Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11831/2019

THE IMMIGRATION ACTS

Held Remotely at Field House by UK Skype On 13 April 2021	**Decision & Reasons Promulgated On 13 May 2021**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

MR ABDUL RAUF
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Maqsood, Counsel instructed by Julia & Rana Solicitors
For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Roopnarine-Davies sent on 20 November 2019. Permission to appeal was granted by Upper Tribunal Judge Finch on 18 June 2020.

2. The hearing was held remotely and neither party objected to the hearing being held in this manner. Both parties participated by Skype for Business.

I am satisfied that a face-to-face hearing could not be held because it was not practicable and all of the issues could be determined in a remote hearing. Both parties confirmed at the end of the hearing that the hearing was fair.

Background

3. The appellant is a 65-year-old national of Pakistan who claimed to have entered the United Kingdom illegally in 2000. He subsequently claimed asylum and his claim was refused on 19 March 2001. An appeal against that decision was dismissed on 15 May 2001. On 19 May 2010 the applicant made a human rights claim. A second human rights claim was made on 3 April 2012 with further applications being made on 20 January 2014, 17 March 2014 and 20 June 2014. All of these applications were either rejected or refused with no right of appeal. On 9 April 2019, the appellant applied for leave to remain in the United Kingdom on the basis of his private life in the United Kingdom pursuant to Article 8 ECHR. The application was refused on 26 June 2019.

4. The applicant claims that at the date of the application he had been residing in the United Kingdom for approximately nineteen years and he has established a private life in the United Kingdom in accordance with Article 8 ECHR. He asserts that his removal to Pakistan would constitute a disproportionate interference with his private life because of his age and ill health. There are very significant obstacles to his integration in Pakistan because he has lost touch with his family there.

The position of the respondent

5. The respondent asserts that the appellant cannot meet the immigration rules in respect of long residence. He has not demonstrated that he has resided in the United Kingdom for a continuous period of twenty years. In particular, he has not presented acceptable evidence to demonstrate that he was present in the United Kingdom between 2001 to 2010. Secondly, it is not accepted that there are very significant obstacles to his integration to Pakistan because he spent the vast majority of his life in Pakistan including his formative years, speaks Urdu and has failed to demonstrate that he has lost all social and family ties with his home country. It is considered there are no exceptional circumstances which would result in unjustifiably harsh consequences for the appellant such as to warrant a grant of leave to remain outside of the immigration rules.

6. In correspondence between the Secretary of State and the appellant's MP, the respondent previously asserted that the appellant left the United Kingdom voluntarily on 3 May 2006, flying to Islamabad. In the refusal decision it is said that even were the appellant not to be this person, the appellant has not presented sufficient evidence to demonstrate his presence in the United Kingdom from 2001 to 2010. Supporting statements from friends were considered but not deemed significant enough to accept his presence in the UK during this period. Further,

despite the fact that the appellant has a heart condition and has undergone several operations, it is considered that Pakistan has a functioning healthcare system and that treatment is available for the appellant's condition in Pakistan and an Article 3 ECHR medical claim is not made out. Any relationships with friends in the United Kingdom can be maintained from Pakistan.

The Decision of the First-tier Tribunal

7. It was not asserted by the appellant' representative that the appellant could meet the requirements of paragraph 276ADE(1)(iii) because it was accepted that the appellant had not lived continuously in the United Kingdom for at least twenty years. The judge turned to paragraph 276ADE(vi) of the immigration rules to determine whether there would be very significant obstacles to the appellant's integration into Pakistan. The judge referred to the tests in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813 and SA (Afghanistan) v SSHD EWCA Civ 53. The judge found the appellant to be not entirely candid because he appeared reluctant to volunteer details about his personal circumstances and there were some inconsistencies in his evidence. On this basis, the judge did not accept that the appellant had lost touch with his family in Pakistan. The judge found that the appellant is 64, is in fairly good health, can speak Urdu and his private life is overwhelmingly with friends from the Pakistani diaspora. The judge found that the appellant has not demonstrated that there would be very significant obstacles to his reintegration in Pakistan.

8. The judge then turned to the wider Article 8 ECHR proportionality assessment. The judge noted that it is in the public interest to maintain effective immigration control. The judge took into account that the appellant understands some English and that he has not been reliant on public funds although he has had access to the benefit of substantial free NHS services. The judge found that the appellant may have worked but he has not paid taxes. The judge found that little weight should be given to a private life formed when a person has been in the United Kingdom unlawfully. The judge noted that the appellant has attempted to regularise his status but his applications have been refused on five occasions and he has never had any leave to remain in the United Kingdom. The judge concluded that the appellant's private life in the United Kingdom is not so strong as to outweigh the public interest in immigration control. The judge was not satisfied that there were compelling or exceptional circumstances such that the refusal would result in unjustifiably harsh consequences for the appellant.

9. The judge found that the appellant has only spent ten years in the United Kingdom between 2000 to 2001 and 2010 to the present. The judge did not make any concrete finding on whether the appellant had left the United Kingdom and returned to Pakistan in 2006.

Grant of Permission

10. Upper Tribunal Judge Finch granted permission on the basis that the judge failed to take into account the implicit acceptance by the respondent that the appellant may have been in the United Kingdom between 2001 to 2006, if she was correct that he departed on an Emergency Travel Document in 2006. The judge also failed to take into account evidence in the appellant's bundle which cast serious doubt on the fact that the appellant had been removed from the United Kingdom in 2006. She decided that all grounds were arguable.

Preliminary Issue – New Evidence

11. The appellant made an application to adduce new evidence of his residence in the United Kingdom between 2001 to 2010. The evidence consisted of dental records from between 2005 and 2021. The evidence was accompanied by a Rule 15(2A) notice. It is said that the reason the evidence was not submitted earlier is because the appellant has memory problems after heart surgery and because of the strong medication he takes. He did not realise that there were longstanding dental records until February 2021 when he visited his dentist.

12. Ms Cunha submitted that the respondent had concerns about the evidence in any event given that four pages were missing and the dental appointments from 2005 onwards were all said to have taken place at midnight.

13. When deciding whether to admit the evidence I had regard to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 which state:

> "15(2A) In an asylum case or an immigration case
>
> (a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party –
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> (i) indicating the nature of the evidence; and
>
> (ii) explaining why it was not submitted to the First-tier Tribunal; and
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> (b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been an unreasonable delay of producing that evidence."

14. The evidence was produced on 8 April 2021 shortly before the error of law hearing and eighteen months after the original appeal before the First-tier Tribunal which was heard on 19 November 2019. Given that the evidence is said to cover the period from 2005 onwards which includes periods which are at issue in this appeal; that the appellant has made five applications on the basis of his residence in the United Kingdom and is represented by a solicitor; the fact that he has a poor memory did not seem to me to be a reasonable explanation for why this evidence was not placed before the First-tier Tribunal.

15. I do not admit the further evidence. The appellant was represented at his appeal and produced statements from himself and his witnesses as well as other documents in relation to his residence in the United Kingdom including medical records. There is no satisfactory explanation why this dental evidence could not have been adduced prior to the hearing before the First-tier Tribunal. Further, the issue before me was whether the judge had materially erred in law on the basis of the evidence before her and since this evidence was not produced at the appeal it does not inform that issue. Finally, I am not satisfied that the evidence would have made a material difference to the outcome of the appeal because it does not cover the period 2001 to 2005. Having considered the overriding objectives of the Procedure Rules, I am satisfied that it is fair and in the interests of justice to refuse to admit the evidence because it is not relevant to the lawfulness of the decision of the First-tier Tribunal. It is open to the appellant to submit the new evidence in support of a fresh claim or application.

The Grounds of Challenge

16. The grounds of challenge are set out in the grounds to the application and further clarified and expanded on in the appellant's skeleton argument. They are as follows:

    (1) The judge has failed to resolve a material issue. The judge failed to make a finding as to whether the appellant left the UK in 2006. There is a conflict in the evidence and a finding on this issue is necessary to determine how long the appellant has lived in the UK.

    (2) The finding that the appellant was not present in the United Kingdom between 2001 to 2010 is unreasoned and irrational. No evidence was presented that the appellant was absent from the United Kingdom in this period and at most it was only open to the judge to find that there was insufficient evidence before her to persuade her that the appellant was present during that period. By finding that the appellant was not in the United Kingdom between 2001 and 2010 the judge has gone beyond this and made a finding not open to her on the evidence.

    (3) The judge has failed to give adequate reasons as to why she rejected the evidence of the supporting witnesses.

Respondent's Position – Rule 24 Response

17. The respondent opposes the appellant's appeal. It is said that grounds 1 and 2 complain about the judge's findings on the appellant's length of residence in the United Kingdom. The burden of proof rests on the appellant to demonstrate that he meets the immigration rules and the judge's self-direction at [7] was correct in this respect. The appellant cannot simultaneously seek to take advantage of the respondent's claim that he was encountered in 2006 to demonstrate his presence from 2001 to 2006 and yet at the same time claim this was not him. It is immaterial whether the respondent could not show that the appellant was

encountered in 2006 in the airport because in any event the appellant has failed to demonstrate his presence in the United Kingdom for the years in question between 2001 and 2010. The respondent considers that any errors would not have made a material difference to the outcome of the appeal under the immigration rules. As at the date of the hearing the appellant had not been here for over twenty years and any further analysis under the rules or under a wider application of Article 8 ECHR should have been conducted on the basis that the appellant did not meet the immigration rules.

Decision on the Error of Law

18. The problem for the appellant in this appeal is that the starting point both at the date of the application and the date of the promulgation of the judge's decision is that the appellant had not acquired 20 year's continuous residence in the UK and could not succeed under the immigration rules. There is no challenge to the judge's findings in respect of 'very significant' obstacles and it is not asserted by the appellant that the judge's Article 8 ECHR balancing exercise is unlawful. In these circumstances it is difficult to see how any error could have been material to the outcome of the appeal. Nevertheless, for the sake of completeness I will consider the alleged errors in turn.

Ground 1

19. Previously, the appellant's representative argued that the appellant should benefit from the 'legacy exercise'. The respondent's position was that the appellant did not benefit from the exercise because he had been encountered at the airport leaving for Islamabad in 2006. The appellant requested a copy of his Home Office file. The file was reproduced in the appellant's bundle and was before the judge. There was evidence in the file that the respondent could not be sure that it was in fact the appellant who boarded a plane to Islamabad in May 2006. This is because the appellant's name is a common name and the references in the file include references to an Iraqi national of the same name born on the same date of birth as the appellant but who entered the United Kingdom many years previously. From this it is apparent that the respondent herself has some doubt as to whether it was the appellant who left the United Kingdom in 2006.

20. Mr Maqsood's submission is that the judge failed to resolve this issue which is relevant to the length of time the appellant has lived in the UK.

21. I have considered the wording of the Secretary of State's refusal. The Secretary of State's refusal was on the basis that it was not relevant whether the appellant left the United Kingdom in 2006 because the burden was on the appellant to demonstrate that he had been living continuously in the United Kingdom between 2001 and 2010 and the respondent was not satisfied there was sufficient evidence before her in this respect.

22. I am not satisfied that the judge needed to resolve this issue in order to lawfully determine the appeal. It was for the judge to decide whether there was sufficient evidence before her to satisfy her that the appellant had been continuously resident in the United Kingdom for 20 years. Even had I found this to be an error however, I would have found that it was not material for the reasons set out below.

Ground 2

23. Moving on to Mr Maqsood's second ground, I am in agreement that the judge went further than finding that there was insufficient evidence to persuade her that the appellant had been present in the UK between 2001 to 2010.

24. At [19], she states;

> "looked at in the round, I found as a fact and on balance that the appellant was not in the United Kingdom between 2001 and 2010"

25. This finding is replicated in the judge's analysis of the wider Article 8 ECHR proportionality exercise where she finds that the appellant has only spent ten years in the United Kingdom from 2000 to 2001 and from 2010 to the present. I am satisfied that this was a finding that was not open to the judge on the evidence before her. There was insufficient evidence before the judge to demonstrate that the appellant had left the United Kingdom in 2001 or that he had returned in 2010. The respondent has not made this assertion in the refusal letter and there was nothing to indicate in the documentary evidence produced by the appellant including his supporting medical evidence, witness statements or indeed his own Home Office file which would suggest that he had returned to Pakistan for a nine-year period. I am satisfied that this finding can be categorised as perverse and constitutes an error on a point of law. I turn to the materiality of the error below.

Ground 3

26. I turn to Ground 3. Mr Maqsood's argument is that the judge has not given satisfactory reasons for rejecting the evidence of the two witnesses who attended the appeal to give evidence on behalf of the appellant. The two witnesses both claim to be family friends of the appellant who had known him in Pakistan. Both witnesses had provided statements in 2012 in support of the appellant's application of that time and both witnesses had prepared further statements for the purposes of the appeal and attended the court to give evidence. Both witnesses are British citizens working in the United Kingdom and both claim that the appellant has been residing continuously in the United Kingdom between the period 2001 to 2010. The judge dealt with the witnesses' evidence at [17] and [18] where it is said:

> "The appellant's friends adopted their witness statements and stated that they knew the appellant in Pakistan. He is 64-year-old. They are respectively 35 and 41 years old. Mr Rehman claimed to have known

> of him/knew him in Pakistan and met him here in 2003 and to be a distant relative.
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> Mr Zaman stated that he knew the appellant in Pakistan. The witnesses asserted (as did numerous testimonials in the bundle) that he had never left the United Kingdom since 2000. They claim to have come from the same town/village in Pakistan but there was not proof of this to the required standard or of their jobs or that they regularly gave the appellant financial support or e.g. photographs of them with him in the seventeen years they claimed to have known him."

27. Mr Maqsood's submission is that rejecting the witnesses' evidence because they had not provided evidence that they had come from the same town or village or provided evidence of their jobs was not relevant to the issue of whether they had known the appellant in the United Kingdom over the last seventeen years or so. He submitted that the reasons for rejecting the witnesses' evidence were not adequate in the circumstances. He also pointed to the fact that the respondent did not attend the appeal and did not cross-examine the witnesses.

28. Ms Cunha submitted that the judge found the appellant to be lacking in credibility in general and gave adequate reasons for this and that this was sufficient to reject the evidence of the witnesses.

29. At [13] the judge referred to the appellant being reluctant to volunteer details of his personal circumstances and to inconsistencies in his evidence. The inconsistencies related to the appellant claiming at different times that he had either three or four children in Pakistan and claiming that his wife had died but not proving this to the relevant standard. The judge also found at [14] that,

> "He claimed to have lost all contact with his family and gave the impression that he had abandoned them so they would reject him if he returned to Pakistan but as recently as 2014 (page 160) he was reported by a clinician at Croydon Hospital as worrying about having lost his job as a dry cleaner and about his family in Pakistan."

30. Ms Cunha's submission is that the judge's finding that the appellant was not a truthful witness is sustainable.

31. I have concerns about the manner in which the appellant's evidence was treated. The judge refers on more than one occasion to the appellant's evidence in his witness statements and his oral evidence as "assertion". At paragraph [15] she states,

> "Although the respondent appeared to accept that the claim that the appellant left the United Kingdom on 3 May 2006, (page 60 GCID minute), could not be substantiated, it remains the case that the appellant has not shown other than by assertion (his witnesses also merely asserted this) that he was present in the United Kingdom between 2001 when his appeal rights were exhausted and 2010 when previous solicitors applied on his behalf for consideration under the legacy scheme ..." (My emphasis)

32. I am not satisfied that the judge's characterisation of the appellant's and the witnesses' evidence as mere assertion indicates proper scrutiny of this evidence. The witness statement evidence and oral evidence is primary evidence and the judge must decide if she accepts or rejects the evidence and give adequate reasons for doing so.

33. However, looking at the decision as a whole, there were various other factors to which the judge was entitled to give significant weight when finding that the appellant was not a truthful witness. These included the appellant's lack of transparency, his reluctance to answer some questions, the fact that there was a significant amount of documentation in respect of him from 2010 onwards in contrast to the period 2001 to 2010 despite the fact that he has been in the UK unlawfully at all times, as well as an obvious inconsistency in the evidence in that in 2014 the appellant referred to being in contact with his family whereas in his application, he stated that he had lost all contact with them since arriving in the United Kingdom in 2000. This inconsistency would have been apparent to the appellant himself prior to the hearing because he tendered this evidence, but he did not deal with it. In these circumstances, the judge was properly able to give less weight to the appellant's own evidence and has given sustainable reasons for doing so.

34. Nevertheless, I am satisfied that the judge has erred in her approach to the evidence of the witnesses. Even if the appellant was found not to be a truthful witness in particular with regard to his family circumstances, the judge was still tasked with assessing the witnesses evidence. The witnesses both provided statements in 2012 and in 2019 as well as giving oral evidence. Their evidence was consistent. They were not cross-examined. It was not put to them that they were not telling the truth.

35. Mr Maqsood referred to a video of the appellant and the witness together being attached to the appeal bundle at pages 346 to 348. However, neither an index for these pages, nor this evidence was in the judge's bundle and I cannot be satisfied that this evidence was actually produced to the judge or that the judge erred when she said there was no photographic evidence of the relationship between the appellant and the witnesses.

36. I am not satisfied that the witnesses' failure to provide evidence of their employment in the United Kingdom or that they came from the same village as the appellant are adequate reasons to reject the witnesses' evidence about their relationship with the appellant and their knowledge of his residence in the UK. There is no reference to the judge asking more questions of them nor that their evidence was challenged in any way at all, nor found to be inconsistent. I find that the judge has erred in her approach to the evidence of the witnesses and has failed to give adequate reasons for rejecting the supporting witnesses' evidence.

37. In summary, I am not satisfied that it was an error for the judge not to make a concrete finding as to whether the appellant left the United Kingdom in 2006, but I am satisfied that the judge has made a finding which was not open to her on the evidence (that the appellant left the United Kingdom between 2001 and 2010) and that the judge gave inadequate reasons for rejecting the evidence of the witnesses.

Materiality

38. These errors are immaterial to the outcome of the appeal for the following reasons.

39. In the original grounds of appeal, it is asserted that the judge failed to give proper weight to the exceptional circumstances of this case which are said to be his strong relationship with his friends and family in the United Kingdom, his good character, his involvement in his community, his poor health and the length of time he has lived outside Pakistan. This ground was not explicitly not pursued by Mr Maqsood.

40. Mr Maqsood asserted that the failure to resolve the issue about whether the appellant returned to Pakistan in 2006 was material to the assessment of proportionality because had the respondent not made an error in this respect, the appellant could have benefited from the legacy application. Mr Maqsood was unable to demonstrate that this point had either been made in the original application or in submissions before the Tribunal and in circumstances where this argument was not raised at all before the First-tier Tribunal I find that it is not relevant. In any event, I am not satisfied for the reasons set out above that the failure to resolve this issue was an error.

41. Had the judge not erred in finding that the appellant left the UK between 2001 and 2010 and accepted the appellant's witness's evidence, the judge may have found that the appellant has been residing in the UK for the last 19 years. Mr Maqsood submitted that this would have had a bearing on the outcome of the proportionality assessment.

42. I do not agree. At the date of the promulgation of the decision, even taking the case at its highest and accepting that the appellant had been continuously resident in the UK for a period of 19 years, the appellant manifestly could not demonstrate that he had been residing in the United Kingdom for a continuous period of twenty years. He could not meet the requirements of the immigration rules. This was conceded by his representative at the hearing. Secondly, the judge has given adequate and sustainable reasons as to why there would be no very significant obstacles to the appellant returning to Pakistan. The judge referred to the correct legal test in relation to the appellant being 'enough of an insider'. The judge pointed to the appellant's knowledge of the language and culture in Pakistan and his friendships and ties to the Pakistani diaspora in the United Kingdom. The judge took into account the appellant's age and health and was entitled on the basis of her sustainable negative credibility

assessment to find that the appellant does have family in Pakistan who can assist him. It was not asserted that the appellant would be unable to access medical treatment in Pakistan. It is not asserted in the grounds of appeal that the judge's approach to 276ADE(vi) or her findings in respect of the lack of very significant obstacles to the appellant returning to Pakistan was erroneous.

43. In circumstances where the appellant could not meet any of the long residence requirements of the immigration rules, the judge was required to take into account the public interest in maintaining effective immigration control and the factors at s117B of the Nationality, Immigration and Asylum Act 2002. The judge has carried out this exercise, taking into account all of the relevant factors. Even had the judge accepted that the appellant had been living unlawfully in the United Kingdom for the previous 19 years, it would have been incumbent on the judge to give little weight to a private life that was established when the appellant was here unlawfully. The judge was entitled to give weight to the fact that the appellant entered the UK unlawfully, has remained in the UK unlawfully at all times and has repeatedly made applications to remain in the United Kingdom, all of which have been refused. The judge manifestly took into account that the appellant has a heart condition for which he is able to obtain treatment in Pakistan, that he speaks some English and that he has benefited from receiving extensive medical treatment in the United Kingdom. Even with 19 years residence, in these circumstances, the only rational outcome in this appeal was for the judge to have found that it is not unjustifiably harsh to expect the appellant to return to Pakistan and that the public interest in maintaining immigration control outweighs the appellant's private life in the United Kingdom.

44. On this basis, I find that although there have been errors on a point of law by the judge they are not material to the outcome of the appeal.

45. I uphold the decision of the First-tier Tribunal.

46. The appeal is dismissed.

Signed R J Owens Date 30 April 2021

Upper Tribunal Judge Owens