



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: EA/05335/2017  
EA/03279/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 18<sup>th</sup> June 2018

Decision & Reasons Promulgated  
On 21 June 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

ZAHID AFZAL BUTT  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Not represented  
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Row promulgated on 23 October 2017, in which the Appellant's appeal against the decision to refuse to issue him with an EEA residence card recognising a permanent

right of residence dated 13 March 2017 and his linked appeal against the decision to remove him dated 26 May 2017 were dismissed.

2. The Appellant is a national of Pakistan, born on 26 November 1986, who applied for permanent residence on the basis that he was the family member of an EEA national and had resided in the United Kingdom with her for continuous period of five years.
3. The Respondent refused the application on 13 March 2017 on the basis that the Respondent was not satisfied that the Appellant's sponsor had been exercising treaty rights for a continuous period of five years, in particular because she had not worked since 2012. Subsequently, the Respondent issued a notice of liability to removal to the Appellant, followed on 27 May 2017 with the decision to remove him from the United Kingdom.
4. Judge Row dismissed the appeals in a decision promulgated on 23 October 2017 on all grounds. He found that the Appellant had not established that his sponsor was a Qualified Person under the Immigration (European Economic Area) Regulations 2006 as she was not a worker, nor was she self-sufficient for the required period. The Appellant did not meet the requirements for leave to remain in the United Kingdom on private life grounds under paragraph 276ADE of the Immigration Rules and his removal did not constitute a disproportionate interference with his right to respect for private and family life under Article 8 of the European Convention on Human Rights.

### **The appeal**

5. The Appellant's grounds in support of his application for permission to appeal were first, that the First-tier Tribunal erred in its assessment of the Appellant's private life under Article 8 of the European Convention on Human Rights and in particular made a factual error as to the date of the issue of his residence card (granted in May 2011 but recorded as May 2016 in the determination). This was said to be material due to the First-tier Tribunal's finding that the Appellant's immigration status was precarious. Secondly, that the First-tier Tribunal failed to consider whether the Appellant was entitled to a residual right of residence as his spouse was exercising treaty rights to the end of 2012 and the Appellant had resided with his wife over five years of marriage.
6. Permission to appeal was granted by Judge Haria on 23 April 2018, which included the following comments:

*"4. Contrary to what is submitted in the grounds, the Judge did not err in failing to make findings on whether the Appellant was entitled to a residual right of residence as this was not raised in the grounds of appeal. The parties did not attend the hearing the appeal was determined on the papers said the issue was not raised at the hearing. It is not an error of law to fail to make findings on arguments not place before the Judge.*

*5. In an otherwise well reasoned determination the Judge arguably erred in his assessment of the Appellant's private life on the basis of a material error of fact."*

7. The Appellant did not attend the appeal, nor was he represented. On 6 June 2018, the Appellant's legal representatives wrote to the Upper Tribunal requesting that the appeal be considered on the papers with the submission that there was a sole ground of appeal, that the First-tier Tribunal Judge made a material error of fact when determining the appeal, namely the residence card was issued in 2016 when in fact this was in 2011. It was submitted that this error of fact was material and the matter should be remitted to be heard de novo. In response, confirmation was given by the Upper Tribunal that the hearing would not be vacated and it was a matter for the Appellant as to whether he wished to be present and/or represented. In all of these circumstances it was in the interests of justice to proceed with the appeal in the Appellant's absence.
8. The Respondent opposes the appeal and submitted that regardless of any mistake of fact as to when the EEA Residence Card was issued, the finding made in paragraph 27 that private life has been established at the time that the Appellant's immigration status was precarious was one which was open to the First-tier Tribunal Judge to make.

### **Findings and reasons**

9. The key issue in this appeal relates to the First-tier Tribunal's finding that the Appellant's immigration status was precarious, during which time he established his private life (as well as during a previous period as a student). If that is correct in law and in fact, then in accordance with section 117B(5) of the Nationality, Immigration and Asylum Act 2002, little weight is to be attached to that private life. That of course affects the Appellant's side of the balance sheet in the assessment of proportionality under Article 8 of the European Convention on Human Rights.
10. The Appellant claims that this finding is based on an error of fact because the Appellant had the benefit of an EEA Residence Card issued in May 2011, not May 2016 as recorded in paragraph 11 of the decision under challenge. By implication it is therefore submitted that the immigration status of a person with an EEA Residence Card is not precarious.
11. However, it is clear from the case of Agyarko v Secretary of State for the Home Department [2017] UKSC 11 that precariousness includes not only someone here unlawfully but also those here temporarily. Although, as the Appellant's application for permanent residence shows, there may have been a route to settlement in his situation, if he could meet the relevant requirements of the Immigration (European Economic Area) Regulations 2006, his status was still precarious. The significance of the difference between being in the United Kingdom unlawfully or being entitled to remain only temporarily, as the Supreme Court stated in Agyarko [at 51], depends on what the outcome of immigration control might otherwise be. In the absence of continuing to meet the requirements as the family member of an EEA national or requirements for permanent residence, then in this case, there was no other basis which the Appellant would otherwise be granted leave to remain.

12. For these reasons, whether or not the finding in paragraph 27 that the Appellant's immigration status was precarious was based on a mistake of fact in paragraph 11 that his EEA Residence Card was issued in May 2016 (as opposed to for example a typographical error in that paragraph) has no material impact on the assessment of proportionality or the outcome of the appeal. Even on the correct factual basis that the EEA Residence Card was issued in May 2011, the Appellant's status was still precarious (including the period prior to May 2011 when he was in the United Kingdom on a temporary basis as a student) and it was therefore correct for the First-tier Tribunal to attach little weight to it in accordance with section 117B(5) of the Nationality, Immigration and Asylum Act 2002. There is no error of law in the decision on this point, nor in the balancing exercise carried out to determine the proportionality of the Appellant's removal.
13. In any event, I would add that it is clear from the decision that the Appellant had not established a particularly strong private life in the United Kingdom and that there were no significant obstacles to his return nor to re-establishing the essential elements of his private life in Pakistan such that even if greater weight was attached to his private life, it is difficult to see that the outcome of his appeal would have been any different.
14. The alternative ground of appeal has not been pursued by the Appellant and was arguably not granted permission by Judge Haria for the reasons set out below paragraph 6 above. To the extent necessary, I agree that there is no error of law by the First-tier Tribunal in failing to make findings on whether the Appellant was entitled to a residual right of residence given that this was not an issue raised or argued before the First-tier Tribunal.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeals is therefore confirmed.

No anonymity direction is made.



Signed

Date

18<sup>th</sup> June 2018

Upper Tribunal Judge Jackson