Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10623/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 February 2018	**On 22 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR SHERAZ MALIK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D. Coleman, Counsel instructed on a direct access basis
For the Respondent: Mr T. Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The resumed hearing of this appeal came before me for hearing on 23 February 2018, following a previous hearing, which took place on 9 October 2017. In a decision and reasons dated 15 November 2017, I found material errors of law in the decision of First tier Tribunal Judge Paul and adjourned the appeal for a resumed hearing. A copy of that decision is appended.

2. The Appellant gave evidence and adopted his witness statement of 10 February 2018. He gave evidence to the effect that in respect of his application

made in 2010, a blank copy of which was contained in the Appellant's bundle, that at D10 and D11 he would have stated that he overstayed and given his reasons *viz* the delay in obtaining bank statements. He also made reference to page 54 of the bundle, which is an extract from the Subject Access Request dated 17 November 2017, which states that his application of 1 July 2010 could not located but caseworking notes show that an extension of leave was granted.. He confirmed that since he arrived in the United Kingdom on 6 August 2005 there were no periods when he was here unlawfully.

3. In cross-examination by Mr Wilding, the Appellant was asked about his wider family in the UK *viz* aunts and uncles. He confirmed that he continued to live in Ilford and that he is a tenant and rents one room in a shared house. He said that in Pakistan he has his mother and two brothers plus a further brother in Dubai. He was asked if he went back to Pakistan whether he could go and live with his mother, to which he replied that he has been in the United Kingdom for twelve years and it would be very difficult to integrate back home. He said that he worked in as a security officer at Asda in Basildon and sometimes in Tesco as part of the on-site security for the distribution centre.

4. The Appellant confirmed that he had studied in the UK. He said that he had graduated with a BA in Economics in Pakistan and applied to come to the UK for higher education. He completed an MBA in the UK. Whilst he had worked for three years in security, prior to that he did bookkeeping and office work for a year. He confirmed that in 2010 he was studying for his MBA and working at the accountancy firm.

5. There was no re-examination.

6. In his submissions, Mr Wilding submitted that the difficulty the Appellant has with establishing a paragraph 276B case is that there was a period of time of 65 days when he did not have any leave as a result of the fact that his section 3C leave expired on 22 May 2010 and he only made the application for further leave on 1 July 2010, which was decided on 22 July 2010. He submitted that, contrary to the Appellant's assertion, the Respondent did consider her long residence policy at pages 4 and 5 of the decision refusing to grant ILR on the basis of long residence but chose not to exercise discretion in the Appellant's favour. He submitted that it is clear that continuous residence requires just that and that if one falls outside the permitted 28 day period one has no leave. Given that the period of overstay was for 60 days this does not assist the Appellant.

7. Mr Wilding submitted that it is clear from the judgment in AG (Kosovo) [2007] UKAIT 00082 that the Tribunal cannot exercise discretion on the Respondent's behalf. He submitted that the Appellant's case under Article 8 falls completely outside the Rules for consideration, given that the Appellant was not advancing a case under paragraph 276ADE(vi) of the Rules. He further submitted that pursuant to section 3C(4) of the Immigration Act 1971 the Appellant cannot use such leave as the starting point to make a further

application, consequently the Appellant has not been lawfully resident since 18 August 2015.

8. Mr Wilding accepted that the Appellant has engaged Article 8 in that he has established a private life in the United Kingdom, however, the issue is whether it would proportionate to expect him to leave. Whilst the Appellant's positive case is based on his long residence, which was mainly lawful and that there is a "near miss" in respect of qualifying under the Rules for long residence, the Appellant does not put forward a case that he cannot return to Pakistan. He further submitted that a near miss is as good as a mile in proportionality terms *cf.* AG (Kosovo) (op cit) at [46] onwards. He submitted that the public interest weighs against the Appellant; that his leave has always been precarious and the Respondent's decision is clearly proportionate.

9. In his submissions, Mr Coleman drew attention to page 30 of the previous Appellant's bundle before the First tier Tribunal, which states that his leave under Tier 1 Post Study leave continues whilst his current appeal is outstanding. He also drew my attention to page 62 of the current bundle and the fact that the case minute notes considered the period of 1 June 2010- 1 July 2010 and the caseworker must have been satisfied that exceptional circumstances existed otherwise s/he would have looked at a longer period if the application was out of time e.g. 9 months. The parties then considered Appendix C of the Immigration Rules covering the relevant period in 2010. Mr Wilding submitted that the level of funds in a Tier 4 application depended on where the Appellant was studying and if it was in Inner London, the funds would need to cover the fees plus £1000 for each month of the course up to 9 months. This was changed in July 2011 and where an Appellant has an established presence he need only provide evidence up to 2 months. He submitted that the Appellant's visa was not back-dated to cover the period when he did not have leave. However, he submitted that this cannot go to consideration of discretion and at best it goes to the question of proportionality which still has this gap. He accepted, however, that the case minutes do not give clarity one way or another and one can only guess what was being considered in respect of [11] of Appendix C and the table therein. Mr Wilding subsequently accepted, upon the consideration by the parties of the Rules in force at the date of the application made on 1 July 2010, that whoever considered that application accepted that the Appellant only needed to show 2 months worth of funds. Thus he was implicitly accepted as a person with an established presence.

10. In his submissions, Mr Coleman invited me to consider the 2010 version of the Rules and Appendix C. He submitted that it was absolutely clear that he filled in section D on the application form in July 2010 and gave exceptional circumstances and provided reasons as to why he has overstayed. The Appellant has provided reasons today about his inability to provide bank statements and difficulties with his solicitors. He submitted that the case record sheet at AB 62 and the amount of money which was considered caused him to

believe that the Appellant was treated as somebody who had applied in time, thus the decision maker must have accepted his reasons. More significantly than that, Mr Coleman submitted that this is not a case where the Home Office policy had been considered. Whilst page 4 of the refusal letter asserts that no exceptional evidence has been provided in support of the Appellant's out of time application, this is not the case if one considers D11 and the Appellant's oral evidence as to what he did. He submitted that there was no reason to doubt this. The Appellant had to provide reasons at D11 because it is mandatory. It was incumbent upon the decision maker in 2015 to look back at the reasons why the application in 2010 was made late, however, the decision maker was not able to do that because the form and the evidence have been lost by the Home Office.

11. Mr Coleman further submitted that the Home Office must have looked at the case minute note and should have looked at 2010 application when considering the ILR application and essentially should have been alive to the issue. He submitted that it would be appropriate to allow the appeal on the basis that the Respondent would be required to make a fresh decision *cf.* AG (Kosovo) (op cit) at [43] and [44] and Greenwood (No 2) [2015] UKUT 00059 (IAC). He declined to make separate submissions on private life, except as to say that that on balance it is apparent that the Appellant had a short gap, however, he provided exceptional evidence as to the reasons for the short gap which were accepted at the time, but the current decision maker was blind to it and did not apply a policy that was directly applicable to the Appellant nor consider exceptional circumstances. Mr Coleman further submitted that it is apparent the Appellant was not required to go above and beyond what someone applying in time is required to do and that the Respondent should not resile from position she took in 2010, when she accepted his application was out of time so effectively exercised her discretion.

12. I permitted Mr Wilding to respond on the issue of Greenwood No 2 (op cit) which he submitted had been wrongly decided in light of the as yet unreported Presidential decision in Charles HU/00561/2015, where the Upper Tribunal found that the failure to exercise discretion should be considered through the prism of proportionality as there is no power any longer to find a decision not in accordance with the law.

My findings

13. I first consider the Immigration Rules in force at the date of the Appellant's out of time application for further leave, made on 1 July 2010. It is clear from the Rules in force at that time that the maintenance funds required were £1600 i.e. 2 months at £800. It is consequently clear from the GCID case record sheet, which makes reference to monthly living costs of £1600 that the Appellant was treated at the date of his application for leave, considered on 5 July 2010, as a person with an established presence and not as an overstayer. This is despite the fact that at AB 60 the application is recorded as having been

validly made but "OOT" which I understand to mean "out of time." My view is further supported by the fact that AB 61 the notes record that the Appellant's course was due to finish on 23.12.2010, therefore, he had over 5 months left to run at the date of consideration.

14. I have further considered the Appellant's application and covering letter made on 10 August 2015, which gave rise to the decision under appeal, however neither the letter nor application form raise the issue of exceptional circumstances in respect of the 2010 application but rather assert that the Appellant has been lawfully present throughout.

15. I turn to the decision of 10 August 2015. I find that at pages 3-4 the Respondent did expressly consider her published "Modernised Guidance: Long Residence and Private Ties" in respect of the exercise of discretion where continuous leave has been broken, however, no reference is made therein to the category contained in the guidance *viz "an inability to provide necessary documents*" and the decision asserts that "*no exceptional evidence has been provided in support of your out of time application therefore it is considered it is not appropriate to exercise discretion."*

16. I find that the Respondent's consideration of whether or not to exercise discretion pursuant to her Long residence guidance was insufficient, both for the reasons set out at [15] above, and due to the fact that the Appellant's application made on 1 July 2010 has been lost (by the Home Office) and no consideration appears to have been given to the GCID casenotes, which are of course taken from the Appellant's file held by the Home Office.

17. The issue is what impact my finding has on the outcome of the appeal. On the one hand, in a decision of the former President in Greenwood (No.2) [2015] UKUT 00059 (IAC) it is suggested at [21] and [23] that if a decision made by the Respondent is not in accordance with the law then a lawful decision remains to be made by the Respondent. On the other hand, the current President, Mr Justice Lane, has held in the now reported decision in Charles [2018] UKUT 00089 (IAC) that any failure by the Respondent to act in accordance with the law should, since the amendments to appeal rights introduced by the Immigration Act 2014, be considered through the prism of proportionality pursuant to a section 82 human rights appeal.

18. I have no hesitation in following the recent and now reported decision of the current President in *Charles* as representing the correct position in law. Mr Wilding accepted that the Appellant had established a private life over the previous twelve and a half years. Applying Lord Bingham's five stage test as set out in Razgar [2004] UKHL 27 at [17] I find that the proposed removal of the Appellant as a consequence of the Respondent's negative decision would constitute an interference by a public authority with the exercise of his right to respect for his private life; it would have consequences of such gravity as potentially to engage the operation of article 8; it is in accordance with the law

(following *Charles* at [58] and necessary in a democratic society. The question is whether such interference would be proportionate.

19. I have taken into account the public interest as encapsulated in section 117B of the NIAA 2002 and make the following findings: (i) the Appellant speaks English, he gave his evidence in English and has resided continuously in the United Kingdom for over 12 years and studied for an MBA in English; (ii) he is financially independent, having worked throughout and is able to pay rent and support himself; (iii) his private life has been developed through lawful residence in the United Kingdom (apart from the short period of overstay in 2015) but (iv) was developed whilst his immigration status was precarious, in that whilst the Appellant may well have hoped to qualify for settlement on the basis of ten years lawful continuous residence, the fact remains is that he did not qualify for settlement until at the earliest August 2015.

20. In light of the public interest considerations and for the reasons set out at [15] and [16] above, I find that removal of the Appellant would not be proportionate in the particular circumstances of his case.

21. It follows that the appeal is allowed, on human rights grounds (Article 8).

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman
20 March 2018