



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

Appeal Number: HU/05587/2020

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 November 2021**

**Decision & Reasons  
Promulgated  
On 23 November 2021**

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**PAUL ONYANGO OTIENO ONGINJO  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Lindsay, Home Office Presenting Officer

For the Respondent: Mr K Mukherjee, instructed by Davjunnell Solicitors

**DECISION AND REASONS**

1. Although this is an appeal by the Secretary of State, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a national of Kenya born on 17 May 1980. His appeal against the decision to refuse leave to remain was allowed by First-tier Tribunal Judge Mehta [the judge] on Article 8 grounds on 26 May 2021. The Secretary of State appealed.
2. Permission to appeal was granted by Upper Tribunal Judge Gill on 6 September 2021 on the grounds that it was arguable the judge had erred

in carrying out the proportionality balancing exercise in relation to Article 8 for the following reasons.

- (i) Arguably it was irrational or not reasonably open to the judge to take into account the factors at [49] of the decision;
  - (ii) The judge arguably failed to consider family life and insurmountable obstacles at [50] and [51];
  - (iii) The judge arguable took into account the Appellant's lack of criminal convictions in his favour when in fact it was a neutral factor; and
  - (iv) The judge failed to consider Thakrar (Cart JR, Art 8, Value to Community) [2018] UKUT 00336 (IAC).
3. There was no dispute about the Appellant's immigration history set out at [5] to [15] of the judge's decision. In summary, the Appellant came to the UK as a student in 2008 and has remained here in that capacity since then. He remained without leave from 12 October 2011 to 13 May 2012 because there was a problem obtaining relevant documentation for his application for further student leave made at that time. The Appellant made an in time application for indefinite leave to remain on 7 February 2020 on grounds of long residence. It is accepted the Appellant cannot satisfy paragraphs 276B, 276ADE or Appendix FM of the Immigration Rules.
  4. Mr Lindsay relied on the grounds of appeal and TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109. He submitted there was no dispute the Appellant's work in the UK was of social value, but the judge had materially erred in law in his approach to the balance sheet assessment of proportionality.
  5. It was accepted the Appellant could not meet the Immigration Rules and there was a general public interest in removal. The judge found at [45] that the public interest carried weight, but he failed to quantify the weight he attached to it and/or appreciate that he must attach considerable weight to the public interest following TZ at [32] and [35]. The judge correctly stated the law at [47] but failed to apply section 117B of the 2002 Act in relation to the weight he attached to the Appellant's private life at [49] to [54].
  6. Mr Lindsay submitted the judge wrongly concluded that the Appellant's lack of leave weighed in favour of his private life at [49] and, given there was no finding of family life at [50] and [51], the factors referred to therein attracted little weight on a proper application of section 117B. The judge wrongly took into account the Appellant's lack of criminal convictions in his favour when this was a neutral factor.
  7. Mr Lindsay submitted the judge had failed to consider Thakrar and to consider whether removal of the Appellant would lead to an irreplaceable loss in the community such that the weight to be attached to the public

interest should be reduced. The fact that the Appellant's occupation was on the shortage list was relevant to this assessment, but was not enough in itself to override the Respondent's immigration policy as expressed in the Immigration Rules.

8. Mr Lindsay submitted the judge failed to make findings of fact prior to carrying out the balance sheet assessment. However, he accepted this was not pleaded in the grounds and submitted this point was relevant to any subsequent disposal should an error be found.
9. Mr Mukherjee submitted there was no material error of law in the decision and, on any view, the Appellant's case was exceptional and compelling. He submitted the interference was not justified given the effect on the Appellant's career. The judge had properly applied TZ and he recognised that considerable weight should be attached to the public interest.
10. Mr Mukherjee submitted the judge was entitled to take into account the Appellant's considerable length of lawful residence and his explanation for the short gap in his lawful leave. Notwithstanding the Appellant's leave was precarious, he had created a protected right by residing in the UK lawfully. The gap in his lawful leave was not a deliberate attempt to deceive the authorities and the Appellant was subsequently granted further leave by the Respondent. The judge properly took into account the matters at [49] in the Appellant's favour.
11. The matters at [49] to [54] were relevant to the balancing exercise notwithstanding they attracted little weight and the judge was entitled to take them into account. The exceptional nature of the Appellant's career and his ability to complete his studies were relevant factors. The Respondent accepted the Appellant had done an extraordinary piece of work which he would be unable to complete if leave was refused. The UK would lose the benefit of the Appellant's skills. There was no misapplication of Thakrar and the judge gave appropriate weight to all relevant factors. The Appellant's case was exceptional and there was no error in the judge's balancing exercise or ultimate conclusion. On the facts, there could be no other possible outcome.

### **Conclusions and reason**

12. The judge stated the relevant law at [44] and [47] but failed to apply it at [49] to [54]. Although the judge recognised the Appellant cannot satisfy the Immigration Rules, it was not apparent that he attached significant weight to the public interest or that he attached little weight to the Appellant's private life in accordance with section 117B. The judge took into account factors in the Appellant's favour which were neutral factors and the gap in the Appellant's lawful leave was placed on the wrong side of the balance sheet, notwithstanding the Appellant's explanation for it.

13. It does not appear that the judge's attention was drawn to Thakrar. The judge made no mention of this case and it was not apparent that he considered it at [54]. I find the judge erred in law in failing to consider whether the Appellant's removal would lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it.
14. I find the judge erred in law in carrying out the Article 8 proportionality assessment. I set aside the decision dated 26 May 2021 allowing the appeal on human rights grounds. The Respondent's appeal is allowed.
15. It was agreed by the parties that there was no dispute on the facts and a further hearing was not necessary. The facts had not materially changed since the First-tier Tribunal hearing and the Upper Tribunal could remake the decision. The following directions were agreed:
  - (i) The Respondent to serve further submissions by 4pm on 3<sup>rd</sup> December 2021.
  - (ii) The Appellant to serve further submission by 10<sup>th</sup> December 2021.

### **Notice of decision**

### **Appeal allowed**

**J Frances**

Signed  
Upper Tribunal Judge Frances

Date: 16 November 2021