Upper Tribunal
(Immigration and Asylum Chamber) **Appeal No: UI-2022-002779**
PA/52868/2021; IA/08211/2021

THE IMMIGRATION ACTS

Heard at George House, Edinburgh
on 2 November 2022

Decision & Reasons Promulgated
on 22 December 2022

Before

UPPER TRIBUNAL JUDGE MACLEMAN
& DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RODERICK BOUDWIN

Respondent

For the Appellant: Mr Andrew Mullen, Senior Home Office Presenting Officer
For the Respondent: Ms K Dingwall, of Latta & Co, Solicitors

DETERMINATION AND REASONS

1. Parties are as above, but the rest of this decision refers to them as they were in the FtT.

2. The appellant made "further submissions" to the SSHD on 28 November 2018. By a decision dated 28 May 2021, the SSHD refused his claim for refugee status, based on being a Christian from Pakistan. The claim was also refused in terms of humanitarian protection; family and private life within the immigration rules; and of discretionary leave, "exceptional circumstances," and the ECHR.

3. By a decision dated 26 April 2022, FtT Judge Gillespie dismissed the appellant's appeal "on asylum and humanitarian protection grounds" and allowed it "on article 8 grounds (private life)".

4. The appellant has not cross-appealed. The private life aspect is now the only live issue. In that respect, the SSHD's decision said:

> **Private Life**
>
> Consideration has been given to the requirements for limited leave to remain on the basis of private life in the UK under paragraph 276ADE (1) of Appendix FM of the Immigration Rules, which [require that as at the date of application] the applicant:
>
> *(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR. 3.1. to S-LTR. 4.5. in Appendix FM; and*
>
> *(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and*
>
> *(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or*
>
> *is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or*
>
> *(iv) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or*
>
> *(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.*
>
> *276ADE (2). Sub-paragraph (1)(iv) does not apply, and may not be relied upon, in circumstances in which it is proposed to return a person to a third country pursuant to Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2014.*
>
> It is accepted that you meet the requirements of paragraph 276ADE(1)(i).
>
> It is accepted you meet the requirements of paragraph 276ADE(1)(ii) as you have made a valid application for leave to remain on the grounds of private life.
>
> It is noted that you were 60 years and 3 months of age and have lived in the UK for 20 years and 2 months at the date of application. However, it is considered that you have not provided sufficient evidence of your continuous residence in the UK for at least 20 years discounting any period of imprisonment. As such, it is not accepted you meet the requirements of paragraph 276ADE(1)(iii).
>
> You are not under 18 years of age at the date of further submissions and therefore do not meet paragraph 276ADE(1)(iv).
>
> You are not aged between 18 and 25, and you have not spent at least half your life living continuously in the UK at the date of further submissions, therefore you do not meet the conditions of paragraph 276ADE(1)(v).

> In relation to paragraph 276ADE(1)(vi) consideration has been given as to whether there would be very significant obstacles to your integration back into Pakistan. It is noted that you were 60 years and 3 months of age and have lived in the UK for 20 years and 2 months at the date of application, therefore you have spent the majority of your life in Pakistan. It is considered you are familiar with the language, culture and traditions in Pakistan. It is considered that you would have the support of your family on return to Pakistan. You can return home and utilise any skills gained in the UK to obtain lawful employment. It is therefore not considered there would be very significant obstacles to your integration, thus failing to meet the requirements of paragraph 276ADE(1)(vi).
>
> Refusal Paragraph under Private Life
>
> Your application on the basis of private life in the United Kingdom is therefore refused under paragraph 276CE with reference to 276ADE(1)(iii), (iv), (v), and (vi) of the Immigration Rules.

5. The SSHD's decision does not contend that the appellant fell for refusal in terms of sub-paragraph (i), "the suitability requirements".

6. But for the SSHD's observation on not showing "sufficient evidence of continuous residence in the UK for at least 20 years discounting any period of imprisonment", it appears that the appellant would have qualified for leave in terms of (iii). In such a case, the further sub-paragraphs do not apply, and there is no need to consider whether there would be "very significant obstacles" to the appellant's integration in Pakistan.

7. We were not shown any clear evidence of the appellant's term of imprisonment. The only references in the FtT's decision appear to be at [13] and [50], noting that he was sentenced to 20 months imprisonment on 1 June 2001. Judge Gillespie found the appellant credible on the time he has been living in the UK. He says he came here in September 1998. His first contact with the respondent was on 8 October 1998. Reducing his period of residence for time in prison, Judge Gillespie found that he had not reached 20 years by the time of the application leading to these proceedings.

8. The SSHD appears to have raised "suitability" at the hearing, but the Judge accepted Ms Dingwall's argument on that point, "given the amount of time elapsed since his conviction".

9. The Judge went on briefly to find that removal would breach the appellant's human rights.

10. The SSHD sought permission to appeal to the UT. The grounds are long and repetitive and are lightly edited here:

> <u>Making a material error/Lack of adequate reasoning</u>
>
> 1. … having found that paragraph 276ADE(1)(iii) is not met at [53] the FTTJ fails to consider whether paragraph 276ADE(1)(vi) is met and whether there are very significant obstacles to integration. … the determination contains no consideration or findings on the existence of any such obstacles and it is

submitted that none exist. Therefore, as found by the FTTJ, it is respectfully submitted that the appellant cannot succeed under the Rules but that the FTTJ's consideration of the Rules is flawed.

2. … the FTTJ has failed to consider the credibility of the appellant in the round at [53] when stating that *'I also heard him and have been able to form a view on whether he was giving credible evidence on the length of time he has been continuously living in the UK.'* … two previous Judges have found the appellant not to be credible as noted by the FTTJ at [4], [9] and [11] and this should have formed part of the FTTJ's assessment of credibility.

3. Having found that paragraph 276ADE is not met … in allowing the appeal on the basis of Article 8, the FTTJ errs in failing to adequately consider the appellant's circumstances against those of the public interest and provides inadequate reasoning …

4. … the FTTJ has failed to consider that the Immigration rules form the basis for any proportionality assessment, and how to balance the rights of the individual applicant against that of the public interest, an approach which has been endorsed by Parliament. In light of the public interest in removal … it will only be in an exceptional case that that public interest will be outweighed by the Article 8 rights of the individual who fails to satisfy the rules … the FTTJ has neglected to consider why the appellant's case is so exceptional, following his failure to meet the rules, in doing so, he errs in law.

5. At [55] the FTTJ finds that the appellant has established a strong private life without providing any reasoning The determination contains very little evidence of the appellant's private life in the UK.

6. At [55] the FTTJ provides inadequate reasoning for finding the decision is disproportionate 'due to the appellant's age, health and all the circumstances are taken into account' . The FTTJ does not clarify what 'all the circumstances' are.

7. … the FTTJ's consideration of Article 8 fails to take into consideration points in the appellant's favour and has therefore produced a one-sided consideration … the Appellant has lived in Pakistan for almost his entire life before coming to the UK and remaining unlawfully.

8. … the FTTJ has failed to consider the public interest considerations in Section 117B of the 2002 Act as is required by law … the FTTJ fails to consider Section 117B(4) which states that little weight should be given to a private life established by a person at a time when the person's immigration status is unlawful … the appellant has no status in the UK … when considering Section 117B(1) – "The maintenance of effective immigration controls is in the public interest" and S117B(3) there is a firm public interest in the appellant's removal to Pakistan.

9. … there is no evidence of anything which would indicate that the Appellant's case is 'exceptional' or that refusal of his claim would result in 'unjustifiably harsh' circumstances if he were refused leave to remain … refusal of leave to remain is entirely proportionate and in pursuit of the legitimate aim of immigration control.

11. (The grounds at [7] presumably aim to show absence of consideration of points on the public interest side of the balance.)

12. On 14 June 2021 FtT Judge Mills granted permission: …

> 2. The Judge dismissed the appeal in relation to the protection claim, but allowed it in respect of Article 8 of the ECHR. The Respondent's grounds assert that the Judge has erred in doing so in a number of ways, including through failing to have regard to the relevant tests set out under the immigration rules at paragraph 276ADE(1)(vi); failing to have any regard to the statutory consider[ations] set out in Section 117B of the Nationality, Immigration & Asylum Act 2002; and generally through inadequacy of reasoning.
>
> 3. While the Appellant is likely to have a significant private life in the UK given that he has resided here since 1998, and the Judge may ultimately be proven to have been correct to have allowed the appeal on Article 8 grounds, I am in agreement with the Respondent that his decision discloses arguable errors of law, for the reasons stated.
>
> 4. The Judge's reasoning is extremely brief, and he fails to make any reference to the public interest factors found in the 2002 Act, nor the relevant tests set out in the immigration rules, nor the legal threshold for allowing an appeal on Article 8 grounds 'outside of the rules'.

13. Ms Dingwall provided a helpful skeleton argument in response to the grant of permission, along the following lines. The grant incorrectly represents the FtT's decision at [51 – 57], which noted the SSHD's acceptance that 20 years residence had been reached at the date of the hearing, and then found the appellant not to fall foul of suitability requirements. Case law on proportionality was then cited and a decision reached taking account of "length of residence, age, health and all other circumstances." Although there was no direct reference to section 117B the assessment was "made after consideration of the circumstances … in the round". Case law is cited on the specialist tribunal being taken to understand the law it is charged to apply. *TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department* [2018] EWCA Civ 1109 (17 May 2018) at [34] is cited for the proposition that where the rules are met, there can be no public interest in refusal, and as such the SSHD's decision would be disproportionate under Article 8 ECHR. The outcome is justified as although the appellant did not meet the rules at the time of application, he did so by the date of the hearing and did not fall for refusal on suitability, and so the principle in *TZ* led to an outcome in his favour. Alternatively, if there was a lack of reasoning, the case should be remitted to the same Judge to complete his decision.

14. Mr Mullen expanded only on [1] and [8] of the grounds. He said that the Judge had brushed aside the terms of the rules on obstacles to integration, and the public interest considerations set out in statute for all article 8 cases. Reasons were simply absent. The decision should be set aside. It could be remade in the UT without adjournment, parties having had the chance to advance their cases, and there being no outstanding dispute on the primary facts.

15. We raised with parties the question of the effect of the appellant's imprisonment on the calculation of continuous residence.

16. From the wording of the rule, as quoted above and in the SSHD's decision, time runs, counting backwards, from the date of application. Periods of imprisonment are deducted from the total.

17. Paragraph 276A was amended on 20 June 2022 and provides a new definition of 'continuous residence 'for the purposes of paragraph 276 ADE(1). As amended it states:

> Long residence in the United Kingdom
>
> 276A. For the purposes of paragraphs 276B to 276D.
>
> (a) "continuous residence" means residence in the United Kingdom for an unbroken period, and … shall be considered to have been broken if the applicant:
>
> … (iv) has been convicted of an offence and was sentenced to a period of imprisonment …

18. That requires 20 years residence beginning once imprisonment has been completed.

19. Interestingly, Ms Dingwall referred us to the respondent's Guidance to caseworkers, as published on 20 June 2022 (although, as we understand it, parties accept that it has stood in similar terms throughout the currency of this case). The Guidance, under the heading "Continuous residence", states:

> Time spent in prison will not be counted towards a period of continuous residence, but time before and after that imprisonment can be counted.

20. Mr Mullen sought to persuade us that the guidance could be read as to the same effect as the rule, but we are unable to agree. Odd as it may be, the respondent's guidance over-rides the respondent's rules. We consider that an appellant would be entitled to the more favourable approach in the guidance. However, as we accept the other submissions of Ms Dingwall, the outcome of this appeal does not depend on resolving this contradiction.

21. On any view, if the appellant were to make a fresh application, he would meet the 20 years requirement.

22. Mr Mullen did not seek to make anything of ground [2] on credibility. It leads nowhere. There is no reason to fault the FtT's decision in that respect.

23. Although the SSHD appears to have made some argument on "suitability" in the FtT, the original decision raises no issue, and the grounds before us suggest no error in the FtT's finding.

24. The challenge by the SSHD comes down to the matters advanced by Mr Mullen, absence of consideration of sub-paragraph (vi) of the rule on obstacles to integration, and of the public interest considerations in section 117B. The decision is brief. On the face of the grounds, we can

see why permission was granted for these apparent omissions. On closer attention, however, we find that Ms Dingwall has answered both points. Once a case is made out through sub-paragraphs (i) – (iii), sub-paragraph (vi) does not arise. On the principle set out in *TZ*, where the rules are met in substance, it is not necessary to go on to separate consideration of the statutory public interest factors in section 117B.

25. We conclude therefore that there is no "material error / lack of adequate reasoning" in the FtT's decision.

26. Alternatively, if we had set the decision aside, then in light of our above reasoning we would have substituted a decision to the same effect.

27. The decision of the FtT shall stand.

28. No anonymity direction has been requested or made.

F J Farrelly

DUT Judge Farrelly 9th November 2022

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.