



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01235/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 29 October 2018

Decision & Reasons Promulgated  
On 13 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

AWG  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Z Nasim, Counsel, instructed by Legal Rights Partnership

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Pakistan born on 7 July 2007. His mother is a British citizen.
2. On 17 December 2016 the appellant travelled to the UK from Pakistan, where he had been living with his mother, and entered the UK as a visitor with a visa valid until 27 November 2018.

3. On 28 April 2017 the appellant applied for leave to remain in the UK on the basis of his family life with his mother.
4. On 11 December 2017 the respondent refused the application. The Reasons for Refusal Letter states that the appellant was unable to satisfy any of the routes to leave to remain under Appendix FM of the Immigration Rules and that there were not exceptional circumstances to justify allowing his application under Article 8 ECHR outside the Immigration Rules.
5. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Powell. In a decision promulgated on 27 March 2018 Judge Powell dismissed the appeal under Article 8 of the ECHR. The appellant is now appealing against that decision.

### **Decision of the First-tier Tribunal**

6. Judge Powell considered the appellant's appeal outwith the Immigration Rules. He found that even though it would be in the appellant's best interests to remain in the UK with his mother, who was his primary carer and had had the main responsibility for his care and upbringing, it would not be disproportionate to require him to leave the UK. The judge commented that the appellant might fall within Paragraph 297 of the Immigration Rules and in accordance with that paragraph of the Rules could apply to join his mother in the UK from Pakistan.
7. The judge attached considerable weight to the public interest in the operation of "fair but firm immigration control". He found that the appellant's mother had brought the appellant to the UK on the pretence of being a visitor but with the intention of deliberately avoiding immigration control by remaining in the UK. The judge concluded that the appellant's return to Pakistan "is proportionate and necessary and therefore justified by Article 8.2".

### **Grounds of Appeal and Submissions**

8. The grounds of appeal submit that the decision contains a fundamental misdirection of law as the judge failed to consider Paragraph 298 of the Immigration Rules, which sets out the requirements to be met by a person seeking Indefinite Leave to Remain in the UK as the child of a British citizen. The grounds acknowledge that the judge was not assisted by both the respondent and appellant failing to raise this issue.
9. It is contended in the grounds of appeal, and was argued by Mr Nasim, that the appellant satisfies the requirements in Paragraph 298 and consequently the appeal should have been allowed on the basis that removal would be disproportionate.
10. The grounds cite *TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department* [2018] EWCA Civ 1109 where it is stated
 

"Where a person satisfies the Rules, whether or not by reference to an Article 8 informed requirement, then this will be positively determinative of that person's

Article 8 appeal, provided their case engages Article 8(1), for the very reason that it would then be disproportionate for that person to be removed”.

11. The grounds also cite *SZ (Applicable immigration rules) Bangladesh* [2007] UKAIT 00037 to support the contention that it is permissible to raise Paragraph 298 at this stage, even though it was not raised either in the appellant’s application or in the First-tier Tribunal.
12. At paragraph 16 of *SZ* it is stated:
 

“However, there will occasionally be situations where the basis of the application, or the scope of the decision, or the grounds themselves, do require the Tribunal to consider more than the self-evidently applicable Rule. Where there is an obvious link or connection between another Rule and the primary way in which the application or grounds are put it may be the obligation of the Tribunal to consider and apply another Rule subject always to the requirements of fairness. In particular, if there is reason to suppose that the appellant may want to challenge the decision on grounds other than those set out in the notice of appeal, there may in certain circumstances be an obligation to consider whether the grounds of appeal should be amended.”
13. To support his submission that the factual circumstances are such that Paragraph 298 is satisfied Mr Nasim relied on the findings of the judge that the appellant’s mother is his primary carer and that her income, combined with the financial support provided to her by her father, is sufficient to meet the appellant’s financial needs.
14. Ms Isherwood argued that it was now too late to raise Paragraph 298 of the Immigration Rules for the first time. She maintained that the appellant had not even applied for Indefinite Leave to Remain and therefore could not now seek to have his case determined under Paragraph 298. She also argued that the findings of fact made by the judge did not support a conclusion that the requirements of Paragraph 298 were satisfied.

### **Error of Law**

15. This was a human rights appeal under Section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). The issue for the First-tier Tribunal to determine, therefore, was not whether the appellant was entitled to a grant of leave under Paragraph 298 of the Immigration Rules, but whether requiring his removal from the UK would be contrary to Article 8 ECHR.
16. This does not mean, however, that the Immigration Rules were not relevant. On the contrary, as the Upper Tribunal in *Charles (human rights appeal: scope)* [2018] UKUT 00089 made clear, if the appellant was entitled to leave under the Rules this would weigh heavily in the proportionality assessment under Article 8(2) as it would reduce (or remove) the public interest in removing him from the UK. Therefore, even though the judge was not required to determine the appeal under the Immigration Rules he did need to consider the relevant provisions of the Immigration Rules in order to undertake an adequate assessment under Article 8 ECHR.

17. Paragraph 298 of the Rules sets out the requirements to be met by a child of a British Citizen who is seeking to remain in the UK. This is precisely the position of the appellant and therefore it should have been obvious to the Tribunal that it needed to be considered. Evaluating the proportionality of the appellant being removed from the UK without assessing, as part of this, whether he met the requirements under Paragraph 298, was a material error of law.
18. Although I accept that the failure to consider Paragraph 298 was a material error of law, I do not accept the appellant's contention that the judge's findings of fact inevitably lead to the conclusion that the appellant satisfies the requirements of that paragraph. The judge made a number of factual findings which are relevant to the assessment under Paragraph 298, but taken alone they are insufficient to determine whether Paragraph 298 is satisfied.

### **Re-Made Decision**

19. In re-making the decision, my starting point is that the factual findings of the First-tier Tribunal were not challenged and are preserved.
20. I heard evidence from the appellant's mother, as well as submissions from Mr Nasim and Ms Isherwood, focussing on the issue of whether the appellant satisfies the requirements of Paragraph 298.
21. The preserved factual findings of the First-tier Tribunal include:
  - (a) The appellant's mother is his primary carer and has the main responsibility for his care.
  - (b) The appellant's mother has an income from employment and receives financial support from the appellant's grandfather.
22. The oral evidence of the appellant's mother was that she earns approximately £800 a month and in addition receives regular substantial financial support from her father, who has provided this support since she separated from the appellant's father. Bank statements were adduced which corroborate this oral evidence.
23. In addition, the appellant's mother submitted a tenancy agreement (executed on 21 December 2017) which shows that she and her mother rent a property (which they have exclusive use of) for £2,100 a month. Her evidence is that she resides in the property with the appellant and her mother.
24. The appellant's mother also submitted a contract of employment showing a start date of 7 July 2018.
25. Mr Nasim argued that the evidence, as summarised above, establishes that the requirements of Paragraph 298 are met and therefore that there is no public interest in removing the appellant from the UK.

26. Ms Isherwood contended that there are gaps in the evidence. She maintained that there had not been an adequate explanation as to how the appellant could afford a monthly rent of £2,100, given her income. She noted that although bank statements support that there have been regular transfers from the appellant's grandfather it had not been established that these would continue such that the appellant's mother would not become a burden on the state. Ms Isherwood also highlighted that Judge Powell had found the appellant's mother to not be an honest witness.
27. Having considered the evidence and submissions I find as follows:
28. The appellant is living in the UK with his British national mother. The appellant's removal from the UK would significantly interfere with the family life he presently enjoys with his mother, who is his primary carer. Article 8(1) is therefore engaged.
29. I now turn to consider Article 8(2) and whether removing the appellant would constitute a disproportionate interference with his rights under Article 8.
30. My starting point is to assess whether he satisfies the requirements in Paragraph 298 of the Rules as his compliance (or non-compliance) with the Rules will weigh heavily in the Article 8(2) proportionality balancing exercise.
  - (a) Under Paragraph 298(i)(c) the appellant must show that his mother is present and settled in the UK and has had sole responsibility for his upbringing or that he normally lives with her and not his father. The preserved findings of fact of the First-tier Tribunal make clear that this element of Paragraph 298 is satisfied.
  - (b) Under Paragraph 298(ii) the appellant must have or have had limited leave to enter the UK and be under the age of 18. This element is met as the appellant was born in 2007 and entered the UK as a visitor with leave until 27 November 2018.
  - (c) Under Paragraph 298(iii) it must be shown that the appellant is not living an independent life, is unmarried and has not formed an independent family unit. Given his age, this is clearly satisfied.
  - (d) Paragraphs 298(iv) and (v) require that the appellant will be accommodated adequately by his mother without recourse to public funds in accommodation which she owns or occupies exclusively and that he will be maintained adequately by his mother without recourse to public funds. This was the main area of contention during the rehearing. Having considered the documentary and oral evidence, as well as the findings of the First-tier Tribunal, I am satisfied that this criterion is met. The evidence indicates (and I find as a fact) that the appellant lives with his mother and grandmother in a house which has a one year tenancy and where a rent of £2,100 is paid monthly. The documentary evidence shows (and I find as a fact) that the appellant's mother and grandmother are supported financially by the appellant's grandfather and that this substantial support provides a significant supplement to the income earned by the appellant's mother through her employment in the UK. The

financial and accommodation circumstances of the appellant are, in my view, sufficient to satisfy Paragraphs 298(iv) and (v).

- (e) None of the other elements of Paragraph 298 are relevant.
- (f) I am satisfied, therefore, that the appellant meets the requirements of Paragraph 298.

31. Given that the appellant would be entitled, under the Immigration Rules, to a grant of indefinite leave to remain in the UK, I am satisfied that there is not a public interest in his removal. Consequently, requiring him to leave the UK would constitute a disproportionate interference with his right to respect for his family life with his mother under article 8 ECHR. I therefore allow the appeal.

### **Decision**

32. The decision of the First-tier tribunal contains a material error of law and is set aside.

33. I remake the decision by allowing the appeal under Article 8 ECHR.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 7 November 2018