Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07510/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision and Reason Promulgated**
On 6 June 2017	**On 21 June 2017**

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE M ROBERTSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SHABAB AHMED
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr Trevelyan, Counsel, instructed by Duhra, Solicitors.
For the Respondent: Mr Mills, Senior Presenting Officer

DECISION AND REASONS

Claim History

1. Although the Secretary of State is the Appellant before us, we will for ease of reference refer to her as the Respondent as she was the Respondent before the

First-tier Tribunal at the hearing on 9 January 2015. Similarly, we will refer to Mr Ahmed as the Appellant as he was the Appellant before the First-tier Tribunal.

2. The appeal of the Appellant against the refusal of the Respondent to grant him further leave to remain in the UK as the spouse of Mrs Zubaira Begum, a British citizen by birth was allowed by First-tier Tribunal Judge I F Taylor (the Judge) under Article 8 ECHR in a decision promulgated on 14 November 2016. The background to the refusal, as taken from the Judge's decision, is as follows:

> *"4. …The appellant and his wife married in Pakistan on the 5 August 2010. Following the wedding the appellant lived with his wife in Pakistan for about 3 months following which Mrs Begum returned to the UK so that she could sponsor the appellant to join her in the UK as his spouse. The appellant made an entry clearance application to join his spouse which was refused. He appealed this decision and his appeal was allowed. The appellant was granted leave as a spouse, valid from 20 March 2013 to 20 June 2015 and he entered the United Kingdom on the 16 April 2013. Since that date the appellant and his wife have been cohabiting in the UK. The appellant made a further application for leave to remain as a spouse on 11 May 2015. At this point the appellant states that he was unaware that he had to pay the Immigration Health Surcharge (IHS) which had recently been introduced. On 15 May 2015 he received three letters from the Home office (a) informing of the need to submit his biometric information, (b) informing him that he had not paid his IHS fee and (c) a letter to acknowledge receipt of his application. The appellant states that at this point he did not know the importance of the letter about non-payment of the IHS fee and as a consequence he didn't do anything about it. On 7 July 2015 the appellant received a letter from the Home Office refusing his application. At this point the appellant sought legal advice from a voluntary advice centre who suggested that he pay the IHS fee immediately which he did on 10 July 2015 by cheque. On 13 July 2015 the Home Office deposited the cheque for £500 in respect of the IHS fees for the first application. However, on 28 July 2015 the Home Office said they were going to return the fee. On 8 August 2015 the appellant lodged a fresh application inviting the Home Office to keep the fees already paid for the IHS. However, on 13 August 2015 the Home Office returned his IHS fees for his first application. It appears that the letters between the Appellant and the Home Office crossed and it seems that the Home Office did not get the appellant's leave to remain application before they returned the IHS fees. On 14 August 2015 the appellant again received 3 letters from the Home Office seeking his biometrics and informing him that the IHS fee had not been paid and an acknowledgement of his application. The appellant again paid the IHS fee on 26 August 2016 and this fee is still held by the Home Office. On 29 September 2015 the appellant's application for further leave to remain was refused and is the subject of the appeal before me. The appellant acknowledges that he made a mistake with the IHS fee but that he was confused and he didn't appreciate that it was a requirement of his application."*

3. The Respondent appealed against that decision for, in essence, the following reasons:

    a. The Immigration Rules (the Rules) provided better explicit coverage of the factors identified in case law as relevant to the analysis of claims

under Article 8 ECHR than was formerly the position. Article 8 should only have been considered if there were arguably good grounds for considering Article 8; that is, where there were sufficiently compelling circumstances not recognised by the Immigration Rules. The Judge recognised this at [20] but the genuine mistake in failing to pay the immigration health surcharge (IHS) and the fact that the Appellant was highly regarded in his community did not come near the compelling circumstances threshold. The Judge should not have gone on to consider the appeal under Article 8 (**Singh v SSHD [2015] EWCA Civ 74**). Inadequate reasons were given to show why the failure to pay the IHS resulted in the proportionality assessment falling in the Appellant's favour.

b. **SS (Congo) EWCA Civ 387** provided that the Rules identified, for the purposes of the application of Article 8, the degree of weight to be attached to the expression of public policy in the substantive part of the Rules applicable to the case in question. In the Appellant's case, the only reference the Judge made to the public interest was at [24] when he found "However, the most significant consideration in favour of the Appellant is the fact that he made a genuine mistake which has given rise to consequences that are unduly harsh and without regard to the legitimate public end sought to be achieved". This finding is inadequately reasoned.

4. Permission was granted in the following terms:

> "*the grounds disclosed an arguable material error of law but for which the outcome of the appeal might have been different. The judge made an arguable error of law in not according any or any adequate weight to a material consideration. The Judge did not accord any or any adequate weight to those public interest considerations mentioned in s 117B of the Immigration Act 2014 as inserted after Part 5 of the Nationality Immigration and Asylum Act 2002. The sole reference which the Judge made to public interest considerations was at paragraph 24 of the judge's decision where the judge stated,*
>
> > *"If the respondent could demonstrate grounds beyond that of the public interest in immigration control or criminal or anti-social behaviour of the appellant, the balancing exercise may well have fallen in favour of the respondent."*
>
> *The Judge did not overtly or tacitly accord weight to the maintenance of effective immigration controls as being in the public interest…"*

5. At the hearing, we indicated that our preliminary view was that there was a material error of law in that all the public interest considerations had not been brought into play in the proportionality assessment. We did however, hear full submissions from both parties on all issues, at the end of which we reserved our decision, which we give below together with our reasons.

Submissions on behalf of the Appellant

6. Mr Trevelyan relied on his skeleton argument. His oral submissions were:

    a. The Judge expressly had regard to the public interest factors at [22]. He referred to the public interest in immigration control, and that little weight should be given to a private life or a relationship formed at the time the person was in the UK unlawfully, and that little weight should be given to a private life established by a person whose immigration status was precarious.

    b. At [23] the Judge stated that nearly all of the Appellant's time in the UK was lawful, except for a small amount of time that may be unlawful or precarious, which occurred as a result of a genuine mistake. Mr Trevelyan emphasised that an important component of the Judge's decision was that it was accepted by both parties that failure to pay the IHS charge was a genuine mistake.

    c. At [24] the Judge again stated that the issue was one of proportionality and that a genuine mistake, against the background of an entirely lawful stay in the UK of three and a half years resulted in the public interest being reduced and he stated that "…in the unusual and individual circumstances of this case result in the public interest in removal being reduced and the individual circumstances of the appellant and his partner being increased."

7. Mr Trevelyan accepted that the economic wellbeing of the UK had not expressly been referred to but he submitted that s 117B only provided for decision-makers to have regard to the public interest considerations and they were not a definitive checklist.

Submissions on behalf of the Respondent

8. The grant was not limited to the s 117B point. There was also insufficient reasoning as to the compelling circumstances which resulted in the public interest being outweighed. At [24] the Judge referred to fertility treatment, property, immigration history and genuine mistake.

9. As to the fertility treatment being received by the Appellant's partner, **Erimako R (on the application of) v SSHD [2008] EWCA 312 (Admin)** was handed up at the hearing, which decided that fertility treatment could only be a limited factor. The Judge did not note the guidance in caselaw. As to property, there was no suggestion that they would need to sell it. The Judge had found that there were no surmountable obstacles to family life continuing in Pakistan but the Appellant's stay in Pakistan need not be permanent or long-term. As to the Appellant's immigration history, the Judge was mistaken that the Appellant had only been in the UK without leave for a very small amount of time. When he made his second application for leave to remain, he was 32 days out of time, which meant that his second application was out of time; he did not have s 3C leave and had therefore

been in the UK unlawfully since his last leave expired on 7 July 2015 and the Judge seemed to have been unaware of this fact. There is a statutory direction to limit weight where there is no leave and the failure to appreciate that the Appellant had been without leave for a significant period of time was a material error of law.

10. It was unclear what the Judge meant when he stated that "However, the most significant consideration in favour of the appellant is that he made a genuine mistake which has given rise to consequences that are unduly harsh and without justification with regard to the legitimate public end to be achieved…" Was he stating that there was no public interest in paying the IHS charge? Clearly paying the IHS is in the public interest and the Judge's view affected the weight he gave to the public interest.

Response on behalf of the Appellant

11. The Judge referred to the 'compelling circumstances' in this case in [20], and these were the Appellant's excellent immigration history until the failure to pay the surcharge; the failure to pay the surcharge was accepted by both parties as a genuine mistake; it was not malicious and he had in fact paid it; he had done all he reasonably could to correct the position; he was a highly regarded member of his community. The Judge found these were compelling circumstances, and, having applied the provisions of s 117B, that it was disproportionate to remove. Even if the Judge had properly identified the period of lawful leave, this would not have affected his analysis.

12. On conclusion of the submissions, we rose for our discussion. On resuming the hearing, we confirmed that our decision was that there was a material error of law and that our written reasons would be sent out in due course. Our reasons we now set out below.

Reasons for Error of law decision

13. There is significant focus within the decision, and at the hearing before us, on the Appellant's mistake in failing to pay his IHS fee with his first application being genuine and the consequences being unduly harsh for the Appellant and his partner against a backdrop of an entirely lawful stay bar a very small period of time which "may have been unlawful or precarious" [23]. As to these issues we find as follows:

    a. The Appellant accepted that he had not paid the IHS fee. It can be inferred that the Judge accepted that the Appellant's application made on 11 May 2015 was rejected because of non-payment of the IHS charge. It can also be inferred that the Judge accepted that the Appellant's second application, made on 8 August 2015 after the 28 day grace period permitted by the Rules, was out of time due to the Judge's reference of the "very small amount of time that may be unlawful or precarious as a result of a genuine mistake" at [23]. Having submitted his second application after the 28 day period permitted by the Rules,

the Appellant's leave was not continued under s 3C of the Immigration Act 1971, from 7 July 2015, when the Appellant's first application was rejected by the Respondent. This was accepted by Mr Trevelyan.

b. The Appellant was lawfully in the UK between 20 March 2013 and 7 July 2015. He was unlawfully in the UK between 8 July 2015 and the date of hearing, which was 31 October 2016, a period of over 15 months. We find that the Judge erred in stating that the Appellant had only overstayed by a "very small amount of time", against the majority of his stay which had been entirely lawful. Overstaying is a factor which would weigh significantly in the public side of the balance in a proportionality assessment under s 117B (1), even if the weight in relation to the s 117 (4) and (5) factors is reduced because the Appellant's relationship with his partner and his private life were not established when he was in the UK unlawfully. When considering the public interest in immigration control, the Respondent does not need to point to criminality or anti-social behaviour to tip the balance in favour of the public interest (see [24]); immigration control is in itself a weighty consideration.

c. There was no mention by the Judge of the public interest in the economic wellbeing of the UK, the s 117(2) and (3) factors. The Judge states that "…if the appellant decides to make a fresh application under Appendix FM within the UK he may well meet the financial requirement of £18,600 per annum as he has only been out of work for a period of four or five weeks" [17] There is, however, no analysis as to whether or not the Appellant is financially independent and no reference to his ability to speak English. Judges are statutorily required to have regard to all the s 117 considerations (**Dube (ss 117B-117D) [2015] UKUT 90 (IAC**). This factor is relevant because the Appellant no longer qualified for leave under para 284 of the Rules; his application was now to be assessed under the provisions of Appendix FM, under the 10 year route, and the Judge was alive to this when he referred to the possible ability of the Appellant to meet the £18,600 threshold at [17], and his application of the provisions of Appendix FM para EX.1(b) at [15 – 19].

d. The Respondent found that the Appellant could not meet the provisions of the Rules because he had not paid his IHS fee. He was given the opportunity to do so when the Respondent wrote to him on 15 May 2015, stating that the IHS fee had not been paid. He did nothing about it until his initial application was rejected for non-payment of the fee on 7 July 2015, a period of nearly 2 months. If he was confused about payment of the IHS, and no one was suggesting that the mistake was anything but innocent, he did not choose to seek advice as to why he had been asked to pay it. He effectively ignored the issue until his application was rejected. He was, in effect the author of his own misfortune and the mistake, though innocent, was entirely avoidable.

No reasons are given in the decision as to why advice was not sought at an earlier stage.

14. We find that by in effect glossing over the details in the case, the Judge did not give sufficient attention to the factors in the public interest side of the balance in his proportionality assessment, which resulted in a material error of law. Had the Judge addressed his mind to all the public interest factors, his decision may well have been different. We would set aside his decision on this basis alone.

15. Mr Mills also submitted that the Judge's decision was inadequately reasoned because it was not clear why the factors in favour of the Appellant were 'compelling' reasons for a grant of leave under Article 8. The reasons given by the Judge as amounting to compelling circumstances were:

    a. The Appellant's partner's fertility treatment. Mr Mills submitted, and we accept, that the receipt of fertility treatment can only carry limited weight in the Appellant's side of the balance (**Erimko**).

    b. The Appellant's standing in the community. This can carry little weight (**UE (Nigeria) and others v SSHD [2010] EWCA Civ 975**). Furthermore, this part of his private life was strengthened at a time when he had no leave to remain in the UK.

    c. As to the property that is owned by the Appellant and his wife, the Judge stated that it might be lost because they could not make the mortgage repayments (the Appellant's wife is not working because she is focussing on the fertility treatment). However, we had no evidence that the Appellant's wife could not work whilst undergoing fertility treatment if necessary. The Judge did not rule out a further application "either in Pakistan or in the United Kingdom" [6]. It was open to the Appellant to make a further application, showing that he was able to meet the requirements of Appendix FM such that the only factor in the Respondent's side of the balance was the policy requirement to make an application from abroad ((**Treebhowan and Hayat v SSHD [2012] EWCA Civ 1054**)).

    d. The Appellant's lawful stay. Whilst it is correct that the Appellant made an out of country application prior to entering, and made an initial in time application for further leave to remain, he has been without leave since 7 July 2015, a factor not recognised by the Judge.

16. We find that as the public interest factors had not been properly assessed, it is difficult to say that the Judge has provided adequate reasons to establish that 'compelling reasons' for a grant of leave outside the Rules have been established, or that adequate reasons have been given for saying why the balance tipped in favour of the Appellant and his wife.

17. We find that the Judge materially erred in law and we set aside his decision.

18. As to the remaking of the decision, Mr Trevelyan stated that he had taken instructions and these were that there was no additional evidence to be provided; the position today was exactly the same as it was before the first-tier Tribunal and he would proceed by way of submissions only.

Submissions on re-making the decision on behalf of the Appellant

19. Mr Trevelyan accepted that the Appellant could not meet the Immigration Rules because he had overstayed by a couple of days but submitted that this was exactly the sort of case where the compelling circumstances threshold was met because the Appellant had done all he reasonably could to comply with the Rules. He had made an in time application. He had made an honest mistake resulting in his application being out of time by a few days, and this is just the sort of case where Article 8 can provide relief due to the inflexibility of the 28 day rule.

20. The Article 8 test was proportionality. It is accepted that there is a genuine and subsisting relationship. The consequences for the Appellant and his wife were disproportionate; the Appellant had never sought to evade immigration control; he made an application from abroad and secured entry clearance. There was therefore little public interest in removal. As to s 117 B (4) and (5), there was nothing to limit the weight to be attached to the relationship. He submitted that the question was whether it was proportionate to require the Appellant to sever family ties and make an entry clearance application all because of one mistake and overstaying for five days.

Submissions on behalf of Respondent

21. Although it was submitted that the Appellant did all that he reasonably could do, he (i) did not pay the IHS surcharge, (ii) he did not make a valid in time application; the Rules were clear, the IHS had to be paid; and (iii) he then overstayed for more than 28 days. Rather than the 28 day Rule being inflexible, it is flexible if one considers the days when any period of overstaying was not accepted.

22. The Appellant had not overstayed by a few days; he had no 3C leave since 7 July 2015 and this is exactly the situation that s 117B(1), the need for effective immigration control, is designed for. It may be that the Appellant nearly met the Rules, and **SS (Congo)** referred to nearly missing meeting the Rules having some relevance, although **SS (Congo**) had been overturned. As to the compelling circumstances, the Appellant's position is that he nearly met the rules and he now seeks the exercise of discretion to remedy the situation. Returning him to Pakistan does not result in unduly harsh consequences; there is no dependency due to illness, there are no children. These are matters of convenience and cannot outweigh the public interest in immigration control.

Appellant's Response

23. There were many cases of non-compliance where there was an attempt to circumvent the Rules. the key feature in this case was innocent non-compliance; it was never suggested by the Respondent that the Appellant was attempting to circumvent the Rules. Had he flouted the Rules it would be very different. In this case, the public interest in effective immigration control was reduced. There was a genuine and subsisting relationship between the Appellant and the Sponsor and the public interest in this particular case was very low.

24. In response to question, Mr Trevelyan accepted that technically Mr Mills was correct and that the Appellant had been without leave since 7 July 2015.

Remaking the decision

25. Mr Trevelyan submitted that the Appellant's position was exactly the same at the date of hearing before us as it was before the First-tier Tribunal.

26. The Judge's findings were not challenged and these are:

    a. The background to the appeal as set out above at para 2.

    b. The Appellant's wife is receiving fertility treatment [24].

    c. The Appellant and his wife have bought a house together; that the Appellant is working and his wife is not [17].

    d. There would not be insurmountable obstacles to family life continuing in Pakistan, pursuant to the provisions of para EX1(b) of Appendix FM [16 – 18].

    e. There would not be very significant obstacles to the Appellant's re-integration into life in Pakistan [19].

    f. The Appellant had made a mistake in failing to pay the IHS fee with his first application [20].

    g. The Appellant is highly regarded in his community [20].

    h. The whole decision is premised on the basis that the relationship between the Appellant and the Sponsor is in a genuine and subsisting. There was nothing before us to suggest that it was not.

27. The additional finding we would make on the basis of our analysis of the underlying facts of the case as set out at paras 21a – c, is that the Appellant did have an opportunity to seek assistance and rectify his mistake from the date of receipt of the letter from the Respondent on 15 May 2015 to the date of rejection of his first application on 7 July 2015. It was only after his first application was rejected that the Appellant "…did all that he reasonably could" [20] to rectify his mistake. This, unfortunately, led to a considerable period of overstaying, which stretches from 8 July 2015 to date.

28. The decision is one to which the post 6 April 2015 appeal rights regime applies; the only ground of appeal available is that the Respondent's decision is contrary to s 6 of the Human Rights At 1998. The Appellant's appeal is based on the Respondent's decision failing to respect his private and family rights (and those of his wife) under Article 8 ECHR. Applying the five step approach in **Razgar**, the Judge correctly stated that as the relationship between the Appellant and his wife was genuine and subsisting, there would be interference by a public authority with the family and private life of the Appellant and his partner and that the decision was in accordance with the law [24]. Reading across our findings of fact as set out above, our proportionality assessment, taking into account the provisions of s117B is as follows:

    a. Immigration control is a weighty factor in the public interest. Whilst the mistake the Appellant made in initially failing to pay his IHS fee was a genuine mistake, it does not detract from the weight to be accorded to the public interest in immigration control. The consequence of the mistake, and the failure to correct the mistake at the earliest opportunity, resulted in a lengthy period of overstaying.

    b. It is in the interests of the economic wellbeing of the UK that the Appellant be able to speak English (s117B (2)) and that he be able establish that he is economically independent (s 117B (3)). It is stated by the Judge that the only provision that the Appellant was not able to meet under para 284 of the Rules was that the Appellant had "…not remained in the UK in breach of immigration rules, disregarding any period of overstaying for a period of 28 days." This would suggest that it was accepted that he met the English language requirement and this would therefore be a neutral factor.

    c. Whilst the Appellant was working, it was not established that he was financially independent. If he was working at the date of hearing before the First-tier Tribunal, he would now have been working for in excess of 7 months and there was no reason why evidence could not have been adduced of his income. However, none was provided and this weighs against the Appellant.

    d. The provisions of s 117B (4) and (5) provide that "little weight should be given" to a private life or a relationship with a qualifying partner that is established by a person when he was in the UK unlawfully or a private life which was established by a person when his leave was precarious. The Appellant's relationship with his partner was established when he had lawful leave, and we have not attributed significant weight in favour of the public interest to this factor. However, as to his private life (particularly his standing in the community) this was strengthened at a time when his second application had been refused and he was an overstayer; his immigration status was therefore precarious and we attribute some weight to this factor in the public interest side of the balance.

e. As to s 117B (6), there are no qualifying children.

29. Taking into account the factors in favour of the Appellant, including the fact that he made a genuine mistake, that he owns property in the UK, that his wife is receiving fertility treatment, and his standing in the community, and weighing these against the public interest in immigration control and the economic well-being of the UK, we find the decision to refuse further leave to remain is not disproportionate. There is no reliable evidence before us that making an entry clearance application from abroad would result in interference that was not proportionate; there was no interdependence due to ill-health or significant emotional interdependence, and there are no children of the family. This is not a case in which the only factor in the Respondent's side of the balance is the public policy consideration requiring that an application be made from abroad (**Treebhowan**); the Appellant had the opportunity, which he failed to take, of establishing that he met all the criteria for a grant of leave under Appendix FM and there are therefore, legitimate reasons based on public policy considerations for refusing leave. There is nothing to prevent the Appellant from putting in a further application supported by the correct evidence.

Decision

30. We remake the decision dismissing the Appellant's appeal under Article 8 ECHR.

Anonymity.

31. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. On the facts of this case, we see no reasons to make such an order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date 21 June 2017
M Robertson
Deputy Judge of the Upper Tribunal