



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

**Case No: UI-2023-003046**  
**First-tier Tribunal Nos:**  
**HU/54959/2022**  
**IA/07273/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 12 October 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ZUCKER**

**Between**

**MR SALAMAT ALI**  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms S Lecointe, Senior Home Office Presenting Officer  
For the Respondent: Mr P W Shea

**Heard at Field House on 6 October 2023**

**DECISION AND REASONS**

1. Mr Ali is a citizen of Pakistan whose date of birth is recorded as 25<sup>th</sup> September 1971. On 7<sup>th</sup> June 2021 he made application for leave to remain in the United Kingdom on human rights grounds which application on 27<sup>th</sup> July 2022 was refused by the Secretary of State.
2. Mr Ali appealed to the First-tier Tribunal. On 22<sup>nd</sup> June 2023 his appeal was heard by Judge Bibi sitting at Taylor House.
3. In a decision dated 26<sup>th</sup> June 2023 Judge Bibi allowed the appeal and it is against that decision that the Secretary of State by Notice dated 10<sup>th</sup> July 2023 with the permission of Judge Chohan dated 27<sup>th</sup> July 2023 brings this matter before the Upper Tribunal.

4. In summary it is the Secretary of State's case that having found that Mr Ali did not meet the Immigration Rules, in particular Rule 276ADE, insufficient reasons were given for allowing the appeal when conducting a proportionality assessment.
5. Of note at paragraph 7 of the decision it appears to have been conceded that at the date of the hearing Mr Ali had been continuously resident in the United Kingdom for nineteen years and two months with a start date of 11<sup>th</sup> April 2004.
6. To succeed under the rules Mr Ali would have had to satisfy the judge that he had been continuously resident in the United Kingdom for not less than twenty years. That continues not to be the case. The only other basis upon which Mr Ali might have succeeded under the rules was if he had been able to satisfy the judge of very significant obstacles to his integration into the country to which he would have to go if required to leave the United Kingdom. The judge was not so satisfied. In those circumstances the Secretary of State contended that there was no sufficient basis for finding that the weight of such evidence as was available in support of Mr Ali outweighed the public interest.
7. On its face I have a great deal of sympathy with the Secretary of State's position. Most people who have been in the United Kingdom for over nineteen years will have made connections with people around them and will have established some kind of private life. In this case Mr Ali had made friends with people at his mosque and was an attender at his mosque. The question was whether or not that was sufficient to outweigh the public interest. As I have already indicated on its face it appears not to have been so, but the question has to be whether or not it was material. What the judge did not take into account was the guidance in the case of **Patel [2013] UKSC 72** and in particular that which appears in the judgment of Lord Carnwath from paragraph 54 onwards:

“The most authoritative guidance on the correct approach of the tribunal to article 8 remains that of Lord Bingham in *Huang*. In the passage cited by Burnton LJ Lord Bingham observed that the rules are designed to identify those to whom ‘on grounds such as kinship and family relationship and dependence’ leave to enter should be granted, and that such rules ‘to be administratively workable, require that a line be drawn somewhere’. But that was no more than the starting point for the consideration of article 8. Thus in Mrs Huang's own case, the most relevant rule (rule 317) was not satisfied, since she was not, when the decision was made, aged 65 or over and she was not a widow. He commented at para 6:

‘Such a rule, which does not lack a rational basis, is not to be stigmatised as arbitrary or objectionable. But an applicant's failure to qualify under the rules is for present purposes the point at which to begin, not end, consideration of the claim under article 8. The terms of the rules are relevant to that consideration, but they are not determinative’”.

8. I pause at that stage to point out that the question in the case of **Patel** was whether or not there was such a concept of near-miss. However, Lord Carnwath went on at paragraph 55:

“Thus the balance drawn by the rules may be relevant to the consideration of proportionality. I said much the same in *Rudi*. Although I rejected the

concept of a 'near-miss principle', I did not see this as inconsistent with the words of Collins J in *Lekstaka*:

'Collins J's statement, on which the court relied [in *SB*], seems unexceptionable. It is saying no more, as I read it, than that the practical or compassionate considerations which underlie the policy are also likely to be relevant to the cases of those who fall just outside it, and to that extent may add weight to their argument for exceptional treatment'".

9. Mr Shea took me in the course of his submissions to **GM (Sri Lanka) [2019] EWCA Civ 1630** in which the correct test was set out and the court there made six preliminary observations about the test to be applied:
  - (a) the Rules and Section 117B must be construed to ensure consistency with Article 8,
  - (b) the national UK authorities have a margin of appreciation, which is not unlimited, but is nonetheless real and important, when setting the weighting to be applied to various factors in the overall proportionality assessment,
  - (c) the proportionality test for the assessment outside the Rules is whether a "fair balance" is struck between the competing public and private interests,
  - (d) the proportionality test needs to be applied on the circumstances of the individual case,
  - (e) there is a requirement for proper evidence and mere assertion by an applicant as to his or her personal circumstances and as to the evidence will not however necessarily be accepted as adequate,
  - (f) the list of relevant factors to be considered in a proportionality assessment is not closed and there is in principle no limit to the factors which might, in a given case, be relevant to an evaluation under Article 8, which is a fact-sensitive exercise.
10. Bringing the guidance of those two cases together it seems to me as I have already indicated that the decision of Judge Bibi was on its face very generous, but what she did not do was expressly state what weight ought to be given to the fact that whilst there is no near-miss principle, nineteen years and two months had elapsed, and now as the matter is before me even more, though it remains the case that Mr Ali has not met twenty years.
11. However there is the reality which has to be put into the mix when considering the public interest. If I were to find that the error of law were material, and what follows is a point with which Ms Lecointe for the Secretary of State agreed, Mr Ali would seek permission to appeal to the Court of Appeal and renew that application, if unsuccessful. That is a reality, one with which Mr Shea agrees. The time between now and the twenty year "finish line" will clearly be met in those circumstances, that, as I have said, is the reality and a factor which must necessarily be put into the mix when considering the case as a whole.
12. Whether therefore I were to find an error of law and re-make it on the basis of those factors which I have now discussed, namely the reality that twenty years

will be met or leave matters as they are, amounts to the same because I find that such error of law as may have been made given the circumstances in which we now find ourselves is not to be material.

13. I was grateful to Ms Lecointe for agreeing that the appeal should be dismissed, on this particular basis, on the facts of this particular case, as matters stand procedurally at the moment. Whether such facts would be sufficient in future as the Secretary of State revisits the processes and procedures is another matter but that is not before me, nor a matter with which I am today concerned.

**Decision**

14. For the avoidance of doubt by consent the appeal to the Upper Tribunal is therefore dismissed and the decision of the First-tier Tribunal shall stand.



Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**11 March 2023**