Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07526/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 18 October 2017	**On 06 November 2017**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M H S
(Anonymity direction not made)

Respondent

Representation:
For the appellant: Mr J. A. Trussler, Counsel (Direct Access)
For the respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. For the sake of continuity, I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal to the Upper Tribunal.

2. The appellant appealed against the respondent's decision to refuse a human rights claim in the context of an application for Indefinite Leave to Remain (ILR) on grounds of 10 years' continuous lawful residence.

3. First-tier Tribunal Judge Onoufriou ("the judge") allowed the appeal in a decision promulgated on 20 January 2017. The judge noted that the appellant did not exceed the total number of days allowed for absence from the UK during the 10-year period. The respondent refused the application because he was absent from the UK for a single period exceeding six months contrary to paragraph 276A(a) of the immigration rules [23]. The judge noted that the policy guidance stated that an application would "normally" be refused, but it "may be appropriate to exercise discretion over excess absences in compelling or compassionate circumstances, for example where the applicant was prevented from returning to the UK through unavoidable circumstances." The judge noted that the policy went on to state that the decision maker should consider the reasons for the absence and whether it was due to compelling circumstances. The decision maker should also consider whether the applicant returned to the UK as soon as they were able to do so [25].

4. The judge considered the reliability of the evidence relating to the compassionate circumstances that the appellant said arose during his visit to Pakistan (18 June 2009 – 31 January 2010), including the way the evidence was obtained by his legal representative [26-27]. The judge concluded:

> "28. In the circumstances, I do give weight to the correspondence with Dr Warsi primarily because this has been checked by the appellant's legal representatives and is not totally documentation provided by an unverifiable individual who has merely provided documentary evidence at the appellant's request. Had the situation been otherwise, I would have dismissed the appellant's appeal as he and his previous solicitors had failed to provide this information in his application and grounds of appeal respectively. Consequently, the respondent was totally correct in her original decision as the facts which have now been presented to me were not available to the respondent. The respondent was therefore not in a position to exercise discretion and it was not incumbent upon the respondent to seek further information from the appellant to ascertain whether discretion should have been exercised or not but I now exercise discretion on the respondent's behalf.
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> 29. For the record, the appellant's claim to private life either within or outside the Immigration Rules would fail. He does not satisfy the requirements of paragraph 276ADE at all. I do not consider that there are any significant obstacles to his return to Pakistan. He is a young, fit man who has transferrable skills. He came to the United Kingdom at the age of 24 so he was an adult when he left Pakistan and is totally familiar with the culture. He will certainly be more familiar with the culture on return to Pakistan than he was familiar with the culture in the United Kingdom when he first arrived here. With regard to his private life outside the Immigration Rules, I note that he is currently in employment here and has friends and family but his status has always been precarious as defined by the Court of Appeal in **Rhuppiah** and therefore section 117B(v) applies to the appellant.
> .....
> 30. On the totality of the evidence before me, and bearing in mind that the burden of proof lies upon the appellant, I find that the respondent's decision was not in

accordance with the law and Immigration Rules applicable to this case. Accordingly this appeal is allowed."

5. The Secretary of State appeals to the Upper Tribunal on the following grounds:

   (i) It was not open to the First-tier Tribunal to 'exercise discretion' on the respondent's behalf under paragraph 276B of the immigration rules.

   (ii) If the judge erred in relation to the assessment of paragraph 276B, then the appeal should have been dismissed in light of the judge's finding that the appellant would not otherwise meet the private life requirements of the immigration rules and there would be a breach of Article 8 outside the rules.

Decision and reasons

Error of law

6. Before I consider the grounds of appeal, there are other fundamental errors on the face of the First-tier Tribunal decision that cannot be ignored. The application for leave to remain was made on 25 September 2015. The respondent refused the application the same day. This is a 'new style' appeal following amendments made to the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") by the Immigration Act 2014. The appellant has a right of appeal to the Tribunal against the respondent's decision to refuse a human rights claim (section 82(1)(b) NIAA 2002).

7. Although the 'new style' appeal provisions primarily have been in force since 05 April 2015, the judge appeared to be unaware of these fundamental changes to the jurisdiction of the First-tier Tribunal. The judge erred in law in purporting to allow the appeal on the ground that the decision was 'not in accordance with the law' and was 'not in accordance with the immigration rules'. The only ground of appeal available to the judge to consider on the facts of this case was whether the decision was unlawful under section 6 of the Human Rights Act 1998 (section 84(1)(c) NIAA 2002).

8. GEN.1.1 of Appendix FM states that the requirements of the immigration rules reflect how, under Article 8 of the European Convention, the balance will be struck between the right to respect for private and family life and the legitimate aim of maintaining an effective system of immigration control. A refusal of leave to remain on grounds of long residence engages the operation of Article 8 of the European Convention. The way in which the immigration rules relating to private life are considered and applied is directly relevant to whether a decision is lawful under section 6 of the Human Rights Act 1998. Because the rules are relevant to the assessment of a human rights claim, the mere fact that the judge considered the terms of the immigration rules is not an error. However, it is of some concern

that a Judge of the First-tier Tribunal appeared to be ignorant of his jurisdiction nearly two years after major changes to the appeal framework were commenced.

9. The Secretary of State is correct say that it is a matter for her to consider whether discretion should be exercised under the immigration rules. The Tribunal in *Ukus (discretion: when reviewable)* [2012] UKUT 00307 made clear that if the decision maker has failed to exercised discretion the failure renders the decision 'not in accordance with the law. In this case, the appellant did not explain the reason for the extended period of absence when he made the application for leave to remain. As a result, the respondent could not be expected to consider whether it was necessary to exercise discretion when she refused the application. In light of the decision in *Ukus* the judge erred in purporting to "exercise that discretion on the respondent's behalf." I have already explained why the First-tier Tribunal did not have jurisdiction to allow the appeal on the ground that the decision was 'not in accordance with the law'.

10. However, the scope of the Article 8 assessment undertaken by the Tribunal is wide enough to consider whether the appellant had produced evidence that might satisfy the requirements outlined in the respondent's policy guidance. It would still be open to a judge to find that the decision did not strike a fair balance between the competing interests giving due weight to the respondent's policy guidance, which states that it she may find it appropriate to exercise discretion if an applicant can explain why there were compelling or compassionate circumstances that prevented him from returning to the UK in time.

11. Even if the judge considered that it was open to him to allow the appeal under the immigration rules, the fact that he had found that the appellant had provided an adequate explanation for the extended absence was relevant to a proper assessment of the balancing exercise under Article 8. The judge's failure to appreciate this fact when assessing where a fair balance was struck also amounts to an error of law. I conclude that the combination of errors identified above were material to a proper determination of the appeal and that the decision must be set aside.

12. I have gone on to consider whether the decision can be remade on the findings of fact made by the First-tier Tribunal, which have not been challenged in the grounds of appeal. The judge had the benefit of hearing evidence from the appellant, who explained that he fell ill during the visit and had to remain in Pakistan longer than intended [9]. The judge considered the credibility of the appellant's explanation in light of the evidence provided by Dr Warsi [26-27]. Dr Warsi confirmed that he treated the appellant for viral hepatitis and that the appellant was unable to travel due to his illness [27]. The judge outlined the information provided by Dr Warsi and gave adequate reasons to explain why he placed weight on the evidence [27]. I am satisfied that the judge made sustainable findings to

explain why he accepted the explanation provided by the appellant and that I can go on to remake the decision based on that finding.

Remaking the decision

13. The appellant has lived in the UK for a period of 13 years. During that time, it is likely that he has established a private life in the UK. The appellant has studied and worked in the UK and is likely to have established social and economic ties here. He also has extended family members in the UK. I am satisfied that his removal in consequence of the decision is likely to interfere with his right to private life in a sufficiently grave way as to engage the operation of Article 8 (points (i) & (ii) of Lord Bingham's five stage approach in *Razgar v SSHD* [2004] INLR 349).

14. The state can lawfully interfere with an appellant's private and family life if it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the case. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see *Hesham Ali v SSHD* [2016] UKSC 60.

15. The respondent's policy, as expressed in paragraph 276B of the immigration rules, recognises the ties that a person has established in the UK during a continuous period of 10 years' lawful residence. The appellant met the requirements of the immigration rules save for a single absence of more than six months from June 2009 to January 2010. I am unable to exercise discretion under the immigration rules. However, I can consider, as part of the overall proportionality assessment, the circumstances in which the respondent would consider exercising discretion in accordance with her policy guidance. In relation to a single absence of over 180 days the guidance states that the decision maker should consider (i) the reasons for the absence; (ii) whether it was due to compelling or compassionate circumstances; and (iii) whether the applicant returned to the UK as soon as they were able to do so.

16. The First-tier Tribunal was satisfied that the appellant produced sufficient evidence to show that his extended absence in 2009/2010 was due to a serious illness that, it appears, required in-patient and then out-patient treatment. He was advised not to travel until he was well enough to do so. I am satisfied that the appellant has provided a good reason for his extended absence and that a serious illness is a compelling and compassionate circumstance. The evidence indicates that the appellant returned to the UK as soon as he was sufficiently recovered to travel.

17. The respondent's rules and policies must be given due weight. The appellant met the requirements of paragraph 276B of the immigration rules save for needing to explain one extended absence. The explanation appears to satisfy the matters that would normally be considered to justify discretion being exercised according to the respondent's policy. I find that these are matters that can be given significant weight in assessing where a fair balance should be struck.

18. Section 117B of the NIAA 2002 sets out a number of public interest considerations that a court or tribunal must take into account in assessing whether an interference with a person's right to respect for private and family life is justified and proportionate.

19. I have place weight on the fact that the maintenance of an effective system of immigration control is in the public interest (section 117B(1)). I have explained why weight should be given to the fact that the appellant appears to meet the combined requirements of the immigration rules and the relevant policy guidance. The rules and guidance are said to reflect where a fair balance is struck under Article 8.

20. The appellant did not need the assistance of an interpreter and was able to give evidence in English at the hearing. As such I find that it is reasonable to infer that no public policy issues arise relating to the appellant's ability to speak English (section 117B(2)). The appellant works in the UK and there is no evidence to suggest that he is likely to be a burden on taxpayers or is unable to integrate into society (section 117B(3)).

21. Section 117B(5) states that little weight should be given to a private life established by a person at a time when a person's immigration status is precarious. The appellant was granted a series of periods of limited leave to remain in the UK, but they were still 'precarious' for the purpose of section 117B(5): see *AM (S 117B) Malawi* [2015] UKUT 0260. The Tribunal in *Deelah and others (section 117B - ambit)* [2015] UKUT 00515 found that the terms of section 117B(5), although giving statutory instruction, did not encroach on "the independent adjudicative function of the judiciary".

22. In order to comply with Article 8 each case must be considered on the facts. The fact that the appellant developed a private life in the UK when his immigration status was 'precarious' is only one part of an overall assessment of the facts of this case, which must also give weight to the respondent's policy as outlined in the rules and relevant guidance. In this case the periods of limited leave to remain counted towards potential settlement under paragraph 276B of the immigration rules. The appellant met the requirements save for an extended period of absence, which he has been able to explain in accordance with the terms of the respondent's policy guidance.

23. After having weighed all the circumstances of this case I conclude that removal of the appellant in consequence of the decision would not strike a fair balance between the weight to be given to the public interest (as expressed in the relevant rules, statutes and policy) and the impact on the individual involved in this case (points (iv) & (v) of Lord Bingham's five stage approach in *Razgar*).

24. The appellant did not meet the strict requirements of the immigration rules at the date of the decision, but having considered the terms of the respondent's policy guidance, and after having weighed the circumstances of the case at the date of the hearing, I conclude that the decision is unlawful under section 6 of the Human Rights Act 1998.

25. It is a matter for the Secretary of State to consider what form of leave to grant the appellant and whether it is appropriate to exercise discretion under rule 276B to grant Indefinite Leave to Remain considering the factual findings made by the Tribunal relating to the extended period of absence.

DECISION

The First-tier Tribunal decision involves the making of an error of law

The decision is remade and the appeal ALLOWED on human rights grounds

Signed  Date 02 November 2017
Upper Tribunal Judge Canavan