



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

Appeal Number: IA/39725/2013

THE IMMIGRATION ACTS

Heard at Field House

On 12th March 2015

Determination

Promulgated

On 13th March 2015

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR WAQAR SHAFIQUE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Burrett (instructed by Levenes Solicitors)

For the Respondent: Ms K Pal (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Appellant with regard to a determination of the First-tier Tribunal (Judge M A Khan) promulgated on 15th September 2014 by which he dismissed the Appellant's appeal against the Secretary of State's decision to refuse him leave to remain in the UK on the basis of long residence and his private and family life.

2. The Appellant says that he came to the UK from Pakistan on 27 April 1998 since when he has lived continuously here. On 16 August 2012 he made an application for leave to remain in the United Kingdom on the basis of long residence and his private and family life which application was refusal on 23 July 2013.
3. In his determination the Judge set out in paragraph 12 the background, namely that the Appellant claimed to have completed 14 years residence in the UK in April 2012 and instructed solicitors to make an application on his behalf. He said that they told him his application had been submitted in time but in fact it had not been; the relevance of delay being the removal, in July 2012 of the 14 year long residence route to settlement. The Judge then goes on to refer to the Appellant's claim to have relatives in the UK including an elderly grandmother for whom he provided support and that his removal would amount to interference with his private life under article 8.
4. The Judge then summarises the Letter of Refusal which considers the Appellant's private life, which formed the basis of the claim, and which falls for consideration under paragraph 276 ADE of the Immigration Rules. The Respondent noted that the Appellant was at the date of the application 37 years of age and that he had spent the first 23 years of his life in Pakistan. He had not lived in the UK for 20 years and it was not accepted that he had lost all ties to Pakistan. The Secretary of State noted that in a previous application made in 2008 it had been claimed by the Appellant that he had no family in the UK whereas now he claimed to have a grandmother, two aunts and four uncles all of whom are British citizens. They also referred to the Appellant saying that he had wanted to claim asylum but had not done so and that he has family in Pakistan with whom he had regular contact.
5. The Judge then set out at paragraphs 18 and 19 the oral evidence. The Appellant formally adopted his written statement and then said that he had four uncles, two aunts and a grand aunt in the UK and that none of these were direct blood relations. His uncles and aunts were cousins of his parents and his grand aunt, who he referred to as his grandmother, was his mother's aunt. He confirmed in his oral evidence that he had no direct family in the UK and that his mother and brother live in Pakistan. He said that his brother is married with two daughters and that his mother lives with his brother and they all live together in his brother's in law's family home. He also confirmed that he was in regular contact with his mother and brother and the last time he had contact with them was the day before the hearing.
6. The Judge recorded that the Appellant said he was involved in voluntary work at two mosques in the UK and he also noted the Appellant's evidence that since 2011 he had not lived with his grand aunt but rather lived separately, sharing a room with a friend. His grand aunt lives with her son, his wife and their three children although the Appellant said that he

spends a lot of time with her and takes her to doctor and hospital appointments.

7. The Judge then refers to the cross-examination of the Appellant in which he claimed that he could not return to Pakistan because he is very close to his family in the UK and has no home in Pakistan as his mother lives with his brother's in-laws. When he came to the UK he said that he was in fear of his life. He claimed that people had beaten him up in 1998 and he still fears them because they are still there. In 1998 they had fired shots at his house. He said that his mother and brother told him that those people are still looking for him and that they had been threatened but nothing has happened.
8. He said that his uncle, who was present at the hearing, supported him financially as does his sister in Canada. In addition he worked doing odd jobs such as on market stalls and clearing people's gardens.
9. In his conclusions there is an obvious typing error at paragraph 25 where the Judge indicates the Appellant had made an application for entry clearance as a spouse. That is clearly an error and in the remainder of the decision accurately reflects the application that was made. In the same paragraph the Judge notes that the Secretary of State was not satisfied that the Appellant met the requirements of paragraph 276 ADE or appendix FM. He referred to the evidence that he had heard and he also referred to the contradiction between the Appellant's written statement and his oral evidence as to the nature of his relatives in the UK. He notes that despite the Appellant's claim to have been in fear he did not claim asylum and also that the reason he gave for not doing so was that he wished to rejoin his family in Pakistan at some stage.
10. At paragraph 28 the Judge notes that the Appellant's representatives had made an application for leave to remain which was refused on 5th November 2008 and the Appellant appealed against that decision which took place in 2009. The Appellant chose not to attend. The appeal was dismissed and the Judge quoted parts of that determination.
11. Thereafter the Judge referred to Article 8, appendix FM and paragraph 276 ADE and dismissed the appeal.
12. The main basis of the challenge before me was what the Judge said at paragraph 32; that on the basis of current case law there was no need for him to consider article 8 under the ECHR outside the Immigration Rules unless there were cogent reasons or compelling circumstances which would justify, exceptionally, allowing an application under article 8. He referred to the line of cases which began with Nagre [2013] EWHC 720 (Admin) and includes MF (Nigeria)[2013] EWCA Civ 1192. He found at paragraph 33 that having considered the requirements of the Rules, only if there may be arguably good grounds for a grant of leave to remain outside the rules, would it be necessary for him to consider article 8 under the

ECHR and whether there were compelling circumstances not sufficiently recognised under the Rules. He found that in this case there were no such compelling circumstances and dismissed the appeal without consideration of article 8 under the ECHR. The grounds challenge that and permission was granted on that basis.

13. It is worthy of note at this stage that the law at the date of this hearing was in line with that quoted by the Judge. However the cases have continued and we now have the benefit of the Court of Appeal's decision in Singh [2015] EWCA Civ 74 which clarifies the decision in MM(Lebanon) [2014] EWCA Civ 985. Singh confirms that there is no need to conduct a full separate assessment under the ECHR where all the issues have been addressed in the consideration under the Rules and paragraph 30 of Nagre remains good law.
14. Mr Burrett did not seek to challenge the current state of the law but said that the reality is whether the Appellant has an Article 8 claim or not and in this case he did and the Judge simply did not deal with it.
15. One of the major planks of Mr Burrett's argument was the failure by the Judge to consider what he sets out briefly at paragraph 12 of the decision, that if the Appellant's solicitors, instructed in 2012, had made a prompt application when the Appellant had clocked up 14 years long residence in the UK, he would have been granted indefinite leave to remain on the basis of the law as it stood then. The solicitors' delay in doing anything meant that by the time the application was submitted in August 2012, the Rules had changed removing the 14 year route.
16. There are several issues that arise from that submission. Firstly, it is trite law that when an Appellant seeks to blame representatives for a failure it is incumbent upon him to produce evidence to that effect. Given that the error was apparently in 2012 the Appellant had ample time to make a complaint and to produce evidence of that to the first-tier tribunal. He did not. Solicitors are required to confirm client's instructions in writing and there would have been correspondence passing between the Appellant and those representatives which he could have produced. The simple fact is the Appellant produced no evidence whatsoever with regard to his claim that his former solicitors were at fault. If the Judge had made a finding that they had been at fault he would indeed have fallen into error because there was no evidence to support such a finding.
17. So far as the Judge's failure to take into account the fact that the Appellant could and should have been granted indefinite leave to remain on the basis of 14 years long residence is concerned, Mr Burrett has failed to take into account that the Appellant could not possibly have succeeded on that basis. As recited by the Judge the Appellant had made a previous application in 2008 which was the subject of the appeal that he did not trouble to attend. The decision of 19th August 2013, which is the decision in the extant appeal, refers to the Appellant being served with form

IS151A on 9 December 2008 informing him of his immigration status and liability to detention and removal. Service of that notice stopped the clock in terms of long residence. As at 2008 he had not accumulated 14 years long residence and could not count the period thereafter.

18. Accordingly, any suggestion that the Appellant was entitled to succeed on that basis in 2012 is a "red herring;" he could not. Accordingly it is not an error on the part of the Judge to fail to consider a matter which was completely irrelevant.
19. The remaining thrust of Mr Burrett's argument was that the Judge simply did not properly consider the private and family circumstances of the Appellant in the United Kingdom and had he done so he should have considered article 8 under the ECHR. With regard to the Judge's comments that the Appellant had no blood relatives in the UK, the evidence was that his grand aunt was to all intents and purposes his grandmother and he treated her as such. The Judge was not entitled to simply brush aside his relationship with her. The evidence was that she was highly dependent upon his assistance and as a result he should have considered the impact of his removal on the grand aunt. He referred to the evidence being unchallenged but that the Judge then made findings against the Appellant on the basis of it which, he argued he was not entitled to do. Additionally, the Judge ought to have paid particular attention to the length of the Appellant's residence in the United Kingdom, his lack of ties in Pakistan and close ties in the UK. He argued that paragraph 276 ADE concentrated purely on the ties to the home country and did not take into account close ties in the UK. They are only in article 8 and he argued that there were compelling factors in the circumstances of this case to warrant consideration of article 8 under the ECHR and for it to be allowed outside the Rules. The Judge erred in failing to do so.
20. I find that argument to be without merit. The factors relied upon by the Appellant in this case are very far from compelling. He relies on his relationship with family members in the UK. However, the Judge accepted the presence of those family members but found the relationship amounted to no more than emotional ties. He noted in particular that despite his grand aunt's apparent dependence upon him, for the preceding three years he had not even lived with her but separately and the grand aunt lived with her own son and daughter-in-law and their children. He was entitled, contrary to Mr Burrett's submissions, in those circumstances to conclude that there were others who could render assistance to the grand aunt if he were not available. Indeed somebody must be assisting her on a daily basis at home. The Judge was entitled to take into account that the Appellant had very close family ties in Pakistan in the form of his mother and brother with whom he was in regular contact to such an extent that he had spoken to them the day before the hearing. So far as family life is concerned that was the only evidence before the Judge. That is a long way short of coming within appendix FM and there is nothing exceptional or compelling about those circumstances to warrant

consideration outside the Rules. There are no circumstances not dealt with under the Rules.

21. In terms of private life the evidence is scant indeed. The only evidence was the Appellant's length of time in the UK and doing some voluntary work on an occasional basis for two mosques. Despite his claim to be doing odd jobs and employment there was no evidence of that before the Judge. The Judge noted that the Appellant did not meet the requirements of either Appendix FM or paragraph 276ADE and there was nothing about the circumstances that warranted any additional consideration. This was a case that could not possibly succeed under Article 8. In that conclusion the Judge cannot be criticised. The Appellant did not come close to meeting the requirements of the Rules and there was certainly nothing to warrant any additional consideration or to warrant the appeal being allowed outside the Rules. No Judge could conceivably have reached any other conclusion.
22. For the above reasons I uphold the First-tier Tribunal's decision and dismiss the appeal to the Upper Tribunal.

Signed

Date 12th March 2015

Upper Tribunal Judge Martin