Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24510/2016

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision and Reasons Promulgated**
On: 20th September 2017	**On: 26th September 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

Tehzeeb Ul-Hassan
(no anonymity direction made)

Respondent

Representation:
For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr Brown, Counsel instructed by direct access

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan born on the 28th August 1984. On the 20th December 2016 the First-tier Tribunal (Judge Pacey) allowed his appeal on human rights grounds. The Secretary of State for the Home Department now has permission to appeal against that decision.

The Decision of the First-tier Tribunal

2. The case before the First-tier Tribunal was that Mr Ul-Hassan was entitled to indefinite leave to remain under paragraph 276B of the Immigration Rules. This requires applicants to demonstrate that they have been lawfully resident in the United Kingdom for a continuous period of 10 years.

3. The Tribunal accepted that Mr Ul-Hassan had lived in this country since the 26th August 2006, when he had arrived with leave to enter as a student. It found however for the Secretary of State on an important question of fact. On the 10th February 2011 the Secretary of State had refused to vary Mr Ul-Hassan's leave to remain so as to grant him leave as a spouse. Mr Ul-Hassan did not make a new application until the 13th April 2011. In the intervening period – calculated in the refusal letter to be 62 days – Mr Ul-Hassan did not have lawful leave to remain. The Tribunal concluded that the Secretary of State was therefore correct to have refused leave under 276B. It accepted that the 'gap' had resulted from the fact that it had taken Mr Ul-Hassan several weeks to assemble the necessary evidence. He was eventually granted leave to remain as a spouse. The determination concludes:

> "In my judgement the appellant cannot succeed under the rules for the reasons provided by the respondent. The perfectly understandable and entirely credible explanation he has provided in relation to the gap in the ten year period, however, coupled with the totality of his otherwise excellent immigration history to my mind is so exceptional as to warrant consideration of Article 8 beyond the rules.
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> I accept that the decision under appeal was made in pursuit of the legitimate aim and that it would have consequences of such gravity as to engage the right to respect for private and family life. I had subsumed, in the question of proportionality, the criteria to be found in s117B of the Nationality, Immigration and Asylum Act 2002. It is for the Respondent to show that the decision under appeal is proportionate in pursuit of the legitimate aim sought to be achieved. I also accept that the maintenance of effective immigration control is in the public interest. I also accept that the appellant can speak English and is financially independent. That is apparent from the documents that he has provided. There is no material element of precariousness given that for the overwhelming majority of his time in the UK he has been here lawfully. It is clear that in that time he will have established strong and enduring

ties to this country. In light of all this, then, I cannot see that there is any real public interest in maintaining the decision under appeal and on that basis, I allow the appeal on human rights grounds".

The Secretary of State's Challenge

4. The Secretary of State contends that the decision of the First-tier Tribunal is flawed for want of reasons and a failure to take material matters into account. The Tribunal finds the decision to refuse indefinite leave to remain to be a disproportionate interference with Mr Ul-Hassan's Article 8 rights but does not identify in what way the interference is caused: it does not appear to have taken into account the fact that Mr Ul-Hassan currently has permission to reside in the United Kingdom as the family member of an EEA national until the 28th November 2018.

5. Permission was granted on the 20th June 2017 by First-tier Tribunal Judge Pedro. The grant of permission does not expressly deal with the issue of time. The appeal was lodged two days late. The explanation given by the Secretary of State was that this was due to the disruption caused by the Christmas break and associated bank holidays. I accept the explanation and extend time.

The Response

6. I was not provided with a Rule 24 response but I accept that given the legal issues involved this is perhaps unsurprising: until very shortly before the hearing of this appeal Mr Ul-Hassan was unrepresented.

7. Mr Brown resisted the Secretary of State's complain insofar as it relates to interference. The denial of indefinite leave is plainly a matter of personal significance to Mr Ul-Hassan and as such is a matter capable of engaging Article 8 ECHR. The fact that he has permission to reside in this country in another capacity does not defeat such a claim: JM (Liberia) [2006] EWCA Civ 1402.

8. Mr Brown did acknowledge that it might perhaps have been more straightforward if the Tribunal had allowed the appeal with reference to paragraph 276B (on human rights grounds) and in line with the published policy guidance on the approach to be taken to 'gaps' in residence. In this case the Tribunal had accepted that some delay had been caused by the fact that the necessary documents had been retained by the Home Office, and overall that a perfectly understandable and entirely credible explanation had been given for the short break in leave. The policy provides that the Secretary of

State exercises her discretion where there is a short gap, and in this case the refusal letter did not demonstrate that such an exercise had been undertaken. Mr Brown submitted that the decision contained no material error but in the alternative invited me to substitute the decision of the First-tier Tribunal with a *Greenwood* declaration to the effect that no lawful decision had been taken: Greenwood (No 2) (paragraph 398 considered) [2015] UKUT 00629 (IAC) [at 23]. In the event of such a finding the matter would, in effect, be back before the Secretary of State to take a fresh decision.

Discussion and Findings

9. This was an appeal determined at first instance on the papers. Having looked at those papers it is apparent that the First-tier Tribunal can be forgiven for overlooking the fact that Mr Ul-Hassan had permission to reside under the Immigration (European Economic Area) Regulations 2006 ('the EEA Regs'). That is because it is nowhere raised as an issue by either party. For the reasons given by Mr Brown I am satisfied that this fact has no bearing on whether the First-tier Tribunal was correct to have found there to be an interference. There was at one time a line of thought to the effect that an appellant who was not facing removal could not logically rely on human rights grounds in an appeal. That approach was rejected by the Court of Appeal in JM (Liberia). Although that case concerned a distinct legal framework I am satisfied that the same approach should apply today. Mr Ul-Hassan's current permission to reside is based on the Immigration (European Economic Area) Regulations 2006. The Secretary of State has recognised a derivative right of residence but that right could lapse at any time: the facts underpinning the recognition might change, or the Regs themselves might even cease to apply. The question therefore of whether Mr Ul-Hassan qualifies for indefinite leave in a personal capacity is clearly therefore one of some significance, which merited consideration under Article 8.

10. The second limb of the appeal, deftly concealed in the closing sentence of the grounds, is a reasons challenge. It is submitted that the decision is deficient for want of explanation as to why the decision is disproportionate. I cannot accept that is so. The Secretary of State cannot possibly fail to understand why the decision was as it is. The only reason that the application failed under paragraph 276B was the gap in continuous lawful residence. The Tribunal considered that there was a perfectly understandable and credible explanation for the gap, only 62 days in a ten year period; Mr Ul-Hassan had established that he had an otherwise unblemished and "excellent" immigration history. Those matters weighed in the balance against the public interest (in particular those matters set out at s117B of the Nationality, Immigration and Asylum Act 2002). All things considered, it would be disproportionate to refuse to grant Mr Ul-Hassan leave.

That is not the decision that every Tribunal might have taken, but it is the one that this Tribunal took, whilst clearly expressing its reasoning. I am unable to find that this ground is made out.

11. I would note for the sake of completeness that there was, as Mr Brown notes, a striking omission in the reasoning of both Tribunal and the Secretary of State in her refusal letter. That is that there is no reference to the Secretary of State's published policy on what might be considered a break in continuous lawful residence. The policy, entitled 'Long Residence' (3 April 2017) lists events that will routinely be considered to break continuous lawful residence. For instance, an absence from the UK of more than 6 months would be sufficient, an absence of less would not defeat an application. In respect of periods of overstaying the guidance stipulates that where there is any one period in excess of 28 days, occurring prior to the 24th November 2016, decision makers **must** consider whether there are any exceptional circumstances that caused the break. Examples are given that include postal delays, serious illness and an inability to provide documents. Had I found there to be an error as alleged in the grounds, and I were remaking this decision, I would have found that there has yet to be a lawful decision by the Secretary of State, who has failed to exercise her discretion as set out in her own policy. It would then be a matter for the Secretary of State, who would have to consider the unchallenged findings of fact in Mr Ul-Hassan's favour about what caused the delay. For my part I can see no discernible difference between the present outcome and that which would follow from application of the policy, save to note the following injunction in the guidance:

> "When granting leave in these circumstances, the applicant must be granted leave outside of the rules for the same duration and conditions that would have applied had they been granted leave under the Rules"

Decision

12. The determination of the First-tier Tribunal does not contain an error of law and it is upheld.

13. There is no order for anonymity.

Upper Tribunal Judge Bruce
24th September 2017