



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/01885/2017**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 20 December 2017**

**Decision & Reasons  
Promulgated  
On 29 January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**SHEHRIYAR ALI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr W Rees of Counsel, instructed by Farani Javid Taylor Solicitors

For the Respondent: Mr N Bramble, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge McIntosh promulgated on 10 April 2017, in which the Appellant's appeal against a decision of the Respondent dated 24 January 2017 refusing a human rights claim was dismissed.
2. The appeal before Judge McIntosh was decided without a hearing 'on the papers', the relevant box having been ticked on the Notice of Appeal to indicate, on its face, that that was the wish of the Appellant.

3. Judge McIntosh dismissed the Appellant's appeal for the reasons as set out in her Decision. The Appellant was granted permission to appeal by First-tier Tribunal Judge Grimmett on 11 October 2017. The Respondent has filed a Rule 24 response dated 16 November 2017 resisting the challenge to the decision of the First-tier Tribunal.
4. The Appellant is a citizen of Pakistan born on 8 November 1991. He entered the United Kingdom in June 2010 with a visa conferring leave valid until 30 August 2011. He was granted a subsequent period of leave up until 27 January 2014. However, on 12 April 2011 the Appellant's leave to remain in the United Kingdom was curtailed to take effect on 11 June 2012.
5. The Appellant married Ms Naila Naseer, a British citizen born on 5 March 1992, on 9 June 2012 - just two days before his curtailment of leave was due to take effect. Since that time the Appellant has made a number of applications for further leave to remain. His applications were rejected in January 2014 and June 2014. The instant application was made by way of form FLR(FP), signed on 5 March 2015. The Appellant sought leave to remain on the basis of his relationship with Ms Naseer, and necessarily therefore his application was treated as a human rights claim by the Respondent.
6. The Respondent refused the application for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 24 January 2017. Amongst other things the Respondent gave consideration to Appendix FM of the Immigration Rules, and in particular the so-called '10 year partner route' in respect of family life.
7. I pause to note that the reference to a '10 year route' is because it is that period of time that needs to pass before a successful applicant is likely to obtain settlement in the United Kingdom. 10 years' residence in the United Kingdom is not a prerequisite to success under those particular parts of the Rules. The relevance of this parenthetical clarification will become apparent in due course.
8. The Respondent in the RFRL accepted that the Appellant satisfied the 'suitability' requirements in respect of the 10 year partner route, and also indicated satisfaction in respect of the 'eligibility' requirements. Regard was therefore had to paragraph EX.1 of Appendix FM, but the Respondent concluded that this provision was not satisfied. In particular, it was stated in the RFRL that the Respondent *"has not seen any evidence that there are insurmountable obstacles in accordance with paragraph EX.2"*.
9. Notwithstanding that observation, it is pertinent to note that the Respondent's decision-maker went on to say the following in respect of the Appellant's partner:

*"Furthermore, although it would be unreasonable to expect your partner to leave the United Kingdom and accompany you to Pakistan, it is open to her to do so if she chooses and you would be there to*

*help her to adapt to the lifestyle there and you would be able to enjoy your life together outside of the United Kingdom in Pakistan."*

10. Whilst necessarily the concepts of 'unreasonableness' and 'insurmountable obstacles' are not congruent, it might be thought that an acknowledgement of 'unreasonableness' would be significant in informing any evaluation of proportionality.
11. Be that as it may, the Respondent refused the Appellant's application under the 10 year partner route, and went on to consider the Appellant's private life by reference to paragraph 276ADE(1), in particular subparagraph (vi). The Respondent decided that the Appellant did not satisfy the rule, in particular because there would be no very significant obstacles to his integration into Pakistan bearing in mind his age, the length of time he had been in the United Kingdom, and the fact that he had spent his childhood and formative years in Pakistan where it could be considered that he would have retained knowledge of the life, language and culture.
12. The Respondent also concluded that there were no such exceptional circumstances to warrant the grant of leave outside the Rules - although in that part of the RFRL it was again acknowledged that it would be unreasonable to expect the Appellant's spouse to leave the United Kingdom.
13. Before turning to particular consideration of the Decision of the First-tier Tribunal it is appropriate to make reference to the grounds of challenge that have been mounted before the Upper Tribunal. The grounds upon which permission to appeal were granted set out in a number of introductory paragraphs circumstances in respect of the background to the Appellant's appeal being determined on the papers - and indeed asserts matters which would not have been known to the First-tier Tribunal Judge.
14. In short: the Appellant advances a claim that his previous advisers had let him down. He had been unaware that his appeal was to be determined on the papers without a hearing. That had not been his election, and the Notice of Appeal necessarily therefore had been, he now claimed, completed without his knowledge or instruction. Moreover, aspects of the documentary evidence advanced in support of his appeal which related to supposed difficulties in Pakistan by reason of his conversion to the Ahmadi faith, were said to have been presented without his authority and not to reflect fact. The Appellant has confirmed before the Tribunal today that he at no point converted to the Ahmadi faith, and he denies that he ever instructed anybody to advance his case on that basis. What is said is that his legal representatives, with whom he had minimal contact directly, prepared an appeal for him which not only did not reflect the way he wished to advance the case - i.e. it did not reflect his wish to give live evidence before the Tribunal - but also misrepresented quite seriously the substance and facts of certain elements of his case.

15. I have noted these claimed circumstances in considering the submissions before me today. However, I particularly sought assistance from the Appellant's counsel on the manner in which the claimed circumstances – misrepresentation of the facts of his case by his previous representatives, and denial of an opportunity to attend a hearing of his appeal by reason of the conduct of his previous representatives - might be said to amount to an error of law on the part of the Tribunal such that the decision of the First-tier Tribunal could be impugned. Mr Rees submitted that the circumstances were such that there had been a procedural impropriety.
16. With respect, it is difficult to see that any such possible impropriety rests with the Tribunal. I am not persuaded that it has been shown on the facts of this particular case that there is any relevant error of law. That is not to say that I rule out altogether that in principle a decision of the Tribunal might be vitiated where a representative has badly failed an appellant; however it seems to me that what would be necessary would be some consequence resulting in a fundamental and material misconception of fact. Mr Rees had not made any such contention.
17. Moreover, although Mr Rees has brought to my attention the case of **BT (Nepal) [2004] UKIAT 311**, he acknowledges that he is not in a position to put before the Tribunal any of the sort of evidence that the Tribunal in **BT (Nepal)** thought would be required in order to mount an action or challenge of the nature intimated in the introductory paragraphs of the grounds of appeal.
18. In all such circumstances in my judgement the matters set out in the introductory paragraphs of the grounds of appeal do not avail the Appellant for the present purpose of the Upper Tribunal considering error of law on the part of the First-tier Tribunal.
19. Moreover, in order to make out the factual premise that there had indeed been some sort of misservice, or disservice, on the part of the Appellant's representatives, considerably more would be required by way of evidence rather than what is presently essentially a matter of mere assertion.
20. I turn then to the Decision of the First-tier Tribunal Judge itself.
21. It is common ground before me that the decision is not well-worded, that there are errors of syntax, and that the stylisation of the Decision is unorthodox.
22. Mr Rees argues in substance that there is such a degree of absence of clarity and coherence, that there is such a degree of confusion and muddle, that it would be unsafe to rely upon the Decision as an adequate determination, or 'safe' disposal, of the Appellant's case.
23. Mr Bramble argues that with careful analysis it is possible to identify within the body of the Decision that all relevant issues have been addressed in

substance by the First-tier Tribunal Judge, notwithstanding the uncertainties as to form.

24. I acknowledge the force of the submission advanced by Mr Bramble. However, ultimately I have come to the conclusion that the standard of the Decision falls short of what is to be reasonably expected in such a document, to an extent that the Decision does not offer the reader sufficient confidence that all issues have properly been addressed within the terms of the applicable jurisprudence.
25. I note in particular the following aspects of the Decision as informing my judgement that due and proper regard has not been given to the Appellant's case in all material respects.

(i) This was a human rights appeal. However, that does not mean that the Immigration Rules were not a relevant matter of consideration - and indeed required to be considered as offering something of a starting point with regard to the yardstick of where proportionality might lie in any particular case.

(ii) At paragraph 27 the Judge states:

*"Although the Appellant applies for leave under the ten year route as outlined above I find that the Appellant does not meet the requirements as at the date of his application the Appellant had been present in the United Kingdom for less than five years."*

On its face, this appears to be a finding that the Appellant could not avail himself of Appendix FM because he had not been present in the United Kingdom for 10 years. This is powerfully indicative that the Judge fundamentally misunderstood the nature of Appendix FM.

(iii) With regard to the private life elements of the case, the Judge refers to paragraph 276ADE of the Immigration Rules at paragraph 28 of the Decision. The paragraph sets out paragraph 276ADE(1)(i)-(vi) preceded by the following sentence: *"Under paragraph 276ADE of the Immigration Rules the Appellant does not meet the requirements of (iii), (iv) and (v), paragraph 276ADE provides:"* Nothing further is said in respect of paragraph 276ADE in the concluding paragraphs of the decision. The references to subparagraphs (iii), (iv) and (v), whilst correct and indeed not disputed, do not for a moment begin to address subparagraph (vi). Although subparagraph (vi) is reproduced at paragraph 28, it is not in substance addressed by the First-tier Tribunal Judge. Indeed, the First-tier Tribunal Judge is silent in respect of subparagraph (vi) in the opening stanza of paragraph 28. It is impossible in those circumstances to see that the Judge has properly turned her mind to paragraph 276ADE(1)(vi).

(iv) It is also to be noted that when the Judge gives consideration to Article 8 at paragraphs 29-32, she speaks exclusively in terms of the Appellant having established a private life in the United Kingdom - albeit that she refers to a private life established with his wife and the extended family. The Judge nowhere refers to the Appellant's freestanding Article 8 claim on the basis of family life. The concern arises that perhaps the Judge did not consider it necessary to have further regard to family life once it had been determined that the Appellant had not been present in the UK for 10 years.

(v) Paragraph 31 appears in the main to be an adequate traverse of the **Razgar** questions, concluding with the simple sentence "*I find that the decision is proportionate in the circumstances*". Little else is given by way of reasons for that conclusion - save the brief consideration at paragraph 32, which essentially refers to the circumstances of the Appellant's British citizen wife. Whilst this repeats to some extent the contents of the RFRL by referring to the possibility that she may wish to remain in the United Kingdom but has the option to go to Pakistan, nowhere within that paragraph - or indeed anywhere else in the Decision - does the Judge acknowledge that the Respondent recognised that it would be unreasonable to expect the Appellant's partner to leave the United Kingdom.

(vi) Nor does the consideration of Article 8 make any reference to the public interest considerations pursuant to section 117B of the 2002 Act. Whilst this might not have availed the Appellant in any material way, it does seem to me that it reinforces the underlying nature of the unsatisfactory application of jurisprudence to an extent that the reader of this Decision is left uncertain as to the extent to which the Judge understood the law that she was required to apply to the particular facts of the case.

26. As I say, notwithstanding the foregoing I have nonetheless recognised the force of Mr Bramble's submissions in regard to the possibility that the Judge has considered all relevant matters. For example there is some appearance that the Judge might have addressed the substance of the issue of insurmountable obstacles. However, on closer scrutiny: at paragraph 24 there is ambiguity as to whether the Judge is making a finding or merely recording what was said in the RFRL; the findings at paragraph 32, whilst possibly relevant to a consideration of insurmountable obstacles, are not referenced in any such context by the Judge.
27. I have also taken into account that it is possible that ultimately the Appellant's case will be found to have little of merit. So far as 276ADE is concerned, and the Appellant's private life, it is difficult to see that anything of substance has been advanced as to why he would have problems reintegrating into the country of his nationality, given the relatively brief absence from that country. So far as continuing family life

in Pakistan with his partner, again, it is not clear that any more is being said than that the Appellant's partner is British and is unfamiliar with Pakistan. However, be that as it may, it seems to me that what is fundamentally important here is that I cannot be confident that the Appellant has had a full and fair consideration of his case because of the nature of the deficiencies in the First-tier Tribunal's decision.

28. On that basis it seems to me that it is appropriate to set aside the Decision of the First-tier Tribunal and require that the appeal now be remade before the First-tier Tribunal before any Judge other than Judge McIntosh.
29. In remaking the decision I understand that the Appellant would now wish to have an oral hearing of his appeal and that should be arranged accordingly. It may be that in due course at that hearing the Appellant will need to address in some detail the circumstances in which the nature of the case he advances is now to be different from the nature of the case advanced, he says, without his authority. To that end it may be that more than has been provided to the Upper Tribunal in respect of the conduct of his previous representatives will require to be obtained and filed before the First-tier Tribunal lest the Appellant encounter arguments in respect of credibility because of the changes in his account. However, those matters are between the Appellant and any advisers he may now have or may have in the future, and are in turn ultimately a matter for the Judge who remakes the decision - I express no particular view and merely alert the Appellant to the likelihood that something more by way of explanation may be required of him given the fundamental nature of the differences between the case that he says he wishes to advance and that which he says was advanced without his authority.

### **Notice of Decision**

30. The decision of the First-tier Tribunal contained a material error of law and is set side.
31. The decision in the appeal is to be remade before the First-tier Tribunal with all issues at large before any Judge other than First-tier Tribunal Judge McIntosh.
32. No anonymity direction is sought or made.

*The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing*

Signed:

Date: **25 January 2018**

**Deputy Upper Tribunal Judge I A Lewis**