Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/22442/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 April 2018	**On 18 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TEJINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr G Franco, of Counsel instructed by Messrs Harbans Singh & Co (Soho Road)

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal O'Brien who in a determination promulgated on 13 October 2017 allowed the appeal of Mr Tejinder Singh against a decision of the Secretary of State made on 17 May 2015 to refuse him leave to remain on the basis of ten years' continuous lawful residence under the provisions of paragraph 276B of the Immigration Rules. The appeal was allowed on human rights grounds.

2. Although the Secretary of State is the appellant before me, I will for ease of reference refer to her as the respondent as she was the respondent in

the First-tier. Similarly, I will refer to Mr Tejinder Singh as the appellant as he was the appellant in the First-tier Tribunal.

3. The appellant entered Britain in December 2004 and thereafter was employed as a Sikh minister at various temples in and around Bristol. He had leave to remain until May 2009. In April that year he applied for an extension of stay. That was refused and he became appeal rights exhausted in September 2009. An application for indefinite leave was refused without a right of appeal, but after a further application for leave to remain in February 2011 he was granted leave until February 2013. Although an application made in January 2013 was refused the appellant was granted leave until February 2016. That leave was curtailed in April 2015. An application for indefinite leave made in February 2015 was refused without a right of appeal, but a further application for indefinite leave made in May 2015 was refused with a right of appeal. That appeal was allowed to the extent that the respondent was to reconsider the application. The application was again refused and thus the appeal against that refusal came before Judge O'Brien on 22 September 2017.

First-tier Tribunal

4. In paragraph 28 of the determination the judge stated that:-

> "The instant application was for indefinite leave on the basis of ten years' continuous lawful residence. It is clear that the Appellant does not in fact satisfy the requirements of the Immigration Rules".

5. The judge in paragraph 29 also commented that he could not allow the appeal on the basis that the decision was "not in accordance with the law per se".

6. In paragraphs 30 onwards the judge considered the appellant's claim that the decision was an infringement of his Article 8 rights. In paragraph 31 he wrote:-

> "The Appellant has been employed throughout his time in the United Kingdom as a Sikh minister. I have heard nothing to support Mr Franco's suggestion that the Appellant would have difficulty finding similar employment in India because of possible differences in religious practice in the United Kingdom. The Appellant has a wife and children still in India. I am satisfied that there are no very significant obstacles to his reintegration into India. He does not, therefore, satisfy paragraph 276ADE".

7. The judge then stated that he was "turning to my assessment of Article 8 at large". Having reminded himself that the maintenance of effective immigration control was in the public interest he considered evidence before him from various temples and local councillors which he said demonstrated the appellant's "significant contribution to and integration with the community". He then accepted that the interference with the appellant's private life would engage Article 8 of the ECHR.

8. Having said that although he did not consider that the issue of whether or not the appellant could satisfy the requirements of the Immigration Rules

to grant indefinite or limited leave to remain was determinative but he said that it was capable of being a weighty factor in determining whether the refusal was proportionate to the legitimate aim of enforcing immigration control. The judge referred to the appellant's immigration history and the dismissal of the appellant's appeal in 2009, and he asserted that when the appellant was refused then he could have successfully applied for leave to remain within the 28 day grace period but had not done so. He had then learned that he could make a fresh application which had been made on 29 January 2010 and had thereafter been allowed to remain until July 2015. The judge said that he considered that had the appellant made an application for "indefinite leave to remain as a Tier 2 (Minister of Religion) Migrant" he considered that the appellant would have succeeded. Finally, the judge stated at paragraph 40:-

> "For the above reasons, it appears to me that the public interest in removing the Appellant is significantly weaker than it otherwise might be. I remind myself that little weight should be given to a private life established whilst a person's presence in the United Kingdom is precarious. However, had the Appellant been properly advised in September 2009 and had he not placed his trust instead in his MP to rectify the issues in his failed application, he would now be entitled as of right to settlement in the United Kingdom. Moreover, I have ample evidence of the standing in which the Appellant is held in the Bristol (*sic*)".

He therefore allowed the appeal, stating that the removal of the appellant would be disproportionate.

9. The Secretary of State appealed, stating that it was clear that the appellant was not relying on any family life in Britain and that therefore he would need to demonstrate compelling circumstances to warrant the grant of leave outside the Immigration Rules on the basis of his private life – the grounds referred to the head note in **Treebhawon and Others (NIAA 2002 Part 5A – compelling circumstances test) [2017] UKUT 00013** where it was stated:-

> "Where the case of a foreign national who is not an offender does not satisfy the requirements of the Article 8 ECHR regime of the Immigration Rules, the test to be applied is that of compelling circumstances".

10. The grounds went on to state that the findings of the judge with regard to the appellant's ability to have made applications which might have succeeded were speculative as was that that he might now be able to meet the Immigration Rules. They argued there was no clear assessment of the public interest factors in Section 117B which would be relevant to a consideration of Article 8 outside the Rules. Moreover, there was no consideration given to the fact that as the appellant could not meet the Immigration Rules and would not face very significant obstacles to reintegration in India, it would be appropriate to require the appellant to return to lodge an entry clearance application to bring himself within the provisions of the Rules, if such a provision existed, or that to do so would be disproportionate. The grounds referred to the decision of the appellant to choose to seek advice from an MP rather than making a further

application and said that that was not a compelling factor. It was emphasised that it was trite law that Article 8 is not to be used merely as a way of circumventing the Immigration Rules and that a "near miss" argument cannot render an otherwise weak Article 8 claim stronger.

11. Permission having been granted, the appeal came before me. The judge granting permission – Judge of the First-tier Tribunal C A Parker – stated that:-

> "… I do not accept that the grounds, insofar as they question the Judge's exercise of discretion, in considering and attaching weight to factors in the proportionality exercise, identify an arguable error of law. Rather, they amount to a disagreement with the outcome.
>
> However, the grounds correctly identify the Judge's failure to refer to the test of compelling circumstances or explain how this was met, before going on to consider the appeal outside of the immigration rules. It is also the case that there is no clear assessment of the relevant public interest considerations set out in section 117B or weighing of those considerations in the proportionality exercise".

12. At the hearing of the appeal before me I noted the terms of the grounds of appeal and asked Mr Franco to respond thereto. He initially stated that he did not consider that there was a challenge to the proportionality exercise before referring to the judgment of the Court of Appeal in **Rhuppiah [2006] 1 WLR 4203 [2016] EWCA Civ 803**. He referred to the statement of Sales LJ where at paragraph 49 he had stated:-

> "Where Parliament has itself declared that something is in the public interest – see sections 117B(1), (2) and (3) and section 117C(1) – that is definitive as to that aspect of the public interest. But it should be noted that having regard to such considerations does not mandate any particular outcome in an Article 8 balancing exercise: a court or tribunal has to take these considerations into account and give them considerable weight, as is appropriate for a definitive statement by Parliament about a particular aspect of the public interest, but they are in principle capable of being outweighed by other relevant considerations which may make it disproportionate under Article 8 for an individual to be removed from the UK".

He stated that the judge had noted that the appellant's private life was precarious and stated that the judge had adequately set out the law and had indeed referred to Section 117B subsections (2) and (3) with regard to the appellant's English language skills. Moreover, the judge was correct to place weight on the appellant's employment in the Bristol area and that that employment amounted to, he considered, compelling circumstances. He asked me to find that the judge had reached conclusions which were fully open to him on the evidence.

13. Mr Clarke pointed out that although the judge had correctly set out the relevant law he had reached the conclusion that the appellant could not succeed under the Rules – that had not been challenged. He argued that the judge had not properly engaged with the public interest of the enforcement of immigration control.

14. I consider that there are material errors of law in the determination of the judge. He simply did not consider the public interest in the enforcement of immigration control and did not consider the issue of whether or not there were compelling circumstances which would mean that this would be a case where the appellant should be allowed to remain outside the terms of the Immigration Rules. Indeed, the reality is that in paragraph 31 of the determination the judge stated that he considered that the appellant would be able to obtain work in India and pointed to the fact that his wife and children were there. Indeed, he said in terms that there were no very significant obstacles to the appellant's reintegration into India.

15. The reality is that what the judge wrote in that paragraph is correct. He did not identify that there were any compelling circumstances that the appellant should remain rather than return to his family and work which he could undertake in the country of his nationality. Nowhere in the determination does the judge put forward any compelling reasons relating to the appellant's private life nor does he appear to place any weight whatsoever on the public interest in the maintenance of immigration control. He accepts that the appellant could not qualify under the Rules but does not show why the appellant should be allowed to remain on private life grounds. The issue before the judge related to the appellant's right to private life rather than a determination of his usefulness within the community. He was clearly wroog to be swayed by a "near miss" argument. For these reasons I find that the judge did not carry out the appropriate proportionality exercise and therefore was in error in allowing the appeal. I set aside his decision.

16. I asked Mr Franco and Mr Clarke what they wished me to do, stating that I considered it would be appropriate for me to re-determine the appeal. Mr Franco pointed to further evidence from the Mayor of Bristol, the Member of Parliament for Bristol West and various officers in the Bristol Sikh Temple and the Bristol Ramgarhia Board Sikh Temple as well as from a councillor for Eastern Ward of Bristol and a statement of the appellant. While he asked that I remit the appeal I do not consider it appropriate to do so. The reality is that the documents to which he referred, which I have read and considered, and the submissions on behalf of the appellant do not advance the appellant's claim. The relevant test relates purely to the difficulties or otherwise that the appellant would have should he be removed to India. There is simply nothing to indicate that he would be in any difficulties if that happened as is clear from the findings of the judge to which I have referred above. There are no compelling factors which would mean that he should be allowed to remain outside the rules on human rights grounds. The letters in support of the appellant clearly point to someone who is considered to be a useful member of the Sikh community in Bristol who has done much to promote community relations there but those factors do not outweigh the fact that there is no difficulty in the appellant making a further application from India should any temple wish to employ him in the future. India is where his family lives and where the religion of which he is a minister is based and where the judge found he would be able to find work. There is nothing compelling as required by

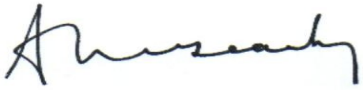
the determination in **Treebhawon** which would mean that it would be disproportionate for the appellant to be expected to return to India.

17. Therefore, having set aside the decision of the First-tier Judge, I re-make the determination in this appeal and dismiss this appeal on human rights grounds.

Decision

The appeal of the Secretary of State is allowed and the decision of the Judge in the First-tier is set aside.

The appeal of the appellant against the decision of the Secretary of State on human rights grounds is dismissed.
No anonymity direction is made.

Signed:  Date: 13 April 2018

Deputy Upper Tribunal Judge McGeachy