



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

Appeal Number: IA/03218/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16<sup>th</sup> October 2015**

**Decision & Reasons Promulgated  
On 23<sup>rd</sup> November 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAINI**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SHAHID KHAN**

Claimant

Representation:

For the Appellant: Mr S Whitwell, Senior Presenting Officer

For the Claimant: Mr P Bonaverio, Counsel instructed by Arlington Crown Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Borsada allowing the Claimant's appeal on human rights grounds with reference to Article 8 outwith the Immigration Rules.
2. In a Refusal Letter dated 30 December 2014, the Secretary of State refused the Claimant's application in relation to his human rights and issued removal directions dated 30 December 2014 pursuant to section 10A of Schedule 2 of the Immigration Act 1971 set for the Claimant's country of origin, Pakistan. The First-tier Tribunal promulgated its decision allowing the Claimant's appeal against that decision on 7 May 2015.

3. The Appellant appealed against that decision. The grounds upon which permission was granted may be summarised as follows:
  - (i) It is arguable that the judge erred in considering the appeal outwith the Immigration Rules due to a near miss with reference to paragraphs 8 and 12 of the determination;
  - (ii) It is arguable that the judge erred in considering section 117B with reference to paragraph 11 of the determination;
  - (iii) It is arguable that the judge erred in making findings upon 276ADE(vi) which was not argued before the judge.
4. The Appellant was granted permission to appeal by First-tier Tribunal Judge Nicholson.
5. I was provided with a Rule 24 response from Claimant's counsel in advance of the hearing which I took into consideration in reaching my decision.

### **No Error of Law**

6. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I do not find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.
7. In relation to the first ground, I find that the Secretary of State's appeal must fail in relation to the judge having allegedly erred in considering the appeal outwith the Immigration Rules due to a near miss with reference to paragraphs 8 and 12 of the determination. This is because the judge sets out his consideration of the exceptionality and the need to perform an assessment outwith the Immigration Rules at paragraph 9 of his determination and finds the Claimant's circumstances sufficiently compelling to move to the second stage. The judge notes that the majority of the Claimant's leave was lawful. This is not incorrect, nor is it said to be factually flawed. The judge also notes that the Claimant has a 'very good immigration history' and has made a 'valuable contribution to society through studies, social activities (Children in Need)' and 'work over a very long period of time'. Furthermore, at paragraph 7 of his determination, the judge also records several factors other than the Claimant's excess of 10 years' residence, which warrant his venturing to the second stage of consideration outwith the Rules. These factors include the judge's concern at the Claimant's anxieties about his predicament including the 'very serious negative effect on his emotional well being' and his 'particular social and cultural characteristics' which have been 'profoundly altered by his long years of residence'. Further still, the judge sets out further factors at the close of paragraph 9 of his determination. Although the judge utilises the phrase 'near miss' at paragraph 12 of his determination, this infelicitous use of phrase was not determinative of the outcome of the appeal. The judge was attempting to describe that the extent to which the Immigration Rules are met, or not met as the case may be, may have a bearing upon the proportionality assessment. Indeed, this much has been clear since the judgment of Lord Carnwath in *Patel & Ors v Secretary of*

*State for the Home Department* [2013] UKSC 72 at [55]. If any reminder were necessary of my Lord's finding in *Patel*, it may be found in the recent decision of *Secretary of State for the Home Department v SS (Congo) & Ors* [2015] EWCA Civ 387 at [56]. Therefore, this is a factor that the judge was lawfully entitled to take into account in considering the proportionality of the Claimant's removal outwith the Immigration Rules. The judge was therefore right to consider the circumstances beyond the Claimant's control, which included a fraud perpetrated upon him by his previous representatives. The judge rightly considered whether the appeal should be considered under Article 8 ECHR simpliciter and gave more than sufficient reasoning for his decision to perform a proportionality assessment.

8. In relation to the second ground, I find that this ground must also fail. Whilst the judge observes that the Claimant's status was lawful and therefore not precarious, an understandable error to make before a pronouncement of how that term might be interpreted in *AM (S.117B)* [2015] UKUT 260 (IAC), as Mr Whitwell fairly observed, the judge considered the alternative position to his interpretation of precariousness, much to the fortune of the Claimant and consequently any error she may have made is wholly immaterial, the alternative position having been considered.
9. Finally, in relation to the third ground, as noted above concerning ground one, a judge is entitled to consider the extent to which the Immigration Rules are met in his view, which may have a bearing upon the proportionality of a person's removal in consequence. In those circumstances, a judge is entitled to express their view as to whether there are 'very significant obstacles' to a person's relocation to their country of origin when considering the proportionality of the Secretary of State's interference with that person's private life outwith the Rules. Indeed, it seems permissible that a judge have in mind the Secretary of State's measure of private life and take that threshold into account when making an assessment on the proportionality of a person's mooted removal. That assessment can then of course be informed by the extent to which such a threshold is met. In this instance, the judge was therefore entitled to gauge her proportionality assessment by reference to paragraph 276ADE(vi) and it was permissible for her to do so in light of *Patel* and *SS (Congo)*.
10. Consequently, the grounds do not reveal an error of law such that the decision should be set aside.

### **Decision**

11. The appeal to the Upper Tribunal is dismissed.
12. The decision of the First-tier Tribunal is affirmed.

Signed

Date

Deputy Upper Tribunal Judge Saini