



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/26867/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 12 May 2017

Promulgated

On 15 June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

**TAHIR UR-REHMAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G. O’Ceallaigh, of Counsel, instructed by M & K Solicitors

For the Respondent: Mrs R. Pettersen, Home Office Presenting Officer

DECISION ON ERROR OF LAW

Background

1. This is the Appellant’s appeal against the decision of First-tier Tribunal Judge Spencer (hereafter “the FtTJ”) dismissing his appeal against the Respondent’s decision to refuse him leave to remain under the Immigration Rules (“the Rules”) and outside of the Rules contrary to Article 8 of the ECHR.
2. The Appellant is a national of Pakistan. He has remained in the United Kingdom since his entry in 2002 as a student. He was granted further

leave on the basis of his marriage to an EEA national until 13 July 2011. On 11 July 2011, he applied for Permanent Residence which was refused on 21 October 2011. A subsequent appeal against that refusal was withdrawn by the Appellant on 8 December 2011 on the advice of his then legal representatives. Since 20 December 2011 the Appellant made various attempts to regularise his immigration status and latterly applied for Indefinite Leave to Remain on the grounds of long residence on 2 April 2015. That application was refused on 15 July 2015. The Appellant appealed. Before the FtTJ there was no dispute the Appellant did not meet the requirements of the Rules, but he argued his removal would be contrary to Article 8 of the ECHR – private life being the focus of the appeal.

3. Central to the Appellant’s arguments on proportionality were his claims that, (i) his marriage to an EEA national terminated one month short of the period required under the 2006 Regulations for him to have retained a right of residence and, (ii) that he was lawfully present in the United Kingdom for 45 days short of ten years’ lawful residence that would have entitled him to settlement on the basis of long residence – a circumstance brought about by an “historic injustice” when he withdrew his appeal on 8 December 2011 on the advice of his then representatives.

The Decision of the FtTJ

4. The FtTJ directed himself appropriately (at [15]-[18]); accepted the evidence of the Appellant and witnesses (at [28]) and concluded that the Appellant did not meet the requirements of the Rules because he fell 45 days short of the ten-year period. The FtTJ accepted the Appellant had established a private life in the United Kingdom. Further, while the FtTJ accepted the Appellant’s case involved a “near miss” in relation to the requirements set out under the Rules, he found it was not a “narrow “near miss””, and that there was no historic injustice as there could have been plausible legal explanations as to why the appeal was withdrawn (at [43]). The FtTJ thus found that there were no compelling circumstances not considered by the Rules, and so there was no need to consider Article 8 (at [44]). Notwithstanding that conclusion, the FtTJ proceeded to consider the proportionality of the Respondent’s decision to remove the Appellant. While the FtTJ accepted that there would be an interference with private life, he found there were no insurmountable obstacles to his return to Pakistan where he had family who could support him, and that, he could maintain contact with his family in the United Kingdom. At [48] the FtTJ said this:

“I find that there is no evidence that shows that the Appellant will not be able to conduct a similar private life in Pakistan.”

5. The FtTJ took account of the Appellant’s ability to speak English and that he was financially independent, but found that there were no exceptional features about his private life, which would reduce the weight to be attached to the “little weight” provision of section 117B whilst here with leave on a precarious and then unlawful basis.

6. The Appellant sought permission to appeal. Permission to appeal was granted by First-tier Tribunal Judge Gillespie on 1 December 2016 on all grounds.

The hearing before me

7. At the hearing, Mr O’Ceallaigh amplified the grounds of appeal, which argued that the FtTJ misdirected himself and that he erred in his assessment of proportionality. Mrs Pettersen made submissions in-line with the Respondent’s rule 24 reply which essentially espoused an argument that the Appellant’s grounds of appeal were a mere disagreement with the FtTJ’s decision. After hearing the submissions of the representatives, I announced my decision that I was satisfied that the FtTJ materially erred in law. I now give my reasons for doing so below.

Error of Law

8. While I do not agree that the FtTJ erred in the manner prescribed in some of the grounds, I am satisfied that in an otherwise comprehensive decision that the FtTJ erred in the following material respects.
9. There is no challenge to the FtTJ’s decision under the Rules. The Rules are said to reflect the Respondent’s view of where a fair balance should be struck between the right to respect for private and family life and public interest considerations relating to the maintenance of an effective system of immigration control. The Rules should be read in a way that reflects a proper interpretation of Article 8 of the ECHR. However, there may some cases where the Rules do not address relevant Article 8 issues. In such cases, it may be necessary to consider whether there are compelling circumstances to justify granting leave to remain outside the Rules: *SSHD v SS (Congo)* [2015] EWCA Civ 387. The FtTJ’s application of this principle is set out at [44]. The FtTJ found that there were no compelling circumstances to justify a grant of leave outside of the Rules and thus concluded that Article 8 need not be considered.
10. The difficulty with this is that that conclusion is based on the FtTJ’s finding that a “near miss” under the Rules was not compelling because the miss was not “narrow” and there was no historic injustice. In my judgement, the FtTJ erred because there is no basis in law to draw a distinction between a “near miss” and a “narrow near miss”, and is a conclusion that could not be rationally drawn from a shortfall of 45 days. Further, in my view, the FtTJ failed to recognise that there is no express mechanism within the Rules for consideration of a private life accrued over the course of 15 years comprising of lawful and unlawful residence. The Rules therefore did not reflect every factor of relevance in this case and there were clear grounds to justify a consideration outside of the Rules.

11. While I acknowledge that the FtTJ proceeded to consider the appeal outside of the Rules, I cannot be satisfied that his decision was not compromised by his view that such an assessment was not warranted and, in any event, I am satisfied that he erred in assessing the proportionality of the Appellant's removal for the following reasons.
12. The FtTJ plainly erred in his application of an "insurmountable obstacles" test to the Appellant's return to Pakistan. Mrs Pettersen rightly accepted that the FtTJ was wrong to do so, and this alone I find is sufficient to vitiate the FtTJ's conclusion in respect of proportionality.
13. I am further satisfied, however, that the FtTJ misdirected himself in finding that an interference with private life could be justified on the basis that the Appellant had not shown that he could not conduct a similar private life in Pakistan [48]. I agree with Mr O'Ceallaigh that this approach is not the correct test. The question to be considered is whether any interference with established private life was justified and thus proportionate. Further still, I am satisfied that there was an inadequate review of the public interest considerations contrary to section 117B(5). While the FtTJ referred to ***Rhuppiah v Secretary of State for the Home Department*** [2016] EWCA Civ 803, there was a failure to apply the guidance therein taking into account the duration and circumstances of the Appellant's lawful presence in the United Kingdom and the extent to which he understood that his time here would be comparatively short or would be liable to termination. The FtTJ further failed to factor into his assessment a key fact, namely, the extent to which the "near miss" affected the public interest.
14. While the FtTJ's decision to dismiss the appeal may well be correct, it is the manner and route by which that conclusion has been reached I find is materially flawed. Consequently, the decision must be set aside and remade.

DECISION

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside. Both representatives invited me to remit the matter to the First-tier Tribunal. I agreed to this course as a full Article 8 assessment is required taking into account the unusual features of this case. The appeal is remitted to the First-tier Tribunal for a rehearing to be heard by a Judge other than FtTJ J. Spencer.

Signed

Dated: 12 June 2017

Deputy Upper Tribunal Judge Bagral

