Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23671/2014

THE IMMIGRATION ACTS

Heard at City Tower	**Decision & Reasons Promulgated**
On 30 June 2015	**On 24 July 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS
UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE M^{C}GINTY

Between

LYDIA LAWRENCE MWARKYAMBIKI
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss D Revill, Counsel, instructed by Peer & Co Solicitors
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. We see no need for, and do not make, an order restricting publication of the details of this case.

2. The appellant is a citizen of Tanzania who was born on 18 February 1986. On 8 May 2013 the respondent refused her application for leave to remain. She said she was entitled to leave because she had accrued ten years' continuous lawful residence in the United Kingdom. She appealed the

decision and the appeal was allowed by First-tier Tribunal Judge E M M Smith in a determination promulgated on 21 January 2014.

3. The material facts are that the appellant entered the United Kingdom on 18 October 2002 with permission as a student. She extended her leave in stages so that her leave lapsed on 30 April 2008. The appellant gave birth to a daughter on 26 January 2008 and they left the United Kingdom on 25 July 2008 which is approximately twelve week after the appellant's leave ran out. On 8 October 2008 the appellant was given further leave to enter the United Kingdom. Her daughter continued to live with the appellant's parents in Tanzania. The appellant's leave to be in the United Kingdom was extended so that it was due to lapse on 19 August 2012. On 14 August 2012 she applied for indefinite leave to remain on the basis of ten years' continuous lawful residence.

4. That application was refused. The appellant appealed and the First-tier Tribunal Judge was persuaded that the decision was not in accordance with the law. This is because, the judge decided, the Secretary of State should not have made the decision without considering her discretion and deciding if she should treat the appellant as if she had continuous lawful residence since she first arrived.

5. The judge said:

> "The appeal is allowed. The decision of the respondent was not in accordance with the law as it suffered from a defective procedure, the effect of this determination, is accordingly that the decision is quashed and that the application remains outstanding awaiting a lawful decision."

6. The application was refused for a second time on 8 May 2014. The Reasons for Refusal Letter is detailed. The letter says:

> "In deciding whether you meet the requirements to have completed ten years' continuous lawful residence in the United Kingdom, it is considered that there are two separate aspects that need to be taken into account. One aspect is any period spent in the United Kingdom without 'lawful leave' and the other aspect relates to breaks in 'continuous residence'.
>
> With regard to the 'lawful leave' aspect it is noted that you were in the United Kingdom without lawful leave between 01 September 2005 and 10 January 2006 and from 01 May 2008 to 25 July 2008."

7. We note that Judge E M M Smith did not appear to have noticed the earlier period of presence without leave.

8. The respondent then directed herself to the appropriate policy described as the "Modernised Guidance Relating Ten Year Long Residence Applications" and identified an instruction there in the following terms permitting a decision maker to grant an application:

> "If an applicant has short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days, and meets all the other requirements for lawful residence.

> You can use your judgment and use discretion in cases where there may be exceptional reasons why a single application was made more than 28 days out of time. For example, exceptional reasons can be used for cases where there is: a postal strike, hospitalisation, or an administrative error made by the Home Office."

9. The respondent then looked at the application dated 28 October 2005. It was rejected because it was submitted 58 days out of time. The explanation for that was that it was rejected because of "inadvertent human error". The appellant had not enclosed the correct fee.

10. The respondent noted that that was no explanation for the application being made 58 days late. Neither did the appellant provide evidence to show there were exceptional reasons why the discretion should be exercised in her favour.

11. The respondent then noted that the appellant had been without lawful leave between 1 May 2008 and 25 July 2008 which was calculated as 86 days. According to the decision maker:

> "Your representatives stated in page 2 of their letter dated 13 August 2012 that you remained in the country without leave due to circumstances beyond your control. They state that your daughter was born in the United Kingdom on 26 January 2008 and you were in not fit state to make an application at that time and you left the country as soon as you and your child were in a fit and healthy state to do so."

12. The respondent commented that a different explanation was offered in the appeal statement where, according to the respondent, the appellant's explanation for being without leave was because of difficulties in obtaining a travel document for her daughter.

13. The Secretary of State did not regard it as self-evident that the appellant was not in a fit state to make an application before 30 April 2008 because she had given birth to her daughter in the previous three months. The assertion was not supported by any medical evidence.

14. The respondent found "no exceptional reasons to justify the exercise of discretion with regard to your failure to submit an in-time application for further leave prior to 30 April 2008".

15. The respondent then explained that because the appellant had left the United Kingdom on 25 July 2008, her leave having lapsed on 30 April 2008, she had broken her period of continuous residence and although the respondent had discretion to waive periods of residence without leave in certain circumstances "there is no such discretion in cases where the period of "continuous residence" is considered to have been broken".

16. The letter shows that the respondent then took heed of the First-tier Tribunal Judge's findings and looked to see if there were circumstances justifying a decision to allow leave outside the Rules.

17. The letter then continues:

> "All your circumstances have been carefully considered and referred to a Deputy Chief Caseworker but it is concluded that there are no compelling compassionate grounds to justify disregarding the break in your continuous residence or granting you leave outside of the Immigration Rules."

18. The letter then went on to deal with human rights points.

19. The appeal then came before First-tier Tribunal Judge Lloyd-Smith.

20. She dismissed the appeal. Paragraph 14 of Judge Lloyd-Smith's determination is important. She said:

> "In considering whether the case needed to be remitted again I have taken into account the submissions of both parties. It was argued that the refusal under consideration was made by the author of the first refusal letter which was unsatisfactory. This is not something that has been raised by the appellant's representatives prior to the hearing day. The skeleton argument states that a different person should have considered the case. The determination of the previous judge states that the Immigration Officer should "seek guidance of a SEO. There is no evidence that such guidance was sought" which was said to amount to a breach of the guidelines and amounted to an error of law. I have a copy of a previous file and first refusal letter. Whilst it may be the case that the same Immigration Officer considered the application, the basis of the refusal has been more fully set out and more detail for the decision has been given. On reading the refusal letter the author states in two different places that the appellant's 'circumstances have been carefully considered and referred to by a Deputy Chief Caseworker. However, despite that 'it has been concluded that there are no compelling compassionate grounds to justify disregarding the break in your continuous residence or granting you leave outside of the Immigration Rules'. I do not agree that by remitting the matter the Immigration Judge was directing that a fresh decision maker take over the case, but rather that the matter should be considered by someone of authority to establish whether the discretion should have been exercised in the appellant's favour when considering the period of time the appellant remained in the UK without valid leave in 2008. Having read both refusals I am satisfied that the decision was considered by both the author of the refusal and by someone of suitable senior authority who would have been authorised to exercise the discretion if deemed appropriate. I do not therefore accede to the application that the matter be remitted again."

21. We summarise below the grounds of appeal to the Upper Tribunal.

22. The first ground of appeal complains that the decision was not in accordance with the law because the further consideration was given by the same caseworker that decided the original application and this, it was contended, was procedurally unfair. Connected with this ground was the contention that the case was not examined by a senior executive officer as required and was therefore contrary to the law.

23. It was also said that the judge had failed to apply **Devaseelan (Second appeals –ECHR – extra-territorial effect) Sri Lanka* [2002] UKIAT**

00702 and had consequently made adverse credibility findings that ought not to have been made. Thirdly, it was said the judge had wrongly considered authorities that had not been cited and therefore should not have been considered without giving notice to the parties and inviting representations and that the Tribunal had wrongly concluded that the appellant had not shown serious compelling circumstances so that discretion ought to have been exercised in her favour.

24. Finally it was said that the decision to dismiss the appeal on Article 8 grounds was wrong.

25. We have a skeleton argument prepared by Miss Revill dated 24 June 2015.

26. Concerning the contention that it was procedurally wrong for the case to be decided again by the same caseworker, she relied on authority to support the contention that it is wrong if "the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that [they were] biased." She supported this in part with reference to a policy document saying that where there is an administrative review it should be conducted by a different officer because "this will make sure there is independence and transparency in the review process". The grounds then complain that there was no evidence produced to show that a senior executive officer had looked at the decision and that was wrong.

27. We heard submissions from both parties and asked questions.

28. Although we understand why permission was granted we find on reflection that there is no merit in the contention that the decision was unlawful because it was reconsidered by the same officer that had made the first decision. It would have been different if the officer was asked to change his mind. That is not the nature of the complaint here. The criticism was that a stage was missed out of the process. There should have been consideration of whether to allow the case outside the Rules on policy grounds. That was not done.

29. Far from being a ground of criticism it seems to us appropriate or even desirable that the file went back to an officer who was familiar with the case. We find that the criticism suggesting the contrary is misconceived. The officer re-making the decision was not under any kind of possible pressure to justify the decision that he had made. He had forgotten to consider another route by which the application might have succeeded and he was addressing his mind to that route.

30. We agree with Judge Lloyd-Smith that the decision of Judge E M M Smith did not order the respondent to have the case decided by a different officer. We are doubtful that such an order could have been made but it was not made. The effect of the decision was that the Secretary of State had to decide the case again which is what she has done.

31. It is regrettable that we are not told the status of the Deputy Chief Caseworker who considered the decision. It would have been very easy to have provided evidence that that officer is a senior executive officer, if such be the case, and it is undesirable that the evidence was not given because its absence created an illusion of unfairness. The illusion vanished when the point was considered but the omission initially created an aura of unfairness even though there was none.

32. We have looked at the terms of the policy in our papers described as valid from 11 November 2013. It states:

> "**Discretion for breaks in lawful residence.**
>
> You must always discuss the use of discretion with a senior caseworker. You must be satisfied the applicant has acted lawfully throughout the whole ten year period and has made every effort to obey the Immigration Rules. The decision to exercise discretion must not be taken without consent from a senior executive officer (SEO) or equivalent."

33. The obligation under the policy is to discuss the use of discretion with a senior caseworker. Judge E M M Smith had no power to impose a higher obligation nor do we think that he did.

34. It is also clear to us that a senior executive officer or equivalent need only be involved if there is a decision to *allow* the appeal. In this context "exercise discretion" must mean exercise discretion to allow. The obligation is to discuss the use of discretion with a senior caseworker but to only allow an application on a discretionary basis if a senior executive officer (or equivalent) agrees. We are quite satisfied that a Deputy Chief Caseworker is a senior caseworker for these purposes. We note that the phrase "senior caseworker" does not have any capital letters. It is descriptive of a role not identifying a job title. The Secretary of State has followed her policy.

35. We also accept Mr Smart's point it does not matter anyway.

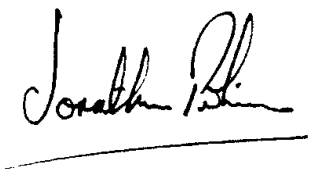
36. The policy applies where there has been a break in *lawful* residence but there is no such discretion when there has been a break in *continuous* residence and that is one of the reasons this appellant failed to satisfy the Rules. Any neglect to follow policy (and none has been established) is irrelevant because there were proper reasons for refusing the application under the Rules that were not affected by the policy.

37. The challenge to the fact finding exercise is irrelevant. We do not agree that the judge has done anything wrong. She has identified the early findings and built on them. However there is no discretion under the Rules and it has never been the appellant's case that she satisfied the rules. The **Devaseelan** point does not arise even if it has merit and we find it does not. No version of events would permit the appeal to be allowed under the

rules or support findings more favourable than those that have been made.

38. Neither is there any criticism of the decision to dismiss the appeal with reference to Article 8 of the European Convention on Human Rights. There is no case made out under the Rules and no reason to allow it outside the rules.

39. Putting all these things together we dismiss the appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 20 July 2015