



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

Appeal Number: HU/15641/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 November 2018**

**Decision & Reasons  
Promulgated  
On 21 December 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

**Between**

**MUHAMMAD USMAN ASIM  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**v**

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

Respondent

**Representation:**

For the Appellant: Mr M Iqbal of Counsel, NR Legal Solicitors

For the Respondent: Miss A Everett, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a national of Pakistan born on 3 June 1985. He first entered the United Kingdom on 22 July 2007 with entry clearance as a student, which leave was subsequently extended and varied to that of a post-study worker and a Tier 1 Entrepreneur.
2. On 13 April 2016, he applied for leave to remain out of time and outside the Immigration Rules and subsequently varied that application for indefinite leave to remain, which was ultimately refused on 10 November 2017 with the right of appeal. The Appellant lodged an appeal against

that decision on 21 November 2017. His appeal came before Judge of the First-tier Tribunal Rothwell for hearing on 8 August 2018. In a decision and reasons promulgated on 30 August 2018, the Judge dismissed the appeal on the basis that, whilst it was accepted the Appellant had continuous leave to remain until 18 March 2016, the issue was whether his repeated applications made from that date onwards counted towards the ten year qualifying period for indefinite leave to remain. The Judge noted that the Appellant stated he made these applications with 28 days and then varied them and asserted that this does count towards ten years' lawful continuous leave. At [16] the Judge found the applications did not count towards that leave due to the fact that the leave was extended pursuant to Section 3C of the Immigration Act 1971 and thus the Appellant had only amassed eight years and eight months' continuous lawful leave to remain. The Judge noted at [17] that the Appellant's counsel disavowed reliance on paragraph 276ADE of the Immigration Rules and she proceeded to dismiss the appeal on human rights grounds.

3. An application for permission to appeal was made, in time, against this decision on the basis that the judge had failed to take into account Article 8 of the ECHR and it was incumbent upon her to do so given that this was a human rights claim. A number of other points were raised, including the assertion that the judge had abused her discretion; that there were no adequate reasons for making the decision and there was a failure to make factual findings.
4. Permission to appeal was granted by First-tier Tribunal Judge Boyes in a decision dated 10 October 2018, solely in respect of the Article 8 issue and no renewed application for permission to appeal was made to the Upper Tribunal.

#### *Hearing*

5. At the hearing before the Upper Tribunal, Mr Iqbal submitted that Article 8 was clearly raised in the grounds of appeal that had not been determined by the Judge; that the Judge had remained focused on whether or not the Appellant was able to meet the requirements of paragraph 276B of the Immigration Rules and did not direct her mind outside the Rules to consider the Appellant's private life in the United Kingdom. Whilst it is the case that the Appellant's wife and daughter are in Pakistan, it was still necessary to consider the Appellant's private life pursuant to Article 8. Mr Iqbal stated that Mr Nasim, counsel for the Appellant at that time, whilst he had abandoned reliance on paragraph 276ADE of the Rules, had not abandoned Article 8 and it was clear from [9] of the Judge's decision that the Appellant had raised a private life claim. He submitted that the Respondent's refusal letter does address the issue of exceptional circumstances for consideration of Article 8 outside the Rules and the Appellant had relied on this and whether his reliance is strong or weak it still requires determination. With reference to the fact that at [9] of the decision the Judge recorded that the Appellant has been in the UK for eleven years and has family and friends here, but that they had not come

to the appeal hearing before the Tribunal, this still does not absolve the Tribunal from determining the Appellant's private life claim.

6. In her submissions, Ms Everett acknowledged that the judge had not dealt with Article 8 of the ECHR and she was not seeking to persuade me that she had. Her submission was that, having gone through the bundle of evidence and the Record of Proceedings, the claim could not have succeeded under Article 8, in that there were no statements from the Appellant's family and friends and the Appellant could not reasonably have an expectation that he could remain permanently in the United Kingdom. Ms Everett submitted, in the alternative, that it would be appropriate to determine the appeal today. Whilst the Respondent accepts in general terms that ten years' lawful residence would meet the proportionality test, the Appellant does not have ten years' lawful residence, his wife and daughter remain in Pakistan and it is difficult to see how the judge could reach a different decision.
7. In reply, Mr Iqbal submitted that Ms Everett's submissions amounted to an invitation to remake the decision, as opposed to defending the decision of the First-tier Tribunal Judge in principle. He invited me to find a material error of law and then to address the question of disposal. He submitted in respect of disposal that it was procedurally unfair and that the Article 8 aspect required determination, either by the Upper Tribunal or by way of remittal to the First-tier Tribunal.
8. I permitted Ms Everett to reply on the question of disposal only, to which she submitted that the Appellant did have an opportunity to fully ventilate the issues surrounding his private life and for his appeal to be prepared on that basis. She submitted that there was no dispute in respect of the evidence.

### ***Notice of Decision***

9. I found a material error of law in the decision of the First-tier Tribunal, which is the failure to make any findings in respect of the Appellant's private life in the United Kingdom. Whilst it is the case that counsel for the Appellant at that time disavowed reliance on paragraph 276ADE of the Rules, as is recorded by the Judge at [17] of the decision, it is unclear whether or not the Appellant's claim based on his private life was also disavowed. Given that the Appellant right of appeal was based on his human rights i.e. his private life in the United Kingdom, this was a matter addressed in the Respondent's refusal decision and raised in the Appellant's grounds of appeal, I have concluded that it was incumbent upon the Judge to address whether or not there were exceptional circumstances justifying consideration of Article 8 outside the Rules.
10. Having sought submissions from the parties, Ms Everett, accepting that there was no factual dispute and thus there was no requirement to cross-examine the Appellant, I preserve the findings of fact made by the First

tier Tribunal Judge and proceed to remake the decision myself in respect of Article 8, based on the evidence on the Tribunal file.

11. I make the following findings:

11.1. the Appellant has lived continuously in the UK since his arrival on 22 July 2007 with entry clearance as a student. He subsequently varied that leave on a number of occasions until he became appeal rights exhausted on 18 March 2016. He then made an application for leave to remain out of time on 13 April 2016, which was refused on 7 March 2017, with no right of appeal. He made a further application on 14 March 2017 and varied this on 27 June 2017 to an application for ILR. This application was refused on 10 November 2017 and the Appellant lodged an appeal on 21 November 2017;

11.2. thus I find that the Appellant has resided for the most part with leave to remain, until 18 March 2016 and he has since that time been endeavouring to resolve his immigration status.

11.3. I accept given his length of residence that the Appellant has established a private life in the United Kingdom. However, reliance upon paragraph 276DE of the Immigration Rules was disavowed before the First tier Tribunal thus the question is whether there are exceptional circumstances which mean that removal of the Appellant from the United Kingdom would be unjustifiably harsh. Whilst no arguments were put forward on this basis, I am prepared to accept that the fact that the Appellant has resided for 8 years and 8 months lawfully and that he submitted his application for further leave to remain within 28 days of becoming appeal rights exhausted and then for a second time 7 days after the refusal of that application that this does amount to exceptional circumstances meriting consideration of his private life outside the Rules.

11.4. I find that removal of the Appellant to Pakistan would amount to an interference with his established private life in the United Kingdom. The question is whether removal would be disproportionate.

11.5. I have taken account of the public interest considerations pursuant to section 117B of the NIAA 2002. I am prepared to accept that the Appellant speaks English, given that he successfully completed a Science degree at Oxford Brookes University and has passed the English language test. The Appellant in his statement at [17] states that he has financially supported himself, albeit I have not been provided with any details of how he has done so. However, it is the case that the Appellant's leave has at all times been precarious *cf. Rhuppiah* [2018] UKSC 58 at [44] and he has not adduced any evidence that he has a qualifying partner or children.

11.6. whilst the Appellant alludes in his statement to having many friends and some relatives, there is no evidence that he has a family life in the UK and there is no evidence before me to show that it would not be possible for him to maintain his private life ties in the UK from Pakistan. I bear in mind [49] of *Rhuppiah* where their Lordships held:

*“49...as both parties agree, the effect of section 117A(2)(a) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of “little weight” itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above. Although this court today defines a precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under article 8 will be unable to escape, section 117A(2)(a) necessarily enables their applications occasionally to succeed. It is impossible to improve on how, in inevitably general Page 17 terms, Sales LJ in his judgment described the effect of section 117A(2)(a) as follows:*

*“53. ... Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question ...”*

12. Consequently, in light of the statutory public interest considerations and the jurisprudence, and given the absence of evidence that the Appellant’s private life has particularly strong features, I find that removal of the Appellant to Pakistan would not be unjustifiably harsh and thus removal would be proportionate.

*Notice of decision*

13. The decision of the First tier Tribunal Judge contained a material error of law in that it failed to consider whether removal of the Appellant would be proportionate. I re-make that aspect of the appeal with the result that the appeal is dismissed.

Signed Rebecca Chapman

Date 13 December 2018

Deputy Upper Tribunal Judge Chapman