



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

Appeal Number: HU/25362/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 22 November 2018**

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

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

**WALEED ANWAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Jaquiss, instructed by MA Solicitors

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

DECISION AND REASONS

1. Mr Anwar appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 22 January 2016 refusing him leave to remain based on his human rights. That appeal was allowed, but subsequently in a decision promulgated on 28 August 2018 I found that there were errors of law in the judge's decision and that the Article 8 issue would therefore have to be reconsidered.
2. The appellant had applied for indefinite leave to remain in the United Kingdom on the basis of ten years' residence in the United Kingdom. The

respondent noted the requirements of paragraph 276B of HC 395 and in particular the requirement of continuous lawful residence in the United Kingdom. Mr Anwar had entered the United Kingdom on 31 December 2004 with entry clearance as a student and had remained lawfully thereafter. 4 September 2015 was taken to be the date on which his valid leave in the United Kingdom had expired. He had left the United Kingdom for Pakistan on 10 January 2012 before his leave to remain expired but did not return until 12 October 2012, 275 days later, with valid entry clearance as a Tier 4 (General) Student.

3. Under paragraph 276A(a):

“‘Continuous residence’ means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of six months or less at any one time ...”

The respondent noted that his period of absence from the United Kingdom had exceeded the maximum amount allowed on any one occasion in order to meet the long residence requirements and as a consequence he was considered to have broken his continuous residence and could not satisfy the requirements of paragraph 276B(i)(a).

4. He had asked that discretion be exercised in his case on the basis that he had remained in Pakistan longer than he had planned in order to look after his brother who was bedridden and required constant looking after. He produced medical documents relating to a Ghulam Abbas but the decision maker considered there was no evidence to show that Ghulam Abbas was his brother, and it was noted that in any event the accident which caused Mr Abbas’s injuries occurred in 2008 but the appellant had returned to Pakistan in 2012. He said he had had to stay to look after his brother as his mother and siblings were unable to, but it was considered that the family could have continued to do so and no exceptional evidence had been provided that he was required to remain in Pakistan in order to care for Mr Abbas. He had not shown evidence that Mr Abbas’s condition deteriorated since the date of the accident four years previously and there was no evidence that the care his brother required could only have been provided by him or that Mr Abbas was in fact his brother. It was considered that the points he had raised were not considered to be sufficiently compelling such as to exercise discretion in his favour.
5. In relation to this point the judge had the benefits of statements from the appellant and his sister and an affidavit from the appellant’s father. He accepted that Ghulam Abbas was the appellant’s brother. The sister and the father confirmed that the appellant went to see his family and was asked to stay for longer to care for his brother as there were no other male siblings and their father was elderly. There was also a letter from a consultant neurologist, dated 28 September 2017, which confirmed that he was asked to attend on Ghulam Abbas due to his aggressive behaviour.

He confirmed that he was non-communicative, restless, irritable and aggressive and that he could follow one-step commands but remained fully dependent for all activities of daily life. The judge concluded that on the medical evidence before him, when the appellant went to Pakistan in 2012, Ghulam Abbas was incapable of managing his own personal functioning and required 24-hour care.

6. The judge noted the respondent's guidance in cases of long residence which said that for single absences over 180 days consideration was required to be given to how much of the absence was due to compelling or compassionate circumstances and whether the appellant returned to the United Kingdom as soon as possible. Medical evidence confirmed that the accident to Mr Abbas occurred in September 2008 and that he would require full support in his daily activities and daily care and was fully dependent for all his needs. A letter from a neurologist dated 11 January 2012 stated that Mr Abbas required nursing support 24 hours a day and was unable to eat, wash or manage his own toileting needs.
7. The judge accepted that it was the Secretary of State's discretion in respect of the policy, but bearing in mind the terms of the policy and the judge's findings of fact, noting that it would not be unusual for the male line to take over responsibilities in particular when it came to the toileting and bathing needs of a man in his late 30s, that it would have been appropriate for the respondent to have exercised her discretion in line with her own guidance and to have viewed the period as being continuous and lawful. The judge took into account the public interest considerations set out in section 117A and 117B of the Nationality, Immigration and Asylum Act 2002 and considered that there were no factors going against the appellant and interference in a case where the Immigration Rules were satisfied was not in accordance with the law. It was considered that had the Secretary of State exercised her discretion lawfully there would have been compliance with the Rules and the judge said that in any event as it was a human rights case the factors in the appellant's favour weighed heavily against the one negative factor. She concluded that the interference was not proportionate.
8. There were other issues relating to jurisdiction which fell for consideration, but it was my conclusion at the error of law hearing that the judge had erred in law finding that the appeal fell to be allowed because the respondent should have exercised discretion in the appellant's favour and there would have been compliance with the Rules. The question of whether the circumstances were such as to amount to compelling and compassionate circumstances was a matter for the respondent and it was not open to the judge to substitute her own consideration of the matter, in particular taking into account in part evidence that was not before the decision maker in concluding as she did. Also, there was a failure to refer to the public interest which required consideration in an evaluation of Article 8 outside the Rules.

9. In her submissions Ms Jaquiss relied on and developed points made in her skeleton argument. It was common ground that the judge's findings on the evidence at paragraphs 21 and 22 of her decision stood. Ms Jaquiss observed that, as had been clarified by the Supreme Court in Rhuppiah [2018] UKSC 58, the presumptions in the 2002 Act are not necessarily determinative in all cases. Section 117A of the Act required judges to have regard to the statutory public interest considerations and hence the provisions of section 117B could not put decision makers in a straightjacket which constrained them to determine claims under Article 8 inconsistently with the Article itself.
10. Under the Home Office guidance there was a discretion to grant leave in compelling and compassionate circumstances outside the Rules. The guidance was a key consideration for any First-tier Judge, being the Secretary of State's view as to how the Rules were to be interpreted. The Rules and the guidance were the Secretary of State's view as to what was compliant with Article 8. Ms Jaquiss also referred to what had been said in SF and Others [2017] UKUT 120 that even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it pointed clearly to a particular outcome in the instant case, as the only way in which consistency could be obtained. It was also relevant to bear in mind what had been said by the Supreme Court in MM (Lebanon) [2017] UKSC 10 setting out guidance as to the relationship between the policy makers and Tribunals as a partnership. The Tribunal was asked to find that there were in this case compelling and compassionate circumstances in the appellant's case meaning he could not return to the United Kingdom. His brother was very seriously ill and their father was old and the appellant was the only person who could look after him. The Tribunal was not invited to substitute its own discretion for that of the Secretary of State, but to look at the terms of the policy and if it found compelling circumstances as to why the appellant could not return, that should inform the proportionality assessment and was a key consideration. It was not for the Tribunal to grant or refuse indefinite leave to remain. That was a matter for the Secretary of State, who might look at the exercise of discretion with regard to indefinite leave to remain but in circumstances where an appellant had been in the United Kingdom for ten years lawfully except for the 275 days and now in the guidance the circumstances which would make refusing indefinite leave to remain disproportionate, the conclusion was that under the Rules with the guidance to assist, his removal would be disproportionate.
11. Ms Jaquiss had made further points about proportionality at paragraph 19 of the skeleton including a reference to the financial independence of the appellant and the fact that he was fully supported by his family. Immigration control was a legitimate aim, but he was not a person with a bad immigration history and had no criminal convictions and was not a burden on the state. As had been said in UE (Nigeria) [2010] EWCA Civ

975, a person's value to the community was a factor which might legitimately be considered in the Article 8 balancing exercise.

12. In her submissions Ms Pal relied on the refusal letter of 22 January 2016. This addressed the consideration of the compelling factors relied on with regard to the appellant's brother. The appellant had not put forward any compelling or compassionate grounds for a grant of leave outside the Rules. He had been outside the United Kingdom for over ten months so there was a break in his continuity of residence. His private life should be given little weight as his leave was always precarious and there was no expectation of a grant of indefinite leave to remain, and that was even more so the case given his long absence. The Secretary of State had addressed the possibilities and the circumstances with regard to his return to Pakistan. It should be found that the decision to remove was proportionate.
13. By way of reply Ms Jaquiss argued that in fact the period of 275 days was nine months rather than over ten. It had not been argued today that there was relevance to the delay between his knowledge of his brother's accident and going to Pakistan. In that regard it was relevant to consider what was said in the appellant's cousin's letter. It was not until he had got to Pakistan that he had realised how bad the situation was. It was not clear what could be said to be compelling or compassionate grounds if these circumstances in this case did not. His brother was paralysed and had suffered significant brain damage.
14. I reserved my determination.
15. The effect of my judgment on the error of law is that the issue in this case has to be viewed not on the basis of the Tribunal exercising its own discretion as to the existence or otherwise of compelling or compassionate circumstances, but being fully entitled to take the policy into account when considering the Article 8 claim in this case. As Ms Jaquiss argued, any conclusion I might come to as to the nature of the circumstances can inform the evaluation of proportionality in this case.
16. I have set out above in quotations from the judge's decision the nature and extent of the physical and mental problems of the appellant's brother. The appellant explained in his statement of 21 September 2015 why it was that he had to remain for as long as he did as his brother was bedridden and required constant looking after and there was in effect no-one else who could do it. There was no assistance from his cousins. The medical report of Dr Al Baqer of 14 September 2008 bears out the nature of Mr Abbas's injuries, as does the medical evaluation of Dr Wasti of 3 November 2008 and that of Dr Ahmed of 11 January 2012 and also the statements from family members as to the circumstances in Pakistan.
17. I must of course bear in mind the provisions of section 117B of the 2002 Act which includes at subparagraph (5) the statement that little weight

should be given to a private life established by a person at a time when the person's immigration status is precarious. As was clarified by the Supreme Court in Rhuppiah, a person who not being a UK citizen is present in the UK and having leave to reside here other than to do so indefinitely has a precarious immigration status for the purposes of section 117B(5). It was also however said at paragraph 49 in Rhuppiah that although the court has defined precarious immigration status in the manner set out above, 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. The Supreme Court quoted from the judgment of Sales LJ in the Court of Appeal at [2016] EWCA Civ 803, paragraph 53, saying that the effects of section 117B(5) may be overridden in an exceptional case by particularly strong features of the private life in question.

18. The appellant has, it would appear, led a blameless life while in the United Kingdom and the only reason why he was unable to succeed in his application under paragraph 276B was on account of the amount of time he had spent outside the United Kingdom. The respondent's policy, which is essentially consistent with what was said by Sales LJ in Rhuppiah in the Court of Appeal, was that "it may be appropriate to exercise discretion over excessive absences in compelling or compassionate circumstances, for example where the applicant was prevented from returning to the UK through unavoidable circumstances". The decision maker is encouraged to consider how much of the absence was due to compelling circumstances, whether the applicant returned to the United Kingdom as soon as they were able to do so and to consider also the reasons for the absences.
19. It is clear that I cannot substitute my own view as to what compelling or compassionate circumstances are for that of the Secretary of State in this case. But, as noted above, they are a relevant factor to bear in mind in considering the proportionality of removal. And in that regard I also bear in mind the quotation from the Court of Appeal in Rhuppiah to which I have referred above. The door is therefore, albeit only slightly, open for a person to succeed where they have a private life established at a time when their immigration status is precarious. It is relevant to bear in mind that under section 117B(1) the maintenance of effective immigration control is in the public interest, and also the point that it is in the public interest that people who seek to enter or remain in the United Kingdom are able to speak English as the appellant can, and that such people are financially independent, as the appellant is.
20. The emphasis in Sales LJ's judgment was on an exceptional case, with particularly strong features of the private life in question. The private life the appellant has in the United Kingdom is essentially that of a person who has studied, worked and lived here for a number of years. He has family here, including his sister. It was argued in the skeleton that his sister's son's best interests are in the status quo being preserved in the family

unit they maintain. That is certainly not an irrelevant factor but it is not a strong factor bearing in mind that the child is the child of his sister and not of the appellant. In my view, though the Sales LJ quotation was aimed at strong features of the private life in question, it can properly be taken, bearing in mind that it is a description of the effect of section 117A(2)(a) and it is a case where a Tribunal is required to determine whether a decision under the Immigration Act breaches a person's right to respect for private and family life under Article 8, to include the whole issue of proportionality. In that regard, I consider that it is appropriate to bear in mind and attach weight to the reasons why the appellant remained outside the United Kingdom for as long as he did. Though I do not seek, as I say, in any sense to trespass on the Secretary of State's territory, these appear to me to be clearly compassionate circumstances of a significantly compelling nature. That is a relevant matter to take into account in assessing the proportionality of the decision to remove. In the highly unusual circumstances of this case, I consider that the proportionality balance comes down in favour of the appellant and against removal and as a consequence his appeal under Article 8 is allowed.

No anonymity direction is made.



Signed

Date 14 December 2018

Upper Tribunal Judge Allen