



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/06350/2016

THE IMMIGRATION ACTS

Heard at Field House

On 27 March 2018

**Decision & Reasons
Promulgated
On 06 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

JAVED ANWAR

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Ahmed, Counsel

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant is a citizen of Pakistan born on 11 February 1976. He first entered the UK on 7 June 2003. On 7 October 2015 he applied for indefinite leave to remain on the grounds of his long residence. His application was refused on 17 February 2016. In brief, the respondent did not consider the appellant had demonstrated ten years' continuous lawful residence, as defined, to meet the requirements of paragraph 276B(i)(a) of the rules. The appellant did not currently have a partner or any children under the age of 18 so he could not qualify under the partner or parent routes. As for his private life, it was not considered there would be very

significant obstacles to his reintegration in Pakistan. There were no exceptional circumstances to justify a grant of leave outside the rules on article 8 grounds.

2. The grounds of appeal to the First-tier Tribunal challenged the decision and maintained the appellant had had over ten years' lawful residence, including leave extended by section 3C of the Immigration Act 1971. Furthermore, the respondent had failed to exercise her discretion or apply her published policy.
3. The appeal was heard by Judge of the First-tier Tribunal Moore on 8 December 2017 at Taylor House. The judge noted the appeal was brought on human rights grounds. He further noted the history in detail, which showed that the appellant had entered the UK on 7 June 2003 after arriving with a transit visa. Having done so, he married an EEA national on 2 December 2003. However, his application for a residence card was refused over concerns regarding the genuineness of the relationship. The appellant left the UK but returned on 17 October 2005 with a family permit as an EEA family member, which he had obtained in Pakistan. He was granted a residence card from September 2007 until December 2012. However, his application for a permanent residence card was refused and his appeal was dismissed. A further application for a residence card was also refused. Again he appealed but this time he withdrew his appeal, instead lodging an application for settlement based on long residence, which he did on 7 October 2015.
4. The appellant told the judge his marriage had been genuine but he had since divorced his wife. He claimed she had given evidence at an appeal hearing in December 2013. He said he had never "overstayed" but had always made applications in-time or within 28 days of becoming appeal rights exhausted.
5. The appellant's counsel, Mr Ahmed, accepted it was "technically correct" that the appellant had not accrued ten years' continuous lawful residence but the respondent should have had regard to her own policy. The respondent's Modernised Guidance on Long Residence explains that time spent in the UK as the spouse of an EEA national is not leave and therefore does not count for the purposes of paragraph 276B. It continues:

"However, you must apply discretion and count time spent in the UK as lawful residence for an EU or EEA national or their family members exercising their treaty rights to reside in the UK.

Sufficient evidence must be provided to demonstrate that the applicant has been exercising treaty rights throughout any period that they are seeking to rely on for the purposes of meeting the long residence rules."
6. Mr Ahmed argued this was relevant to the proportionality balancing exercise.
7. In paragraph 22 of his decision, the judge made it clear that he agreed with Mr Ahmed that the appellant could not meet the requirements of the

rules. However, he noted, the respondent was required in those circumstances to apply discretion and count time spent in the UK as lawful residence. He dealt with this at paragraph 24 in the following way:

“Regarding the issue of discretion, it was submitted by Mr Ahmed that no such discretion had been exercised by the Respondent, and even if it had, reference to the refusal letter did not demonstrate that a proper consideration had been given to discretion taking into account all the facts. I do not agree. The Respondent in the refusal letter (page 5 of 10) stated that the appellant did not meet the fundamental requirements of the Immigration rules and that it was considered not appropriate to exercise discretion in the appellant’s case. A full and detailed consideration of the grounds stated in that refusal letter satisfies me that the Respondent did in fact exercise discretion, but refused having exercised such discretion to find in favour of this appellant. The guidance document on long residence states that the Respondent “... must apply discretion ...” I am satisfied the Respondent has done so and within the refusal letter has given reasons in relation to time spent in the UK, and what constituted continuous lawful residence, and having considered these issues and the appellant’s immigration history, determined not to exercise discretion in the appellant’s favour.”

8. The grounds seeking permission to appeal complained that this paragraph failed to explain how the respondent had applied discretion to the appellant’s case, which was relevant to the human rights claim.
9. Permission to appeal was granted by the First-tier Tribunal because it was arguable the judge had failed to make findings about the periods in which the appellant had had leave and the periods he was lawfully residing as the family member of an EEA national. It was therefore arguable the judge had failed to explain the extent to which the appellant had failed to meet the rules or how the respondent had applied her policy. It was also arguable the judge erred in relation to article 8 outside the rules.
10. The respondent has not filed a rule 24 response opposing the appeal.
11. I heard submissions from the representatives on the question whether the Judge made a material error of law in his decision. Neither representative had checked whether the policy was in force at the date of decision. The document which had been provided to the judge was dated 3 April 2017. However, both parties were content to proceed on the basis an earlier version of the policy was in force at the date of decision in the same terms as that set out in paragraph 5 above.
12. Mr Ahmed expanded on his written grounds. He criticised the manner in which the respondent had looked at her policy guidance and he argued the judge had fallen into the same error. The real issue was the relevance of the time spent by the appellant lawfully in the UK within the proportionality balancing exercise.

13. Mr Ahmed also argued the judge's fact-finding was inadequate. He had not addressed the appellant's circumstances in Pakistan or the private life ties he had formed during his 13-year residence in the UK.
14. Mr Avery said it was difficult to see how the correct exercise of discretion under the policy was relevant in a human rights appeal. He argued there was no evidence the appellant had been exercising Treaty rights. If he had been, he would have claimed to have had a permanent right of residence. He argued the judge had made a reasonable assessment of the appellant's private life.
15. In reply, Mr Ahmed argued the decision did not contain an adequate balancing of the relevant factors. He relied on the case of *Greenwood (No. 2) (para 398 considered)* [2015] UKUT 00629 (IAC) for the proposition that the Tribunal retains a power to declare a decision of the Secretary of State to be unlawful, although there is no longer power to remit the case for a lawful decision to be made.
16. I reserved my decision on whether the First-tier Tribunal made a material error of law. Having done so, I have decided it did not and its decision shall stand. My reasons are as follows.
17. I note that the refusal letter states that the appellant last applied for a residence card on the basis that he had retained a right of residence on the dissolution of his marriage. This application was refused on 11 May 2015. The refusal letter states that the reason for that refusal was that the appellant's marriage was considered to have been one of convenience. The letter continued,

"With this in mind, it has been determined that the whole period upon which you have relied upon (sic) in your current application whilst being the spouse or family member of an EEA national is not accepted to contribute to the ten year legal leave period as a whole."
18. The clear meaning of this paragraph is that the respondent did not consider the appellant had demonstrated he had genuinely resided in the UK as the spouse of an EEA national. Therefore, the exercise of discretion on which the appellant sought to rely did not arise. This is clear from the second paragraph in the extract at paragraph 5 above.
19. The judge noted that the appellant refuted the allegation that his was a marriage of convenience in his witness statement. The judge noted the appellant had withdrawn his appeal against the decision which alleged his was a marriage of convenience. As Mr Avery said, had the appellant continued to reside in accordance with the EEA Regulations, he would have argued he had a permanent right of residence. There was no basis on which it could be said the respondent's decision was unlawful or wrong.
20. In the light of the above, the appellant's case that, had the respondent exercised discretion correctly, residence in the UK would have been

counted as lawful and this would weigh in his favour in the balancing exercise falls away.

21. I note what is said in the grant of permission to appeal about making clear findings on the appellant's periods of leave and residence under the EEA Regulations. However, the judge was not put in a position to make those findings because the appellant had not provided clear evidence of such matters as when he left the UK after his marriage and when he divorced his wife. He has never had leave to enter or remain. If his marriage was one of convenience he has never enjoyed a right of residence either, notwithstanding the subsequent issuance of a family permit and residence card. It follows the judge was right to give little weight to the appellant's private life.
22. I note the appeal was argued outside the rules and paragraph 27(1)(iv) of the rules was not expressly raised in the grounds of appeal to the First-tier Tribunal. In any event, the judge gave this matter adequate consideration in paragraph 27 of the decision. All the appellant says in his witness statement is that he has no ties or connections in Pakistan. That is not the test: see *SSHD v AK (Sierra Leone)* [2016] EWCA Civ 813. The judge correctly directed his mind to the question of whether the appellant would be able to reintegrate and gave reasons why he considered he would be able to do so. I see no error in his approach and he was plainly entitled to conclude as he did. The test provides an elevated threshold (*Treabhawon and Others (NIAA 2002 Part 5A – compelling circumstances test)* [2017] UKUT 00013 (IAC)) which was plainly not met on any view.
23. As for the appellant's private life ties in the UK considered outside the rules, all the judge had before him was witness evidence from his friends and the length of his residence. Given his previous finding that the appellant's stay had been unlawful, the judge was bound to give these matters little weight in the balancing exercise. The judge's conclusions in paragraphs 28 and 29 do not contain any error of law.
24. The appellant's appeal is dismissed and the First-tier Tribunal's decision to dismiss the appeal shall stand.

Notice of Decision

The Judge of the First-tier Tribunal did not make a material error of law and his decision dismissing the appeal shall stand.

No anonymity direction is made.

Signed

Date 27 March 2018

Deputy Upper Tribunal Judge Froom