IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003069

First-tier Tribunal Nos:
HU/54948/2021
IA/12308/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 19 March 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR WAHEED PERVAIZ
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S Lecointe, Senior Presenting Officer
For the Respondent: Mr D Balroop, Counsel, instructed by House of Immigration

Heard at Field House on 21 December 2022

DECISION AND REASONS

Introduction

1. I shall refer to the parties as they were before the First-tier Tribunal: the Secretary of State is once more "the Respondent" and Mr Pervaiz is "the Appellant".

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Sweet ("the judge"), promulgated on 25 April 2022, by which he allowed the Appellant's appeal against the Respondent's refusal of his human rights claim.

3. The Appellant is a citizen of Pakistan born in 1978. He came to the United Kingdom in 1998 and has resided here ever since. In June 2008 he was convicted of using a false instrument in order to undertake employment and was sentenced to nine months' imprisonment with a recommendation that he be deported. Following this, an asylum claim was made and refused later in 2008, with a subsequent appeal being finally determined in March the following year. A deportation order was not made until October 2011. The Appellant then absconded for a number of years, with legal representatives providing further submissions on his behalf in July 2017 and February 2018. An application for leave to remain (which constituted the human rights claim) was made in May 2018 and was refused on 17 March 2021. The human rights claim was in effect an application to revoke the deportation order made in 2011.

The judge's decision

4. Having set out the Appellant's immigration history, as summarised above, the judge referred himself to paragraph 390 of the Immigration Rules ("the Rules"), which related to applications for revocation of deportation orders. A summary of the evidence was then set out. In the section entitled "Findings and Decision" the judge referred to previous Tribunal findings and other matters which were, broadly speaking, adverse to the Appellant. There was a lack of evidence in respect of any health conditions, family life or indeed his overall activities whilst in the United Kingdom. The core of the judge's reasoning appears at [21] and [22] of the decision. In the former, the judge noted that the Appellant

could not succeed by reference to paragraph 276ADE(1)(iii) of the Rules because of the extant deportation order. The judge made reference to sections 117B(4) and 117C of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"). There were references also to paragraphs 398 and 399A of the Rules. In [22], the judge found there to be "considerable evidence" of the Appellant's charitable activities at his local mosque and elsewhere. He found that the Appellant had a close circle of friends whom he assisted in various ways. A reference is made to paragraph 96 of the reasons for refusal letter which had confirmed that the Appellant's offending was not "serious" or "persistent". The judge accepted that the Appellant has shown contrition and remorse for his offence in 2008. The judge viewed the length of time the Appellant had spent in the United Kingdom as being a "significant and compelling factor". The last sentence in [22] referred to the possibility that the Respondent might grant limited leave not exceeding 30 months, with reference to paragraph 399B of the Rules. The appeal was allowed on Article 8 grounds.

The grounds of appeal

5. The Respondent drafted grounds of appeal in the following terms: (a) the judge had failed to make a finding as to whether the Appellant had a family life in the United Kingdom such that the family life exception under the Rules and the 2002 Act could apply; (b) the judge's finding that the Appellant had undertaken charitable activities did not amount to social and cultural integration into life in the United Kingdom; (c) the Appellant could only have relied on the existence of "very compelling circumstances" with reference to paragraph 398 of the Rules and the Appellant's charitable activities "do not approach the high threshold of very compelling circumstances". The judge had "therefore erred in allowing the appeal". A reference is made to the relevant threshold which is set by the very compelling circumstances test.

6. Permission was refused by the First-tier Tribunal but then granted by the Upper Tribunal on renewal.

The hearing

7. After some discussion, and an indication of certain matters which had arisen from my pre-reading in this case, Ms Lecointe accepted that the Appellant was not a "foreign criminal" for the purposes of either the Rules or section 117D of the 2002 Act. His sentence was for less than twelve months; and the reasons for refusal letter had expressly accepted that his offending had not caused "serious harm", nor was he a "persistent offender". Although she acknowledged this state of affairs, Ms Lecointe stated that she was unable to concede the appeal. However, she had no further submissions to make.

8. Mr Balroop indicated that he had attempted to make it clear to the judge that the Appellant was not a "foreign criminal" and that the appeal had been based on paragraph 390 of the Rules. He accepted that section 117B of the 2002 Act was relevant, but references by the judge to section 117C and the deportation provisions in the Rules were misconceived. He submitted that the judge had been entitled to place significant weight on the length of residence and that in terms of the underlying evidence, the Appellant's offence had related only to obtaining unlawful employment and this had been a factor considered by the Court of Appeal in ZH (Bangladesh) [2009] EWCA Civ 8, where it said that many people who resided in the United Kingdom unlawfully had worked in order to support themselves. Mr Balroop submitted that the reference in [22] to limited leave to remain being granted by the Respondent did not constitute a material element of the judge's assessment, particularly as paragraph 399B of the Rules was irrelevant, given that the Appellant was not a "foreign criminal". Ms Lecointe made no reply.

9. At the end of the hearing I reserved my decision.

Discussion and conclusions

10. I remind myself of the need to apply appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to a number of pronouncements by the Court of Appeal to that effect.

11. Two aspects of this case are in my view clear. First, the judge was not required to engage with paragraphs 398, 399, or 399A of the Rules, nor section 117C of the 2002 Act because the Appellant was not a "foreign criminal" within the definition set out in either the Rules or section 117D of the 2002 Act (and it is Part 5A which governs the assessment of an appeal: Binaku (s.11 TCEA; s117C NIAA; para 399D) [2021] UKUT 34 (IAC)). To that extent, the judge had regard to irrelevant considerations. The second issue is that the Respondent's grounds of appeal upon which she was granted permission are entirely misconceived because they are predicated on the Appellant being a "foreign criminal" and thereby having to rely either on the two exceptions or very compelling circumstances. That premise was erroneous.

12. In terms of what the judge should have been looking at, and in my judgment did look at when his decision is read as a whole, the relevant matters were those which bore on the proportionality exercise under Article 8 with reference to the fact that the Appellant was asking for the deportation order to be revoked (with paragraph 390 of the Rules as the context for this). In referring to the Appellant's charitable activities the judge did not make reference to relevant decisions such as Thakrar (Cart JR; Art 8; Value to Community) [2018] UKUT 336 (IAC). This might have constituted an error if it had been a significant aspect of the overall assessment. However, it is clear that the central issue was that of the length of residence, being at the time just over 24 years. In this context the judge had referred to section 117B of the 2002 Act. I am satisfied that the reference to the grant of limited leave by the Respondent was not an operative factor in the judge's assessment. When it is recalled that these factors did not fall to be considered within the context of paragraph 398 or section 117C of the 2002 Act, in my judgment the overall conclusion reached was one which was open to the judge. Another judge may have reached a different conclusion on the same evidence, but this judge's decision was neither irrational nor materially

infected by the taking into account of irrelevant considerations or a failure to take account of relevant considerations.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law.

The decision of the First-tier Tribunal shall stand.

The appeal to the Upper Tribunal is accordingly dismissed.

H Norton-Taylor

Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 13 March 2023