Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04399/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th March 2019	**On 23rd April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MR MUHAMMAD ASAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Turner, Counsel
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan whose date of birth is recorded as 4th August 1982.

2. He first entered the United Kingdom on 23rd September 2006 as a student. There were various extensions to his leave until 28th March 2016. On 24th March 2016 he made an in-time application for leave to remain as a Tier 1

Entrepreneur but on 19th May 2016 that was refused. On 3rd June 2016 he applied for administrative review. The initial decision was maintained. On 5th July 2016, leave under section 3C of the Immigration Act 1971 expired.

3. On 19th July 2016 he made application, out of time, for leave to remain in the United Kingdom on the basis of his private life. He subsequently varied that application for leave to remain on the basis of long residency; that application being made on 31st August 2016. The application of July 2016 was refused on the basis that the Appellant had no extant leave when made and had only completed nine years, nine months and eleven days' continuous lawful residence and not acquired ten years' continuous lawful residence.

4. As to the exact amount of time that the Appellant had lawfully been in the United Kingdom was concerned, there is an issue. Mr Turner submits that in fact the Appellant was entitled to benefit from a further 28 days credited to him on the basis that an application can be made 28 days in advance. The amount of time by which the Appellant fell short of the ten years in this matter, whether it be the nine years, nine months and eleven days, or the extra 28 days contended for, in my view are not material to my consideration of the merits of the appeal.

5. The Appellant appealed the decision of the Secretary of State and on 18th October 2018 the matter was heard by Judge of the First-tier Tribunal Hawden-Beal sitting at Birmingham. It was common ground that the Appellant could not succeed under the Immigration Rules. The Appellant however advanced his appeal on the basis of the wider application of Article 8 ECHR. Judge Hawden-Beal dismissed the appeal.

6. Not content with that decision by Notice dated 12th November 2018 the Appellant made application for permission to appeal to this Tribunal. On 12th February 2019 permission was granted.

7. In the grounds which run to 47 paragraphs it was submitted under the first ground that the judge had erred in law in the proportionality assessment. Reliance was placed on delay in the grounds with reference made to the guidance in the case of **EV (Kosovo) [2008] UKHL 40**.

8. The second ground makes reference to paragraph 276ADE of the 2002 Act but Mr Turner helpfully accepted that he was not pursuing the appeal on that basis but in the lengthy submissions which he made to me he relied heavily upon his submission that the Appellant, having been so close to the ten years which would have otherwise qualified him for the relief being sought, was entitled to succeed in this appeal because of other factors which Mr Turner submitted weighed in the Appellant's favour and therefore outweighing the public interest.

9. At the outset I reminded the parties of the guidance in the case of **Patel [2013] UKSC 72**. That case was concerned principally with whether an Appellant who came close to meeting the requirements of an Immigration

Rule ought to be allowed to succeed on the basis of a "near miss". The lead judgment was given by Lord Carnwath. He said as follows:

> *"53. Faced with the conflict between the approach taken in these authorities and that of **Pankina** Burnton LJ had 'no difficulty' in preferring the former, which he regarded as binding on the court (paras 21–25). He could see no principled basis for distinguishing, as Sedley LJ had proposed, between rules to which the near-miss principle did and did not apply. In particular he disagreed with Sedley LJ that a financial criterion 'has in itself no meaning' and could therefore be distinguished from other rules, such as those relating to academic qualifications, in respect of which 'a miss is as good as a mile'. In conclusion he said at paras 25–26:*
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> > *'Finally, quite apart from authority, I prefer the approach stated in **Mongoto**'s case … and **Rudi**'s case … A rule is a rule. The considerations to which Lord Bingham referred in **Huang**'s case … require rules to be treated as such. Moreover, once an apparently bright-line rule is regarded as subject to a near-miss penumbra, and a decision is made in favour of a near-miss applicant on that basis, another applicant will appear claiming to be a near miss to that near miss. That would be a steep slope away from predictable rules, the efficacy and utility of which would be undermined. For these reasons, I would dismiss the appeal in relation to the 'near-miss' argument. In my judgment, there is no 'near-miss' principle applicable to the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an Article 8 claim, but the requirements of immigration control are not weakened by the degree of non-compliance with the Immigration Rules.'*
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> *54. The difference between the two positions may not be as stark as the submissions before us have suggested. The most authoritative guidance on the correct approach of the Tribunal to Article 8 remains that of Lord Bingham in **Huang**. In the passage cited by Burnton LJ Lord Bingham observed that the rules are designed to identify those to whom 'on grounds such as kinship and family relationship and dependence' leave to enter should be granted, and that such rules 'to be administratively workable, require that a line be drawn somewhere'. But that was no more than the starting point for the consideration of Article 8. Thus in Mrs Huang's own case, the most relevant rule (rule 317) was not satisfied, since she was not, when the decision was made, aged 65 or over and she was not a widow. He commented at para 6:*
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> > *'Such a rule, which does not lack a rational basis, is not to be stigmatised as arbitrary or objectionable. But an applicant's failure to qualify under the rules is for present*

> *purposes the point at which to begin, not end, consideration of the claim under Article 8. The terms of the rules are relevant to that consideration, but they are not determinative.'"*

10. The judgment went on to cite with approval Mr Justice Collins' words in L**ekstaka v Immigration Appeal Tribunal [2005] EWHC 745 (Admin)**:

> *"Collins J's statement, on which the court relied, seems unexceptionable. It is saying no more, as I read it, than that the practical or compassionate considerations which underlie the policy are also likely to be relevant to the cases of those who fall just outside it, and to that extent may add weight to their argument for exceptional treatment. He is not saying that there arises any presumption or expectation that the policy will be extended to embrace them."*

11. In his submissions Mr Turner accepted that there was no near-miss principle but contended that the judge had failed to look at the quality of the private life relied upon by the Appellant in support of his claim.

12. At paragraph 11 of the Decision and Reasons the judge set out those factors submitted by Counsel who appeared for the Appellant below:

> *"11. Mr Ali submitted that the difference between the time he has been here and the time he should have been here is marginal and it cannot be proportionate to remove him after he has been here legally for so long. He has invested in his studies and his business, he is fluent in English, has contributed to the economy, has not claimed benefits, has no previous convictions and had integrated into English society. He was a highly skilled migrant and was in one of the shortage occupations and it was obviously of benefit to the United Kingdom if he is allowed to stay here. He submitted that the fact that the refusal in July 2016 gave him 14 days to correct his position may be said to have given him an expectation. Finally, he submitted that the act that he has his wife and parents in Pakistan does not automatically mean that he has not established a private life here and accordingly asked me to allow the appeal."*

13. It is unlikely in my judgment that by the time the judge got from paragraph 11 to his consideration of proportionality, this decision being only 28 paragraphs long, that the judge had lost from his mind those factors set out at paragraph 11. The judge considered whether there were significant obstacles to integration in Pakistan; that is dealt with at paragraph 25. The judge then went on at paragraph 26 to note that the Appellant was 24 years of age when he came to the United Kingdom. He was satisfied that it would be reasonable to expect the Appellant to be able to understand how life there is carried on and participate in it. He

also noted that the Appellant had been back to Pakistan on two recent occasions when he got married and then again in 2016. The Appellant's wife was working there and his parents were still there.

14. The judge clearly gave anxious consideration to the fact that the Appellant was only two and a half months or so short of the required ten years because he dealt with it specifically at paragraph 27.

15. He went on, as he was required to do, to consider Section 117B. The judge clearly weighed in the balance the private life that the Appellant had in the United Kingdom and indeed said so at paragraph 27. He noted, "He has established a private life here by virtue of the length of time he had been here". That relates, I find on any proper reading, to those matters which are set out just a couple of pages before at paragraph 11. I do not accept that the judge did not take those matters into account. The judge came to a decision that was open to him. Those additional factors appear to me to be little more than the ordinary incidences of life, which of themselves only lead to the relief being sought after 10 years lawful residence.

16. As to the point taken on delay, that was not a matter that was taken below. Mr Turner was unable to provide any evidence to suggest otherwise, a point that was taken by the Respondent, but in any event it seems to me that the delay in making the decision in this case was not material notwithstanding the guidance in **EV (Kosovo)**. At all material times the Appellant's position was precarious as a matter of law and less weight was to be given to it.

17. Standing back from this decision I asked myself whether there was anything perverse or irrational in the Decision made below. There was not. I asked myself whether this was a decision that was open to the judge on the basis of the evidence that was before him and I answer that in the affirmative. It follows that the appeal is dismissed.

No anonymity direction is made.

Signed **Date: 23 April 2019**

Deputy Upper Tribunal Judge Zucker