



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01689/2019

**THE IMMIGRATION ACTS**

Heard remotely via video (Skype for Business)  
at Field House  
On 8<sup>th</sup> October 2020

Decision & Reasons Promulgated  
On 22<sup>nd</sup> October 2020

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

NASSIM BIBI ATTERKHAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

Respondent

**Representation:**

For the Appellant: Mr D Clarke, Home Office Presenting Officer  
For the Respondent: Mr R Deepchand, Solicitor, Lambeth Solicitors

**DECISION AND REASONS**

This decision follows a remote hearing in respect of which there has not objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

1. This is an appeal against the decision of Judge of the First-tier Tribunal Brewer, promulgated on 27<sup>th</sup> September 2019, in which the judge allowed the appeal of Nassim Bibi Atterkhan, the respondent, but dismissed the appeal of her husband, Muhammad Asif.

## **Background**

2. The respondent is a national of Mauritius born on 3<sup>rd</sup> November 1965. Her husband is a Pakistani national who was born on 23<sup>rd</sup> April 1980. They married on 30<sup>th</sup> August 2016. The respondent has a child who tragically died in 2005. The child is buried in this country and the evidence before the First-tier Tribunal was that the respondent regularly visits the child's grave.
3. The respondent entered the United Kingdom on 29<sup>th</sup> November 1997 as a visitor. She thereafter made various applications for leave to remain, all of which were refused. The respondent and her husband made human rights applications on 26<sup>th</sup> September 2019 based on the private lives they had established in this country. These applications were refused on 11<sup>th</sup> January 2019.
4. The appellant, in brief, found that neither the respondent nor her husband met the Immigration Rules relating to family life, which are contained in Appendix FM to the Immigration Rules. The appellant found that the respondent did not meet any of the requirements of paragraph 276ADE(1)(iii) to (vi). At the time of her application the respondent had been in the UK for eighteen years. The appellant was not satisfied that the respondent's husband met the Suitability requirements of the Immigration Rules because he used deception in a TOEIC English language test. The appellant was not satisfied there were any exceptional circumstances such that the refusals of the applications would lead to breaches of Article 8 ECHR. The respondent and her husband appealed those decisions to the First-tier Tribunal pursuant to Section 82 of the Nationality, Immigration and Asylum Act 2002.

## **The judge's decision**

5. At paragraph 12 of his decision the judge stated that the respondent's appeal was on the basis that she had accumulated twenty years' residence in the UK, and that her husband's appeal was on the basis that he did not commit fraud in his TOEIC test. The judge considered several documents that had been provided to him including a bundle of documents provided by the respondent and her husband. The judge considered written statements from the respondent and her husband and heard oral evidence from them.
6. Under the heading 'Findings of fact' at paragraph 16 the judge stated: "Having heard evidence from the first and second appellant I make the following findings of fact." At paragraph 17 the judge stated:

"The first appellant was born in Mauritius in 1965. She came to the UK in 1997. It is fair to say that she has a chequered immigration history. However at the date of the hearing she had been in the UK for over twenty years. I find as a fact that the first appellant meets the requirements of paragraph 276ADE(1)(i) - (iii)."

The judge then set out an extract of paragraph 276ADE(1)(i) to (iii). Paragraph 276ADE(1)(iii) requires an applicant to have lived continuously in the UK for at least twenty years (discounting any period of imprisonment). The judge gave no other consideration to any of the other requirements of paragraph 276ADE(1).

7. The judge then considered the evidence relating to the husband's TOEIC test and considered the possibility of the husband and the respondent relocating to Pakistan or of continuing their relationship in Mauritius. The judge found that the evidential burden was met by the appellant in producing prima facie evidence of fraud. The judge found that no satisfactory innocent explanation had been provided and concluded that the legal burden on the appellant had been discharged. The judge supported his findings with adequate reasoning.
8. The judge concluded that the respondent's husband could not meet the Immigration Rules relating to private life, that is 276ADE(1), including his claimed risk of harm from his family in Pakistan for marrying out of the community as he claimed. The judge concluded that even though the respondent's appeal was allowed the respondent could not meet the requirements of Appendix FM of the Immigration Rules because of her immigration status and because of the suitability requirements in relation to her husband.
9. The judge then considered Article 8 ECHR. At paragraph 33 the judge set out the five questions in Razgar v SSHD [2004] UKHL 27. The judge referred to relevant authorities such as Agyarko [2017] UKSC 11. The judge found that whilst there was clearly family life between the respondent and her husband, the decisions did not breach that family life. The judge found that, given the length of time that the husband had been in the UK, he had established a private life. The judge then considered case law relating to the other requirements of Article 8(2) including interference, whether the decision was in accordance with the law and whether the interference was necessary in a democratic society.
10. Finally, the judge considered the issue of proportionality. At paragraph 47 the judge stated:

"I have found that family life will not be interfered with the respondent's decision. However, even if I am wrong about that, given all of my findings above and balancing the family's position against the public interest I find that the respondent's decision is proportionate. I also find that the respondent's decision is proportionate in relation to the interference in private life. I have taken into account that I should give little weight to private life formed when the appellant's stay in the UK is precarious."

The judge concluded by allowing the respondent's appeal but dismissing the appeal of her husband.

### **The challenge to the judge's decision**

11. The appellant sought permission to appeal on what is accepted by both sides as a narrow ground. Paragraph 276ADE(1)(iii) requires that the requisite twenty years is

considered by reference to the date of application. The appellant's simple point is that the judge was wrong to determine the respondent's appeal pursuant to paragraph 276ADE(1)(iii) because at the date of the respondent's application she had resided in the United Kingdom for eighteen years and not twenty years. Whilst the respondent had lived in the UK for over twenty years by the date of the hearing, she could not meet the requirements of the Immigration Rules themselves. The appellant additionally noted that if an error of law was identified by the Upper Tribunal then she would wish to provide evidence indicating that the respondent may have re-entered the UK as a visitor in 2005.

12. Permission was granted by Judge of the First-tier Tribunal Appleyard in a decision dated 20<sup>th</sup> January 2020. An error of law hearing was listed for 27<sup>th</sup> March 2020 but had to be vacated due to the COVID-19 pandemic. Directions were issued in light of the pandemic on 13<sup>th</sup> May 2020. The respondent responded to the COVID directions on 15<sup>th</sup> May 2020 with a skeleton argument which is essentially in the same terms as the grounds of appeal. Noting that the appellant requested an oral hearing and that the COVID directions were sent to the respondent's solicitors but not to herself, Upper Tribunal Judge Finch directed that an error of law hearing be conducted via remote means. Judge Finch's directions were dated 29<sup>th</sup> July 2020 but were issued on 20<sup>th</sup> August 2020 by email to the appellant and to the respondent's solicitors and by post to the respondent.
13. I have heard via Skype submissions both from Mr Clarke, representing the appellant, and from Mr Deepchand, representing the respondent. At the outset of the hearing Mr Deepchand stated that an application for permission to appeal by the respondent's husband had been lodged with the First-tier Tribunal. Unfortunately it is unclear whether any decision has been made by the First-tier Tribunal. It remains the case that there is no appeal by the husband before me, no decision by the Upper Tribunal granting permission, and in these circumstances, I am confined to consideration of the appeal by the Secretary of State in relation to Ms Atterkhan.
14. Mr Clarke's submissions were focussed and concise and mirrored the grounds of appeal and the appellant's skeleton argument. Mr Deepchand drew my attention to the skeleton argument that was before the judge, which indicated that the respondent was relying on paragraph 276ADE(1)(vi), and to the covering letter that accompanied the application made by the respondent to the Home Office in 2016, which also relied on paragraph 276ADE(1)(vi). Mr Deepchand submitted that it was unclear whether the judge made a decision under paragraph 276ADE(1)(iii). Mr Deepchand maintained that the judge's decision was, in any event, consistent with a lawful application of paragraph 276ADE(1)(vi). He submitted alternatively that the outcome was not likely to be different, given the evidence that was before the judge and the respondent's length of residence in the United Kingdom. I indicated that I did not need to hear from Mr Clarke in reply.

## **Discussion**

15. In my judgment the judge's concluded that the respondent met the requirements of paragraph 276ADE(1)(iii). In so doing the judge made a material error in law. Under the Immigration Rules the length of residence required to fulfil paragraph 276ADE(1)(iii) is measured by reference to the date of application. It is apparent from a holistic reading of the decision that the judge proceeded on the basis that the respondent met the formal requirements of long residence and that her appeal fell to be allowed, presumably on the principles established in **TZ (Pakistan) [2018] EWCA Civ 1109**.
16. I wholly reject Mr Deepchand's submissions that the judge may have applied paragraph 276ADE(1)(vi). It is, with respect, entirely clear that the judge was applying paragraph 276ADE(1)(iii). This is apparent from a combined reading of paragraph 12, paragraph 16 and paragraph 17. The judge did not set out the requirements of paragraph 276ADE(1)(vi). He focussed his assessment purely on the respondent's length of residence and explicitly referred to paragraph 276ADE(1)(iii). In any event, there was simply no consideration of any other factors that one would reasonably expect to find if the judge did in fact consider and apply paragraph 276ADE(1)(vi).
17. Whilst the fact that the respondent has remained, or may have remained, in the UK for twenty years at the date of the hearing is clearly a relevant factor to take into account in any Article 8 assessment at large, she did not meet the formal requirements of the Immigration Rules. Mr Deepchand submitted that the judge engaged in an Article 8 assessment in any event but it is clear from reading the judge's assessment, particularly in relation to proportionality, that that focus was on the position of both the respondent and her husband and no consideration was given to the respondent's private life rights under Article 8. The judge simply failed to engage in an Article 8 assessment relating to the respondent alone. There has been no consideration, as one would expect in an assessment under paragraph 276ADE(1)(vi) or an assessment under Article 8 outside the Immigration Rules, of the respondent's chequered immigration history or indeed other considerations that may have played in her favour, such as the death of her child in 2005. It is not the case that the error could have made no material difference to the judge's outcome as submitted by Mr Deepchand.
18. I am without any doubt that this decision is unsafe and must be set aside.

## **Remittal to First-Tier Tribunal**

19. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

20. I have determined that the judge's decision is unsafe because he misapplied the immigration rules and consequently failed to make any necessary factual findings in respect of the respondent's private life in the UK. Both Mr Clarke and Mr Deepchand agreed that in these circumstances it was appropriate for the case to be remitted back to the First-tier Tribunal for primary factual findings to be made. The appeal will be remitted to the First-tier Tribunal so that a new fact-finding exercise can be undertaken.

### **Notice of Decision**

**The making of the First-tier Tribunal's decision involved the making of errors on points of law and is set aside.**

**The case is remitted back to the First-tier Tribunal to be decided afresh by a judge other than judge of the First-tier Tribunal Brewer.**

**No anonymity direction is made.**

*D. Blum*

14 October 2020

Signed

Date

Upper Tribunal Judge Blum