Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08207/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 November 2017	**On 8 December 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

RAJA MUHAMMAD SALIM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel instructed by M A Consultants (London)
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan born on 5 October 1965. He appeals the determination of a First-tier Judge following a hearing on 24 November 2016 in which the judge dismissed the appellant's appeal against the decision of the Secretary of State on 7 October 2015 to refuse his application for leave to remain in

the UK. The appellant's application had been made on 25 June 2015. He had applied for leave to remain on the grounds of family life with his British partner whom he had married on 11 April 2011 in an Islamic ceremony. The representatives asked the Secretary of State to note that the appellant had two stepdaughters who were over the age of 18 and who were currently living with him and his wife. They considered the appellant as their own father.

2. The Secretary of State noted the appellant had entered the UK illegally and had never obtained valid leave to remain and failed to meet the eligibility requirements of paragraph R-LTP.1.1(d)(ii). The First-tier Judge summarised the remainder of the respondent's decision as follows:

> "10. Consideration had been given as to whether EX.1 of Appendix FM applied to his application, and therefore whether he met the requirements of paragraph R-LTRP.1.1(d)(iii) of Appendix FM. He was in a genuine and subsisting relationship with his British national partner. However, the Secretary of State had not seen any evidence that there were insurmountable obstacles in accordance with paragraph EX.2 of Appendix FM which meant that there would be very significant difficulties which would be faced by him or his partner in continuing their family life together outside the UK in Pakistan, and which could not be overcome or would entail very serious hardship for him or his partner. So he failed to meet the requirements of EX.1(b) of Appendix FM.
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> 11. With regard to Rule 276ADE, he claimed to have lived in the UK for twenty years and six months (at the time of application), but he failed to provide any evidence prior to the year 2011 to demonstrate his residence in the UK. It was not accepted that he has lived continuously in the UK for at least twenty years. So there would not be very significant obstacles to his integration into the country to which he would have to go if he was required to leave the UK. He had spent the majority of his life in Pakistan, including his formative years. He spoke Urdu, and Urdu was a recognised language of Pakistan. His mother and three brothers continued to reside in Pakistan. Thus he had maintained close cultural, social and familial ties to his home country.
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> 12. A decision had also been made on whether there were exceptional circumstances. His relationship with his partner did not warrant a grant of leave. It was open to his partner to travel to Pakistan with him to continue their family life in Pakistan. The relationship he claimed to have with the children of his partner also did not warrant a grant of leave. They were over the age of 18, and were thus adults. His partner claimed to be in employment in the UK, and it was open to her to seek employment in Pakistan. It was further noted that his partner was a Pakistani national by birth, before becoming a British citizen. So her

experience in her native country would aid her reintegration into life in Pakistan."

3. The appellant gave oral evidence before the First-tier Judge. He claimed to have arrived in the UK in January 1995 and wished to be considered under the long residence provisions – he had been in the UK for over twenty years – in addition to his claim that he was in a genuine and subsisting relationship with a British citizen. While his wife's daughters were her dependants they were now adults and were still part of the family and it was not safe in Pakistan for his wife or her daughters. The judge records that the appellant said that his passport had been issued in 2013 or 2014 and was his first passport and that he had falsely informed the Pakistani Embassy that he had been previously issued with a passport in order to get this passport. He called two witnesses, Mr Pervaiz Khan and Mr Nasser Faryadmarni, to support his claim to long residence in the UK. The appellant's wife was called as a witness as was her daughter, Ikra. Her sister Masha was not able to come to court as she was working on the day of the hearing. She and her sister provided most of the income to pay for the rent and utility bills for the house which they occupied. The appellant had given them great support and they were really attached to him.

4. Much of the argument had the appeal hearing focused on the issue of the length of the appellant's residence in the United Kingdom and the judge made his findings on this aspect in the following extract from his decision:

> "31. In order to qualify for leave to remain on the grounds of twenty years' continuous unlawful residence, the appellant has to show that he had accrued twenty years' continuous residence by the date of his application in June 2015. He has been consistent in his assertion that he entered the United Kingdom illegally with the assistance of an agent in January 1995. However, his general credibility as a witness of truth is undermined by the fact that, by his own admission, he did not tell the truth when he applied for a Pakistani passport in the UK. Although he claims he was ordinarily resident in East Ham, London E6, he gave as his residential address an address an address in Birmingham. It is not a credible explanation that he happened to have gone to stay with a friend at this address for a period of one month. As he well knew, the embassy officials would have understood him to be providing a permanent residential address, not an address at which he was a temporary visitor.
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> 32. The passport that was issued to the appellant also contains the information that he had previously been issued with a Pakistani passport, which he had lost. The appellant says this is not true, and he just made it up in order to obtain a new passport. If so, this shows a willingness to lie and also that the appellant must have entered on a false passport. It is also reasonable to question whether the embassy officials would have simply taken the appellant's word for it that he had previously been issued with a passport, rather than checking the information given and finding it to be correct. This in turn introduces the distinct possibility of the appellant

having been issued with a valid passport in Pakistan which he used to come and go from the United Kingdom in the past.

33. It is significant in my judgment that the two witnesses who have come forward to testify as to the appellant's long and *continuous* residence are not people who have provided the appellant with either accommodation or employment. Both of them have been relatively peripheral in the appellant's life, seeing him from time to time. Mr Faryadmarni said that the appellant has never been a guest at his house.

34. I am prepared to accept that the appellant met Mr Khan in East Ham in the year 2000, but this does not avail the appellant in establishing a right of residence under Rule 276ADE, as Mr Khan has not known him for twenty years. Mr Faryadmarni did not present as a dishonest witness, but he was understandably vague as to when he first met the appellant, mentioning the dates of either late 1995 or late 1996. It is reasonable to question whether he met him as far back as either of these two dates, given that the appellant instructed his previous solicitors that he had made an asylum application in 1999. If it is the appellant's evidence that he made his asylum application soon after his arrival in the UK, and this would indicate that he did not arrive in the UK until 1999. Mr Khan's evidence was that he had lived in East Ham for 40 years, so Mr Khan first encountering the appellant in the year 2000 would be consistent with the appellant being a new arrival in East Ham in the year 2000. But even if some credence is given to the alternative dates proffered by Mr Faryadmarni, they do not establish on the balance of probabilities that the appellant arrived in the United Kingdom *before t*he end of June 1995, so as to mean that the appellant had accrued twenty years' residence by the date of application.

35. Accordingly, I find the appellant has not discharged the burden of proving on the balance of probabilities that he entered the United Kingdom as far back as the first part of 1995 so as to have accrued twenty years' continuous unlawful residence in the United Kingdom at the date of his application in June 2015."

5. It was not argued that he qualified for leave to remain on private life grounds on account of there being significant obstacles to his reintegration in Pakistan. The judge then turned to consider whether it was shown that there were insurmountable obstacles to family life between the appellant and his wife being carried on in Pakistan. The judge noted that although she had claimed asylum in or about 2006 on the basis that she was fleeing domestic violence her appeal against the decision had ultimately been unsuccessful and while she had sought to resurrect this claim, as the judge puts it, "her general credibility is undermined by discrepancies in the evidence". The judge found that her account of what had happened was not consistent and not supported by her daughters whose evidence completely undermined the case she advanced. The judge rejected the claim that there was any

real risk to the appellant's wife and stepdaughters suffering harm on return to Pakistan at the hands of his wife's ex-husband. The judge found that the family would be left alone and be able to live peacefully in Karachi "which for all of them is the home area in Pakistan from which they originate, and with which the appellant and his wife have a high degree of familiarity". Accordingly there were no insurmountable obstacles to the appellant and his wife carrying on family life in Pakistan. The potential impact on other family members of their relocation to Pakistan was a matter that had to be addressed in an Article 8 claim outside the Rules as was acknowledged by Counsel (see paragraph 43 of the determination).

6. The determination concludes as follows:

> "44. Turning to an Article 8 claim outside the Rules, I accept that questions 1 and 2 of the **Razgar** test must be answered in the appellant's favour with regard to establishment of family and private life in the United Kingdom. Questions 3 and 4 of the **Razgar** test must be answered in favour of the respondent. On the issue of proportionality, I must take into account the relevant public interest considerations arising under Section 117B of the 2002 Act. Although the appellant probably speaks and understands some English, he does not demonstrate a fluency in English commensurate with a significant degree of integration into UK society. He is also not financially independent. Although his wife is a qualifying partner, little weight can be attached to family life built up with a qualifying partner by a person whose status here is unlawful. Mrs Abdullah embarked on a relationship with the appellant in the knowledge that his status was at least precarious, and that there was no guarantee that she would be able to carry on family life with the appellant on a permanent basis in the United Kingdom, as opposed to having to carry on family life with him in Pakistan.
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> 45. Mr Karim submits that the appellant has established family life with his stepdaughters, citing **Ghising (family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC)**. This case is not the paradigm case envisaged in **Ghising** where the adult children have lived all their lives in the same household as their parents. The appellant only joined the family unit following his marriage to Mrs Abdullah in 2011. By that time Mashal Abdullah was over the age of 20, and Iqra Abdullah … was 15. The appellant is financially dependent on his stepdaughters, and to a lesser extent on his wife, rather than the other way round. Although I accept that his stepdaughters are devoted to him, I question whether in reality the ties between the grown up children and their parents go beyond the normal emotional ties to be expected between adult children and parents who live under the same roof. But even if it is right to characterise the appellant as having established family life with his stepdaughters as well as with his wife, this does not give rise to a right to remain under the Rules, and there are not sufficiently compelling and compassionate circumstances to justify the appellant being granted Article 8 relief outside

the Rules. The members of the family face a reasonable choice. If preservation of the integrity of the family unit is the priority, it is open to Mrs Abdullah and her daughters to relocate with the appellant to Pakistan. Another option is for Mrs Abdullah to relocate with her husband to Pakistan, while her daughters remain here to pursue their own lives. They are living in a multicultural and tolerant society where it is not essential that they should conform to a cultural norm of their home country of living with their parents until they are married.

46. Another option is for the appellant to go back to Pakistan on his own, with a view to regularising his status by making an application for entry clearance from abroad. Applying the **Chikwamba** jurisprudence, there is good reason to require the appellant to go back to Pakistan for this purpose, as he has an adverse immigration history and he does not qualify for leave to remain under Appendix FM. By returning to Pakistan voluntarily, he would become eligible to apply for entry clearance as a spouse.

47. Accordingly, I find the decision appealed against strikes a fair balance between, on the one hand, the rights and interests of the appellant, his wife and his stepdaughters, and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls."

7. The judge accordingly dismissed the appeal. There was an application for permission to appeal. This application was dismissed by the First-tier Tribunal. The application was renewed and it was found to be arguable that the judge had not made an adequately-reasoned finding on the issue that by the date of hearing the appellant had resided in the UK for twenty years which was a relevant matter to take into account when considering Article 8.

8. A response was filed on 27 September 2017. It was pointed out that the appellant could not satisfy the Rules as at the date of the application as the Rules required. The Rules could not be applied selectively.

9. Counsel relied on the issue of the appellant's long residence and referred to the evidence given by the witnesses at the hearing. The appellant had intervened in a fight between an Asian man and Mr Faryadmarni "in late 1995 or late 1996". The judge had made a positive credibility finding in respect to the witness. It was relevant that the appellant satisfied the requirements of the Rules as at the date of the hearing, even if not at the date of application. At best the findings were unclear. The judge's findings in paragraph 45 of the decision that the ties between the adult children and their parents did not go beyond the normal emotional ties was irrational. The youngest child had been living with the appellant since the age of 15 and the judge had recorded the evidence of her sister who paid the bills and the rent. Counsel referred to **Kugathas [2003] EWCA Civ 31** and **Ghising**. The judge had not

properly engaged with the written and oral evidence. This was not a near miss case – it was not argued on that basis.

10. Ms Ahmad noted that the witness had been vague and the judge's findings had been on an "even if" basis. The judge had correctly concluded in paragraph 35 that the appellant did not meet the relevant requirements of the Rules. She referred to **Chau Le (Immigration Rules – de minimis principle) [2016] UKUT 186 (IAC)** which made it clear that the "near miss" principle had no application in the construction or application of the Immigration Rules.

11. In relation to the point based on **Kugathas** she referred to **Entry Clearance Officer, Sierra Leone v Kopoi [2017] EWCA Civ 1511** at paragraphs 19 to 22. She highlighted the last sentence of paragraph 20 in which it was said:

> "No doubt in the present case there are emotional ties felt on both sides, but there is nothing to indicate that these go beyond the normal emotional ties experienced between family members in very many families."

It was open to the First-tier Judge to find as he had done on this issue. Ms Ahmad also referred to **SS (Congo) [2015] EWCA Civ 387** referring to paragraphs 54 to 58 dealing with the issue of "near miss" cases.

12. In reply Counsel submitted that the judge had clearly found in paragraph 34 that the witness was not dishonest and did not wholeheartedly reject the evidence. What was said in the case of **Kopoi** should be seen in the context of that case – it was an entry clearance case where an entry clearance had been refused in a visit application. The circumstances in the instant appeal were different. The appellant was the stepfather of the children. The Court of Appeal had noted there was no relationship of dependency of any kind at all and only the older child had actually met the respondent – on a visit to Sierra Leone aged about 2. The appellant on the other hand had resided with the family since 2011. The judge had failed to grapple with the evidence and the appeal should be allowed.

13. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the determination of the First-tier Judge if it was flawed in law.

14. As I have observed the judge heard oral evidence and he records that the appellant was extensively cross-examined in paragraph 16 of his determination. The judge's findings about the credibility of both the appellant and his wife are set out in the determination. The judge considered the serious issue of the appellant not telling the truth when he applied for a Pakistani passport in the UK – he had claimed that his old passport had been lost which was not true and he had just made the story up. The judge was fully entitled to show that this demonstrated a willingness to lie and the appellant must have entered on a false passport. The judge comments that this introduced the distinct possibility "of the appellant having been issued with a valid

passport in Pakistan which he used to come and go from the United Kingdom in the past". In paragraph 33 of the determination which I have set out above the judge underlined the word 'continuous'. The judge makes an unqualified finding that the appellant met one of the witnesses in 2000 and found this consistent with the appellant's evidence.

15. The judge found that the evidence of Mr Faryadmarni was vague and in my view far too much is read into what the judge said in paragraph 34 about the witness not presenting as "dishonest". The judge's comment that "even if" some credence was given to the alternative dates put forward by this witness cannot be read as meaning that he was satisfied that the appellant had come to the UK before the end of June 1995. What the judge found in paragraph 35 of his determination was that the appellant had not discharged the burden of proof "that he entered the United Kingdom as far back as the first part of 1995 so as to have accrued twenty years' continuous unlawful residence in the United Kingdom at the date of his application in June 2015." I am not satisfied that the determination can be read in the way that Counsel argued or that the determination lacks clarity. There was no need for the First-tier Judge to say anything more about the witness's evidence.

16. In determining the appellant's human rights appeal again the judge properly directed himself. The determination cannot be read on the footing that the judge made a finding that the appellant would have satisfied the twenty year Rule at the date of the hearing. The judge accepts a meeting between Mr Khan and the appellant in the year 2000. He notes this evidence was consistent with the appellant's evidence. On top of that there is a problem of establishing continuous residence.

17. Both husband and wife gave evidence which the judge found to be discredited. The behaviour of the appellant when obtaining his passport raised serious issues. I am not satisfied that the judge erred in his findings or in not making express reference to the appellant's residence in the United Kingdom when considering Article 8. However, in paragraph 44 of his determination it is implicit that he had regard to the appellant's residence when commenting that "he did not demonstrate a fluency in English commensurate with a significant degree of integration into UK society". The relationship between the appellant and his wife was embarked upon at a time when the appellant's status "was at least precarious". I do not find that the judge left out of account any relevant or material matter concerning the appellant's residence when considering the appellant's claim under Article 8 outside the Rules. It is argued that the judge's assessment of family life between the appellant and his stepdaughters was arguably irrational as there was both emotional and financial dependency. The judge expressly refers to the issue of financial dependence in paragraph 45. While he accepted that the appellant's stepdaughters were devoted to him and while he questioned whether in reality the ties went beyond normal emotional ties he found that even if family life had been established there were not "sufficiently compelling and compassionate circumstances to justify the appellant being granted Article 8 relief outside the Rules".

18. The judge outlines the various possibilities in paragraph 45 of his decision and refers to the further alternative that the appellant could return to Pakistan and apply for an entry clearance from overseas in paragraph 46. I am not satisfied that it was incumbent on the judge to make any additional findings in respect of the stepdaughters. In the grounds it was argued that the judge had misdirected himself in referring to compelling and compassionate circumstances in this context. In the grounds reference was made to **SS (Congo)**. The argument was not developed at the hearing. Ms Ahmad did refer to the case of **SS (Congo)**. In the context of near miss cases it is said that the fact that "an applicant may be able to say that their case is a 'near miss' in relation to satisfying the requirements of the Rules will by no means show that compelling circumstances exist requiring the grant of LTE outside the Rules...". In paragraph 56 it is stated, however, that the "near miss" argument is not wholly irrelevant to the balancing exercise required under Article 8:

> "If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the Rules, the fact that their case is also a 'near miss' case may be a relevant consideration which tips the balance under Article 8 in their favour...".

19. There is also a reference to "compelling circumstances" in paragraph 51 of the judgment. As I have said, the point was not developed at the hearing and I detect no material error in the judge's assessment.

20. In conclusion, in my view the judge's determination was full and satisfactorily reasoned. He made a careful factual assessment and a proper and thorough analysis of the evidence before him. I detect no material error of law in his approach to the case under and outside the Rules. He made the necessary findings in respect of the stepdaughters and directed himself appropriately when considering their position. He was entitled to conclude that the decision was proportionate and fair as he did in paragraph 47.

21. I am not satisfied that there was any material error of law in the decision of the First-tier Judge and accordingly this appeal is dismissed.

22. The judge made no anonymity order and I make none.

Fee Award

23. The judge made no fee award and I make none.

Signed Date 7 December 2017

G Warr, Judge of the Upper Tribunal