



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

Appeal Number: IA/07918/2013

**THE IMMIGRATION ACTS**

**Heard at North Shields**

**on 3<sup>rd</sup> March 2014**

**Determination**

**Promulgated**

**on 29<sup>th</sup> May 2014**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

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

Appellant

**and**

**ZEESHAN ALI KHAN  
(Anonymity order not made)**

Respondent

**Representation:**

For the Appellant: Mrs Rackstraw – Senior Home Office Presenting Officer.

For the Respondent: Ms McCrae instructed by Chauhan Solicitors.

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Shamash promulgated following a hearing at Taylor House on 19<sup>th</sup> July 2013 in which the Judge allowed Mr Khans appeal under Article 8 ECHR.
2. Mr Khan, a citizen of Pakistan, was born on 21<sup>st</sup> November 1985. His immigration history shows he entered the United Kingdom on 4<sup>th</sup> January 2002 lawfully with a student visa valid until 31<sup>st</sup> January 2003. He was subsequently granted three further periods of leave as a student valid until 31<sup>st</sup> January 2010. On 30<sup>th</sup> January 2010 he submitted an application for further leave under the Tier 1 Highly Skilled Post Study route which was refused on 4<sup>th</sup> March 2010. He appealed the decision on 26<sup>th</sup> March 2010 but left the United Kingdom

on 5<sup>th</sup> July 2010. Accordingly his appeal will have been abandoned by virtue of section 104 (4) of the 2002 Act, although the reasons for refusal letter suggests it was subsequently dismissed on 7<sup>th</sup> July 2010. Mr Khan re-entered the United Kingdom on 6<sup>th</sup> October 2010 with a Tier 1 visa valid until 11<sup>th</sup> August 2012. On 9<sup>th</sup> August 2012 he applied for indefinite leave to remain on the basis of 10 years continuous lawful residence which was refused by the Secretary of State who noted from the immigration stamps in his passport and the schedule of absences provided in section 6.2 of the application form, that he had a total of 602 days or 20 months absence from the United Kingdom between 4<sup>th</sup> January 2002 and 4<sup>th</sup> January 2012, and therefore could not meet the requirements of paragraph 276A (a)(v), as he was considered to have broken his period of continuous residence in the United Kingdom.

3. The Secretary of State therefore refused the application on the basis of which Mr Khan applied but considered his family and private life by reference to the Immigration Rules in force from 9<sup>th</sup> July 2012. In relation to his private life under paragraph 276ADE but as he had not submitted an appropriate application on the correct specified form to allow consideration under Appendix FM in relation to any family life that he claims exists, this was not considered.
4. The Judge notes in paragraph 4 of the determination that at the beginning of the hearing, counsel for Mr Khan conceded that he did not meet the requirements of the Immigration Rules as it was accepted, as set out in the refusal letter, that he did not have continuous lawful residence in the United Kingdom for the requisite 10 year period.
5. The Judge notes the evidence and some legal issues before setting out her findings from paragraph 34 onwards. The Judge specifically notes that in addition to it being conceded that Mr Khan was unable to meet the requirements of 276A he was also unable to meet the requirements of the Immigration Rules or Appendix FM [24].
6. Even though it was accepted Mr Khan could not succeed under the Rules the Judge appears to have thought it appropriate to proceed to undertake a freestanding Article 8 assessment by reference to the Razgar criteria, without more [30 and 34]. The Judges factual findings can be summarised as follows:
  - i. Mr Khan has family in Pakistan who he has visited regularly. He is 27 years of age and the appeal must be based primarily on private and life grounds although he clearly has family life both in the UK and Pakistan [35].

- his law. The
- ii. Returning Mr Khan to Pakistan will be an interference with private and family life. It will be in accordance with the only issue is whether the decision is proportionate [36].
- iii. The starting point must be that the Rules are there to provide a mark for those who have lived legally in the UK for 10 years. People coming to study here on a temporary basis should not build up any expectation of a right to remain and further their ties and relationships in the United Kingdom [37].
- the fact with his situation [38].
- iv. There is a question regarding the weight to be attached to Mr Khan arrived here aged 16 years of age and has lived with his uncle during what was clearly a difficult adolescence in a where he was being handed to a different family member [38].
- at 16 Anjum he felt his different. He is weight to be not a fixed and Khan's own ability to education and lifestyle that he are very significant factors. The fact highly qualified is a relevant factor too
- v. There is a question whether the fact Mr Khan came to the UK and moved into a house has affected him so intensely as Dr stated in his evidence and that when he returned to Pakistan alienated and unable to fit in. It is accepted Mr Khan can use qualifications in Pakistan although the system there is different. He is highly qualified and has much to contribute. The weight to be attached to the public interest in removal is not a fixed and immutable quality, it varies and in this case Mr Khan's own ability to integrate into his community and the education and lifestyle that he has had in the United Kingdom are very significant factors. The fact Mr Khan is westernised and highly qualified is a relevant factor too [40].
- age of family between
- vi. Although Mr Khan has been in the United Kingdom since the 16, in 2001, the schedules shows that he returned to see his every summer holiday remaining in Pakistan for periods of five and six weeks [41].
- extended to return could not to he was absent legal adviser at the Had it not been for this allowed as overall absence allowed. Considerable weight is was forced to return in order to abide He did what was required of him and the United Kingdom [42].
- vii. The length of the visits became shorter bar two longer periods, the first when he completed his degree and sought to Pakistan to consider settling down, when he claims he settle, and the second when he returned to Pakistan in order to obtain a visa to re-enter as a post study worker, when he was absent for 102 days. He claims he took advice from the legal adviser at the university and believed that he had to return. Had it not been for this period he would fall within the 18 months allowed as overall absence and for this reason the appeal is allowed. Considerable weight is attached to the fact Mr Khan was forced to return in order to abide by the Immigration Rules. He did what was required of him and returned immediately to the United Kingdom [42].

viii. Mr Khan was not absent from the United Kingdom voluntarily for an extended period of time and he will find it very difficult to readapt to life in Pakistan. His right to a private and family life is far beyond that of a formal student and the appeal is allowed [43].

### **Error of law finding**

7. The Secretary of State challenges the determination on the basis the Judge failed to give adequate reasons for material matters in allowing the appeal on Article 8 grounds when Mr Khan was unable to demonstrate that he had spent 10 years continually in the UK and as such did not meet the requirements of the Rules.
8. The grounds refer to the case of Miah in which it was found there was no near miss principle applicable to the Rules and that the requirement for immigration control is not weakened by the degree of non-compliance with the Rules.
9. It is also asserted that Mr Khan is currently in employment and that he could return to Pakistan to continue his employment and that inadequate reasons have been given for finding his removal will be disproportionate.
10. There is merit in the Secretary of State's grounds. It was conceded that Mr Khan is unable to succeed under the relevant immigration rule relating to 10 years lawful residence as, notwithstanding his having appealed against the refusal decision on this ground, he chose to voluntarily leave the United Kingdom and abandon his appeal and did not re-enter for a further 102 days. In paragraph 42 of the determination the Judge seems to believe that there was no formal requirement for him to do so and that had he not done so he may have been able to succeed on appeal and therefore allows this appeal. Such an approach is arguably without legal merit. Mr Khan had the opportunity to remain in the United Kingdom to pursue his appeal yet he chose not to. He was not forced to leave the UK and did so voluntarily. He did not have the required period of lawful leave and it was conceded he could not succeed on this basis. The Judge appears to have found that the fact he could have remained somehow adds greater weight to his private life. This must be a finding on a 'near miss' basis whereas the Supreme Court in Patel and others v Secretary of State for the Home Department [2013] UKSC 72 has now effectively held that there is no near miss argument as such albeit that all facts have to be taken into account and considered in context.
11. The family and private life elements of the claim had to be considered in accordance with the guidance to be found in the cases of MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC

720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. This approach has been further confirmed by the Court of Appeal in the more recent case of Haleemundeen v SSHD [2014] EWCA Civ 558.

12. The Judge clearly failed to consider the merits of the case in this way despite acknowledging that Mr Khan could not meet the requirements of the relevant rules. She merely launched into a freestanding Article 8 ECHR assessment. I find this to be legal error. Even if the Judge was entitled to proceed in this way it is incumbent upon her, when considering proportionality, to ensure she undertakes a properly reasoned proportionality balancing exercise by examining both parties' cases and making adequate findings supporting the eventual findings. In this case there appears to be little examination of the Secretary of States case and inadequate reasoning given for how the legitimate aim relied upon is overridden on the evidence. In MF (Nigeria) the Court of Appeal make the comment that the results of a proportionality assessment undertaken within the Rules or outside the Rules should be the same, but if one of those assessments has not been undertaken it cannot be said that this is a result that has been achieved, especially as in this case under the Rules Mr Khan appears to be unable to succeed whereas the Judge found under Article 8 ECHR he was entitled to succeed. When combined with the other issues referred to in the grounds and above I find the Judge has made a legal error material to her decision to allow the appeal.
13. I set the determination aside although the findings regarding Mr Khan's immigration history, his academic achievements, work record, family and domestic ties to the UK and Pakistan shall be preserved findings.

## **Discussion**

14. The section 47 direction was withdrawn by Mrs Rackstraw at the start of the hearing to re-make the decision.
15. It was accepted that Mr Khan is unable to succeed under the Immigration Rules relating to family and private life in the United Kingdom. Miss McCrae was therefore asked to address the Tribunal regarding the basis on which she asserts Article 8 can/should be assessed outside the Rules in light of the guidance provided in Gulshan and other cases making it clear there was no need to go on to a specific assessment under Article 8 if it is clear from the facts that

there are no particularly compelling or exceptional circumstances requiring that course to be taken.

16. It was submitted that the exceptional circumstances present in this appeal relate to the impact upon Mr Khan of his having to return to Pakistan which include loss of opportunity for him, loss to the United Kingdom economy of what he is able to contribute, difficulties in readjusting if he had to live in Pakistan, and difficulties regarding his obtaining employment in Pakistan.
17. Article 8 does not guarantee an individual the right to live where they choose or employment and the fact the Secretary of State has refused the application and seeks to remove Mr Khan is clearly indicative of the fact that any positive contribution he is able to make to the United Kingdom economy is not considered to be determinative. It was also submitted the fact he came to the United Kingdom at 16 as a student, due to his emotional state and difficulties with family at that time, makes this case different from the normal cases and means the issue should be considered outside the Immigration Rules. It was also submitted that having done so, where the issue is one of proportionality, the decision must be found to be disproportionate.
18. I accept that Mr Khan came to the United Kingdom and into the care of his uncle as a result of family and emotional problems when he was an adolescent 16 year old, but it is clear that he is now recovered, that he is successful, and that he is an adult. I accept that there may be advantages to him in remaining in the United Kingdom but it is clear that he has preserved ties to Pakistan as evidenced by the frequency and duration of visits and that although he may find it difficult to readjust to a country that he does not himself view as one that he wishes to remain in, he has not established on the evidence that any problems or difficulties that may be encountered are such as to make the Secretary of State's decision disproportionate or one that will result in particularly compelling or exceptional circumstances. There is no evidence of any psychological/emotional/behavioural relapses if he has to return and re-establish himself such as to demonstrate that it would be disproportionate, or that such circumstances require an Article 8 ECHR assessment to be undertaken. The fact Mr Khan wishes to remain and the fact he may want a better life in the United Kingdom is not a reason for allowing him to remain.
19. I accept Mr Khan was in the UK lawfully and did return to Pakistan and therefore honour the requirements of the immigration laws, for which he is given due credit, but he is not entitled to greater reward for doing what the law requires him to do.
20. I also accept that Mr Khan has had a great deal of support from family members in the United Kingdom and credit must also be given to them for assisting this young man to re-establish itself and to move on

with his life, but it has not been shown on the evidence that there is any continuing need for such support and nor has it been established that if he returns to Pakistan he will not be able to maintain contact with Dr Anjum by mutual visits, telephone calls, or other means of communication.

21. In conclusion, I find that Mr Khan cannot satisfy any provision of the Immigration Rules relating to duration of time in the United Kingdom, family or private life. I find he is unable to succeed under any near miss argument as there is no such principle in English law. I find he has failed to discharge the burden of proof upon him to the required standard to show that there are any particular compelling or exceptional circumstances that would require an assessment under Article 8 outside the Rules but even if there were, based upon the submissions made, evidence considered, and preserved findings, the Secretary of State will be found to have discharged the burden of proof upon her to the required standard to show that the decision is proportionate.

**Decision**

22. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

23. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as it is not warranted on the facts.

Signed.....

Upper Tribunal Judge Hanson

Dated the 28<sup>th</sup> May 2014