Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23070/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 August 2017	**On 4 September 2017**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

UBAID ALI KHAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Chelvan, of Counsel, instructed by J J Law Chambers.
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant challenges the determination of First-tier Tribunal Judge Hanes dismissing his appeal against the respondent's refusal to grant further leave to remain. The determination was promulgated on 23 December 2016 following a hearing at Taylor House on 3 December 2016.

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2. The appellant is a Pakistani national born on 7 November 1985. He entered the UK as a student in March 2005. On 13 March 2015, he made an application for indefinite leave to remain on the basis of 10 years' continuous and lawful stay but this was refused on 10 June 2015. The respondent considered that the appellant's lawful residence was broken between 9 December 2009 and 13 January 2011 and discretion was not exercised in his favour because he had been here with 3C leave since 2013 and exhausted his appeal rights in March 2015. Furthermore, he did not meet the requirements of Appendix FM or paragraph 276ADE(1) and there were no significant obstacles to his reintegration into Pakistani life and insufficient evidence of exceptional circumstances which would warrant a grant of discretionary leave.

3. The appellant obtained permission to appeal from First-tier Tribunal Judge Lambert on 5 July 2017. The matter then came before me on 31 August 2017 when I heard submissions from the parties. I now give my decision.

Discussion and Conclusions

4. The appellant attacks the determination of the judge both in respect of her conclusions under paragraph 276B and on article 8.

5. On the first matter, it is argued that the judge misdirected herself as to paragraph 276B, that there are no gaps in his residence and that the judge failed to determine whether the respondent had discharged the burden on her to prove that the application made in October 2009 was invalid. It is maintained that in the absence of any evidence to support the respondent's assertion as to the invalidity of the application, the appellant was entitled to succeed in his appeal.

6. The second matter focuses on the judge's approach to article 8 and her assessment of the evidence. It is pointed out, both in the grounds and in Mr Chelvan's submissions, that whilst the judge found there were inconsistencies in the evidence (at paragraph 16, she failed to identify what those inconsistencies were. Additionally, it is maintained that she criticized the appellant for failing to put forward any evidence as to how any future children would be raised, given that the appellant was a Muslim and his girlfriend an atheist, but had failed to put this matter to the parties at the hearing. It is argued that the judge reached her findings on this and other highlighted matters on the basis of suspicion rather than the evidence. It is pointed out that no findings were made as to the evidence given by the appellant's girlfriend. Finally, it is maintained that the judge wrongly relied on s.117B (4) when assessing article 8 because at paragraph 22 she wrongly self-directed herself on the weight to be given to a

relationship established when a person’s immigration status was *precarious* whereas that subsection refers to *unlawful* status.

7. Dealing with the second matter first, I do not find any merit in the complaint that the judge did not identify the inconsistencies in the evidence which she referred to in her paragraph 16. Several are listed in that paragraph itself and relate to when the relationship became serious, how they spent time together, when she began to stay over and why documentary evidence bore different addresses for the appellant’s girlfriend including the appellant’s residence at a time when she did not live there.

8. Further inconsistencies arise in paragraph 17 with the appellant maintaining that they spend a few days a week together as he was in shared accommodation whereas in the previous paragraph his girlfriend was recorded as saying she had moved in with him. At paragraph 18, the girlfriend’s sister’s evidence raises yet more inconsistencies relating to when the relationship commenced. At paragraph 20, the judge notes that the appellant made no reference to his girlfriend in his application of March 2015 even though he was supposed to have been in a relationship with her at that time. It is, therefore, plain that the judge identified numerous inconsistencies in the evidence. The fact that these are all not listed in the paragraph where she referred to there being discrepancies is irrelevant. The judge found there were inconsistencies and then proceeded to set them out. To suggest that they were not identified is to misrepresent the determination.

9. The complaint that the judge failed to put her concerns over the proposed faith of the appellant’s future children to him at the hearing would have been an error had the judge relied on that issue to make adverse credibility findings. It can be seen from paragraph 20 that the judge’s rhetorical question played little, if any, part in her findings. It is but one of many points raised on the reliability of the relationship and is referred to towards the end of her assessment. Even if the judge was wrong not to have put that point to the parties at the hearing, there are ample other reasons given for her finding that the relationship did not engage article 8.

10. The grounds also complain that the judge based her decision on suspicions rather than evidence. Reference is made to the finding that the joint bank account was opened to bolster the appellant’s claim. Contrary to what is argued, however, the judge had every reason to reach this conclusion. At paragraph 16, the judge noted that although the couple did not claim to cohabit until August 2016, the bank account was opened well before that and used the appellant’s

address for both parties even though the appellant's girlfriend did not reside there at the time.

11. The last point made on the article 8 issue concerns the weight given to the claim by the judge. It is argued that the judge was under the mistaken impression that little weight could be ascribed to family life where a person's status was precarious. However, by this stage of the determination, the judge had already made her findings on family life and had not discussed the issue of weight at all in arriving at her conclusions. In any event, the establishment of a relationship during a precarious period of stay is a relevant matter for an article 8 assessment (Rajendran (s.117B- family life) [2016] UKUT 00562). At the offending paragraph 22, the judge considers *private* life, her conclusions on family life already having been reached and section 114B(4) is applicable to that assessment.

12. For these reasons, I am satisfied that the judge undertook a proper and full assessment of the article 8 claim. I find no errors of law with respect to the findings and conclusions on article 8 and the decision in that respect stands.

13. I turn now to the first part of the appellant's complaint which is that the respondent has the burden of proving that the appellant's 2009 application was invalid and that having failed to do so the appellant should succeed in his appeal because he has an outstanding application and hence no break in his period of stay.

14. At the start of the hearing, Mr Whitwell produced a copy of a CID print out from the respondent's file which confirmed that the appellant's 2009 application had been rejected because payment by a credit card had been declined. Mr Chelvan submitted that the burden was on the respondent to show that the application was invalid, that *"on its face"* it had not been shown that the application was insufficiently completed and that there should be disclosure by the respondent of the application form so as to establish whether or not it was properly completed. He submitted that the evidence should have been made available to the First-tier Tribunal and that the appellant needed an opportunity to respond to it. Mr Whitwell submitted that there would not be any other information available apart from what had been adduced.

15. Both parties referred to past authorities in their arguments. I have considered these. In Basnet (invalidity of application) [2012] UKUT 113 (IAC) the Tribunal held that the question of whether an application was valid depended not upon whether the payment was successfully processed but whether the application was accompanied by a fee which it would be if accompanied by such authorisation as

would enable the respondent to receive the entire fee without further recourse to the payer. In Mitchell (Basnet revisited) [2015] UKUT 00562 (IAC) the Tribunal held that there was no burden of proof on the respondent where the application was on its face insufficiently completed and that as payment pages were only retained for 18 months, any question of the reason for failure to obtain payment could only be investigated during that time.

16. The difficulty I have with Mr Chelvan's submissions and Mr Nicholson's grounds is that the issue of the invalidity of the application made in October 2009 is only being raised now, almost eight years after it was rejected for non-payment of the fee. I accept that there was an obligation on the Secretary of State as per Basnet but only if that decision had been challenged. If it had, the Secretary of State would have been obliged to provide the evidence that has now been lost by the passage of time. As there was no challenge, either by way of representations or judicial review (and no explanation for the appellant's inaction), the decision stands and it is inappropriate to launch what is effectively a public law attack against it all these years later.

17. I accept that the respondent's CID note was not previously before the appellant but even without it he was aware that payment had been declined in 2009 as is plain from his witness statement. Given that he did not seek to adduce evidence in support of any claim he had that his application was valid, it is difficult to see how he can do so now or why he should be permitted to. Further, his claim in his witness statement that he had had sufficient money in his bank to cover the fee (and the reliance of that claim in the skeleton argument) is contradicted by the respondent's evidence that the appellant sought to pay by credit card rather than through his bank.

18. I have regard to Mitchell where a similar scenario occurred. The appellant in that case also sought to remain on the basis of ten years' residence and challenged the respondent's assertion that she had been without leave for some nine months four years earlier, on the basis that she had made a valid application. The Tribunal pointed to the long delay in the raising of the challenge to the respondent's decision to reject an earlier application as invalid.

19. In the present case, the delay is even lengthier; indeed, it is more than twice as long. As the Tribunal found in Mitchell, had the appellant wanted to assert that the respondent's decision was wrong, he should have done so at the time. Regard was also had to the material adduced by the respondent relating to the processing of information and data. The Tribunal noted that payment pages are stored for just eighteen months for security reasons and that after

that period they are destroyed. The appellant could, if he wished to raise a challenge about payment of the fee, have done so at an earlier stage. What he cannot do is to bring a challenge against a decision made in 2009 through the medium of these proceedings. It is simply far too late to do so.

20. It follows that the First-tier Tribunal Judge was entitled to conclude that the appellant had failed to show that he had completed ten years of lawful and continuous residence.

21. Decision

22. The First-tier Tribunal made no errors of law and the decision to dismiss the appellant's appeal stands.

23. Anonymity

24. No anonymity order was made by the First-tier Tribunal. I was not asked to make one and, in any event, see no reason to do so.

Signed

Upper Tribunal Judge

Date: 1 September 2017