Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21440/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th January 2020	**On 17th January 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR MUHAMMAD RAFIQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Mackenzie, Counsel instructed by Legal Rights Partnership
For the Respondent: Mr P Singh, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan. He claims to have arrived in the United Kingdom in 1995. On 19th February 2009, the appellant made an application for leave to remain in the UK on the grounds of long residence. The application was rejected on 3rd March 2009. The appellant made a further application for leave to remain on 6th March 2009 and that application was refused, but the appellant was granted discretionary leave

to remain on 23rd November 2009, valid until 23rd November 2012. On 20th November 2012, he made an application for further leave to remain on Article 8 grounds. That application was refused for the reasons set out in a decision dated 2nd July 2013 and the appellant's appeal against that decision, was dismissed for the reasons set out in a decision of First-tier Tribunal Judge Mayall promulgated on 16th December 2013. On 24th January 2014, the appellant made yet a further application for leave to remain on family and private life grounds. That application was refused for the reasons set out in a decision dated 4th April 2014. A further application was made by the appellant on 16th March 2015 and that application was refused on 19th July 2016, and an appeal against that decision was dismissed for the reasons set out in a decision promulgated on 15th September 2017. The appellant's most recent application was made on 27th February 2018 and was refused by the respondent for the reasons set out in a decision dated 8th October 2018. That decision attracted a further right of appeal and the appellant's appeal was dismissed for the reasons set out in a decision of First-tier Tribunal Judge Paul promulgated on 26th July 2019.

The decision of F*t*T Judge Paul

2. The judge refers to the appellant's immigration history at paragraphs [2] and [3] of his decision. The Judge records, at [4], the matters relied upon by the appellant in support of his most recent application. At paragraph [5], the judge stated:

> "The core feature of the appellant's case throughout has been to try to persuade the relevant authorities that he has been in the country since 1995. On 16 December 2013, in a determination promulgated by Judge Mayall, specific consideration was given to the appellant's evidence and claim that he had been in the UK since 1995. After careful consideration of the evidence, the judge concluded that the appellant had been here since 1999 based on concessions made by the respondent. The judge also said that the date of his arrival would probably fall somewhere between 1995 and 1999. However, he had not established 20 years, and his appeal was dismissed."

3. At paragraphs [11] and [12], the judge stated:

> "11. There was then a discussion between the representatives as to how this appeal could succeed on the basis that the 20-years' continuous residence had to be shown at the date of application. The date of application in this case was 18 February 2018. It followed, therefore, that the appellant would have to show that he had been in the UK since February 1998. I pointed out that, in the light of the previous Tribunal decisions, and in particular the decision of the Upper Tribunal in the second appeal, this was a point that had been exhaustively considered previously. Thus, it appeared at the outset that there was an insuperable burden on the appellant to show that he had been in the country for the requisite period of 20 years at the date of application.
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> 12. For the appellant, Miss Stuart-King submitted that under the Article 8 jurisprudence it was pertinent to look at the situation as of the date of hearing. Now, more than 20 years passed since his accepted arrival in the UK which the respondent had previously conceded was 1999. It followed, therefore, that the Tribunal was invited to consider whether it would be proportionate in all the circumstances; that somebody who had exceeded 20 years by the date of the appeal, for the appellant to have his appeal dismissed and effectively face removal so that he could make a fresh application."

4. The judge's reasons and conclusions are set out at paragraphs [14] to [18] of the decision. The judge noted that the Tribunal previously proceeded on the basis of the respondent's concession that the appellant could prove that he was in the UK by 1999.

5. At paragraphs [17] and [18], the judge stated:

> "17. In my view, it was wrong for the appellant's representatives to argue that, in effect, because the appellant had now completed 20 years by the date of hearing, that in some way narrowed the margin between the consideration of long residence under the Rules and any prospective application under Article 8. The point about long residence under the Rules is that there is no requirement that a person had been in the country lawfully. Clearly, a critical feature in relation to Article 8 (applying the principles of section 117B and obviously the overriding principle of Razgar), is that a person's status is a highly material factor. In my view, there is clearly nothing in this case that distinguishes it from the previous appeals, and the appellant's point that because he now has 20 years that in some way should get him over the finishing line, in my view, is a flawed argument.
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> 18. The fact is that the appellant is entitled to proceed on the basis that he could be treated as being in this country since 1 January 1999, which means that any application he now makes will demonstrate that he probably has been in the country for 20 years subject to all the other requirements of that particular rule being considered. In my view, this was a fundamentally flawed attempt to get around the 20-year rule by relying on the fact that at the date of the appeal he had been in the country for 20 years. The previous decisions of the Tribunals and

> the Courts have established the principle that a 'near miss' is a near miss, but does not help the appellant to get over the finishing line. The only solution now is for the appellant to make another application, which will be considered on the merits in accordance with all the other relevant factors under the long residence Rule provisions."

The appeal before me

6. Permission to appeal was granted by First-tier Tribunal Judge Povey on 28th November 2019. In doing so, he noted that it is arguable that the judge erred in law in failing to properly assess the public interest in the appellant's removal, given that any application made at the date of his determination, would have met the requirements of the immigration rules. That was particularly relevant since the respondent's policy on immigration control is expressed through the rules (including the 20-year rule referred to by the judge) and, as correctly advanced by the grounds, it is entitled to be afforded *'considerable weight'*; TZ (Pakistan) [2018] EWCA Civ 1109 *at [34].*

7. Mr Mackenzie submits the authorities establish that on appeal, s85(4) of the Nationality, Immigration and Asylum Act 2002 properly read, requires the Tribunal to consider the appellant's circumstances as they are at the date of the hearing; SE (Mauritius) -v- SSHD [2017] EWCA Civ 2145 *at [33 & 34]* and OA (human rights; new matter; s120) Nigeria [2019] UKUT 00065 (IAC) *at [33]*. He submits that the Senior President of Tribunals confirmed in TZ (Pakistan) at [32] to [34], that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules.

8. At the hearing before me, Mr Singh on behalf of the respondent candidly accepts the judge was wrong, at paragraph [17], to say that the appeal could not succeed because the appellant could only establish that he has live continuously in the UK at the date of the appeal, rather than at the date of the application. He accepts the judge should have considered the facts as they stood at the date of the hearing. He accepts that in a decision promulgated by First-tier Tribunal Judge Mayall on 16th December 2013, the judge considered the appellant's evidence and the judge

concluded that the appellant had been here since 1999, based on concessions made by the respondent. He accepts that in her decision of 8th October 2018, the respondent confirmed the application does not fall for refusal on grounds of suitability.

9. Mr Singh, properly my judgement, accepts that the decision of the First-tier Tribunal Judge is tainted by a material error of law and should be set aside.

10. As to disposal, the parties agree that the appropriate course is for me to remake the decision, noting the finding made previously that the appellant has established that the has lived in the UK continuously since 1999.

Discussion

11. I am satisfied that the decision of First-tier Tribunal Judge Paul is tainted by a material error of law for the reasons set out in the grounds of appeal and, in particular, the concession properly made by Mr Singh, that I have referred to at paragraph [8] above.

Remaking the decision

12. The only ground of appeal available to the appellants was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The appellant's ability to satisfy the immigration rules is therefore not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative factor, when deciding whether the refusal of the application for leave to remain is proportionate to the legitimate aim of enforcing immigration control.

13. Article 8 is plainly engaged. I find that the decision to refuse the appellant leave to remain may have consequences of such gravity as potentially to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal, as is often

the case, is whether the interference is proportionate to the legitimate public end sought to be achieved.

14. First-tier Tribunal Judge Mayall had previously found that the appellant has lived in the UK continuously since 1999 and he also said that the date of the appellant's arrival in the UK would probably fall somewhere between 1995 and 1999. On any view, as at today's date, the appellant has now lived continuously in the UK for at least 20 years. Mr Singh did not seek to persuade me otherwise and accepts, as set out in the respondent's decision, the application does not fall for refusal on grounds of suitability in Section S-LTR of Appendix FM of the immigration rules.

15. The appellant relies upon his private life. I am satisfied that the appellant has established on a balance of probabilities that he has lived continuously in the UK for at least 20 years and therefore satisfies the requirements to be met by an applicant for leave to remain on the grounds of private life as set out in paragraph 276ADE(1)(iii) of the immigration rules.

16. Having regard to the policy of the respondent as expressed in the immigration rules, and in the absence of any countervailing factors in the public interest that weigh against the appellant, I am satisfied that on the facts here, the decision to refuse leave to remain is disproportionate to the legitimate aim of immigration control. In the circumstances I allow the appeal on Article 8 grounds.

Notice of Decision

17. The appeal is allowed and the decision of First-tier Tribunal Judge Paul is set aside.

18. I remake the decision and allow the appeal on Article 8 grounds.

Signed Date 14th January 2020

Upper Tribunal Judge Mandalia

FEE AWARD

The appellant was unable to satisfy the requirements of paragraph 276ADE of the immigration rules as at the date of his application or as at the date of the respondent's decision dated 8th October 2018. I have allowed the appeal on the basis of the facts as they are as at the date of my decision and in the circumstances, I decline to make a fee award in favour of the appellant.

Signed Date 14th January 2020

Upper Tribunal Judge Mandalia