



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/18680/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 15 April 2019

Decision & Reasons Promulgated  
On 07 May 2019

Before

**DEPUTY UPPER TRIBUNAL JUDGE SYMES**

Between

**ASIM ALI**  
(ANONYMITY ORDER NOT MADE)

Appellant

and

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

Respondent

**Representation:**

For the Appellant: Mr R Wilcox (for Lamptons Solicitors)

For the Respondent: Ms Holmes (Senior Presenting Officer)

**DECISION AND REASONS**

1. This is the appeal of Asim Ali, a citizen of Pakistan born 10 September 1984, against the decision of the First-tier Tribunal (Judge Cary) of 11 January 2019 dismissing his appeal on human rights grounds, itself brought against the refusal of his human rights claim of 24 August 2018.
2. The immigration history provided by the Respondent sets out that the Appellant arrived in the UK on 2 October 2006, with entry clearance as a

student, and held leave as such until 31 October 2010. On 20 December 2010 he applied for further leave as a Tier 4 student to study at Union College, and he was granted leave to remain from 26 January 2011 until 14 October 2013. However Union college had its licence revoked and his leave was curtailed to expire on 27 May 2012.

3. By now the Appellant had married Anum Akhtar, on 19 May 2012, and he applied for leave to remain as her partner, which was granted from 4 February 2013 until 4 February 2015, extended until 14 March 2017. On 14 March 2017 he applied for further leave to remain, now on the basis of his private and family life, confirming he still resided with Ms Akhtar. This application was refused and certified as clearly unfounded, and thus did not carry the right of appeal, on 12 April 2018. However following a Pre Action Protocol letter which argued that he had a viable claim for indefinite leave to remain based on his ten years of lawful UK residence, the decision was reconsidered, the new refusal bearing the right of appeal.
4. Before the First-tier Tribunal the Appellant explained that he was now separated from his wife. His explanation for the break in his leave was his having been severely injured in a road accident. He received a head injury and was taken to hospital, then discharged after a few hours, however his knee then swelled leaving him in immense pain; he was bedbound for some time thereafter. It was later discovered that his knee was fractured. He was unable to obtain a CAS from Birmingham FBT College as over this period he was unable to visit them in person.
5. The First-tier Tribunal accepted that the Appellant had established some form of private life in the UK having lived here continuously since 2006 apart from various visits to Pakistan, most recently from late December 2013 to early February 2014.
6. The problem confronting his long residence application was the gap in his leave from 31 October 2010 to 26 January 2011. The Appellant argued that the fact that his application was subsequently granted effectively condoned his overstaying. The Judge did not accept this, noting that the Secretary of State was entitled to grant further leave, but that this did not retrospectively legalise the period of overstay, which was over a period where section 3C of the Immigration Act 1971 did not operate to render the Appellant's presence lawful. Having regard to the published guidance on these cases, the Judge noted that there was no requirement for "*very exceptional*" circumstances, albeit that the threshold was a high one, equating to incapacitation by way of hospitalisation in a case where the delay was attributed to health problems.
7. The Judge found that the Appellant's claim to have been incapacitated for a lengthy period was not corroborated by the medical evidence produced. The only report from the time of the accident was an emergency medicine department report from Heartlands Hospital stating he had attended at 12:14am on 9 October following a road traffic collision, suffering from a minor head injury, and was discharged with no follow up. The sickness

certificate from Woodrow Medical Centre did not describe him as immobile; they merely referred to him being unfit for work and one referenced a Whiplash injury with no mention of his knee. A consultant orthopaedic surgeon recorded in a report of 11 April 2011 that the Appellant had suffered injuries to his neck, left arm and left leg; his left knee swelled up some hours after the accident, and slowly improved over a month or so, though the pain never fully subsided. He was not limited to any particular activities. The actual injury appeared to be a possible “posterior horn tear of the medical meniscus” rather than a fracture. There was no evidence from the college to confirm he would have had to visit them in person to obtain a CAS. He had been assisted by family and friends following the accident, and there was no reason why they could not have assisted him with the college if he had mobility issues.

8. Accordingly the First-tier Tribunal found that the Appellant had not established a viable claim for ten years lawful residence in the UK. Assessing his human rights claim more generally, he had established his private life in this country whilst his immigration status was precarious and he had no expectation of further residence here. He spoke English and had not been dependent on the state (albeit that his present means of support was unclear), so those considerations did not count against him. His witness statement was remarkably light on detail and it was unclear how he had spent his time since finishing his studies in August 2010. He had lived in Pakistan until the age of 22 and would be able to assimilate there, given he spoke the language.
9. Grounds of appeal argued that given the Appellant had relied upon the same exceptional circumstances both in the December 2010 application and on his application for indefinite leave to remain, it had been an error of law for the Secretary of State to fail to take account the fact that his earlier decision had condoned the break in leave.
10. The Upper Tribunal granted permission to appeal on 14 March 2019 on the basis that the ostensible inconsistency in the Secretary of State’s approach to the extension and settlement applications might have been a necessary consideration in the assessment of proportionality.
11. At the hearing I remarked that the Appellant’s case needed to confront the fact that Rule 276B, in so far as it addressed breaks in a migrant’s leave, by definition presupposed a subsequent grant of leave that, at least to some extent, must have condoned the particular break in question. Mr Wilcox for the Appellant submitted that there was more to this particular case than a bare subsequent grant of leave, because there had been an express exercise of discretion in the Appellant’s favour in 2011 on precisely the same basis as he had sought in the application giving rise to this appeal. Discretion should be exercised consistently. The April 2011 letter from Worcester Acute Hospitals NHS Trust contained important information that demonstrated that the Appellant had been incapacitated over the relevant period.

12. For the Respondent, it was submitted that there was no obligation to exercise discretion consistently: the Secretary of State's exercise of power would otherwise lack the quality of discretion. Anyway there was more information before the First-tier Tribunal than was before the Secretary of State, including the live oral evidence, all of which was found collectively wanting.

### Findings and reasons

13. I do not accept that there was a material error of law in the decision of the First-tier Tribunal for the following reasons.
14. In principle the Appellant's case is an arguable one. The appeal was brought by reference to his right to private life under the Human Rights Convention. If he had a viable case under the Rules, then so long as he had established private life in the UK, his appeal would inevitably succeed: see *TZ (Pakistan) and PG (India)* [2018] EWCA Civ 1109 §35. If his case failed under the Rules but could succeed by reference to published guidance, then the public policy judgments supplementing the Rules would be relevant to his appeal's prospects outside them. As stated by Richards LJ in *Tozhlukaya* [2006] EWCA Civ 379 (and applied in *AG Kosovo* [2007] UKAIT 00082):

“If a policy tells in favour of the person concerned being allowed to stay in this country, it may affect the balance under article 8(2) and provide a proper basis for a finding that the case is an exceptional one.”

15. The Supreme Court noted stated in *MM (Lebanon)* [2017] UKSC 10, “although the tribunal must make its own judgment, it should attach considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy.” Lord Carnwath in the Supreme Court makes the same point in *Patel* [2013] UKSC 72, stated at [55] that “the balance drawn by the rules may be relevant to the consideration of proportionality”.
16. Rule 276B provides:

**“Long residence in the United Kingdom**

**276A.** For the purposes of paragraphs 276B to 276D and 276ADE(1).

...

(b) “lawful residence” means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

(ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted;

...

**276B.** The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) ... he has had at least 10 years continuous lawful residence in the United Kingdom.

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

- (a) age; and
- (b) strength of connections in the United Kingdom; and
- (c) personal history, including character, conduct, associations and employment record; and
- (d) domestic circumstances; and
- (e) compassionate circumstances; and
- (f) any representations received on the person's behalf; and

...

(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where

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(a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or

(b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied."

17. The relevant Home Office guidance states:

**"Gaps in lawful residence**

You may grant the application if an applicant:

- has short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days where those gaps end before 24 November 2016
- has short gaps in lawful residence on or after 24 November 2016 but leave was granted in accordance with paragraph 39E of the Immigration Rules
- meets all the other requirements for lawful residence

**Periods of overstaying**

When refusing an application on the grounds it was made by an applicant who had overstayed by more than 28 days before 24

November 2016, you must consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying.

The threshold for what constitutes 'exceptional circumstances' is high, but could include delays resulting from unexpected or unforeseeable causes. For example:

- serious illness which meant the applicant or their representative was not able to submit the application in time – this must be supported by appropriate medical documentation
- travel or postal delays which meant the applicant or their representative was not able to submit the application in time
- inability to provide necessary documents – this would only apply in exceptional or unavoidable circumstances beyond the applicant's control, for example:
  - it is the fault of the Home Office because it lost or delayed returning travel documents
  - there is a delay because the applicant cannot replace their documents quickly because of theft, fire or flood – the applicant must send evidence of the date of loss and the date replacement documents were sought."

18. Thus the long lawful residence Rule effectively prohibits the grant of leave (by declining to disregard breaks in leave exceeding 28 days) to a person who has overstayed by more than 28 days before making their next application. The Appellant had held leave until 31 October 2010 and applied for further leave on 20 December 2010. So clearly there was an overstay of some 20 days. The ultimate break in leave was significantly longer, but the Rule and guidance focus on the timing of the successful application rather than holding the length of decision making against an applicant.
19. The discretion supplementing the Rule provides for the grant of leave notwithstanding a period of excess overstaying so long as exceptional circumstances are demonstrated, including where serious illness (and doubtless by analogy serious accident) prevented a timely application being made, the threshold applied by Home Office decision makers being a "high" one. The First-tier Tribunal was clearly alive to these aspects of the discretion, and appreciated that if in its own estimation the threshold for exceptional circumstances had been surpassed, it should make a decision in accordance with the guidance. It seems to me that that was an entirely correct approach.
20. Numerous authorities identify the value of the principles of legal certainty and consistency. The Administrative Court cited this passage from academic authority in SA [2015] EWHC 1611 (Admin):

“De Smith's Judicial Review 6th ed. (2007) helpfully explains the rationale behind these principles at paragraph 9-005:

‘The underlying rationale of the principle against fettering discretion is to ensure that two perfectly legitimate values of public law, those of legal certainty and consistency (qualities at the heart of the principle of the rule of law) may be balanced by another equally legitimate public law value, namely, that of responsiveness. While allowing rules and policies to promote the former values, it insists that the full rigour of certainty and consistency be tempered by the willingness to make exceptions, to respond flexibly to unusual situations, and to apply justice in the individual case.’”

21. David Richards LJ stated in *Chirairo* [2016] EWCA Civ 77 §25:

“... a discretionary public law power must not be exercised in an arbitrary or partial way. If two individuals in identical circumstances are knowingly treated differently, this may well involve an arbitrary exercise of power in the case of one of them and, without a rational explanation, is liable to be struck down as unlawful. Moreover, the circumstances of the two individuals, though not identical, may be so similar as to call for a rational explanation for the different treatment to be given, if the unfavourable treatment given to one is to stand. It would be unfair of the Secretary of State not to treat like cases alike in the sense of discriminating against someone upon inadequate grounds: see *R v Secretary of State for the Home Department, ex p Zeqiri* [2002] UKHL 3 ... at [56] per Lord Hoffmann. Nonetheless, caution is required. First, personal circumstances will usually differ to an extent which prevents two individuals from being treated as like cases. Secondly, different decision-makers faced with substantially the same facts may on entirely rational grounds come to different conclusions: see *Otshudi v Secretary of State for the Home Department* [2004] EWCA Civ 893.”

22. *Chirairo* spoke to the situation where decision making appeared inconsistent as between similarly placed applicants; the same considerations must apply *a fortiori* when different decision makers confront the same applicant who relies on the same facts. Where the Tribunal and Secretary of State are confronted by *identical* information, one can well see that the same approach to the exercise of discretion should be taken by both administrative and judicial decision makers. It is accordingly necessary to examine the decision making in this particular case and the First-tier Tribunal’s response to it.

23. The Judge clearly appreciated the breadth and nature of the Secretary of State’s discretion. However, when it evaluated the Appellant’s case for itself, it found the Appellant’s explanation of his state of incapacity to be wanting. It did not accept that the medical evidence supported the Appellant’s claim, because the material did not indicate that the Appellant was wholly immobile over the relevant period (I note that a March 2011 letter referred to the fact that by then at least the Appellant was working part-time at Pizza Hut), particularly in the context where the evidence indicated he had friends

and family to assist him with transport if necessary. It gave adequate reasons for its conclusions which are fully supported by the evidence it identified as supporting them; one could not possibly say that those conclusions were irrational.

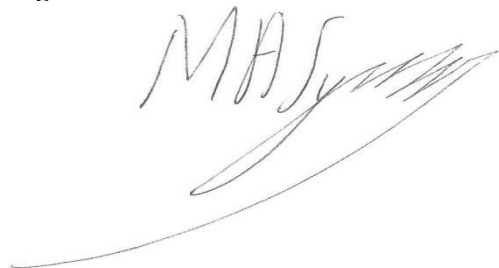
24. It is clear that the medical evidence put forward now was largely unavailable to the Secretary of State previously, as the application of December 2010 predates much of the evidence now relied on (pages 3-4 of the Home Office refusal letter itemises the material provided on the present application, which included seven letters and reports from 2011). It is not possible to discern precisely what the Secretary of State was previously told about the Appellant's circumstances, or what supporting evidence was provided. It may well be that the Secretary of State took the Appellant's claim to have been completely incapacitated at face value. That, however, was not what the medical evidence showed when subsequently produced. I accordingly do not accept that the First-tier Tribunal was effectively bound to make a finding that discretion should have been exercised in the Appellant's favour simply by the fact that the same general considerations underlay both the December 2010 extension application and the ultimate application for indefinite leave to remain.
25. The Appellant's core submission on consistency having been addressed, it remains to address the rest of the First-tier Tribunal's reasoning. Its conclusions on the appeal were unsurprising. The Appellant put forward only rather faint evidence of private life in the UK. Doubtless he has established private life here, but absent meeting the criteria of an immigration route under the Rules, he needed to establish a compelling case in order to show that the immigration decision was a disproportionate one. Given the lack of detail of UK connections and the breakdown of his relationship with his former wife, it seems to me that the Judge below was perfectly entitled to reject the Appellant's claim on these grounds.
26. For these reasons I consider that the appeal must be dismissed.

### **Decision**

The appeal is dismissed.

Signed

Date 24 April 2019

A handwritten signature in blue ink, appearing to read 'M.A.S. Symes', with a long horizontal flourish underneath.

Deputy Upper Tribunal Judge Symes