**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/18663/2018

**THE IMMIGRATION ACTS**

| **Heard at North Shields** | **Decision & Reasons Promulgated** |
|---|---|
| **On 7 August 2019** | **On 21st August 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES**

**Between**

**Z. A.**
**(ANONYMITY DIRECTION MADE)**

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms Najah, Counsel instructed by Law Lane Solicitors
For the Respondent: No attendance

**DECISION AND REASONS**

1. The Appellant, a national of Pakistan, entered the United Kingdom legally in October 2006 with leave to remain as a student. Her leave to remain was then extended on a number of occasions, and in different capacities until the most recent grant that expired on 23 September 2017.

2. On 31 August 2017 the Appellant made, in time, an application for a grant of indefinite leave to remain on the grounds of her long residency. This was refused on 29 August 2018 with reference to paragraphs 276A(a)(v) and 276B(i)(a) of the Immigration Rules. The Respondent relied upon the fact that the Appellant had been absent from the UK for a total of 761 days during the ten year period that she relied upon as the basis for her application. This period ran from October 2006 (the date of entry) to August 2017 (the date of application). The Respondent's calculation of the relevant periods of absence identified the four longest periods of absence as 175 days 9.12.14-3.6.15, 102 days 26.12.12-10.4.13, 175 days 23.1.11-18.7.11, and 113 days 18.6.08 – 10.10.08 [F1]. This calculation has never been placed in dispute, and thus it has never been in dispute that arithmetically the Appellant had been physically absent from the UK during this period for in excess of the period of six months permitted by paragraph 276A(a)(v).
3. The Appellant's immigration history during the period from October 2006 to 31 October 2017 did however demonstrate a sequence of in time applications for leave, so that the combined effect of section 3C of the Immigration Act 1971, and the grants of leave that were specifically made to the Appellant was to provide a chain of periods of leave in different capacities during the eleven year period in question.
4. The Appellant's appeal against the refusal of her deemed human rights claim was heard and allowed on Article 8 grounds by First Tier Tribunal Judge Hands in a decision promulgated on 28 January 2019.
5. The Respondent was granted permission to appeal by decision of 25 June 2019 of Upper Tribunal Judge Pickup on the basis it was arguable Judge Hands' decision was confused, and, contradictory. Arguably the Judge had erred in making inconsistent findings when she had found that not all of the Appellant's absences from the UK could be justified as due to compelling or exceptional circumstances, and yet, that the Appellant had met the requirements of paragraph 276B. Arguably the Judge was said to have used Article 8 as a general dispensing tool and failed to give the appropriate weight to the Appellant's precarious status in the UK and the relevant public interest. Arguably the conclusions were inadequately reasoned and unjustified in the light of the immigration history.
6. There is no cross-appeal brought by the Appellant.
7. A Rule 24 Notice was lodged on 25 July 2019 in response to the grant of permission to appeal. Neither party has applied pursuant to Rule 15(2A) for permission to rely upon further evidence. Thus the matter came before me.

The hearing

8. The hearing of the appeal was originally listed for 2 August 2019, but on that occasion the entire list had to be adjourned because the presenting officer was indisposed on the morning of the hearing. Having consulted the Appellants and their representatives to ascertain their availability, and secured a court room, the entire list was adjourned to 7 August 2019 in an effort to minimise the expense and delay that the parties would otherwise face (two of the appeals being privately funded). Time for the service of the Notice of Hearings was thereby abridged.
9. On 6 August 2019 the Respondent applied by email of 1255 hours for an adjournment of the entire list on the basis it was anticipated that it would not be possible to provide a presenting officer as a result of seasonal staff shortages. That application was refused by email of 1414 hours on the basis there remained ample time for the Respondent to secure adequate representation, if necessary by resort to the services of the Bar. The application has not been renewed. The Respondent did not attend the hearing.
10. In the circumstances I was satisfied that the Respondent is aware of the hearing. I was not satisfied there was any good reason demonstrated as to why the appeal should be adjourned once again of the Tribunal's own motion. The issues were simple, and it was in the interests of justice to proceed with the hearing without delay and with minimal further expense, and the appeal therefore proceeded in the Respondent's absence, having considered paragraphs 2, 36, and 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The challenge raised in the grounds

11. The grounds to the application for permission to appeal to the Upper Tribunal noted that the Judge had concluded that this was only ever a "private life" appeal [23, 33], and that there were no insurmountable obstacles to the Appellant's return to Pakistan [23, 41]. Pausing there, the Appellant has raised no cross-appeal to the Judge's findings of fact upon her relationship with her uncle and aunt in the UK, or, upon her ability to live in Pakistan in safety. Whilst there would no doubt be disruption to the way of life the Appellant had established for herself in the UK she owned property in Pakistan, had family there, and had spent significant periods of time there in safety.
12. The grounds raised four discrete challenges.
13. First it was argued that the decision was confused and contradictory. Having concluded the Appellant had failed to establish that her absence from the UK between December 2014 and June 2015 in excess of six months was due to exceptional or compelling circumstances [30-1], it was not open to the Judge to

conclude that the Appellant had demonstrated that she met the requirements of paragraph 276B.

14. Second it was argued that it was common ground between the parties that the Appellant's total number of relevant absences from the UK was 761 days [4, 16]. It was not in the circumstances open to the Judge to use instead a figure of 720 days as the total of her periods of absence.
15. Third it was argued that the Judge had resorted to using Article 8 as a general dispensing tool having concluded that the Appellant did not meet the Immigration Rules. The Judge had failed to offer adequate reasons for any conclusion that it was disproportionate to expect the Appellant to return to Pakistan. That conclusion was not one that was open to her in the light of her findings, the relevant jurisprudence, and section 117B of the 2014 Act.
16. Fourth it was argued that the conclusion that the refusal of the application was disproportionate was inconsistent with the finding that the Appellant had failed to establish that she met the requirements of the Immigration Rules, and thus one that was not open to her.

The Appellant's response

17. Although there is no cross-appeal from the Appellant the Rule 24 response argues that the Judge's approach to the appeal erred in not following the guidance to be found in Balajigari [2019] EWCA Civ 673; if she had then it is argued that she would have allowed the appeal, because she would have "stepped into the shoes of the decision maker" to exercise a general discretion.
18. It is conceded that the parties were agreed before the Judge that the calculation of the Appellant's absences from the UK during the relevant period amounted to a total of 761 days [#10].
19. It is argued that it was open to the Appellant to establish that some of her absences from the UK were for compelling compassionate reasons, and thus that they should be left wholly out of account in the calculation of 761 days. Although the argument as framed is not easy to follow, it is based upon the Respondent's published guidance of 3 April 2017, although no passage with the effect argued for is identified within that guidance.
20. As a subsidiary argument the Appellant points to the fact that the Respondent's own calculations of her absences show that none equalled or exceeded a period of 180 days [F1]. Thus it is argued that none equalled, or exceeded, a period of six months (since a month is 30days in this context) with the result that there is no break in the chain of "continuous residence".
21. At the hearing Ms Najah chose to focus upon this subsidiary argument. She also argued that the Appellant was entitled to take the date of hearing and then work back from it for a period of ten

years in order to show that the periods of absence in this period (10.1.09 – 10.1.19) were less than 540 days in total, and thus that the requirements of the Immigration Rules were met as at the date of the hearing.

22. In any event, Ms Najah argued that since this was a human rights appeal the Judge was obliged to undertake a holistic assessment of the relevant facts, and the Appellant was entitled to bring into the balance of proportionality the reasons for her absence from the UK. She argued that since the majority of those absences were for compelling and compassionate reasons (although the Judge's findings offer no support for that proposition) then there was either no public interest in the decision under appeal, or, it was outweighed by the weight that should be given to the Appellant's "private life". She argued that there was no public interest in the Appellant being required to make a fresh application for ILR, if as was argued, she now met the requirements of paragraph 276B but had failed to do so either at the date of her application, or, the date of the decision under appeal.

Conclusions

23. The Appellant enjoyed no recourse to a ground of appeal that the Respondent's decision was not in accordance with the law; the only applicable ground of appeal open to her was that the decision under appeal amounted to a disproportionate interference in her Article 8 rights; section 84 of the 2002 Act.

24. The Judge concluded that the decision under appeal potentially engaged the Appellant's Article 8 rights [22]. Although she failed to clearly specify why, or which "gateway" she was considering when reaching that conclusion, it is in my judgement clear once the decision is read as a whole that the Judge could only have been considering the balance of proportionality in the context of a "private life" appeal. She had noted that the Appellant was not in a relationship with anyone in the UK, and had no child living in the UK. As noted above, the Judge had considered the evidence that the Appellant had lived as an adult member of the household of her aunt and uncle since 2006, but she had made no positive finding that the nature of the Appellant's relationship with any member of that household was sufficient to constitute "family life" [33]. The Judge had considered the health of the Appellant's uncle, but had declared herself unable to assess the true meaning of the medical report relied upon as evidence of his condition. Whilst the Judge declared that she had no reason to doubt the Appellant's evidence concerning her uncle's health or the care that was provided by the Appellant to him, she found that she was not satisfied that it was sufficient to show that the Appellant's presence in the UK was necessary for his well being. Thus it was declared

that there would be no interference in her "family life" should he leave the UK [sic]. As noted above there is no cross-appeal, and the finding that the Appellant did not enjoy "family life" with any individual living in the UK must therefore stand.

25. The Judge stated that she was prepared to give "some weight" to the Appellant's private life. It is difficult to discern from the decision precisely what the Judge accepted this "private life" consisted of, bearing in mind that no individual had offered evidence at the hearing on her behalf. However, given the nature of the evidence relied upon, and the Judge's observations, it must in my judgement have been accepted to consist of two elements. First the membership of the household of her uncle and aunt, and the time physically spent in the UK; the "conventional private life". Second her business interests; the "business private life".
26. The Judge appears to have been somewhat sceptical of the financial information provided in relation to the Appellant's business, and whether it was financially viable or profitable [38-40]. However the Judge made no adverse findings in relation to this, and in particular there was no finding that the business was insolvent, or a sham dishonestly created in order to provide a foundation for previous applications for grants of leave to remain. Thus it is difficult to see precisely how the Judge treated the business for the purposes of the Article 8 claim. Neither of those appearing below, nor the Judge, appear to have engaged with the guidance to be found in Onwuje [2018] EWCA Civ 336 concerning the weight that could be given to business interests created whilst an individual held a lawful, albeit precarious, immigration status.
27. My starting point must be therefore that the Judge did find, and was entitled to find, given the applicable low threshold of engagement, that the decision under appeal engaged the Appellant's Article 8 rights as a result of the interference it would occasion to her "private life" in the UK. Notwithstanding the Respondent's general criticisms of the decision as contradictory and confused, this much is clear.
28. A well structured decision ought to have considered where in the "private life" continuum the facts of the Appellant's case placed her, and thus how close she fell to the concept of moral and physical integrity and how far removed from this core she fell, so as to allow an assessment of how readily her interests were defeasible by those of the state; Patel [2013] UKSC 72 and Nasim and Others (Article 8) Pakistan [2014] UKUT 25. On the facts as she had found them to be the Judge ought to have concluded that the "private life" the Appellant had established was removed from the core concept of moral and physical integrity.
29. The Judge's assessment ought then to have turned to the question of whether the Appellant met the requirements of the Immigration

Rules for the application she had made, at either the date that application was submitted, or, decided. If the Judge had followed that course then she would have been bound to note as her starting point that the parties were agreed that however one sought to calculate a ten year period between arrival and application for ILR, or, between arrival and decision upon that application, there were a total number of 761 days absence from the UK. It was simply not open to the Judge to substitute some other figure for that agreed total, and when she did so she plainly fell into material error. Ground 2 is made out.

30. The Judge ought then to have considered the disputed question of whether in the circumstances the Appellant had met the requirements of paragraph 276A(a)(v) of the Immigration Rules. Since the undisputed figure of 761 days well exceeded the figure of 540 days set out in the over-riding condition of paragraph 276A(a)(v), the Appellant plainly did not do so, and again the Judge plainly fell into error in apparently concluding otherwise. Ground 1 is made out.
31. The appeal appears to have been argued before the Judge (as I fear is reflected in the drafting of the Rule 24 response) on the basis that the free standing nature of the over-riding condition contained in paragraph 276A(a)(v) was ignored. Alternatively the way in which the operative elements of paragraph 276A(a) operated together with the published guidance [v15.0 of 3 April 2017], was confused, so that the free standing nature of this over-riding condition was not adequately recognised, or engaged with.
32. There is in my judgement no proper basis for the argument advanced on behalf of the Appellant that the same discretionary provisions brought into consideration in relation to periods when an applicant was within the UK, but an "overstayer", so as to excuse them from the breaks in the chain of grants of leave that would otherwise exist, should be transposed to excuse periods of physical absence from the UK, with the result that they should be left out of account altogether from the calculation of total absences for the purposes of paragraph 276A(a)(v). Nor is it possible, simply because none of the individual periods of absence from the UK exceeded 180 days, to leave them out of account from the calculation of total absence. There is nothing in the Respondent's published guidance of 3 April 2017, or the wording of the Immigration Rules themselves which would permit such an approach.
33. It was not suggested before the Judge that the Appellant met the requirements of paragraph 276ADE for a grant of leave.
34. It follows that the Judge's approach to the balance of proportionality was flawed because she took as her starting point her unsustainable and inconsistent finding that the Appellant met

the requirements of the Immigration Rules, when she did not, and when the Judge had elsewhere concluded that she did not.

35. Thus it follows that I must set aside the Judge's decision and remake it. The findings of primary fact are unchallenged by any cross-appeal. There is no suggestion that I need to make any additional findings of primary fact in order to do so, and neither party has made any application that I should hear further evidence in order to do so.

The decision remade

36. There is, plainly, a public interest of significance in the maintenance of effective immigration controls; section 117B(1). The Appellant could not meet the requirements of either paragraph 276A or paragraph 276ADE when she made her application, or, when a decision was made upon it.

37. Those provisions represent the Secretary of State's judgment of the balance required by the public interest in the generality of "private life" cases based on long residence. It will only be exceptionally that there will exist compelling reasons sufficient to require a discretionary grant of leave to remain outside the Rules.

38. The Tribunal is only permitted to give little weight to a "private life" established whilst the Appellant has enjoyed a lawful but precarious immigration status; section 117B(5). This is not however to say that the "private life" relied upon should be given no weight.

39. The Appellant's "private life" consists of both the "conventional" resulting from the length of time spent in the UK and her longstanding membership of the household of her uncle and aunt, and, that resulting from her involvement in her business. I bear in mind the guidance of the Court of Appeal in Onwuje to the proper approach in such circumstances;

> 25. As regards private life, the position has arguably been unnecessarily complicated by the emphasis placed by the FTT on the Appellant's involvement with his business. Mr Mustafa made it clear that the Appellant had always relied also on conventional private life grounds. In his witness statement in the FTT he gave evidence, albeit in fairly general terms, about the friendships and social life that he and his wife and children had developed in their local community and how fully integrated they were, particularly through church and school. It is fair to say that those general statements were not supported by very much in the way of independent evidence: the letters from the Appellant's church and his daughter's school are perfunctory. Nevertheless, the general proposition is entirely plausible. I would therefore be prepared to hold that the FTT was entitled to find that the right to respect for the private lives of the Appellant and his wife and children was engaged by their liability to removal, even without any reference to his business.

> 26. Having said that, I have no difficulty with the proposition that in some circumstances an entrepreneur's ownership of, and involvement in, his or her business may also be regarded as an aspect of their private life for the purpose of article 8. In a well-known passage of its judgment in *Niemietz v Germany* (1993) 16 EHRR 97, the ECHR said, at para. 29:
>
> > "The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world."
>
> There are certainly cases where the work that a person does can properly be described as integral to their "physical and social identity" (to use the language of the ECHR in *Pretty v United Kingdom* (2002) 35 EHRR 1, at para. 61); and a case where an individual has established a business in which he or she remains actively involved may well come into this category. As regards this particular case, the Appellant's witness statement does not explicitly rely on the business as an aspect of his identity. Rather, it focuses on its importance to the local economy and to its clients, neither of which has anything to do with article 8; and that is likewise the focus of the FTT's reasoning. Since I would in any event find that article 8 was engaged on the more conventional basis discussed above, it is unnecessary to decide definitively whether on the basis of that evidence the Judge was entitled, to the extent that he did, to take the Appellant's involvement in Casgo into account when addressing the first two *Razgar* questions; but I am inclined to think that, despite its deficiencies, he was.

40. I take into account the Judge's findings in relation to the "conventional private life" claim [33-4], and I do give them weight. On the other hand, as noted above, they do not place the Appellant at the core of the "conventional private life" concept of moral and physical integrity.
41. Turning to the "business private life" claim, I note the absence of evidence from either employees or clients of the Appellant's business, and thus the absence of evidence concerning the personal relationships the Appellant had established with either [38-9]. I discount the Judge's apparent scepticism over the business itself. I give weight to the existence of the business, and to the fact that the Appellant must have committed significant effort to its creation, and subsequently to its maintenance for it to have survived. On the

other hand, the proper approach to a "business private life" claim must be as indicated in Onwuje.

42. Thus, whilst it appears to have been argued on behalf of the Appellant that her business would collapse if she were not granted ILR, this is very far from being self-evident. No such claim was made by the Appellant in her witness statement of 3 January 2019, or, on her behalf by her accountant. No such finding was made by the Judge, and I am not prepared to draw such an inference. The business has plainly survived her lengthy absence from the UK in the past, and she has not demonstrated why if it were profitable (as the disclosed accounts suggest it is) she is unable either to sell it, or, to run it from abroad. Thus she is, and has always been, in a position to extract in monetary terms whatever value the marketplace considers her investment of time and money has created.
43. Unless the Appellant is able to satisfy the criteria for a grant of leave as an investor or entrepreneur established from time to time under the Immigration Rules as the Respondent's policy demands, and it is not suggested that she is, then it is difficult to see why the mere creation or ownership of a business should require the discretionary grant of leave to remain outside the Rules. For the Tribunal to use Article 8 in this way would in my judgement inevitably draw it into making value judgements on profitability, economic value, and/or value to the community of a variety of businesses, that would be wholly inappropriate, and would inevitably lead to the loss of public confidence in human rights law that the President has warned against; Thakrar [2018] UKUT 336.
44. Nor, in my judgement, is this a situation which engages the principles rehearsed in Chikwamba and subsequent jurisprudence. No attempt has been made to demonstrate that the Appellant would necessarily succeed were she to make a fresh application (in any capacity) today, whether from within the UK, or by way of leave to enter from Pakistan.
45. I turn then to the argument that less weight should be afforded to the public interest in maintaining the decision to refuse to grant the Appellant ILR because some of her periods of absence would not have occurred were it not for the compelling and compassionate circumstances she has been faced with from time to time.
46. No such argument is raised in relation to the 2007, 2008, or 2009 absences of 58, 113 and 92 days, together totalling 263 days.
47. The first period to which this argument is said to apply was that commencing in January 2011, totalling 175 days. The Judge treated this argument as also being raised in relation to the next period of absence commencing in January 2012, totalling 39 days. The third period to which this argument is said to apply was that which

commenced in December 2012, totalling 102 days, which followed her mother suffering a stroke in November 2012.

48. No such argument is raised in relation to the absence commencing in December 2014 of 175 days, or, the absence in January 2017 of 7 days. It is the Judge's approach to this period of absence which is criticised by the Appellant, correctly, as having been subject to an unwarranted "rounding up" so that the absence of 175 days (which was indeed the Respondent's own case [F1]) was incorrectly rounded up by the Judge so that it incorrectly became an absence of 180 days [30]. Whilst the Judge did so, nothing turns on it, since I have ignored the error in my own consideration of the evidence.
49. Thus no such argument is raised in relation to a total of 445 days of absence, but the Appellant seeks to take out of account the whole of the three periods of absence of 175 days, 39 days and 102 days occurring between 2011 and 2013. I am satisfied that the Judge's approach to this argument was, at best, confused, and at worst one that was not open to her on the evidence [29-30].
50. There was no express finding, and indeed no evidence that would appear to have allowed any such finding, as to how long the Appellant had originally intended to stay in Pakistan for when she commenced the January 2011 trip, and thus how long she would have been absent for in 2011 had her father not died shortly after her arrival. There was for example no evidence concerning the date of her original flight booking, and its rearrangement. Even the Appellant's witness statement of 3 January 2019 accepted that she was physically absent from the UK when her father died, and that this necessitated a longer stay than originally planned – but wholly failed to engage with what the original plans were, or by how much the trip was extended.
51. Nor could it be said that the lengths of either of the periods of absence of 175 days, 39 days, or 102 days between January 2011 and April 2013 were out of the pattern of absences and their length that occurred either prior to January 2011, or after April 2013. Thus I note that the Appellant was absent for a 113 day visit to Pakistan in 2008, and for a 175 day visit in 2014/5.
52. Accordingly it was not open to the Judge to conclude that the Appellant would not have been absent from the UK for in excess of 540 days had it not been for the death of her father, or, the stroke suffered by her mother. Indeed it is very far from clear that the Judge ever intended to reach such a conclusion, since I note that she expressly rejected precisely this argument [31].
53. It is unclear how the Judge calculated that the Appellant spent an extra 90 days in Pakistan as a result of these events, which she would not have spent in Pakistan if they had not occurred, and which should be excused because of exceptional and compelling circumstances [29]. Nor is it clear which of the three periods of

absence she was applying it to. Even if such a finding were open to her (and I am very far from being persuaded that it was) then arithmetically it would still leave the Appellant as absent from the UK for well in excess of the 540 days permitted in the ten year period relied upon (761 – 90 = 671).

54. I note the Judge's findings that the Appellant's mother continues to live in Pakistan, and, that the Appellant herself owns property in Pakistan. Plainly the Appellant was well educated in Pakistan, before travelling to the UK for her tertiary education. There is no suggestion that the Appellant has lost her fluency in any relevant language and plainly she has marketable skills if she needed to seek employment, or, chose to start a business in Pakistan. The Appellant has a home, and close family to return to, and arguably her mother would benefit from her presence and support. It is also quite clear the Appellant could live permanently in safety in Pakistan if she was willing to do so. I can identify on the facts of this appeal no good reason why the Respondent should bow to her wish that she be granted ILR, even though she was not entitled to it when she made her application for it, or when that application was refused.

55. It is asserted, baldly, that the Appellant meets the requirements of the Immigration Rules now but the evidence does not establish that this is the case – if such an application were made now she would be obliged to demonstrate more than that her periods of absence in the period 7.8.09 to 7.8.19 were below 540 days, and she has not done so. I can see no good reason why she should be relieved of the obligation of making a fresh application, and paying the appropriate fee, should she consider that she is now entitled to a grant of leave under any avenue open to her under the Immigration Rules.

56. Looking at the evidence in the round I am therefore satisfied that on the facts of this case the decision under appeal was a proportionate interference in the Article 8 rights of the Appellant. In the circumstances I dismiss the Article 8 appeal.

**DECISION**

The Determination of the First Tier Tribunal which was promulgated on 28 January 2019 is affected by material errors of law in the decision to allow the Appellant's human rights appeal which require that decision to be set aside and remade.

I remake the decision so as to dismiss the human rights appeal.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

**Signed**

Deputy Upper Tribunal Judge JM Holmes
Dated 9 August 2019