



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

**Case No: UI-2022-004225**  
**First-tier Tribunal Nos:**  
**HU/52528/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 08 July 2024**

**Before**

**UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

**Muhammad Sohail Wajid**  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**The Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr Biggs, Counsel instructed by Riverdale Solicitors  
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

**Heard at Field House on 3 June 2024**

**DECISION AND REASONS**

1. By my decision issued on 16 November 2023 (a copy of which is appended below), I set aside the decision of the First-tier Tribunal without any findings preserved. I now re-make the decision.

Introduction

2. This is an appeal brought under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 on the ground that the decision by the respondent dated 26 May 2021 to refuse the appellant's application for indefinite leave to remain in the UK on the basis of long residence is unlawful under section 6 of the Human Rights Act 1998 because it violates article 8 ECHR.
3. The appellant has a business partner, Mr Shamshad, whose immigration history is in all material respects the same as that of the appellant. However, in contrast to the appellant, Mr Shamshad was granted indefinite leave to remain on the basis of long residence.

4. The principal issue in dispute is the significance, for the proportionality assessment under Article 8 ECHR, of the respondent treating the appellant differently to Mr Shamshad.

#### The Appellant's Immigration History

5. The appellant is a citizen of Pakistan who entered the UK in June 2010 with leave until March 2012. He was granted further leave until August 2014.
6. Before his leave expired he applied for further leave as a Tier 1 Entrepreneur. His application was refused and subsequent appeal dismissed. There has been some confusion about when his appeal rights were exhausted. The correct position, as confirmed by Mr Biggs at the hearing, is that they were exhausted on 25 November 2018, which is the date of deemed service of the Court of Appeal decision refusing him permission to appeal issued on 23 November 2018.
7. On 7 December 2018 or 8 December 2018 (the date of the application is disputed, but nothing turns on this) the appellant applied for leave as a Tier 1 Entrepreneur. In June 2020, whilst the application was pending, the appellant varied it to an application for indefinite leave to remain on the basis of long residence. This was refused on 26 May 2021.

#### Mr Shamshad's Immigration History

8. Mr Shamshad entered the UK in 2010. His leave was extended until August 2014. He applied (in-time) for leave as a Tier 1 Entrepreneur. His application was refused and his appeal was considered together with that of the appellant. He and the appellant appealed unsuccessfully to the Court of Appeal and became appeals rights exhausted on 25 November 2018.
9. Mr Shamshad then applied for leave as a Tier 1 Entrepreneur, varying the application to an application for indefinite leave on the basis of long residence. He was granted leave on this basis. There was some uncertainty, at the error of law hearing, as to the basis upon which Mr Shamshad was granted leave. However, the documentation that has now been disclosed by the respondent makes it clear that he was granted leave because the respondent accepted that the requirements of paragraph 276B of the Immigration Rules were satisfied. The respondent's records state:

"It is considered [that Mr Shamshad] meets all the requirements of 276B(i)(a)".

"Decision Under ILR Rules: Grant ILR Under Para 276C Yes 10-Year Period: 15/05/2010 - 15/05/2020".

#### Submissions

10. Mr Biggs did not argue that the appellant meets any of the routes to leave under the Immigration Rules. He also did not advance any arguments, or refer to any evidence, in respect of the appellant's private or family life in the UK save to assert that because of the length of the appellant's residence in the UK it cannot be disputed that his Article 8 ECHR right to private life is engaged.
11. The focus of Mr Biggs' submissions was that it would be disproportionate under Article 8(2) ECHR to refuse the appellant leave because, by doing so, the respondent would be treating him differently to Mr Shamshad without any lawful

justification. To support this argument, Mr Biggs relied on public law authorities which highlight that there must be a rational explanation for differential treatment of similarly placed individuals.

12. Ms Everett did not dispute that the appellant and Mr Shamshad have similar immigration histories. She submitted that the only explanation for the differential treatment is that Mr Shamshad benefitted from a mistake. She submitted that where leave is granted on a mistaken basis proportionality does not require a decision concerning a different person to be aligned with the mistake.

### Analysis

13. My starting point is to consider whether the appellant satisfies any of the conditions of the Immigration Rules. The only route under the Immigration Rules that the appellant appears to come close to satisfying is paragraph 276B (10 years' continuous lawful residence). However, Mr Biggs accepted that the appellant's lawful residence ended in November 2018, which means that his continuous residence was for a period of approximately 8.5 years, not the required ten.
14. Where an appellant does not meet the requirements of the Rules, it is necessary to consider Article 8 outside the Rules.
15. As the appellant has lived in the UK since 2010, I accept that, as a consequence of his length of residence, he has established a private life in the UK that is interfered with by the decision. It therefore is necessary to consider whether removing him/refusing him leave is proportionate.
16. I have assessed proportionality by adopting a balance sheet approach where I weigh factors for and against the appellant. I have incorporated into this assessment the considerations mandated by Part 5A of the 2002 Act.
17. Weighing against the appellant is that he does not meet the requirements of the Immigration Rules and that the maintenance of effective immigration controls is in the public interest: section 117B(1) of the 2002 Act.
18. The appellant is unlikely to be a financial burden and speaks English. Therefore the considerations in sections 117B(2) and (3) of the 2002 Act do not weigh against him.
19. Weighing in favour of the appellant is that he has lived for a considerable period of time in the UK during which time he will have established a private life. However, as his private life was established when his immigration status was precarious, section 117B(5) of the 2002 Act requires only little weight to be given to it. In exceptional circumstances this can be overridden. However, no features of the appellant's private life have been identified that would warrant attaching more than little weight to it.
20. I now turn to the question of what weight (if any) should be given to the appellant being treated differently to Mr Shamshad, which was the sole reason advanced by Mr Biggs as to why refusing leave would be disproportionate.
21. As acknowledged by Mr Biggs, Mr Shamshad did not meet the conditions necessary for a grant of leave under paragraph 276B and, like the appellant, his

lawful residence ended in 2018. He therefore fell short, by a considerable degree, of accruing the 10 years of continuous lawful residence that he needed for the requirements of paragraph 276B to be met. I agree with Ms Everett that Mr Shamshad benefited from a mistake by the respondent, who granted him leave on a basis to which he was not entitled.

22. I am not aware of, and neither Mr Biggs nor Ms Everett were able to direct me to, any case law addressing differential treatment as the result of a mistake in an Article 8 proportionality assessment. However, I have gained some assistance from considering the House of Lords judgment in *O'Brien and others (FC) v Independent Assessor* [2007] UKHL 10, where the question arose as to whether an assessor of compensation was bound, or ought to have followed, a previous decision that he considered erroneous. At paragraph 30 it is stated:

“It is generally desirable that decision-makers, whether administrative or judicial, should act in a broadly consistent manner. If they do, reasonable hopes will not be disappointed. But the assessor’s task in this case was to assess fair compensation for each of the appellants. He was not entitled to award more or less than, in his considered judgment, they deserved. **He was not bound, and in my opinion was not entitled, to follow a previous decision which he considered erroneous** and which would yield what he judged to be an excessive award. While he did not, in his initial assessments, refer to Sir David’s 10% deduction, he made plain that he regarded the deductions he did make as the permissible minimum. In his addendum his disagreement with Sir David was express. Since the appropriate deduction is a highly judgmental matter and the assessor’s deductions are not in themselves impugned, I would reject the appeal on this ground also.” [Emphasis added]

23. Mr Biggs sought to distinguish *O'Brien* on the basis that it did not concern an assessment of proportionality under article 8. I accept that the decision in *O'Brien* was made in a different context. However, in my view, the principle enunciated in the judgment is as relevant in an article 8 assessment as it is in any other context, which is that a decision maker is not required (and indeed ought not) to repeat – or perpetuate – a mistake. To align the appellant’s case with that of Mr Shamshad the decision maker would have had to treat the appellant as if he had met the requirements of paragraph 276B when he did not, which would be to repeat and perpetuate a mistake. Avoiding repetition of a mistake is a rational reason to treat the appellant differently to Mr Shamshad. Accordingly, the public law principle highlighted by Mr Biggs - that there must be rational reason for differential treatment of similarly placed individuals - does not assist the appellant. I therefore attach no weight to the differential treatment of the appellant and Mr Shamshad.

24. The proportionality assessment firmly favours the respondent as the appellant does not meet the requirements of the Immigration Rules and his private life in the UK, to which I have attached only little weight, is outweighed to a significant extent by the public interest in the maintenance of effective immigration controls.

### Costs

25. In my decision of 16 November 2023 I directed the respondent to file and serve, within a specified timeframe, documents and records concerning the immigration history of Mr Shamshad. The case was listed for a resumed hearing on 29 January 2024. At this hearing Mr Biggs sought an adjournment, which was unopposed by Ms Everett, on the basis that the respondent only filed and served evidence late

in the day on the working day before the hearing, thereby not giving him sufficient time to consider it. Mr Biggs raised the question of costs and I gave the parties an opportunity to make written submissions on whether a costs order should be made against the respondent in respect of the costs wasted as a result of the adjournment. The appellant made written submissions; the respondent did not. At the hearing, Ms Everett was unable to provide an explanation for the failure to comply with directions that resulted in the adjournment.

26. Under rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I am entitled to make an order in respect of costs where I consider that a party has acted unreasonably in bringing, defending or conducting the proceedings.
27. In my view, the respondent has acted unreasonably in the conduct of these proceedings by (a) failing to comply with my directions and thereby necessitating an adjournment; and (b) failing to provide any explanation for the failure to comply despite being given the opportunity to do so.
28. The total costs claimed by the appellant, as set out in the statement of costs for summary assessment, are £2,722.65. I am satisfied that these costs, which relate only to the costs wasted as result of the adjournment, are reasonable and proportionate.

**Notice of Decision**

29. The appeal is dismissed.
30. The respondent will pay the appellant the sum of £2,722.65.

D. Sheridan

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

13 June 2024

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**(NO ANONYMITY DIRECTION MADE)**

Appellant

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**Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr Biggs, Counsel instructed by Piperjuris Solicitors  
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

**Heard at Field House on 16 October 2023**

**DECISION AND REASONS**

1. At the hearing, following Mr Biggs' submissions, Ms Everett conceded that the decision of the First-tier Tribunal involved the making of an error of law. The parties were in agreement that the decision should be remade without any findings preserved. In the light of the respondent's concession, my decision will be brief.
2. The appellant is appealing against a decision of Judge of the First-tier Tribunal Bart-Stewart ("the judge") dismissing his appeal. One of the arguments advanced by the appellant in the First-tier Tribunal was that his immigration history was materially the same as that of his business partner, who was granted Indefinite Leave to Remain. The judge rejected this argument, finding in paragraph 17 that, inter alia, he could not rely on "mere assertion" that the respondent's decisions were inconsistent.
3. There are 5 grounds of appeal, all of which are variations on the same theme, which is that the judge was wrong, based on the evidence before him, to find that there was a material difference between the immigration history of the appellant and his business partner.

4. The second ground of appeal submits that the judge erred by not making a finding (and not giving sufficient reasons) in respect of the credibility of the evidence given by the appellant and his business partner about their circumstances being materially the same. Ms Everett conceded that the judge erred in this way, as it was unclear from the decision why the judge did not accept the unchallenged witness evidence. She noted that the respondent was not represented and therefore the evidence had not been challenged. In the light of Ms Everett's concession, it has not been necessary for me to consider the other grounds.
5. Ms Everett and Mr Biggs agreed that the decision should be remade without any findings preserved. They were both neutral on whether the case should be remitted although Mr Biggs acknowledged that he would be in difficulty in arguing for remittal. The parties have not been deprived of a fair hearing or of an opportunity to advance their case, and the extent of further fact-finding is likely to be relatively limited (even though there are no preserved findings of fact). Accordingly, having regard to *AEB v SSHD* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 IAC, I consider this to be a case that should remain in the Upper Tribunal.
6. An important issue for the remaking of the decision will be whether the immigration history and circumstances of the appellant are in fact materially the same as those of his business partner. Accordingly, as discussed with Mr Biggs and Ms Everett at the hearing, I have made directions for both parties to produce evidence relevant to this issue.

### **Notice of Decision**

7. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.
8. The decision will be remade at a resumed hearing in the Upper Tribunal.

### **Directions**

9. Within 14 days of this decision being received, the appellant will provide the respondent with a signed authority from the appellant's business partner authorising the respondent to serve on the appellant and file with the Upper Tribunal all information in the respondent's possession concerning his immigration history and status (including all applications and decisions concerning him).
10. Within 21 days of this decision being received, the appellant will file and serve all information held by (or on behalf of) the appellant's business partner concerning his immigration history and status (including all applications and decisions that he has a copy of).
11. In the event that the appellant is unable to comply (either in part or fully) with the directions above, a witness statement must be provided explaining why. This must be filed and served at least 7 days before the resumed hearing.
12. Upon receipt of the signed authority from the appellant's business partner, the respondent will file and serve a copy of all documents and records concerning the immigration history and status of the appellant's business partner (including

copies of all applications and decisions). This must be filed and served within 21 days of receiving the signed authority from the appellant.

13. In the event that the respondent is unable to comply with the direction above, a witness statement must be provided explaining why. This must be filed and served at least 7 days before the resumed hearing.
14. The parties have permission to rely on evidence (in addition to that which is referred to in the directions above) that was not before the First-tier Tribunal. Any such evidence must be filed with the Upper Tribunal and served on the other party at least 7 days before the resumed hearing.

D. Sheridan  
**Upper Tribunal Judge Sheridan**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

17.10.2023