



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

Appeal Number: HU/00250/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 19 April 2017**

**Decision & Reasons Promulgated
On 4 May 2017**

Before

UPPER TRIBUNAL JUDGE PITT

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MURUGUPILLAI PAKEERATHAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Armstrong, Home Office Presenting Officer

For the Respondent: Ms E Harris of Counsel instructed by Nag Law Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision promulgated on 10 October 2016 of First-tier Tribunal Judge Hodgkinson which allowed the Article 8 ECHR appeal of Mr Pakeerathan.
2. For the purposes of this decision I refer to Mr Pakeerathan as the appellant and to the Secretary of State as the respondent, reflecting their positions before the First-tier Tribunal.

3. There is no dispute to the finding of the First-tier Tribunal that the appellant could not meet the requirements of the Immigration Rules. As Judge Hodgkinson found at [21] the English language requirement in paragraph 276B(iv) of the Immigration Rules in force at the date of the decision was not met.
4. The judge went on in [27] to [37] to assess whether the appellant could succeed outside the Immigration Rules, concluding that he could. The judge sets out the correct **Razgar** questions at [27]. He finds at [29] that the appellant has established a private life here, having shown that he came on 13 May 1996 and remaining continuously since then. The finding outside the Immigration Rules that the applicant had been resident continuously since 1996 was not specifically challenged in the grounds and, on the basis of the extensive materials and witness evidence before the First-tier Tribunal, was clearly a finding open to Judge Hodgkinson; see [19] and [20].
5. At [30] the judge took into account that the respondent's decision reflected the public interest in effective immigration control. In [31] specific reference is made to s.117B(1) of the Nationality, Immigration and Asylum Act 2002 which states that the "maintenance of effective immigration controls is in the public interest." The First-tier Tribunal judge was clearly aware of the proper role of the public interest when making his decision therefore. In the same paragraph the First-tier Tribunal explicitly weighs the appellant's poor immigration history against him.
6. The First-tier Tribunal goes on in [33] to consider the other relevant provisions of s.117B, finding against the appellant regarding s.117B(2) and (3) as the appellant has not shown fluency in English or that he is financially independent. At [35], the judge also weighs against the appellant his access to free medical care and ability to access any requisite care in Sri Lanka. He finds at [34] that the appellant has family to return to in Sri Lanka, making his return "feasible", even after 20 years in the UK. The judge clearly took into account at [31] and [32] that the appellant's immigration status has been "precarious" and that, following s.117B(5), statute indicates that his private life should attract little weight in the proportionality assessment. It is not arguable, therefore, that the judge failed to address the material provisions of s.117B.
7. Having identified that s.117B "normally" allowed little weight to be attributed Judge Hodgkinson indicates at the end of [32], however, that "I find the appellant's circumstances to be exceptional, for the reasons set out below." The case of Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 00013 (IAC) provides authority for this approach, summarised in paragraph 3 of the head note, thus:

"The Parliamentary intention underlying Part 5A of NIAA 2002 is to give proper effect to Article 8 ECHR. Thus a private life developed or established during periods of unlawful or precarious residence might conceivably qualify

to be accorded more than little weight and s 117B (4) and (5) are to be construed and applied accordingly.”

8. The First-tier Tribunal’s reasons for finding in the applicant’s favour notwithstanding the provisions of s.117B(5) are set out in [36] to [37]:

“36. The strongest element to the appellant’s case, in terms of an assessment of proportionality, is the fact that he has now resided in the United Kingdom continuously for over twenty years and, were he now to make an application for leave to remain on private life grounds, the evidence before me would suggest that such application should be successful, there being no suggestion, I reiterate, that the appellant would fall to be refused as a result of the relevant suitability requirements set out in Appendix FM, and this was not suggested by Mr Grennan at the appeal hearing before me. Indeed the respondent, I find, could not realistically contend, with reference to the current appeal, that the appellant might fall for refusal under the relevant suitability requirements, bearing in mind that, inter alia in the refusal letter, the respondent considered the potential application of paragraph 276ADE and gave no indication at all of concern regarding the suitability requirements.

37. Thus, on the basis of the evidence before me, it appears that, were the appellant to submit a fresh application at the present time, relying upon private life with reference to 276ADE, then I consider that it is more likely than not that he would succeed in such application. In these very particular unusual and exceptional circumstances, having taken into account the totality of the available evidence, I conclude that the respondent’s decision does not, as at the date of the hearing before me, serve a legitimate purpose or, put another way, I conclude, albeit reluctantly bearing in mind the appellant’s immigration history, that the decision is a disproportionate one. Consequently, exceptionally, I allow the appeal under Article 8 outside the Rules.”

9. The renewed grounds before the Upper Tribunal upon which permission was granted state as follows:

“Whilst it is accepted that it is for an appellant to make as many applications as he wishes and it is for the Respondent to deal with any applications made. It is argued that it is not the position of an Immigration Judge to allow an appeal Outside of the Immigration Rules before an application has been made that may or may not succeed under the Rules.”

10. The grounds go on, “It is respectfully submitted that for Judge Hodgkinson to find this appellant’s circumstances exceptional brings him into the realms of perversity”.

11. The grant of permission dated 28 February 2017 states as follows in the second paragraph:

“It is arguable that having found that the appellant cannot meet the requirements of the rules the Judge had erred in allowing the appeal under article 8 of the ECHR when he has not identified any sufficiently compelling

factors to show that his removal would be disproportionate and that therefore to that extent the decision is perverse.”

12. The challenge here is, therefore, that it was not open to the First-tier Tribunal to find the fact that the applicant met the provisions of the Immigration Rules in force as of the date of the hearing a sufficiently exceptional factor or one that made the respondent’s decision disproportionate.
13. In response, the appellant submitted that the First-tier Tribunal followed the correct approach, taking into account the statutory requirements but ultimately making a decision on proportionality that was his to make and not perverse. In particular, I was referred to [60] of **Agyarko v SSHD [2017] UKSC 11**:

“60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word ‘exceptional’, as already explained, as meaning ‘circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate’. So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that ‘exceptional’ does not mean ‘unusual’ or ‘unique’: see para 19 above.”

14. I have set out above that the First-tier Tribunal decision here showed that proper consideration was given to the public interest and to the s.117B factors. He explicitly identified the provisions of s.117B(5). He identified why the particular facts of this case, specifically the applicant meeting the long residence Rules as of the date of hearing, led to the conclusion that the decision was disproportionate. The wording in [37] about the absence of a “legitimate purpose” is infelicitous where the judge has already, correctly, identified that the decision reflected the public interest in an effective immigration system; see [5] above. That infelicity is remedied immediately by the correct re-formulation of the key question as one of proportionality. It is not my view that the First-tier Tribunal’s conclusion on proportionality was perverse. He was obliged to consider the situation as of the date of the hearing, was not wrong in law to conclude that the applicant met the Immigration Rules then in force and it was open to him to conclude that this weighed the balance in the appellant’s favour after taking into account the relevant statutory provisions.

Notice of Decision

15. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed 
Upper Tribunal Judge Pitt

Date: 27 April 2017