authorities.

21. Mr Gilbert further submitted that the judge had erred in taking into account an irrelevant matter and/or had failed to provide adequate reasons, in rejecting the appellant's credibility for not providing evidence in chief about the 2018 breach of bail conditions when the judge had earlier accepted at [32]-[33] that the appellant was in the UK from 2017 onwards. Mr Gilbert took us to page 152 of the stitched bundle where the respondent's records show that the Bail document was returned as not known at this address, on 24 June 2018 (the judge recording at [31] that the appellant failed to comply with bail conditions and was not at his address on 24 June 2018). However, the same records, at page 152 of the stitched bundle, go on to show the appellant attended the police station the very next day on 25 June 2018. In addition Mr Gilbert submitted that whereas the judge recorded at [30] that the police attended on 1 April 2016 and the appellant was not there, the judge also had before him evidence of the appellant having reported regularly since 2014 all the way through to 220 (stitched bundle pages

124-138) with a record on page 135 stating that the appellant was regularly reporting in 2018.

22. It was submitted therefore that the judge took into account an irrelevant matter in rejecting the witnesses' evidence for not mentioning the appellant's failure to report/be at his address/or that he had breached his bail address.

23. Ms Nolan submitted that the judge at paragraph [13] set out that the appellant could not succeed under the long residence Immigration Rules. She submitted that the judge stating at [16], that he would examine whether the appellant had provided a sufficiency of evidence to demonstrate that he was continuously present in the UK for 20 years or more, must be read with [13]. The judge had considered what was said in Younas (section 117B(6)(b); Chikwamba; Zambrano [2020] UKUT and counsel's submission that if the appellant could demonstrate that he was bound to succeed under the immigration rules there was no public interest in requiring him to return to China to make an application for entry clearance. We indicated at the hearing that we were not aware of a specific entry clearance route for long residence.

24. Ms Nolan submitted that the judge had considered the years when there was no supporting documentary evidence of the appellant's residence at paragraphs [21] [25] and [28] and the years when there was evidence and went on to note that the appellant accepted that there was no documentary evidence from 2005 to 2007 and was relying on the witness evidence from Ms Pin Pan. Ms Nolan submitted that the judge provided adequate reasons, at paragraph [36] why he did not accept the witness evidence, as neither the appellant nor Ms Pin Pan mentioned the failure to report/be at his address or the breach of bail conditions.

25. Ms Nolan submitted that the Tribunal was being asked to 'island hop' between particular parts of evidence. The judge was satisfied that there was no documentary evidence for 2003, 2005 to 2007 and 2013 and then assessed the witness evidence and gave adequate reasons why continuous residence was not established.

26. Ms Nolan submitted that the case had been put forward on a Chikwamba basis, relying on Younas (above). Ms Nolan relied on Alam & Anor v Secretary of State for the Home Department [2023] EWCA Civ 30, as authority that Chikwamba does not state any general rule of law. In Younas the Upper Tribunal concluded that the mere fact that a person was likely to be granted entry clearance if they made an application from abroad was not sufficient, to the extent that an appeal must be allowed on that basis.

27. In reply, Mr Gilbert submitted that in rejecting Ms Pin Pan's evidence the judge had ultimately not done so on a proper analysis and there was a plain concern if the judge had not recorded the nature of the appellant's contact with Ms Pin Pan and the regularity of that contact, given in evidence, it was difficult to see how the judge could reject the evidence of that contact. In respect of long residence Mr Gilbert submitted that notwithstanding that the appellant did not meet the long residence Immigration Rules at the date of application, but contended he did at the date of hearing, such would be a weighty matter in considering private life and whether removal was a disproportionate interference.

The Law

28. The jurisdiction of the First-tier Tribunal was to hear the appellant's appeal against the refusal of his human rights claim, made on the basis of Article 8 ECHR.

29. Under section 11(2) of the Tribunals, Courts and Enforcement Act 2007, an appeal lies to the Upper Tribunal against a decision of the First-tier Tribunal "on any point of law arising from a decision made by the First-tier Tribunal", rather than on a disagreement of fact. However, an error of fact is capable of amounting to an error of law.

30. In R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 Brooke LJ summarised the ways in which findings of fact are capable of amounting to an error of law:

"…
i) Making perverse or irrational findings on a matter or matters that were material to the outcome("material matters");
ii) Failing to give reasons or any adequate reasons for findings on material matters;
iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
iv) Giving weight to immaterial matters;
v) Making a material misdirection of law on any material matter;
vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

31. We have reminded ourselves of the authorities which set out the distinction between errors of fact and errors of law and which emphasise the importance of an appellate tribunal exercising judicial restraint when reviewing findings of fact reached by first instance judges. This was summarised by Lewison LJ in Volpi & Anor v Volpi [2022] EWCA Civ 464 at [2] as follows:

"i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be

discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

32. In the earlier case of Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5 at [114]: the Court of Appeal similarly advised appropriate restraint in the approach to first instance decisions:

"i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
ii. The trial is not a dress rehearsal. It is the first and last night of the show.
iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

Discussion

33. The judge set out his summary of the evidence at paragraphs [11] and [12] of the decision and then went on to set out his analysis and conclusions at paragraphs [13] to [36] with his consideration of the evidence of continuous residence from [17] onwards, as follows:

"*17. The appellant has produced evidence that he entered the United Kingdom and claimed asylum on 23 May 2000. He has produced supporting documents that he was present in the United Kingdom for some of the time since then but there are many gaps. He accounts for his failure to produce a sufficiency of documents to demonstrate continuous residence as being due to his moving home a lot and evading immigration control from time to time.*
18. His friend Xion Pin Pan attended the hearing. She claims to have known him since 2005 after they met at a restaurant where he was working and where another friend of theirs also worked.
19. The appellant has helpfully produced a chronology which I have carefully considered.
20. I accept that the appellant entered the United Kingdom in May 2000 as he claimed asylum and went through an appeals process which concluded in March 2002.
21. It is accepted there that there is no supporting evidence for 2003 and 2004.
22. The appellant has produced photographs to show that he was in the United Kingdom in 2004. These photographs do not show that he was continuously present throughout that year.

23. The appellant has produced a copy of the temporary admission restrictions (IS96) issued on 1 April 2004 as proof of his presence here. However according to Home Office records the appellant failed to report to Welwyn Garden City Police Station on 1 April 2004. The appellant explained orally that he was afraid he would be removed. I attach little weight to the appellant's explanation as he has been able to make multiple claims and report on and off over the years. I attach great weight to his failure to report in April 2004.

24. The Home Office records show that he notified a change of address in 2006.

25. For the period from 2005 to 2007 the appellant accepts that there is no supporting documentary evidence to demonstrate that he was present in the United Kingdom throughout those years. He relies upon the witness evidence from Miss Pin Pan.

26. The appellant has submitted documentary evidence from 2008 showing that at times since then he has been present in the United Kingdom. I am satisfied that there is a sufficiency of evidence to demonstrate that he was present in 2008-2009. The appellant has produced a subject access report which shows that he was compliant with his reporting restrictions for the period from 20 November 2008 until 2009. He contacted the Home Office to let them know that he had moved to London.

27. The appellant thereafter lost contact with the Home Office from 2010. The respondent's records show that the appellant was issued with documents in 2008 to 2012.

28. There are no Home Office documents relating to the appellant for 2013.

29. The appellant reports again at the police station in 2014.

30. The police attended at the appellant's address on 1 April 2016 as removal Directions were set. The appellant was not there and those present claimed not to know him.

31. On 24 June 2018 Immigration officers attended the appellant's address after he failed to comply with bail conditions. He was not present there.

32. The appellant has produced NHS documents that show that he was receiving treatment in 2017 and 2018. I accept that he was present here on these dates for treatment.

33. Home Office records show that the appellant made the claim which is subject to this appeal in 2018 and has engaged with the process since then. I accept that he has been present here since then.

34. The appellant has submitted some documentary evidence to show that he has been present at times since 2000 with the exception of the years 2003, 2005 to 2007 and 2013.

35. The appellant accounts for his lack of interaction with the Home Office and his failure to comply with reporting restrictions due to him not wanting to leave the United Kingdom. He was issued with a notice that he was liable to be removed in 2004 and therefore chose not to interact with the authorities at that time.

36. Having considered all of the evidence individually and together, I am not satisfied that the appellant has demonstrated that he was present in the United Kingdom continuously since 2000. He has not produced supporting documentary evidence for the years 2003, 2005 to 2007 and 2013. I have carefully considered his and Miss Pin Pan's evidence. I do not accept that she was in close contact with him continuously.

Neither the appellant nor Miss Pin Pan mention anything about the appellant's failure to report or be at his address when Immigration Officers attended or that he breached his bail conditions."

34. We are satisfied that the judge made a number of errors in his consideration of the evidence of the appellant's continuous residence:

a. In attaching adverse inference at [36] to the appellant and Ms Pin Pan's failure to mention in oral evidence in chief the appellant's failure to report or be at his address when Immigration Officers attended, or that he had breached his bail conditions in 2018, that finding ignored the evidence in the respondent's records that although the appellant had breached bail/subsequently not been present at his address on 24 June 2018 (paragraph [31]), the respondent's records, at page 152 of the stitched bundle demonstrated that he had reported at the police station the day after his breach of bail, on 25 June 2018.

b. The judge also appeared to accept, at [32]-[33] the appellant's presence from 2017 onwards and failed therefore to provide adequate reasons for the significance he subsequently attached to the lack of mention in evidence in chief by the appellant or Ms Pin Pan, of the appellant's 2018 breach of bail.

c. In rejecting Ms Pin Pan's evidence for failure to mention the lack of reporting/not being at his address/breach of his bail conditions, the judge did not put this to Ms Pin Pan. Whilst that in itself would not be fatal, the judge failed to provide reasons why he considered that she could not be credible, in relation to her evidence of the appellant continually residing in the UK, if she did not know about the appellant's non-compliance at times with immigration control, if that was his finding. The judge had accepted that the appellant was in the UK from 2018 onwards, in finding at [34] that the appellant had engaged with the Home Office since making the claim in 2018 that was the subject of this appeal and in accepting that 'he has been present since then'. Given that finding, the reader of the decision is left wondering why Ms Pin Pan's lack of knowledge concerning peripheral details of the appellant's movements in 2018 was so significant.

d. The matter of what weight to be attached to evidence was plainly a matter for the judge. However, the judge's findings are inconsistent. Whilst the judge at [23] attached little weight to the appellant's explanation for his failure to report on 1 April 2004 that he was afraid to be removed and attached great weight to that failure to report on 1 April 2004, as the judge accepted that the appellant had been able to 'make multiple claims and report on and off over the years', the judge's finding at [23] (and at [21] where the judge stated it was 'accepted there is no supporting evidence for 2003 and 2004) in relation to 2004 is inconsistent with what the judge went on to find at [34] and [36].

e. The judge at [34] found that the appellant had submitted 'some documentary evidence to show that he has been present at times since 2000 with the exception of the years 2003, 2005 to 2007 and 2013'. The judge seems to have accepted therefore, at [34] that there was documentary evidence for 2004. The judge confirmed that finding at [36] where he again stated that 'he has not produced supporting documentary evidence for the years 2003, 2005 to 2007 and 2013'.

f. The judge found at [22] that the appellant had produced photographs to show that he was in the UK in 2004 but that 'the photographs do not show that he was continuously present throughout that year'. It is unclear however, including in light of the judge's findings at [34] and [36] what if any reliance was placed on the photographs.

35. We are satisfied that the judge made a number of mistakes of fact and errors in his consideration of the documentary and oral evidence before him, and there is a lack of clarity as to what periods of continuous residence he accepted, as identified above.

36. The judge was considering, under Article 8 whether the appellant's removal was disproportionate. Whilst it was accepted that the appellant did not meet the requirements of the Immigration Rules in relation to 20 years' long residence at the date of application and whilst the judge may have misdirected himself in relation to the relevance of entry clearance, that is not material. We accept that whether the appellant at the date of hearing had accrued 20 years' continuous long residence, was a relevant factor in the proportionality balance under Article 8.

37. The judge's conclusions in rejecting the evidence of the witnesses were not rationally supported and were based on a number of errors of fact in his consideration of the documentary and oral evidence.

38. We have considered those errors holistically. We cannot say for certain that the judge would have reached the same conclusions had he not made those errors, including in relation to whether the appellant had demonstrated that he had been continuously present since 2000 and in relation to the weight then to be attached to the appellant's private life. Whilst section 117B(4) of the Nationality, Immigration and Asylum Act 2002 requires that little weight be attached to private life established at a time when a person is in the United Kingdom unlawfully, we remind ourselves that this is a spectrum.

39. Drawing this analysis together, the judge had surveyed the last 20 years of the appellant's claimed residence. He reached a number of findings that he was present during that period which have not been challenged by either party, in particular from May 2000 to March 2002 (paragraph [20]), in 2006 (paragraph [24]), from 2008 to 2009 (paragraph [26]), in 2014 (paragraph [29]), in 2017 and 2018, and from 2018 onwards (paragraphs [32] and [33]). We therefore preserve those findings. We have found that in respect of the remaining periods of the appellant's residence, the judge reached findings that were either inconsistent or inadequately reasoned. We consider however, that it is possible to isolate these findings reached by the judge for the purposes of the remaking of the decision in this tribunal.

40. The decision of the First-tier Tribunal to dismiss the appellant's appeal contains an error of law and is set aside. The judge's findings summarised in paragraph [39] above can stand.

Notice of Decision

The appeal against the decision of the First-tier Tribunal is allowed. The decision of Judge Mulholland is set aside, with the findings of fact at summarised at paragraph [39], above.

[Directions given for the decision to be remade.]