



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-002578**  
**First-tier Tribunal No:**  
**HU/58281/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 31 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**Asif Patel**  
**(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr J Plowright, counsel instructed by T M Fortis Solicitors

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

**Heard at Manchester Civil Justice Centre on 25 May 2023**

**DECISION AND REASONS**

1. The appellant is a national of India. His appeal against the respondent's decision of 28 January 2021 to refuse his application for leave to remain on human rights grounds on the basis of his family life with his partner Ms Tahira Parveen was dismissed by First-tier Tribunal Judge McAll for reasons set out in a decision dated 28 April 2022.
2. The appellant claims Judge McAll recorded at paragraph [12] of the decision that it was common ground that the appellant's valid leave to remain in the UK came to an end on 18 February 2019. The appellant met his partner in July 2018. The appellant claims the judge therefore erred, at paragraph [45], in stating that he must "*..add little weight to his relationship with the sponsor which was formed at a time when he had no valid leave to remain in the UK*". The appellant claims that on the

chronology as understood by the judge, the relationship was formed at a time when the appellant was lawfully in the UK. Alternatively, Judge McAll put himself into the “strait jacket” warned against in the decision of the Court of Appeal in Rhuppiah v SSHD [2018] UKSC 58. The appellant claims that if Judge McAll had directed himself properly, he would arguably have reached the conclusion that the appellant’s removal from the UK, even temporarily whilst an application for entry clearance is made, is disproportionate. Furthermore, the appellant claims that when considering the medical evidence regarding the treatment being received by the appellant’s wife, the judge erroneously speculated that a different doctor might provide a different prognosis, or that it may be possible to receive treatment in India or Pakistan.

3. Permission to appeal was granted by Upper Tribunal Judge Bruce on 1 November 2022. She noted it is arguable that the Tribunal’s reasoning as to the appellant’s status at the time that his relationship started, is inconsistent with section 117B of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).
4. I am grateful to Mr Plowright for his focussed and succinct submissions. He has quite properly drawn my attention to the relevant extracts from the decision of the First-tier Tribunal that refer to the appellant’s immigration history and his relationship with his partner.
5. Mr Plowright submits that at paragraph [12] of his decision Judge McAll states it is common ground that various applications have been made by the appellant to the respondent and that his valid leave to remain in the UK came to an end on 18 February 2019. That is repeated in paragraph [31] of the decision. Mr Plowright quite properly acknowledges that is difficult to reconcile with the appellant’s immigration history that is referred to in the respondent’s decision and cited by Judge McAll in paragraph [22] of his decision. Judge McAll correctly noted the appellant entered the UK on 20 April 2011 as a student with leave to remain until 30 April 2013. He also correctly noted that on 30 April 2013 the appellant applied for further leave to remain as a Tier 1 Entrepreneur. That application was refused in January 2016 and the appellant had exhausted his rights of appeal on 22 June 2018. The appellant then made a further application for leave to remain on family and private life grounds on 2 July 2018. That application was refused on 18 February 2019.
6. Mr Plowright accepts, quite rightly in my judgment, that it is not at all clear how Judge McAll understood it to be common ground that that the appellant had valid leave to remain in the UK that came to an end on 18 February 2019. In fact, at paragraph [34] Judge McAll noted the submission made by Mr Hussain (the Presenting Officer) that the appellant has been an overstayer in the UK since 2018, and was an overstayer when the appellant and his sponsor met.
7. Mr Plowright submits Judge McAll understood the appellant had valid leave to remain in the UK that came to an end on 18 February 2019, and erroneously said at paragraph [45] that he must attach little weight to the appellant’s relationship with the sponsor which was formed at a time when he had no valid leave to remain in the UK. If Judge McAll’s understanding

of the appellant's immigration history was correct, s117B(4) of the 2002 Act did not require the judge to attach little weight to the relationship formed by the appellant with Mrs Tahira Parveen who was born on 12<sup>th</sup> December 1980 and is a British citizen, because the appellant was not in the United Kingdom unlawfully. Mr Plowright accepts that if Judge McAll had properly understood the immigration history, the approach adopted at paragraph [45] was fortuitously correct. However the confused approach adopted by the judge vitiates the conclusion and was material to the outcome of the appeal. Mr Plowright submits the Tribunal cannot be satisfied that Judge McAll would have reached the same conclusion if he had not attached little weight to the relationship formed by the appellant with Mrs Parveen.

8. I did not call upon Mr Bates to reply.

### Decision

9. Despite the best efforts of Mr Plowright to persuade me otherwise, I am satisfied there is no material error of law in the decision of First-tier Tribunal Judge McAll.
10. The appellant's immigration history is set out at paragraph [22] of the decision. Mr Plowright accepts that on a correct analysis of that immigration history, the appellant arrived in the United Kingdom with leave to remain valid until 30 April 2013. The application made on 30 April 2013 was an in-time application and s3C Immigration Act 1971, operated so as to extend the leave and prevent the appellant from becoming an overstayer whilst he was awaiting a decision on his in-time application and while any appeal was pending. The appellant was therefore in the United Kingdom lawfully until 22<sup>nd</sup> June 2018. The subsequent application made on 2 July 2018 was made after the appellant's s3C leave had ended, and at a time when the appellant was in the UK unlawfully.
11. Although there is force in the submission made by Mr Plowright that Judge McAll refers to it being common ground that the appellant's valid leave to remain in the UK came to an end on 18 February 2019, in paragraph [12] and again at paragraph [32], that is difficult to reconcile with the submission made by the presenting officer recorded at paragraph [34]:
- "It is argued by Mr Hussain that the Appellant has been an overstayer in the UK since 2018 and was an overstayer when the Appellant and his sponsor met. The sponsor was aware of his immigration history and his precarious immigration status when she entered into the relationship with him yet she chose to take that risk and therefore I should add less weight to their relationship and any private life established after leave to remain came to an end. I do accept that submission at the same time as noting the Respondent does appear to concede the Appellant and sponsor are in a genuine and subsisting relationship."
12. On a proper application of the appellant's immigration history, the appellant was in the UK unlawfully after his s3C leave ended on 22 June 2018. On his own account, as set out in paragraph [13] of the decision, the appellant met Ms Parveen in July 2018. That is after his s3C leave had ended. They entered into an Islamic marriage on 5 August 2019 and the

marriage was formalised in a ceremony at Manchester District Registry Office on 5 December 2019. On the facts, whether fortuitously or otherwise, Judge McAll was correct to attach little weight to the relationship formed by the appellant with Ms Parveen, a qualifying partner, that was established by him at a time when he was in the United Kingdom unlawfully. There is therefore no material error of law in the decision on this ground.

13. As far as the remaining grounds are concerned, the ultimate issue for the First-tier Tribunal judge was whether a fair balance has been struck between the individual and public interest. Section 117A(2)(a) of the 2002 Act requires the Tribunal to have regard to the considerations listed in section 117B in considering the public interest question. The public interest question is, in turn, defined in section 117A(3) as being the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). There is, however, an element of flexibility within this provision. In Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, at [49], Lord Wilson observed 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.
14. The decision of Judge McAll must be read as a whole. The assessment of an article 8 claim such as this is inherently fact sensitive and the First-tier Tribunal must carry out the assessment on the evidence before it. It is clear Judge McAll carefully considered the appellant's claim that the fertility treatment has reached a critical stage. He weighed in the balance the desire of the appellant and his partner to undergo fertility treatment and to have a child. He noted the appellant has not shown the treatment would be unavailable in India or Pakistan. That was not speculation. He noted the timescales for such treatment are never certain, and neither is there any certainty with medical treatment or advice. That undoubtedly is correct and again, is not speculation.
15. It is clear from the findings and conclusions set out at paragraphs [33] to [46] that in reaching his decision Judge McAll plainly had regard to the evidence of the appellant and his partner and the factors that weigh in favour of the appellant and those that weigh against him. Even allowing for a degree of flexibility, Article 8 does not give a person the right to choose where they wish to live. In this case the Judge gives proper and adequate reasons to support the conclusions he reached. Judge McAll set out his reasons for the conclusion that the public interest in removal outweighs the matters relied upon by the appellant.
16. The decision reached was one that was open to the Judge and the appellant simply disagrees with the findings and conclusions that were open to Judge McAll in respect of the Article 8 claim.
17. It follows that I dismiss the appeal.

### **Notice of Decision**

18. The appeal is dismissed.

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**First-tier Tribunal No: HU/58281/2021**

**V. Mandalia**

**Upper Tribunal Judge Mandalia**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**25 May 2023**