Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/00413/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 28 February 2018	**On 05 March 2018**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

IMRAN ZAHID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Miss M. Atcha of Ebrahim & Co.
For the respondent: Mr I. Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The following history can be gleaned from the limited evidence before the Upper Tribunal. The appellant says that he entered the UK in January 2001 with entry clearance as a student. He married an EEA national and was issued with a five-year residence card in January 2004. The appellant applied for a permanent residence card in November 2008. The appellant became divorced from his wife in 2009. The respondent refused the application on 01 February 2010. The appellant lodged an appeal against the respondent's decision.

2. First-tier Tribunal Judge Meah dismissed the appeal under The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006") in a decision promulgated on 07 May 2010. However, the appellant had raised human rights issues in the appeal, which Judge Meah found needed

to be considered by the respondent. In respect of this issue the appeal was allowed to the limited extent that the case was 'remitted' to the respondent to consider a human rights claim within the context of paragraph 395C of the immigration rules.

3. Although this was an unorthodox way of dealing with the matter given that the appellant had not made a formal human rights claim to the respondent, it is accepted that the respondent subsequently made a decision to refuse leave to remain on human rights grounds on 02 October 2013 and that this gave rise to a right of appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). The appellant did not lodge the appeal against the decision until 2016. The First-tier Tribunal agreed to extend time. The appeal before the First-tier Tribunal was therefore an appeal against the respondent's decision to refuse a human rights claim.

4. The appeal was dismissed by First-tier Tribunal Judge Obhi in a decision promulgated on 15 June 2017. The judge concluded that the appellant had failed to produce any evidence to show that he was in a relationship with his claimed partner. Although paragraph 7 of the decision states that she gave evidence, at the hearing today, Miss Atcha confirmed that his partner did not in fact attend the hearing. The appellant's evidence was that his partner was a Pakistani asylum seeker whose application had been refused and was the subject of an appeal to the First-tier Tribunal. The judge concluded that there was very little evidence to support the claimed relationship, and apart from the birth certificates, no evidence relating to the children.

5. The judge noted that no human rights application was made to the respondent after the matter was sent back to the respondent following the appeal in 2010. There was no evidence to show that the appellant asked the respondent to consider the claim on grounds of long residence. Nor was there any evidence to show that he had raised the issue of his relationship with his partner or the fact that he had children in the UK.

6. The judge concluded that she could not make a decision in relation to 10 years' lawful residence because the appellant had not made an application to the respondent. There was no statement from his partner and limited evidence relating to the children. The appellant didn't even mention them in the witness statement he prepared for the hearing. In any event, the judge concluded that there was insufficient evidence to show that the appellant had 10 years' lawful residence or to show that he met the private life requirements under paragraph 276ADE or the family life requirements under Appendix FM. She directed herself to the public interest considerations contained in section 117B of the NIAA 2002, but concluded that little weight could be given to the appellant's private life, which was established in recent years when his private life was precarious. The appeal failed due to a manifest lack of evidence.

Decision and reasons

7. Given that the appellant claimed that he had a partner and children in the UK for the first time at the First-tier Tribunal hearing, for the avoidance of doubt, Mr Jarvis confirmed that consent was given to the Upper Tribunal to consider the issues as a 'new matter' for the purpose of section 85(6) of the NIAA 2002.

8. The grounds of appeal made general submissions in relation to the substantive issues without, in my assessment, even raising any arguable errors of law. At the hearing Miss Atcha continued to make general assertions about the appellant's length of residence and expressed general disagreements with the outcome of the appeal. She asserted that the appellant had leave under section 3C of the Immigration Act 1971 following the appeal in 2010 and therefore accrued a period of 10 years' lawful residence. When pressed to concentrate on whether the First-tier Tribunal made an error of law she said that the judge should have applied the 'old rules' but failed to make any arguments as to why this should be the case.

9. The judge was correct to say that there was no evidence to show that the appellant had made an application for leave to remain on grounds of 10 years' lawful residence. It is inadequate simply to make a general assertion about the appellant's length of residence. The requirements of paragraph 276B of the immigration rules must be satisfied. A proper application should be made with supporting evidence. A period of residence under European law is not 'lawful residence' for the purpose of paragraph 276A(2) of the immigration rules, although the respondent's guidance says that she will consider whether to exercise discretion. An essential element of the assessment of an application for Indefinite Leave to Remain on grounds of 10 years' lawful residence is the respondent's assessment of whether, having regard to the public interest, there are no reasons why it would be undesirable for an applicant to be granted leave to remain. Other evidential requirements must be satisfied relating to English language and knowledge about life in the UK. In other words, it is necessary for a formal application to be made and for the respondent to consider discretionary matters before it can be considered on an appeal.

10. The correspondence sent to the respondent following the appeal in 2010 was extremely limited and amounted to nothing more than a general request for leave to be granted. The judge was correct to say that there was no evidence to show that a proper application was made for leave to remain on grounds of 10 years' lawful residence. Nor was there any evidence to show that submissions were made in relation to the appellant's new partner or their children or that any meaningful human rights submissions were made to the respondent.

11. Miss Atcha's assertion that the judge should have considered the 'old rules' was vague and unparticularised. She did not even identify what rule should have been considered. It is trite law that the respondent is entitled to consider the rules in place at the date of decision. No application was made for leave to remain on human rights grounds. At the date of the decision in 2013, the respondent was unarguably entitled to consider the

human rights issues with reference to the 'new rules' introduced after 2012: see *Singh & Khalid v SSHD* [2015] EWCA Civ 74.

12. The appellant had not produced any evidence to support his claim to have 10 years' lawful residence to the respondent or to the First-tier Tribunal. In the absence of a formal application for leave to remain it was not possible for the First-tier Tribunal to determine the matter, nor was there any evidence to support the appellant's bare assertions about his length of lawful residence. It is not arguable that the appellant's leave was extended under section 3C of the Immigration Act 1971 because it only applies to a person who has limited leave to remain who applies to vary their leave. The first appeal was decided under the EEA Regulations 2006. The appellant did not have limited leave to remain and had not applied to vary his leave to remain prior to the appeal. Section 3C did not apply on the facts of this case.

13. It was open to the judge to conclude that the appellant had failed to discharge the burden of proof given that there was so little evidence to support a human rights claim. The appellant did not have 20 years continuous residence for the purpose of the private life requirement contained in paragraph 276ADE(1)(iii) of the immigration rules and there was no evidence to show that he would face 'very significant obstacles' to integration if he returned to Pakistan for the purpose of paragraph 276ADE(1)(vi). The appellant claimed that he was in a relationship with a Pakistani national, but produced no evidence to support the claim. In any event, if she had no leave to remain the appellant could not hope to meet any of the family life requirements contained in Appendix FM of the immigration rules.

14. Although the appellant produced copies of two birth certificates, it was open to the judge to note that there was no other evidence to show where the best interests of the children lay. Neither child had been resident in the UK for a continuous period of seven years. They were not qualifying children for the purpose of section 117B(6) of the NIAA 2002. Even if the appellants' evidence was taken at its highest, his partner does not have leave to remain in the UK. There was no evidence to show that the couple could not continue their family life in Pakistan. There was no evidence to show that the children's welfare would not be catered for if they returned to Pakistan as a family. The preparation of the appeal was simply inadequate. In the circumstances, the judge's findings were lawful and open to her to make. It is understandable that the appellant disagrees with the decision but it is not arguable that the judge's findings were outside a range of reasonable responses to such inadequate evidence.

15. For these reasons, I conclude that the First-tier Tribunal decision did not involve the making of an error of law. The decision shall stand.

DECISION

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

The decision shall stand

Signed  Date 28 February 2018
Upper Tribunal Judge Canavan