



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

Appeal Number: IA/34902/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 19 July 2017**

**Decision & Reasons Promulgated
On 27 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

AASIM AHMED PIRZADA

Appellant

and

**SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Z Malik, of Counsel instructed by Malik Law Chambers
For the Respondent: Mr P Singh, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge I Ross ("FtTJ") promulgated on 29 November 2016 in which he dismissed the appeal of the Appellant against a decision of the Respondent dated 25 November 2015.
2. The Appellant is a citizen of Pakistan born on 28 October 1975. He has a lengthy immigration history which I summarise briefly as follows. He entered the United Kingdom on 6 March 2004 with a visa as a student valid until 30 April 2005. Thereafter, he made an in-time application for an extension of leave to remain subsequently granted until 30 June 2008. He then made an application for variation of leave under the EEA Regulations and this was refused as a forged document had been submitted with the

application. In consequence, the Appellant was sentenced to 5 months imprisonment and was served a notice of removal on 24 September 2008. On 8 October 2008 he made an application for leave to remain as a student which was successful with leave being granted to 31 July 2010 and subsequently extended to 30 August 2011. On 27 August 2011 the Appellant applied for leave to remain outside of the Immigration Rules ("the Rules"), which was refused on 22 September 2011 and his subsequent appeal to the First-tier Tribunal was dismissed and upheld by the Upper Tribunal on 16 May 2012. Following a further appeal to the Court of Appeal the proceedings were disposed of by a Consent Order; in consequence the Respondent subsequently granted leave on discretionary grounds to 22 May 2014.

3. On 21 May 2014 the Appellant applied for leave to remain outside of the Rules which was refused; however, he successfully appealed to the First-tier Tribunal against this decision to the extent that the judge found the Respondent's decision was not in accordance with the law, and issued a direction that she consider and make a decision on the long residence claim taking into account the Appellant's conviction and to grant a period of discretionary leave to allow him to obtain a CAS letter. Further leave to remain was thus granted from 8 July 2015 until 8 November 2015. A refusal of the claim followed on 24 November 2015 and it is this decision which was the subject of the appeal before the FtTJ.
4. It is prudent at this stage to recount the Respondent's reasons for refusal. The Respondent reviewed the history of the Appellant's various applications and then referred to the provisions of paragraph 276B of the Rules. The reasons are disjointed and could have been set out in a more coherent manner, but she determined that the Appellant did not meet the requirements on two bases: first, there was a break in continuous lawful residence in consequence of his imprisonment (see page 4 of the refusal) and, second, in view of the Appellant's conviction his presence in the UK was undesirable (see page 3 of the refusal). In such circumstances the Respondent determined that the Appellant failed to satisfy the requirements of paragraph 276B(i), (iii) and (v) of the Rules.
5. The Respondent also gave some consideration to the Appellant's case with respect to Appendix FM and, more particularly, paragraph 276ADE of the Rules. In respect of paragraph 276ADE it was decided that the Appellant could not satisfy sub-paragraph (i) because he did not meet the suitability criteria with reference to paragraph S-LTR 1.6 of Appendix FM. It was also determined by the Respondent that the Appellant did not satisfy the requirements of paragraph 276ADE(vi), that is to say in respect of significant obstacles to integration in his country of nationality. In conclusion the Respondent determined that there were no exceptional circumstances to warrant a grant of leave outside of the Rules.
6. The particular factual issue that was at the core of the Respondent's decision and informed the unfavourable outcome on the Appellant's

application in respect of paragraph 276B was the break in continuous lawful residence and his previous conviction. Inevitably that contentious factual issue dictated the course of the appeal and indeed much of the focus of the consideration of evidence and submissions before the FtTJ. Suffice to say for present purposes that the FtTJ found against the Appellant on these as well as other points. The FtTJ noted following an agreement by the Appellant's then counsel that the sole issue in the appeal was whether the Appellant satisfied the long residence provisions of the Rules. Before the FtTJ, while counsel conceded that there was a break in continuous lawful residence from 1 July 2008 until 8 October 2008, as a consequence of the Appellant's imprisonment, counsel relied on the Respondent's guidance and the requirement to consider evidence of exceptional circumstances that prevented an application being made within 28 days of overstaying.

7. The FtTJ's findings are set out briefly at [13] to [20], but is clear that there is some mis-numbering as there is no paragraph [17] to [19].
8. In view of counsel's concession, the FtTJ found that residence was broken due to the Appellant's imprisonment and further found that he was without leave from 16 May 2012 to 22 January 2014. The FtTJ, without specific reference to the terms of the guidance, concluded that the Appellant's inability to make an application due to his imprisonment could never amount to an exceptional circumstance. He proceeded and found, "in relation to the refusal on character grounds," that the Respondent properly exercised her discretion in refusing the application in view of the Appellant's deception evidenced by his conviction which showed "a contempt and blatant disregard for the immigration system."
9. The FtTJ was of the view that there were no arguably good grounds for leave to remain to be granted outside of the Rules, but went on to consider the position outside of the Rules in two short paragraphs. He had regard to section 117B of the Nationality, Immigration and Asylum Act 2002. He noted the Appellant spoke English and that he was not financially independent and that such factors did not outweigh the public interest. The FtTJ accordingly found that the refusal was proportionate.
10. The Appellant sought to challenge the FtTJ's conclusions in this regard. Permission to appeal was granted by Designated First-tier Tribunal Judge McDonald on 9 June 2017.
11. I am satisfied that the central submissions advanced by Mr Malik on behalf of the Appellant are correct to the following extent such that the decision should be set aside.
12. Mr Singh was right to concede that ground one is well-founded. The FtTJ plainly erred in finding that the Appellant was without leave from 16 May 2012 to 22 January 2014. Mr Malik helpfully set out the Appellant's immigration history in chronological order with a corresponding

explanation of the legalities of the periods in question following the in-time application made on 27 August 2011. There is no dispute that following the refusal of that application and the final determination of the appeal on 16 May 2012 by the Upper Tribunal, that there was a subsequent appeal to the Court of Appeal which was disposed of by a Consent Order resulting in a subsequent grant of leave on 22 January 2014. There is no dispute that in the circumstances the Appellant's leave continued by virtue of section 3C(2)(c) of the Immigration Act 1971. While the FtTJ was not assisted by the incomplete immigration history in the Respondent's refusal letter, the full history was discernible from other documentation as noted by the FtTJ at [11].

13. While the error is apparent, Mr Singh submitted that it is not material to the FtTJ's consideration of the appeal under the Rules because the FtTJ correctly found, following a concession made by counsel, that continuous leave had been broken by the Appellant's imprisonment. Mr Malik did not seek to suggest that that concession was either right or wrong, but he contended that the point was erroneously taken against the Appellant as the Respondent did not contend in the refusal that continuous leave had been broken. I reject that submission. Whilst the Respondent could have set out her reasons with greater clarity, I consider that she did take the point at page 3 and 4 of the refusal. Therein she referred to the definition of "continuous residence" by reference to the Rules and concluded that "the Secretary of State considers the period you spent in prison to have broken your lawful residence in the UK." While she did not use the word "continuous", in my judgement, it is clear on a holistic reading of the refusal that that is what she meant. I do not accept therefore that the FtTJ took the issue of his own volition thus giving rise to unfairness.
14. Mr Malik next contended that the FtTJ erred at [14] by proceeding on the basis that the Appellant was refused on character grounds when there was no such reference to that in the refusal. While Mr Malik is correct to point out that there is no express reference to paragraph 276B(ii) of the Rules in the refusal, I consider that it is apparent from the terminology used therein that the point was being taken by the Respondent when she stated at page 3 thereof following a recital of the Appellant's conviction that, "Therefore based upon your personal history including character and conduct the Secretary of State is satisfied it is undesirable for you to remain the UK." I therefore reject this submission as well.
15. While I agree with Mr Malik that the FtTJ erred in failing to take into account in relation to the exercise of discretion that the Respondent granted leave on four occasions following his conviction, but in view of my conclusions above the error cannot be material to the FtTJ's assessment of the application under the Rules.
16. Thus, while I am not satisfied that the FtTJ erred in his consideration under the Rules, I am satisfied that the FtTJ erred in concluding that the refusal was proportionate. There is no dispute that the FtTJ was required as part of

a two-stage process to consider Article 8 outside of the Rules. The FtTJ's consideration of the Article 8 issues is really confined to two short paragraphs which I summarised earlier. On its face it does not follow the careful approach that jurisprudence requires. It might also be noted that there is no express finding in respect of private life - whether as to its existence or its quality.

17. Essentially there is an assessment of the public interest considerations which were conclusive of the question of proportionality with no account being taken of the relevant associated factors personal to the Appellant either in relation to his immigration history, the Secretary of State's view of his conviction following subsequent grants of leave and having no regard to the Appellant's length of residence or to the ties developed over a period of 12 years. I reject Mr Singh's submission that the Article 8 assessment is sustainable on account of the Appellant's precarious private life and his conviction as neither is determinative of the question of proportionality and by reference to the latter he falls into the same error as the FtTJ, in that, it fails to take cognisance of the fact that leave was granted post-conviction on four occasions.
18. In these circumstances, while I do not say that the ultimate decision reached by the FtTJ is wrong, it is the manner and route by which that conclusion has been reached that is flawed.

Notice of Decision

19. The decision of the First-tier Tribunal contained a material error of law and is set aside. I agree with representatives that the appropriate disposal is remittal to the First-tier Tribunal for rehearing by a judge other than FtTJ I Ross.

No anonymity direction is sought or made.

Signed:

Date: 6 October 2017

Deputy Upper Tribunal Judge Bagral