**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-003117

First-tier Tribunal Nos: PA/51215/2023
LP/01552/2024

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 8th of October 2024

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ZUCKER**

**Between**

**FM**
**(ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr R Dar of Counsel instructed by Trojan Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

**Heard at Field House on 25th September 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the Appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the**

**Appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court**.

## DECISION AND REASONS

1. The Appellant is a citizen of Pakistan whose date of birth is recorded as 20th February 1984. On 3rd April 2018 he made application for international protection as a refugee. On 6th February 2023 a decision was made to refuse the application and the Appellant appealed, including in his appeal a claim that the decision of the Respondent violated his human rights pursuant to Article 8.

2. On 24th May 2024 the appeal was heard by First-tier Tribunal Judge Aziz sitting at Birmingham. In a decision dated 30th May 2024 Judge Aziz dismissed the appeal on all grounds. Not content with that decision by application dated 13th June 2024 the Appellant sought permission to appeal to this Tribunal. Unhelpfully the grounds are not enumerated but in essence they are that Judge Aziz:

   (i) Applied the wrong standard of proof. (It is not clear however whether it is contended under the heading in the grounds, "Standard of Proof" that the lower standard of proof ought to have been applied but was not or whether because of the Appellant's mental disorder a lower or more objective assessment of the evidence should have been applied). However this is more particularly dealt with further in the grounds.

   (ii) Assessed the Appellant's account subjectively rather than objectively given the Appellant's mental health issues.

   (iii) In considering the Appellant's private and family life, erroneously, in part, placed in the grounds under the heading "Humanitarian Protection" failed to carry out, sufficiently, a proportionality assessment which ought to have found in the Appellant's favour.

   (iv) Failed to exercise a discretion in the Appellant's favour.

3. On 4th July 2024 First-tier Tribunal Judge Dainty granted permission limited only to Article 8 of the European Convention on Human Rights stating:

   > "It is plain from paragraphs 3 to 4 [of the Decision and Reasons] that Article 8 is in issue and notably the Appellant has been in the United Kingdom since 2011, but in the findings section only one subclause is devoted to Article 8 outside the Rules and there is no balancing exercise at all. On that point alone permission is granted".

4. It is now trite law since the guidance in the case of **Agyarko [2015] EWCA Civ 440** that the Secretary of State has a residual discretion whether to grant leave outside the Rules, see for example **SSHD -v- SS (Congo) [2015] EWCA Civ 387** but in particular paragraph 10 of **Agyarko** itself. It was said however in **Agyarko** that

   *"It was not incumbent upon the Secretary of State to cast around herself to try to fashion alternative arguments which might be advanced by [Mrs Agyarko] under Article 8. This was not an argument of such obviousness that the Secretary of State might be said to have come under an obligation to consider it regardless of*

*whether it was distinctly mentioned by the Appellant. Accordingly, the Secretary of State cannot be said to have erred in law in failing to grant leave to remain on this basis."*

5. However, the situation is somewhat different when matters come before a Court or Tribunal. That is because the wording of Section 117A of the Nationality, Immigration and Asylum Act 2002 mandates a Court or Tribunal to have regard to those matters set out at Section 117B. Consideration is to be given to the maintenance of effective immigration control being in the public interest; the ability of an Appellant to speak English; the independence of a particular Appellant; whether the private life or family life was established at a time when a person was unlawfully in the United Kingdom, with little weight to be given to any private life established at a time when the person's immigration status was precarious, and goes on then to consider persons who are not liable to deportation having genuine and subsisting parental relationships with a qualifying child.

6. What is required therefore is for those factors set out in the preceding paragraph to be taken into account in an overall balancing exercise having the public interest on the one side and the competing private interests of the Appellant on the other. Because the judge failed to reference Section 117A or B and because the judge was required to do so that in my view amounts to an error of law. Ms Cunha did not dissent from that view.

7. In those circumstances because there is an error of law, I set aside the decision of Judge Aziz for it to be re-made here in the Upper Tribunal.

8. In the re-making however I find that Judge Aziz has in making findings of credibility which are not essentially challenged given sufficient reasons for finding that the Appellant was an unreliable witness. It is not necessary for me to go through line by line the decision of Judge Aziz because it stands alone and is available for the parties themselves to consider. For the avoidance of doubt, I should say also that I agree entirely with the grant of permission having been limited as it was.

9. What was submitted to me by Mr Dar was that Judge Aziz had failed to give sufficient weight to the length of time that the Appellant had been in the United Kingdom, though it is of note that it is significantly short of twenty years, and more particularly the mental disorder which was accepted by Judge Aziz and which Mr Dar contends is sufficient for the appeal to succeed outside of the Rules.

10. In my view reading the decision of Judge Aziz as a whole and after maintaining the findings which he has made because they are sufficiently explained and justified, and noting that when considering the availability of treatment in Pakistan and any medication and the absence of evidence in certain circumstances, it is inevitable in my view that had Judge Aziz considered Section 117B would have come to the view, as I do, that the balancing exercise favours the Secretary of State and the public interest.

11. Whether or not the Appellant spoke English is neutral in any event. As to those other factors under 117B, Mr Dar did not address me on them but in fairness to him he understood as I went through Judge Aziz's decision why he was facing the uphill battle that he was in seeking to overturn the eventual result of the appeal.

He is to be commended for doing the best he could for his client but in the event the decision of Judge Aziz is clear enough and, in the event, having corrected the error to having now considered section 117B of the 2002 Act, I arrive at the same result. In those circumstances the appeal is dismissed.

**DECISION**

The Decision of the First-tier Tribunal contained a material error of law. The decision is remade and for the reasons set out above the appeal is dismissed.

**D Zucker**

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

**4 October 2024**