Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15191/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 February 2019	**On 26 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

WAQAS LATIF
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood of the Specialist Appeals Team
For the Respondent: Mr A Papasotiriou of Counsel by Direct Access

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as "the Applicant" is a Pakistani born on 23 November 1988. On 21 February 2007 he entered with leave as a family visitor: his father and step-mother are resident in the United Kingdom. His leave was extended on a number of occasions, in the first extension in 2009 following an out of time application, until 2 June 2017. His previous application of 24 June 2013 was refused and by a decision promulgated on 12 February 2014 Judge of the First-tier Tribunal B Lloyd

allowed the appeal in consequence of which he was granted further leave. On 30 May 2017, in time, he applied for indefinite leave on the basis of 10 years' continuous lawful residence.

2. His application referred to a marriage certificate and the Applicant stated he is married to a Mauritian who is said to remain in Mauritius. There is no evidence in the Tribunal file that she is elsewhere.

The SSHD's decision

3. On 1 November 2017 the Appellant (the SSHD) refused the application on the basis that the gap of some 49 days between expiry of the Applicant's leave on 19 January 2009 and the grant of further leave on 28 April 2009 subsequent to an out of time application made on 19 March 2009 meant the Applicant had not shown continuous law for residence of at least 10 years at the date of his application. The SSHD noted there was no evidence of any partner or other dependant in the United Kingdom and that the Applicant had visited Pakistan for some four months in 2008, just over a fortnight in 2010 just over two months in 2015 and for three weeks and 2016.

4. The SSHD considered the Applicant did not meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules and that it was not unreasonable to expect him to return to Pakistan where he would be able to re-integrate, using the experience he had gained in the United Kingdom. The SSHD refused the application by reference to paragraph 276ADE (1)(vi) and by reference to Article 8 of the European Convention.

5. On 16 November 2017 the Appellant lodged notice of appeal under s.82 Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are general but include a reference to instructing in good time a solicitor in connection with his first application for further leave in 2009.

Proceedings in the First-tier Tribunal

6. By a decision promulgated on 19 April 2018 Judge of the First-tier Tribunal ID Boyes dismissed the appeal on human rights grounds. He noted the Applicant stated he had instructed his solicitor in 2009 in good time and the solicitor had failed him. The Applicant said that he had made formal complaint but the fire was no longer in existence. There is no evidence of the making of the complaint or anything else relating to the circumstances or the time when the Applicant instructed this solicitor. Judge Boyes concluded there was a material gap in the Applicant's leave so he could not succeed on the basis of 10 years' continuous lawful residence. He concluded in short order that there were no very significant obstacles to the Applicant's return to and integration into Pakistan.

7. On 17 May 2018 Judge of the First-tier Tribunal CA Parker granted the Applicant permission to appeal. By a decision promulgated on 14 August

2018 Deputy Upper Tribunal Judge Mailer found there was a material error of law in the decision of Judge Boyes in that he had failed to refer to the previous decision of Judge Lloyd which had not been appealed and had not considered the relevant provisions of Part VA of the 2002 Act. He set aside the decision of Judge Boyes and remitted the appeal for a fresh hearing in the First-tier Tribunal.

8. By a decision promulgated on 1 October 2018 Judge of the First-tier Tribunal Page allowed the appeal. On 27 December 2018 Judge of the First-tier Tribunal Bird granted the SSHD permission to appeal on the basis it was arguable the Judge had erred in law in his treatment of the Applicant's claimed continuity of residence and had failed to take adequate of the public interest as required by s.117B of the 2002 Act.

The hearing in the Upper Tribunal

9. The Applicant attended. I explained the purpose of the hearing and procedure to be followed. He confirmed his current address but otherwise took no active part in the proceedings.

Submissions for the SSHD

10. Ms Isherwood relied on all five grounds for appeal. The Judge had at paragraph 7 and elsewhere in his decision found that the Applicant had not shown he met the requirement of 10 years' continuous law for residence and had then at paragraph 9 referred to a break in continuity. He had made no finding whether the Applicant or his solicitor had been responsible for the out of time application for further leave. She referred to evidence about this which had been before Judge Boyes. In fact, the Tribunal file has no documentary evidence and Judge Boyes referred to the matter descriptively at paragraph 6 of his decision but without reference to any specific item of evidence. Further, the SSHD had considered the matter in the top half of page 3 of the reasons for refusal.

11. The Judge had used the expression "near miss". The principles of *de minimis* and and "near miss" had been discredited in *Chau Le (Immigration Rules-de minimis principle) [2016] UKUT 186 (IAC).* This is certainly the case so far as the application of the Immigration Rules is concerned and of course the SSHD's decision in *Chau Le* was prior to the coming in to effect of the provisions of the Immigration and Asylum Act 2014 and so the appeal was at least in part on Immigration Rules grounds.

12. Ms Isherwood made the point that the skeleton argument for the Appellant had not addressed any claim based on his family life. I noted that the original grounds of appeal had relied on the Applicant's private life but not family life.

13. The Applicant's leave all time was of a precarious nature and Judge had failed to give little weight to the Applicant's private life during the

currency of that leave as required by s.117B of the 2002 Act. She submitted the Judge had failed to engage with the high test imposed.

14. At paragraph 19 of his decision the Judge had relied on the findings of Judge Lloyd in 2014 but had not addressed the fact that the relevant wording of paragraph 276 ADE(1) (vi) of the Immigration Rules had been amended from a consideration of ties to the country of proposed return to a consideration whether there were very significant obstacles to re-integration. The Applicant had spent his early years in Pakistan and had made a number of visits.

15. The decision of the First-tier Tribunal contained material errors of law and should be set aside.

Submissions for the Applicant

16. Mr Papasotiriou submitted there was no material error of law. The Judge was entitled to find there was no evidence before him to decide whose fault it was that the Applicant's 2009 application had been made late. At paragraph 23 the Judge had dealt with the issue of re-integration and made findings on the point.

17. He was clear there had been no disagreement before the Judge that there had been a break in the Applicant's leave. This was evident from the Judge's findings at paragraph 17ff of his decision. At paragraph 23 he had addressed the issue of re-integration. This is a relevant criterion under paragraph 276ADE (1)(vi) and the reference to "the relevant Immigration Rule at the beginning of the next paragraph, 24, had to be read with reference to paragraph 276ADE (1)(vi). It made no sense to seek to say the Judge had paragraph 276B in mind.

18. The Judge at paragraph 8 of his decision had recorded that the Applicant accepted there was a break in his continuous leave. This was a matter that would have to be brought in to the eventual assessment of the proportionality of the SSHD's decision. The Judge at paragraph 20 made no finding as to the causation of the late application in 2009 and at paragraph 22 acknowledged the lack of finding meant that no weight for or against the Applicant would be attached to the cause of the delayed application.

19. There had been no requirement fourth the Judge to address the family life of the Appellant since it had not been pleaded. The issue before the Judge was whether in all the events and circumstances the SSHD's decision was proportionate.

20. At paragraph 23 of his decision the Judge had treated Judge Lloyd's decision on the Applicant's lack of ties to Pakistan as a starting point and had gone on to address the difficulties he would face on return in re-integrating. Paragraph 6 amounted to a self-direction that there was a difference between ties and integration. The Judge had properly taken account of the fact that Judge Lloyd had allowed the appeal. He was

entitled to rely on her findings. He had taken account of subsequent events and given sustainable reasons for finding that there were very significant obstacles to the Applicant's re-integration on return to Pakistan.

21. The Judge had fully rehearsed the provisions of s.117B at paragraph 21 and at paragraph 24 had given reasons which with the benefit of the subsequent judgment in *Rhuppiah v SSHD [2018] UKUT 58* are sustainable. There were no factors identified in s.117B which were of an adverse nature. He relied on his skeleton argument.

22. The grounds for appeal did not disclose any material error of law. Alternatively, any error of law was not material once account had been taken that the appeal had been allowed by reference to paragraph 276(ADE)(vi) of the Immigration Rules. The Court of Appeal had found in *TZ (Pakistan) v SSHD [2018] EWCA Civ.1109* that if the requirements of the Immigration Rules were met then Article 8 would be engaged.

Response for the SSHD

23. Ms Isherwood pointed out that the Judge had not considered the issue of interference with the Applicant's family life and the relevant test and had not referred or adequately referred to issues of re-integration. The SSHD challenge the Judge's treatment at paragraphs 22 and 23 of the Applicant's private life. There had been no reflection on matters subsequent to the 2014 decision or of the precariousness of the Applicant's leave. Paragraph 24's reference to "the relevant Immigration Rule" was to paragraph 276B.

Consideration and conclusions

24. At the end of the hearing I reserved my decision which I now give by reference to the five grounds for appeal, taking into account the submissions made for the SSHD and the Applicant. At paragraphs 7, 18 and 20 the Judge found that there had been a 49 day gap in the otherwise continuous leave of the Applicant. It is clear that the Judge and indeed the Appellant as already indicated accepted that there was a 49 day gap. The Judge may at paragraph 18 have described as a "minor blip" but nevertheless it is a blip.

25. The Judge at paragraph 20 then went on to consider the proportionality of the SSHD's decision. Use of the phrases "near miss" and "minor blip" may be unfortunate but the principle remains that the extent of compliance with the requirements of the Immigration Rules is a matter which must be reflected in any proportionality assessment. The Judge did not err in his overall approach.

26. In the light of the Judge's findings in relation to paragraph 276ADE(1)(vi) there was no need for him to make any finding who was responsible for the late 2009 application. I accept Mr Papasotiriou's submission that the reference to "the relevant Immigration Rule is to paragraph 276ADE(1)(vi).

It is the findings in relation to this paragraph which form the main plank of the Judge's decision.

27. The fourth grounds for appeal challenges the Judge's treatment of the relevant test imposed in paragraph 276ADE(1)(vi), very significant obstacles to re-integration. The Judge was entitled to use as his starting point the findings of Judge Lloyd that the Applicant in 2014 had no ties to Pakistan. He addressed whether there are very significant obstacles to his integration on return to Pakistan at the end of paragraphs 14 and 19 and gave sustainable reasons for his conclusion at paragraph 23. He had no reason not to rely in particular on the findings of Judge Lloyd at paragraphs 37, 40 and 43 of the 2014 decision. The Applicant's claim was based on his private life and there was no evidence before the Judge of any material change in the past four years. It is of note there was no claim in respect of his family life or on the basis of his marriage to a Mauritian of whom there was no evidence she was living elsewhere than in Mauritius.

28. The Judge fully recited s.117B at paragraph 21 of his decision. The SSHD's claim is that he had already decided at paragraph 17 on the on the proportionality of the decision before addressing the public interest factors identified in s. 117B. At the start of paragraph 17 the Judge had addressed at least some of these public interest factors. The absence of a substantial consideration of the precariousness of the Applicant's private life might be an error of law but the main plank of the decision to allow the appeal was the Judge's conclusion that the Applicant faced very significant obstacles to re-integration on return to Pakistan with which I am satisfied that he adequately dealt.

29. Despite Ms Isherwood's determined and detailed submissions, I am persuaded by those of Mr Papasotiriou and for the reasons given find that the decision of the First-tier Tribunal did not contain a material error of law such that it should be set aside. It shall therefore stand.

Anonymity

30. There was no request for an anonymity direction and having heard the appeal consider none is warranted.

SUMMARY OF DECISION

The decision of the First-tier Tribunal does not contain an error of law and shall stand. The consequences that the Mr Latif's appeal is successful.

No anonymity direction is made.

Signed/Official Crest Date 22. ii. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal