Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14884/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th February 2018	**On 8th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR MUHAMMAD ISHAQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik, Counsel instructed by Ash Norton Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Pakistan, appealed to the First-tier Tribunal against the decision of the Secretary of State dated 22nd March 2016 to refuse his application for leave to remain in the UK on the basis of his private life. First-tier Tribunal Judge Frazer dismissed the Appellant's appeal in a decision promulgated on 2nd June 2017. The Appellant now

appeals to this Tribunal with permission granted by First-tier Tribunal Judge Mailer on 11th December 2017.

2. The background to this appeal is that the Appellant was granted leave to enter the UK as a Tier 2 Migrant on 6th August 2011 until 16th February 2013. He entered the UK to take up employment as a chef for the Kashmiri Karahi Restaurant in Slough on the basis that the employer had shown that it was necessary to recruit a Kashmiri chef from Pakistan as there were no such chefs in the UK. The Appellant was granted further leave to remain as a Tier 2 Migrant until 5th February 2016 on the same basis. However, on 7th October 2015, the Appellant's leave to remain was curtailed so as to expire on 12th December 2015 as his employer's sponsorship licence was revoked.

3. The Appellant applied for further leave to remain outside the Rules on 10th December 2015. That application is contained at section A of the Home Office bundle and was sent with a covering letter from his solicitors dated 11th December 2015 asking that he be granted further leave to remain in order to find a Sponsor to transfer his Tier 2 general visa. It is stated that he is an experienced chef and is said to have exceptional skills. The application form states that the Appellant's wife and family remain in Pakistan. It is stated that the Appellant has been supporting himself and his family without recourse to public funds and wishes to be allowed to remain in the UK as he had at that time been living in the UK for nearly five years and it was asserted that he would experience hardship if he is required to return to his country.

4. The Secretary of State refused the application under paragraph 276ADE of the Rules and decided that there were no exceptional circumstances which would justify the grant of leave to remain.

5. In considering the appeal the judge noted that the Appellant is a chef of exceptional talent and has contributed to the success of the restaurant with whom he was employed. The judge noted that the Appellant has been able to support his parents and his family on the wages that he earns through the restaurant and has been able to send his children to private school [11]. The judge said that the Secretary of State believed that three individuals on the premises of the restaurant on 11th March 2015 were working at the restaurant and it appears that the restaurant's sponsorship licence was revoked. The judge noted that in oral evidence the employer said that the company are applying for a new sponsorship licence so that the Appellant can work for them again [12]. The judge found that the Appellant and the restaurant have been instrumental in providing support to local charities and that the Appellant has cooked food for a number of charity events and that the restaurant has contributed to the local community. The judge took account of letters of commendation from Khidma Community Trust, Slough Borough Council and Thames Valley Police [13]. The judge went on to conclude that the Appellant had clearly developed a private life in the UK by way of connections to colleagues and to the local community. The judge said:

> "However I attach little weight to this private life because it was formed at a time when the Appellant's status in the United Kingdom was precarious, that is, when he had no reasonable expectation that he would remain in the United Kingdom other than on short term visas (s.117B(5) of the Nationality, Immigration and Asylum Act 2002). He does not meet the long residence requirements under the Immigration Rules under paragraph 276ADE in that he has only been in the United Kingdom for just under six years." [14]

6. The judge went on to deal with the Appellant's contention that his family would suffer severe hardship if he were not granted leave to remain but found that the Appellant had not made any effort to look for an alternative Sponsor [15]. The judge considered that if the Appellant wishes only to work for Kashmiri Karahi then it would be open to him to return to Pakistan and apply for a further Tier 2 visa if and when the restaurant obtains a further licence. The judge considered that alternatively the Appellant could apply for employment with a different restaurant which already had a sponsorship licence. The judge found that the Appellant was able to support his family before he came to the United Kingdom and should be able to do so again. The judge considered that there were no compelling circumstances why the Appellant should be granted leave to remain in the United Kingdom outside of the Immigration Rules and that the Respondent's decision was not a disproportionate breach of the Appellant's right to private and family life under Article 8.

Error of law

7. In the application for permission to appeal and at the hearing before me Mr Malik outlined three Grounds of Appeal challenging the decision of the First-tier Tribunal.

8. The Appellant contends in Ground 1 that the judge erred at [14] in her approach to Section 117B(5) of the Nationality, Immigration and Asylum Act 2002. Section 117B(5) states, "little weight should be given to a private life established by a person at a time when a person's immigration status is precarious".

9. Mr Malik relied on paragraph 44 of the decision of the Court of Appeal in **Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 802** where Lord Justice Sales made the following remarks:

> "This discussion is sufficient to dispose of the appellant's argument about whether her own immigration status was "precarious" at the relevant time, i.e. between 1997 and late 2010. I would wish to reserve my opinion about the submission of the Secretary of State that any grant of limited leave to enter or remain short of ILR qualifies as "precarious" for the purposes of section 117B(5). I have to say that I am doubtful that this is correct. If that had been intended, the drafter of section 117B(5) could have expressed the idea more clearly and precisely in other ways. There is a very wide range of cases in

which some form of leave to remain short of ILR may have been granted, and the word "precarious" seems to me to convey a more evaluative concept, the opposite of the idea that a person could be regarded as a settled migrant for Article 8 purposes, which is to be applied having regard to the overall circumstances in which an immigrant finds himself in the host country. Some immigrants with leave to remain falling short of ILR could be regarded as being very settled indeed and as having an immigration status which is not properly to be described as "precarious". The Article 8 context could be taken to support this interpretation. However, it is not necessary to decide in this case whether the Secretary of State is correct in her submission or not, since whichever view is correct the appellant clearly loses on this point.

10. Mr Wilding referred to the decision in **AM (Section 117B) Malawi [2015] UKUT 260 (IAC)** where the Upper Tribunal said:

> “24. We reject the suggestion that some yardstick for the identification of whether or not a period of lawful immigration status is "precarious", might be found by reference to its length. We can see no basis for such an approach, not least because that would impose upon the judiciary the burden of identifying where that boundary lay, which cannot have been Parliament's intention. If the answer was to be found in the length of the period then Parliament would simply have said so. Nor does the statute oblige the FtT to descend to adopting the approach of affording subtle gradations of "little weight" to the elements of private life established during different periods of time. Whether an individual was present unlawfully, or had a precarious immigration status, Parliament has required the FtT to give little weight to the "private life" relied upon. The distinction in approach to the issue of weight is to be found in s117B(4) so that little weight is also to be given to a relationship formed with a qualifying partner at a time when the claimant is present unlawfully. It is open to the FtT to give such weight as it sees fit to such a relationship formed at a time when the individual's immigration status was precarious, but the FtT is not required to give that relationship little weight any more than it is required to give it significant weight.
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> 25. Nor is there any merit in our judgement in the suggestion that the answer is to be found in an individual's subjective belief that they would in the future be able to extend the period of leave that had been granted to them. The test must be an objective one.
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> 26. That approach is in our judgement entirely consistent with the approach of the ECtHR to those families with children who seek to resist removal on the basis of their "private life" from a host state when none of them is a citizen of their host; Alidjah-Anyame v The United Kingdom App 39633/98 4 May 1999, and Sarumi v The United Kingdom App 43279/98 26 January 1999.

27. In our judgement all those who have been granted by the Respondent a defined period of leave to enter the UK, or, to remain in the UK (which includes both those with a period of limited leave to remain, and those with a period of discretionary leave to remain), hold during the currency of that leave, an immigration status that is lawful, albeit "precarious". Even if the individual genuinely holds a legitimate expectation that their leave will ultimately be extended further by the Respondent, they have no absolute right to insist that this will occur, whether or not they meet the requirements of the Immigration Rules at the date of their application; HSMP Forum UK Limited [2008] EWHC 664. Still less will those who merely hold a genuine, and well founded belief, that they will at some future date be able to meet the requirements of the Immigration Rules and thus be able to obtain an extension; E-A (Article 8 - best interests of a child) Nigeria [2011] UKUT 00315 (IAC).

28. In all such cases, in order to obtain the variation that they seek (whether to gain a further grant of leave which is limited in duration, or is indefinite) the individual will need to meet at some future date the requirements of the Immigration Rules that are then in force; Odelola v Secretary of State for the Home Department [2009] 1WLR 1230. The ability of the individual to do so is not capable of prediction in advance - even if at any given moment during the currency of their existing leave the individual genuinely believes that they are continuing to meet the requirements attached to their existing grant. Indeed the ability of those who have not yet been granted indefinite leave to remain, to obtain a variation of their leave in the future, will probably always depend in part upon matters that are outside their control - whether that be the actions of others, or the future prosperity of themselves or others.

29. During the course of argument we were referred to Chapter 13 of the IDIs, version 5.0 published on 28 July 2014, entitled "Criminality Guidance in Article 8 ECHR cases". At paragraph 4.4.5 appears the following;

> "The Immigration Rules also require that a relationship not be formed at a time when the foreign criminal has precarious immigration status because a claim to respect for family life formed when there was no guarantee that family life could continue indefinitely in the UK, or when there was no guarantee that if the person was convicted of an offence while he had limited leave he would qualify for further leave, will be less capable of outweighing the public interest. For the purposes of this guidance, a person's immigration status is precarious if he is in the UK with limited leave to enter or remain, or he has settled status which was obtained fraudulently, or he has committed a criminal offence which he should have been aware would make him liable to removal or deportation".

> 30. Again, whilst in no way binding upon any court, one can see that the Respondent's view of what the term "precarious" meant where used in s117B is entirely consistent with our own.
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> …
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> 32. To put the matter shortly, it appears to us that a person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave. It is precisely because such a person has no indefinite right to be in the country that the relationships they form ought to be considered in the light of the potential need to leave the country should that grant of leave not be forthcoming.
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> 33. Of course in some circumstances it may be that even a person with indefinite leave to remain, or a person who has obtained citizenship, enjoys a status that is "precarious" either because that status is revocable by the Secretary of State as a result of their deception, or because of their criminal conduct. That is a different set of circumstances to these, but we can see no answer to the point that, vitiated by dishonesty, a grant of indefinite leave to remain would be susceptible to curtailment on proper grounds with immediate effect, with the consequent removal of the immigration status previously enjoyed. The Appellant did not seek to persuade us, correctly in our judgement, that this was the sole basis upon which an individual would hold a precarious immigration status. If that had been Parliament's intention it would have been a simple matter to spell it out. Equally, the decision by an individual with a grant of indefinite leave to remain to embark upon a course of criminal conduct, (even if it would not be sufficient from the outset to trigger a decision by the Respondent under the automatic deportation provisions of the 2007 Act) would probably be sufficient to render his status precarious. In these cases the person is well aware that he has either initially, or subsequently, imperilled the status he had, and cannot viably claim thereafter that his status is other than precarious."

11. Mr Malik submitted that, as it pre-dates **AM (Malawi)**, **Rhuppiah** must be preferred. However I note that the remarks of Sales LJ in **Rhuppiah** were obiter and he considered that it was not necessary to decide this matter.

12. In any event I note that the interpretation put forward by Sales LJ is that there is a very wide range of cases in which some form of leave to remain short of indefinite leave to remain may have been granted and that the word 'precarious' involves a more evaluative concept which is to be applied having regard to the overall circumstances. In the instant case the judge clearly looked at all of the circumstances of the Appellant's case. At paragraphs 11, 12 and 13 the judge looked at the Appellant's circumstances in the UK in terms of his length of residence and his involvement with the restaurant and with the wider community. At

paragraph 15 the judge gave consideration to the Appellant's options as regards his ability to obtain an alternative Sponsor or to return home and re-apply if his current Sponsor obtained a further licence. The judge was aware that the Appellant came to the UK in August 2011 and that he had a wife and children and his parents who he supported in Pakistan.

13. Mr Malik submitted that, as a Tier 2 (General) Migrant, the Appellant belongs to one of the settlement categories where a person qualifies for indefinite leave to remain after a single extension and on completion of five years in the UK. However, events in this case demonstrate the precarious or the temporary nature of the Appellant's circumstances in the UK. The Appellant had been granted a further extension as a Tier 2 visa but, as his leave to remain was dependent upon a Sponsor, when that sponsorship licence was lost, the Appellant's leave to remain was curtailed. This demonstrates the uncertainty of the Appellant's status.

14. The judge was clearly aware of all of these circumstances and referred at paragraph 12 to the evidence from the Sponsor in relation to the events which led to the revocation of the licence. It is clear that the judge was aware of all of the circumstances in this case. In my view this is not the type of case envisaged by Sales LJ at paragraph 44 of the decision in **Rhuppiah**. Accordingly the judge made no error in her approach to section 117B (5).

15. Ground 2 contends that the judge erred in failing to consider and determine whether there would be very significant obstacles to the Appellant's integration on return to Pakistan under paragraph 276ADE(1)(vi) of the Immigration Rules. Paragraph 276ADE(1)(vi) provides that a person qualifies for leave to remain on the grounds of his private life if he –

> "(vi) is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

16. Mr Malik contended that the judge failed to engage with this matter at all. Mr Wilding contended that this ground is without merit because it was not argued in the First-tier Tribunal that the Appellant would face very significant obstacles to his integration. Mr Wilding submitted that 276ADE was not mentioned in the Grounds of Appeal to the First-tier Tribunal and that the only assertion in the Grounds was that the Appellant would suffer severe hardship if he was required to start over in Pakistan. He submitted that the case was advanced in the First-tier Tribunal on the basis of compelling circumstances outside of the Rules. In any event he submitted that the Secretary of State had considered paragraph 276ADE(1)(vi) and it is difficult for the Appellant to complain now that it was not considered by the judge when it is not clear that that is the case that was being advanced.

17. As highlighted above the basis of the application to the Home Office was that the Appellant would experience hardship if required to return to Pakistan (F1 of the Respondent's bundle). The Grounds of Appeal dated 4th April 2016 state:

> "The Appellant maintains he will suffer severe hardships if he is required to start over, as his skills and experience are valued. His role is recognised under the shortage occupation list in the United Kingdom.
>
> The Appellant maintains he will face insurmountable obstacles if he is required to return to Pakistan."

18. The Appellant's witness statement prepared for the appeal and contained in the Appellant's bundle at pages 6 to 8 states that he has been able to provide for his elderly parents, his wife and his two children who all live in Pakistan since coming to the UK. He states at paragraph 6 that if he is required to return to Pakistan:

> "I will face severe difficulties to build any career and my wife and children rely on me to provide for them. My earnings from the United Kingdom have helped with supporting my family. I have been able to provide a good education for my children. ...I have been able to provide my young children and my family in Pakistan a good lifestyle, education and a comfortable home."

At paragraph 7 the Appellant said that if he was required to return to Pakistan:

> "I will not be able to provide for my family, with the same standards as I have to date. Since I have been in the United Kingdom for six years, my family has become accustomed to the security and stability that I provide, especially my children, who are progressing well in their studies, in Pakistan at good schools."

At paragraph 8 the Appellant went on to say that he had good opportunities in the UK and would find it hard to start all over in Pakistan.

19. At paragraph 3 of the decision the judge noted the Grounds of Appeal. However, I note that at paragraph 7 which summarises the submissions made on behalf of the Appellant, it is clear that the case was put on the basis that the Appellant should be granted leave to remain outside of the Immigration Rules. I also note that the judge gave full consideration to the allegation that the Appellant contends that he and his family would suffer severe hardship if he were not granted leave to remain but the judge found that the Appellant had not made any effort to look for an alternative Sponsor and that the Appellant could apply to return to the same Sponsor or another Sponsor [15]. The judge considered that the Appellant could apply for employment with a different restaurant which already had a sponsorship licence. The judge found that the Appellant "was able to

support his family before he came to the United Kingdom and should be able to do so again". Whilst I agree that the judge should perhaps have given active consideration to paragraph 276ADE(1)(vi) on the basis of the evidence before him, he could not have reached a conclusion other than that reached at paragraph 15 in any event.

20. The third Ground of Appeal contends that the First-tier Tribunal Judge's approach to the Appellant's Article 8 claim is inconsistent with the guidance given in **UE (Nigeria) v Secretary of State for the Home Department [2010] EWCA Civ 957**. There Sir David Keene said:

> "18. … But by the same token a public interest in the retention in this country of someone who is of considerable value to the community can properly be seen as relevant to the exercise of immigration control. It goes to the weight to be attached to that side of the scales in the proportionality exercise. The weight to be attached to the public interest in removal of the person in question is not some fixed immutable amount. It may vary from case to case, and where someone is of great value to the community in this country, there exists a factor which reduces the importance of maintaining firm immigration control in his individual case. The weight to be given to that aim is correspondingly less.
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> 19. None of this means that the individual is being rewarded for good behaviour. It goes instead to the strength of the public interest in his removal and how much weight should be attached to the need to maintain effective immigration control in his particular case. …"

21. It is contended on the Appellant's behalf that, whilst noting the Appellant's role in the restaurant and contribution to local charities at paragraphs 11 and 13, the judge failed to have regard to the fact that the Appellant was of value to the community when assessing proportionality. At the hearing Mr Malik submitted that these are relevant matters in relation to the proportionality assessment which the judge should have taken into account as positive factors in making the proportionality assessment. In his submissions Mr Wilding pointed to the findings in paragraph 15 and noted that every part of this case has been considered. He highlighted the fact that the judge had pointed out that the Appellant can apply again for a Tier 2 visa when the employer obtains a further sponsorship licence and that this too was a relevant factor in considering proportionality.

22. In relation to this aspect of the case I am satisfied that the judge did take into account the contribution the Appellant had made to the restaurant and the contribution he and the restaurant had made to the local community at paragraphs 11 and 13. The judge also took into account Section 117B(5) and it is clear that the judge attached significant weight to that factor in assessing proportionality.

23. However the judge took into account the fact that the Appellant could obtain another Sponsor or could, after he left the UK, apply to return to the

UK when his last employer obtains a further sponsorship licence. These were legitimate factors to take into account in assessing the proportionality of the decision to curtail the Appellant's leave to remain. In my view Ground 3 discloses no material error of law.

Conclusions

24. Having considered the three grounds as set out above I am satisfied that none of the grounds disclose a material error of law.

Notice of Decision

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

26. The decision of the First-tier Tribunal shall stand.

27. No anonymity direction is made.

Signed Date: 7th March 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As the appeal is dismissed there is no fee award.

Signed Date: 7th March 2018

Deputy Upper Tribunal Judge Grimes