Upper Tribunal
(Immigration and Asylum Chamber)

Case No: UI-2023-003667

First-tier Tribunal No: HU/59333/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated

12th February 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

MANISH CHIMANBHAI PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Iqbal, Counsel instructed by Connaught Law
For the Respondent: Mr E. Terrell, Senior Home Office Presenting Officer

Heard at Field House on 8 December 2023

DECISION AND REASONS

Introduction

1. The appellant is a citizen of India born on 10 May 1973. He appeals against a decision of First-tier Tribunal Judge Hyland (the judge) promulgated on 24 July 2023, dismissing his appeal against the decision of the Secretary of State (the respondent) dated 21 November 2022, to refuse the appellant's human rights application, made on the basis of his private life under Article 8 ECHR.

Factual Background

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2. The appellant arrived in the United Kingdom on 6 July 2003 with entry clearance conferring leave to enter as a visitor.

3. On 17 August 2011, the appellant made a human rights application which was refused on 26 September 2011. On 15 March 2016 the matter was reconsidered with the decision to refuse the application with no right of appeal upheld.

4. The appellant made a further application for leave to remain on 15 December 2021, on the basis of his private life Article 8 ECHR. The respondent refused that application on 21 November 2022 on the basis that the appellant did not meet the requirements of paragraph 276ADE(1)(iii)-(vi) of the Immigration Rules because he was not under 18 years old, or between the ages of 18 and 25 at the date of application. It was also noted that the appellant had lived in the UK since 6 July 2003 and, in consequence, the respondent was not satisfied that the appellant had lived in the UK continuously for 20 years at the date of application. The respondent was further satisfied that there were no very significant obstacles to the appellant's integration into India, if required to leave the United Kingdom.

5. The respondent did not accept that there were any exceptional circumstances in the appellant's case which would render the refusal a breach of Article 8 such that would result in unjustifiably harsh consequences, or that the appellant otherwise qualified for a grant of leave to remain outside the Immigration Rules on the basis of compassionate factors.

6. The appellant appealed. The judge noted that the appellant relied on Article 8 on the basis of his period of residence in the UK, 18 years at the time of application and 19 years and 11 months at the date of hearing, and his lack of ties to his country of nationality to demonstrate that there would be unjustifiably harsh consequences if he were to be returned to India.

7. At the hearing the respondent was not represented. The judge heard oral evidence from the appellant and submissions from his counsel, Mr Iqbal (who appears before me). Mr Iqbal conceded before the judge, in view of the appellant's evidence that he was in contact with at least three close family members in India, that there were no very significant obstacles to the appellant's integration on his return.

8. There was no dispute before the judge that the appellant had resided continuously in the United Kingdom since his entry on 6 July 2003. At the date of hearing, therefore, the appellant's residence in the United Kingdom was, as the judge noted, twenty-nine days short of the 20-year threshold required under paragraph 276ADE(1)(iii) of the Immigration Rules. However, it was the appellant's case before the judge, as submitted by Mr Iqbal, that this could amount to an exceptional circumstance because in the event the appeal was dismissed, the appellant would nonetheless cross the 20-year threshold by the time his appeal rights had been exhausted (at [10]).

9. Whilst the judge found the appellant had resided in the United Kingdom continuously since 6 July 2003, she noted that the appellant could not succeed under the private life Immigration Rules as he could not

demonstrate that he was continuously present in the UK for over 20 years at the date of the application.

10. The judge proceeded to examine therefore whether the appellant's appeal could otherwise succeed under Article 8. The judge concluded that Article 8 was "engaged" by reason of the respondent's refusal resulting in a sufficiently grave interference with the appellant's established private life in the United Kingdom, and thus observed the matter boiled down to the question of proportionality. The judge factored into her assessment the appellant's failure to meet the Immigration Rules and the public interest considerations under paragraph 117A-D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), and, in her application of paragraph 117B thereof stated thus:

> " 19. ...I attach only little weight to the private life that the appellant has established when his immigration status was not only precarious, but unlawful once his leave ended. Whilst the appellant speaks some English and is of good character, which goes in his favour, he would be reliant upon the NHS."

11. The judge then characterised the appellant's case as advanced by Mr Iqbal as a 'near-miss' argument, and by reference to the case of Miah v Secretary of State for the Home Department [2012] EWCA Civ 261 observed, on that basis, the appeal must accordingly fail. In giving notice of her decision the judge stated, "[t]he appellant is unable to satisfy the immigration rules", and "[t]he appeal is dismissed on human rights grounds".

Grounds of appeal

12. The grounds are concise and essentially argue, first, that the judge misconstrued the appellant's case as a 'near-miss' argument and, in doing so, second, failed to take into account a relevant consideration, namely, the appellant's length of residence at the date of hearing and the fact that he had crossed the 20-year threshold by the time the judge promulgated her decision on 24 July 2023.

13. Permission to appeal was granted on renewed application by the Upper Tribunal on 8 November 2023 on all grounds.

Discussion

14. It is not necessary to recite the submissions of the representatives. They are reflected where necessary to support my conclusions below.

15. The jurisdiction of the First-tier Tribunal was to hear the appellant's appeal against the refusal of his human rights claim, made on the basis of Article 8 ECHR. No ground of appeal lies against the Immigration Rules as the judge purported to identify at [22].

16. The factual background before the judge was uncontroversial. There was no dispute the appellant entered the United Kingdom on 6 July 2003, and lived here continuously up to the date of hearing before the judge on 7 June 2023. There was also no dispute that the appellant was by that date 29 days short of the 20-year threshold required under paragraph 276ADE(1)(iii).

17. In his opening submissions Mr Iqbal sought to argue by reference to authorities in other jurisdictions a general proposition, namely, whether the judge was entitled to consider material facts that came into existence post-hearing and prior to promulgation. In the context of this case, Mr Iqbal submitted that the judge ought to have considered that by the time she promulgated her decision on 24 July 2023, the appellant's length of residence crossed the 20-year threshold.

18. There are several difficulties with this submission. First, it strays too far from the grounds of appeal upon which permission to appeal was granted. Second, the authorities upon which Mr Iqbal relied essentially relate to circumstances where a judge who has announced his or her decision is entitled to change his or her mind, which as Mr Terrell rightly identified is not relevant in this case. Third, the judge was required to decide the appeal on the circumstances appertaining at the date of hearing. At the date of hearing, the appellant could not establish a residency requirement of 20 years at the date of application, as required by the Immigration Rules. Fourth, when this Tribunal further observed that the appellant's case was not analogous to circumstances where, for instance, a country guidance case is reported after a hearing, which if applicable a judge is required to consider before promulgation, Mr Iqbal sensibly resiled from pursuing this argument and restricted himself to amplifying his grounds.

19. Having considered the submissions of the representatives, I announced my decision at the hearing that I was satisfied the judge erred in law as contended by Mr Iqbal. My reasons are as follows.

20. I accept Mr Iqbal's submission that he did not put the appellant's case on the basis of a 'near-miss' argument, that is plain at [10], but the judge characterised it as such at [11] and [21], the material ground is, however, the second ground, namely, that the judge should have weighed into the balance the appellant's length of residence and the fact that he was likely to have accrued 20 years continuous residence by the time the appeal was finally determined and, by extension, would have been entitled to apply for leave to remain on private life grounds under the Immigration Rules. I agree with Mr Iqbal that these were relevant factors which the judge ought to have considered, regardless of whether this was a near-miss argument or not, but she did not do so.

21. Whilst Mr Terrell, said all that he could in his reliance on paragraph [19] and [20] of the judge's decision, these references do not demonstrate that the judge properly "balanced the competing factors" in play on both sides. At [19] the judge applies section 117B and rightly attributes "little weight" to the appellant's private life, but then misapplies it, by stating that "[w]hilst the appellant speaks some English and is of good character, which goes in his favour…", which demonstrates a misunderstanding of the provisions, and [20] is merely a statement of the judge's conclusions in respect of proportionality. What is apparent from these paragraphs is that the judge's assessment was brief, incorrect, and not adequately balanced.

22. The judge, in my view, plainly erred in law in failing to take into account relevant factors in the proportionality balance under Article 8. I cannot say for certain that the judge would have reached the same conclusions had she not erred. In the circumstances, I consider it appropriate to set the

decision aside. The judge's factual findings at [14] and [15] are preserved and, in particular, her finding that the appellant "has been in the UK continuously since his arrival, a date agreed by the respondent as 6 July 2003", and her finding "that the appellant has established a private life during his period of residence in the UK".

23. At the hearing before me, the parties agreed that it was appropriate for me to remake the decision.

Remaking

24. Mr Terrell confirmed that the only factual issue outstanding was whether the appellant had left the United Kingdom since the date of hearing before the judge on 7 June 2023. Mr Iqbal called the appellant to give evidence in English and he adopted the contents of his witness statement. In answer to Mr Iqbal's supplementary questions the appellant confirmed his date of entry as 6 July 2003 and stated that he had not since left the United Kingdom. In answer to questions from Mr Terrell the appellant again confirmed that since his date of entry in 2003 he had not left the United Kingdom. Neither representative considered it necessary to make any further submissions.

25. At the hearing before me Mr Iqbal accepted the appellant could not meet the requirements of the Immigration Rules at the date of application. The parties agreed therefore that the central issue is Article 8 outside of the Immigration Rules; the burden of proof being on the appellant to establish the primary facts to a standard of a balance of probabilities and for the respondent to justify removal under Article 8(2).

26. The judge found the appellant has been resident in the United Kingdom continuously since his entry on 6 July 2003. I accept that since the hearing of his appeal before the First-tier Tribunal on 7 June 2023, the appellant has continued to reside in the United Kingdom and has not at any time left this jurisdiction since his entry in 2003. The appellant has therefore been resident in the United Kingdom for a period of 20 years and 5 months. It is not claimed the appellant has established a family life in the United Kingdom; the focus of the Article 8 claim is on the basis of the appellant's private life only.

27. I undertake the Article 8 assessment in accordance with the guidance in R v SSHD ex parte Razgar [2004] UKHL 27. The appellant has been here since 6 July 2003 so he will have established a private life. His removal would interfere with that private life. It is not argued that his removal would be otherwise not in accordance with the law, and I accept that his removal would be necessary in a democratic society.

28. I turn then to proportionality.

29. In view of the appellant's evidence before this Tribunal, it is not the Secretary of State's case as advanced by Mr Terrell that the appellant has left the United Kingdom since he arrived on 6 July 2003. It is instead the Secretary of State's case that the appellant did not meet paragraph 276ADE(1)(iii) at the date of the application. There is no dissent by Mr Iqbal about that. At the date of application, the appellant had clocked up a period of residence of 18 years only. On the other hand, Mr Terrell did not dissent from Mr Iqbal's case on behalf of the appellant, that, as he has now been in

the United Kingdom for over twenty years, he should succeed in a new application on private life grounds under the Immigration Rules. These are the competing submissions of the parties which I factor into my assessment.

30. In undertaking the proportionality exercise I take into account the factors set out in section 117B of the 2002 Act and I balance the public interest considerations against the factors relied upon by the appellant. I weigh the following factors in the public interest:

- The appellant cannot meet the requirements of the Immigration Rules - he had not lived continuously in the United Kingdom for 20 years at the date of the application.

- It is not argued that he would face difficulties in India, there is no evidence that he would face very significant obstacles to his reintegration there.

- The maintenance of effective immigration controls is in the public interest.

- The appellant's stay in the United Kingdom was initially precarious whilst here as a visitor, but mostly unlawful after his leave ended. The exact date is unclear, but it is likely that he was granted leave to enter for a period of six months. I attach little weight to the private life he has developed in the UK (section 117B (4) and (5)).

- While there is no evidence that the appellant has relied expressly on public funds, he has used a number of public services, including health services.

31. The appellant can speak English (section 117B (1)) and is financially independent (section 117B (2)). I recognise that he can obtain no positive right from either of these factors, but these do not count against him, and are considered neutral factors.

32. In the appellant's favour I take account of the following factors:

- In light of the factual findings at the date of the hearing the appellant has been in the UK continuously for over 20 years.

- The appellant had been resident in the UK for 18 years when he applied for leave to remain. At the date of hearing before the First-tier Tribunal he had been in the UK for nearly 20 years. I acknowledge that there is no 'near-miss' principle applicable to the Immigration Rules, and failure to comply with the Rules, even by a small margin, does not give rise to a presumption that a person falling just outside of them should be treated as though they were within them or be given special consideration for that reason (Miah supra). However, the appellant has, on my findings of fact, accrued 20 years' continuous residence. That is the threshold set by the Secretary of State in para. PL 5.1.(a) of Appendix Private Life denoting when the Secretary of State accepts that it would be unjustifiably harsh for an individual to be removed in light of the longevity of their residence.

- The Secretary of State has not raised (and did not raise at the hearing) any suitability-based concerns militating against a grant of leave to remain.

33. In my judgment, it would be disproportionate to remove the appellant in light of the fact he meets the substantive requirements of the Immigration Rules, namely the 20-year requirement. I accept that he did not meet that requirement at the date of application, but the question of the Article 8 proportionality of his prospective removal must be determined by reference to the length of residence which the Secretary of State, through the Immigration Rules, accepts is the point at which such removal becomes disproportionate. While it could be said that the appellant should make a further application, based on these findings of fact, the question for my consideration is whether to remove the appellant from the UK at the date of the hearing would be disproportionate. In light of the length of his residence it would be.

Notice of Decision

The decision of Judge Hyland involved the making of an error of law and is set aside.
I remake the decision by allowing the appeal on human rights grounds.
I make no fee award.

R.Bagral

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 February 2024