



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/09864/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 7th November 2018**

**Decision & Reasons
Promulgated
On 4th December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

**MR MUHAMMAD ASIF KHAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Harvey, counsel.

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Pakistan, appealed to the First-tier Tribunal against the decision of the Secretary of State dated 23rd August 2017 to refuse his application for indefinite leave to remain in the UK on the basis of his long residence. First-tier Tribunal Judge Geraint Jones QC dismissed the appeal in a decision promulgated on 12th July 2018. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Mark Davies on 7th September 2018.

2. The background to this appeal is that the Appellant was granted leave to enter the UK as a student on 17th September 2007 and was granted subsequent extensions of leave to remain until 30th November 2010. He submitted an application for further leave on 29th November 2010 and that application was refused on 14th December 2010. His further application was made on 18 January 2011 and leave was granted on 10th February 2011 and further periods of leave to remain were granted until 23rd May 2011. He made an application on 23rd May 2011 for leave to remain as a Tier 1 Entrepreneur but varied that application on 15th November 2016 when he submitted an application for leave to remain based on his long residence in the UK under paragraph 276B of the Immigration Rules.
3. That application was refused by the Secretary of State on the basis that there was a gap in the Appellant's lawful residence in the UK as a result of the application for leave to remain made on 29th November 2010 being rejected because the fee was not paid as his card was declined. His subsequent application was made on 18th January 2011 therefore, according to the Secretary of State, the Appellant had not made a valid application within 28 days of the permitted time from his rejected application therefore his section 3C leave was not extended. The Secretary of State concluded that there was a gap in the Appellant's lawful residence between 16th December 2010 and 9th February 2011, a total of 56 days and that there was therefore a break in the Appellant's lawful residence in the UK within the 10 year qualifying period. The Secretary of State went on to conclude that the Appellant had not established that there would be very significant obstacles to his integration in Pakistan under paragraph 276ADE (1) (vi). The Secretary of State decided that there were no exceptional circumstances such as to justify a grant of leave to remain outside the Immigration Rules.

Error of Law

4. The First-tier Tribunal Judge rejected the submission put on the Appellant's behalf that the subsequent grant of leave to remain in February 2011 amounted to an implied waiver of the period of overstaying. This finding has not been challenged.
5. At paragraph 13 of the decision the judge set out the four submissions made by counsel on the Appellant's behalf. In summary, these were that the Appellant met the requirements of paragraph 276ADE (1)(vi); that the Appellant had only been an illegal overstay by a period of 56 days and a 28 day period was normally overlooked; that the Appellant should succeed under Article 8 as a result of the 'near miss' provisions; that in August 2017, when the application was refused, the respondent refused to exercise discretion to waive the absence of 10 years continuous residence.
6. The first ground of appeal contends that the judge misdirected himself as to the evidence he could consider. This ground has not been clearly articulated with specific reference to this appeal. The first and second grounds of appeal are interlinked and in essence it appears that it is

argued that the judge failed to treat the appeal as a human rights appeal and failed to undertake a full assessment of Article 8. It is contended that the judge failed to consider proportionality with reference to the circumstances of the Appellant's overstay between 16th December 2010 and 9th February 2011 which he says was because the payment made in respect of his in-time application bounced because of an attempted fraudulent withdrawal from his account and that at the time he was recovering from a very serious accident as a result of which he was unfit for work from February 2010 until September 2011.

7. In her submissions Ms Harvey contended that the judge had erred in deciding that the issue of the potential exercise of discretion by the Secretary of State due to the circumstances of the failed payment and the Appellant's accident could not be considered because the evidence of these matters had not been put to the Secretary of State. It was her submission that, in an Article 8 consideration, these issues should have been considered by the judge. Ms Harvey submitted that the crux of the case was that very little weight had been given in the proportionality balance to the Appellant's explanation for the delay in re-submitting his application after the payment failed.
8. However in my view the difficulty with this submission is that the Appellant did not provide evidence to support his belated explanations (which, as highlighted by the judge, had not been put to the Secretary of State with the re-submitted application) as to why the first payment bounced and why he delayed beyond the 28 days in re-submitting the application. There is no evidence from the bank explaining what happened to the payment in December 2010. This is evidence which could very easily have been obtained and the Appellant put forward no reason for not producing evidence from the bank. The Appellant did submit medical evidence. However, whilst the medical evidence supports the Appellant's claim that he suffered from low back claim (albeit it does not clearly support the extent of disability asserted in paragraph 5 of the witness statement), the evidence does not support the Appellant's claimed memory problems which he put forward as the reason he failed to re-submit within 28 days. Again, this is evidence which could have been easily obtained from the Appellant's doctors. The judge was entitled to attach little weight to this evidence, which had not been submitted to the Secretary of State.
9. However, in addressing the issue in terms of the exercise of the Secretary of State's discretion at paragraphs 21-24, the judge was addressing the case put to him which appears to have been a submission that the decision was not in accordance with the law not being in accordance with the Secretary of State policy. The judge was right to conclude that any request to the Secretary of State for exercise of discretion on the basis of this policy should have been put to the Secretary of State. The Secretary of State could not consider the exercise of discretion in circumstances where he had not been made aware of the explanation for the delay.

10. The grounds of appeal highlight Gen 3 of the Immigration Rules which applies in this appeal and which provides that the decision-maker must consider whether there are exceptional circumstances which would render refusal of leave a breach of Article 8 because such a refusal would result in unjustifiably harsh consequences for the Appellant, their partner, child or another family member. This is what the judge did at paragraph 20. Ms Harvey did not draw attention to any evidence of unjustifiably harsh consequences for the Appellant or anyone else as a result of this decision.
11. In these circumstances, and in light of the evidence before him, the judge was entitled to find at paragraph 20 that the Appellant had not put forward any special or compelling circumstances which could justify a grant of leave to remain under Article 8 outside the Immigration Rules.
12. Looking at the decision as a whole, I agree with Ms Isherwood's submission that the judge dealt with the case as it was put to him. The grounds seek to put the case on a different basis but, based on my analysis at paragraph 8, even had the case been clearly put on that basis it could not have succeeded. These factors, which were inadequately evidenced, were not capable of tipping the proportionality balance in the Appellant's favour in circumstances where he did not meet the requirements of the Immigration Rules and in the absence of any other exceptional circumstances.
13. Having considered all of the grounds put forward I conclude that none of the grounds have been made out. The judge made findings open to him based on the evidence. There is no material error of law disclosed in this decision.

Notice of Decision

The decision of the First-tier Tribunal does not contain a material error of law.

The decision of the First-tier Tribunal will stand.

No anonymity direction is made.

Signed
2018

Date: 30th November

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT **FEE AWARD**

As the appeal has been dismissed there can be no fee award.

Signed
2018

Date: 30th November

Deputy Upper Tribunal Judge Grimes