



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

Appeal Number: HU/10500/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 December 2018**

**Decision & Reasons  
Promulgated  
On 30 January 2019**

**Before**

**DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL**

**Between**

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

Appellant

**and**

**MR ABDULQUDOOS BOOTA  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: Miss S Iengar, Counsel, instructed by Aston Bond Law Ltd

**DECISION AND REASONS**

1. In a decision posted on 8 October 2018 Judge Morgan of the First-tier Tribunal (FtT) allowed on human rights grounds the appeal of the respondent (hereafter the claimant), a citizen of Pakistan, against the decision made by the appellant (hereafter the Secretary of State or SSHD) on 4 September 2017 to make a deportation order and on 5 September to refuse his protection and human rights claim. The claimant is a foreign criminal as a result of his 30 months' sentence in 2017 for two convictions

for conspiring to supply both class A and class B drugs. The claimant had been granted ILR in 2010.

2. At paragraphs 17 and 18 the judge stated:

“17. Applying the approach outlined above I find that if the appellant is removed to Pakistan he would face very significant obstacles to his integration. He would struggle to operate in Pakistan, without family to whom he can turn to for support and with nowhere to live he would face risks of exploitation and would be without the capacity to operate and build up the variety of human relationships necessary to give substance to his private life. I find that these risks enable and justify a finding that he would face very significant obstacles to his integration. This is a factor in my judgement that weighs in the appellant’s favour in the balancing exercise albeit that given his residence has not been lawful it does not carry the weight it otherwise would. If the appellant had had an additional 2 years of lawful residence his ability to satisfy this exemption, contained within the immigration rules, would arguably have been conclusive in respect of the proportionality assessment.

18. In this respect I also note that the appellant would have been able to satisfy the previous formulation of both paragraphs of 399A however as already indicated the current rules set out both a stricter test and require lawful residence.”

3. The SSHD’s grounds take issue with three features of the judge’s decision. The first relates to the judge’s treatment of “exemptions” contained within the Immigration Rules and the Immigration Act. The second relates to the judge’s reliance on the appellant’s ability to satisfy paragraph 276ADE(1) (v) because he would face significant obstacles to his integration if returned to Pakistan. It is submitted that the judge effectively treats the fact that the claimant would face very significant obstacles as tantamount to him meeting the higher threshold of very compelling circumstances. The third feature concerns the judge’s approach to the claimant’s residency particularly as reflected in paragraphs 18 to 23 where he appears to attach significant weight to the fact that the claimant would have been able to satisfy the requirements of paragraph 399A if he had had a further two years of lawful residency.

4. I express my gratitude to the representatives for their submissions.

5. The judge’s decision is vulnerable to a number of criticisms. Mr Tarlow is right to say that the judge’s treatment of the exemptions in the Rules is flawed. The language of “exemptions” is misleading since what the judge meant to identify were specific instances where the Rules impose more or less stringent requirements by reference to length of residence. But I agree with Ms Iengar that the judge was meaning to use the term analogically and drawing attention to policy he considering to underlie the Rules. However, it remains that the judge’s findings about such “exemptions” are inconsistent. At paragraph 26 he states that he allows the appeal “because the appellant satisfies the exemptions contained

within the Immigration Rules and the Immigration Act (see above) ...” Yet at paragraph 22 the judge states that “[the claimant] is not able to satisfy the exemptions contained within the Immigration Rules and [Section] 117 [of the NIAA 2002]”. In discussion with Counsel, I raised the issue of whether I should regard paragraph 26 simply as an typo or oversight, the judge having simply forgotten that he had earlier found to the contrary. Such a view would certainly chime with the fact that everywhere else in the judge’s decision it is accepted and acknowledged that the claimant does not come within any of the “exemptions”.

6. However, even if I disregard the inconsistency in this way, it remains the case that paragraph 26 makes abundantly clear that for the judge the claimant’s position in respect of the Immigration Rules was extremely important. That in my judgment significantly undermines Ms Iengar’s efforts to defend the judge’s decision. For the judge it was of particular importance that, despite failing to meet the requirements of the Rules, the claimant either met some of their requirements or would have in the future. Thus at paragraph 13 the judge noted that paragraph 276ADE(1)(v) provided that a young adult aged between 18 and 25 who has spent half of his life living continuously in the UK is able to satisfy the private life requirements without the need to satisfy the reasonableness test set out in paragraph 276ADE(1)(iv). The judge went on to say that it was only the claimant’s status as a foreign criminal that prevented him from being able to benefit from it (paragraph 13). Also at paragraph 17 the judge found that:

“[i]f the [claimant] had had an additional 2 years of lawful residence his ability to satisfy this exemption [he is clearly referring to paragraph 399A], contained within the Immigration Rules, would arguably have been conclusive in respect of the proportionality assessment.”

7. It is clear that in the above paragraphs the judge lost sight of the fact that one way or another the claimant did not meet the requirements of the Immigration Rules and that that failure was a public interest factor counting against the claimant. For the judge the claimant’s ability to meet some of the Rules was seen to override and negate the fact that overall he failed to meet them. What the judge stated at paragraph 17 (as immediately quoted above) further reinforces my view that the judge failed to properly weigh in the balance the significance of the claimant’s inability to meet the requirements of the Rules, since even if he had been able to show lawful residence for over half of his life and so satisfy paragraph 399A, his was a case that fell to be considered under paragraph 398. As a result it was simply wrong to suggest that if the claimant had been able to qualify under 399A that “would arguably have been conclusive in respect of the proportionality assessment”. What the judge set out at paragraph 18 is afflicted by the same error.
8. What I have just said about the SSHD’s first concerns also doubles as my reason for considering that the SSHD’s third concern is well-founded.

9. As regards the SSHD's second main area of concern, the judge's seeming elision of the very significant obstacles test and the higher very compelling circumstances test, Miss Iengar is right to highlight that the judge properly identifies that the test he had to apply was the latter. At paragraph 24 the judge wrote:

"24. In summary although the appellant's offences are very serious, on the particular facts of this case the strong public interest weighing in favour of deportation is outweighed by the rights of the appellant and his settled mother. I find that there are very strong and compelling circumstances present in the appellant's case which renders his deportation disproportionate. I find particular circumstances in which deportation would result in unjustifiably harsh consequences for the appellant and his settled mother such that a deportation would not be proportionate."

10. It remains, however, that in assessing whether the claimant had been able to show very compelling circumstances, the judge plainly attached undue weight to the claimant's ability to meet - or nearly meet - some provisions of the Rules: see the point made earlier about the judge's summary at paragraph 28.
11. For the above reasons I conclude that the judge materially erred in law and I set aside his decision. Both parties submitted that if I set aside the decision I was in a position to re-make it without further ado, which I now proceed to do.

### **My Decision**

12. In re-making the decision in the appeal I see no reason to revisit the primary facts as found by Judge Morgan.
13. It is not in dispute that in order to succeed in his appeal the claimant has to show very compelling circumstances over and above those set out in paragraphs 399 and 399A. However, in assessing whether such circumstances exist, it is relevant to consider the claimant's position under the Immigration Rules. It is not in dispute that he cannot meet their requirements. It is true that he was able to meet the requirement of paragraph 276ADE(1)(v) by virtue of being a young adult aged between 18 and 25 who had spent at least half of his life living continuously in the UK. However, he could not benefit from that Rule by virtue of being a foreign criminal. It is also true that if the claimant had been able to show he had a further two years' lawful residence he would have been able to satisfy paragraph 399A, but the fact is that he had not lived lawfully in the UK for half of his life and so could not benefit from this Rule. I consider that the claimant's inability to meet the Immigration Rules is a factor to be weighed against him in the proportionality assessment. In particular his inability to satisfy the suitability requirements of paragraph 276ADE, which reflect the fact that great weight should generally be given to the public interest in the deportation of a foreign offender who has served a sentence of more than twelve months.

14. The question then is whether the public interest in deporting the claimant, a foreign criminal, should be regarded as outweighed by countervailing factors amounting to very compelling circumstances.
15. The factors that the claimant seeks to rely on in this regard are that: neither he nor his mother has had contact with family members in Pakistan since their arrival in the UK in 2003; he only speaks basic Urdu; he has almost no social, cultural or family ties in Pakistan; if removed to Pakistan he would face very significant obstacles to his integration; he has undergone all his schooling in the UK since the age of 5; he has spent fifteen years – over half his life – in the UK including his most formative years as a child and young adult; he has integrated into UK society and UK culture, values and pastimes; prior to his two offences he had not been in trouble with the law and had simply fallen in with the wrong crowd; he has had no further contact with his co-defendants; he was an exemplary prisoner and has abided by his licence conditions and has been engaging with the probation services; he was assessed by probation as posing a low risk of serious harm; he has been motivated to engage in positive activity; his mother is unwell, she is a single mother and sees a diabetic nurse for diabetes management and a rheumatologist specialist for her arthritis; her GP has expressed concern that her physical and mental health will deteriorate without the claimant's help; and there is an unusual level of dependency between the claimant and his mother given her various medical conditions.
16. It is plain that if the countervailing factors just enumerated are to qualify as very compelling circumstances it must be on the basis of their cumulative impact.
17. But for one factor I would have had no hesitation in concluding that, even though taken cumulatively these factors carry substantial weight, the claimant's circumstances fall short of the very compelling circumstances threshold. In favour of the claimant it can be said in particular that he speaks English; that by virtue of having been granted ILR in 2010 his immigration status is not precarious; and that the SSHD has not sought to dispute the judge's finding that the claimant would face very significant obstacles if returned to Pakistan. However, "very significant obstacles" is a lower threshold than is required by paragraph 398 and by the general proportionality assessment. Furthermore, what has to be shown are that the claimant's circumstances are sufficiently compelling to outweigh the very strong public interest in deportation of foreign criminals. Further, the fact that the claimant has shown significant rehabilitation is not a factor to which I can attach significant weight.
18. There is however one other factor in play in the claimant's case, which concerns the physical and mental health of the claimant's mother. The SSHD has not sought to dispute the judge's finding of fact that there was an "unusual level of dependency between the [claimant] and his mother"

or the GP's assessment that his removal would compromise his mother's physical and mental health. By virtue of the terms of s.6 of the Human Rights Act 1998, I have to consider not just the claimant's human rights but those of his mother. I consider I must attach significant weight to this finding and the medical evidence underlying it.

19. In my assessment and particularly given that the SSHD has not challenged the primary findings of fact on which I base my assessment, I am just persuaded that the claimant has established very compelling circumstances sufficient to outweigh the strong public interest in his deportation.

20. For the above reasons I:

- set aside the decision of the FtT Judge for material error of law;
- re-make the decision by allowing the claimant's appeal under paragraph 398 of the Rules and Article 8.

No anonymity direction is made.



Signed:

Date: 15 January 2019

Dr H H Storey  
Judge of the Upper Tribunal