



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

Appeal Number: IA/34485/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 4 August 2014**

**Determination
Promulgated
On 07th Aug 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

MS NANCY LISA MPANGILE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Youssefian, Legal Representative, D J Webb & Co Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Tanzania and her date of birth is 5 June 1972. She entered the UK as a student on 5 January 2003 and she made a series of in-time applications for extensions to remain here as a student. Her leave expired on 31 May 2009. She made an application for leave on 2 July 2009 and this application was rejected as invalid on 31 July 2009. She made a second application on 4 August 2009 but this was refused by the Secretary of State in a decision of 3 September 2009. On 17 November

2009 she made another out of time application and her leave was varied in a decision of 22 January 2010. On 27 July 2012 she made an application for indefinite leave to remain on the basis of ten years' continuous lawful residence pursuant to paragraph 276B(i)(a) of the Rules. This application was refused by the Secretary of State in a decision of 6 August 2013. The application was refused because of the seven month gap between 1 June 2009 and 21 January 2010. There was a gap in her leave and the application was refused under the Immigration Rules. In addition the application was considered under Appendix FM and paragraph 276ADE of the Immigration Rules and refused under those provisions.

2. The appellant appealed against the decision of the Secretary of State and her appeal was dismissed by Judge of the First-tier Tribunal Verity in a decision that was promulgated on 30 May 2014 following a hearing on 8 May 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Ford in a decision of 19 June 2014. Permission was limited to the decision under the Rules/policy only and not Article 8 of the 1950 Convention on Human Rights.

The Decision of the First-tier Tribunal

3. The First-tier Tribunal heard evidence from the appellant and witnesses. The Judge recorded that it was accepted by the appellant that there was a gap in her leave between 1 June 2009 and 21 January 2010. Her evidence was that the application was made out of time by her college on 2 July 2009. This application was invalid because the form used by the college was out of date. The college then submitted a further application on 4 August 2009 which was refused on 3 September 2009 on the basis that the college at that time was not a registered sponsor. The appellant made an out of time application on 17 November 2009 as a Tier 4 (General) Migrant and this was allowed on appeal.
4. The appellant's evidence was that she was in regular telephone contact with her family in Tanzania. She was employed as a support worker in the UK. The position of the Secretary of State was that the appellant has a private life here but she could return to Tanzania and continue her private life there.
5. The Judge recorded in her determination that Mr Youssefian, who represented the appellant before the First-tier Tribunal, argued that the decision of the Secretary of State was not in accordance with the law because the decision-maker had not considered the relevant policy guidance. In his view, in the light of the fact that the initial late application was submitted by the college and therefore was not late as a result of anything within the appellant's control, she should benefit from the policy. In his view the case should be remitted back to the Secretary of State for a lawful decision to be made.

6. The First-tier Tribunal made findings at [19] to [30] of the determination as follows:

“19. I am prepared to accept that the Appellant came to the United Kingdom in January 2003, when she was approximately 30 years of age. I am also prepared to accept that her mother and eight of her siblings still live in Tanzania and that she was educated in Tanzania and undertook Accounting and IT qualifications. In her statement at paragraphs 12 to 14 she indicates the history of her application to remain in the UK as a student and attempts to demonstrate that it was the fault of her college that resulted in her spending time in the UK without the required visa. She does accept that for approximately seven months between June 2009 and January 2010 she did not have lawful status in the UK. At paragraph 12 of her statement she states that she approached her college, Vision College of Theology and Business Studies, with the completed application form and all the required documents and asked them to submit this on her behalf. She then states as follows:-

‘I believe that the college had done so and that I was therefore in the UK lawfully’.

20. The Appellant is an intelligent adult who had by this stage been in the UK for some years. She had also gone through what might be termed the visa process and must have been aware of its technicalities. I do not therefore accept that without any proof she believed her college had submitted the application form. A prudent person would have asked for a copy of the application form countersigned and submitted by the college or would have at least ascertained from the college the date the form was submitted to the Home Office. She appears to have done neither. She states at paragraph 13 that it was only in July 2009 that she became aware that the college had actually submitted an application out of time and that as a result an incorrect version of the application form had been submitted and a new version of the application form had to be completed. She then states that she asked the college to ‘resubmit the application as soon as possible’. She then maintains that she believed that everything was now in order. Bearing in mind, that on her own evidence she had become aware that the assurances of her college were of dubious value, I am at a loss to understand why she would accept those assurances yet again from her college, when she had clear evidence that they had already let her down once before. Surely, it would have been prudent for her, to have requested that the college provide exact details as to when they submitted her application and the nature of the letter they had written in her support. I therefore do not accept that she believed everything was in order. At paragraph 14 she stated

that she was surprised when she was informed that her application was refused on 3rd September 2009 because her college was no longer on the Sponsor register. She then maintains that she sought legal advice from her solicitors and a fresh application was made on her behalf on 17th November 2009. If, as she claims she became aware that her application had been refused at the beginning of September 2009, then I am again at a loss to understand why two months elapsed before she sought legal advice and a fresh application was submitted on her behalf. She must at this stage have clearly been aware that she was residing in the UK without leave, that the assurances of her college were valueless, and that she needed to rectify her position immediately with the Home Office. Even if I accept that she only became finally aware that her college was no longer an accredited Sponsor at the end of the first week of September, it is clear that there was little sense of urgency on her part and that the new application was only submitted some two months later. Her own conduct clearly indicates a lack of urgency and purpose with regard to satisfying Immigration Rules.

21. With the help of her solicitors she was then given leave to remain in the UK from January 20 July 2010. She made a further application in July 2010, and this was refused. The appellant challenged this decision by way of appeal and the matter came before Immigration Judge Alakija on 2nd December 2010. I note that when considering the Appellant's rights under Article 8, he concluded that the Appellant had been in the UK for a long period of time, that she now wished to finish her education and return to Tanzania. At paragraph 13 of his determination he records this information as follows:-

‘She submits that she will then return to Tanzania to work in the company her brother owns using skills acquired here. Whilst I feel that this Appellant has taken an exceedingly long time over her studies, the fact that her application has not been refused on any such grounds suggests that she is complying with Immigration Rules in that respect. In such circumstances precedent seems to suggest that it would be disproportionate to make her return to Tanzania in order to make what would in all probabilities be a successful application to return’.

22. He then records that the decision is dismissed, under the Immigration Rules, although the appeal is allowed on human rights grounds. It is therefore clear to me that the Appellant does not satisfy the Immigration Rules at the date of that decision and that the Appellant had clearly indicated to the Immigration Judge that she wanted to finish her academic course and would then be returning to Tanzania to her family and to

work in her brother's company. Approximately two years later however, the Appellant changed her mind about returning to Tanzania and is now making an application through her solicitors for indefinite leave to remain in the UK. She was asked when this change had occurred in her plans and the Appellant indicated that it was only after the previous hearing before the Immigration Judge that she had decided that she wanted to remain in the UK. She indicated that she now worked and provided assistance to vulnerable adults and that she preferred this type of work to Accountancy and Computer Studies. I accept that the Appellant was offered a job with the London Borough of Richmond upon Thames in June of 2012 in this capacity and that this might have been the trigger for her application to remain in the UK made in December 2012. I do therefore accept that this change of heart as to her future intentions and decision not to return to Tanzania was probably triggered by the start of her new job, which she obviously enjoyed and found satisfying. Nevertheless, for the reasons I have already given I do not think the Appellant took the application process for her visa seriously monitored it carefully and that as a result a seven month gap does exist in her stay.

23. It was put to me by the Appellant's Legal Representative that the requirements of the UK Border Agency guidance on long residence and private life should have been applied by the Respondent and interpreted in the Appellant's favour. Having studied that guidance it is clear that continuous lawful residence is broken if there is a gap of six months or more which is the position in the Appellant's case. A short gap of approximately ten days is acceptable, if as an administrative error by the UK Border Agency or a postal strike or hospitalisation. It is clear that the three examples given in the guidance clearly indicate that it is not the fault of the Appellant that the gap resulted. For instance an Appellant should not be penalised because they enter into hospital or a postal strike means that their application is not delivered in time. They cannot of course be held responsible for an error on the part of the UK Border Agency. However none of this is applicable in the Appellant's case. If she had exercised some degree of diligence and care, steps might have been taken earlier in her visa application process. She was dilatory and appears to have accepted assurances from Vision College, even though after the initial mistakes had become apparent, she still continued to trust them to submit applications on her behalf and certainly did not request proof that they had done so or took the trouble to find out when applications were submitted. She herself accepts that there has been a seven month break and I therefore find that the Immigration Rules have not been satisfied and that the Appellant cannot meet the requirements. As to the various authorities which were given to me with regard to "near miss" I do not consider that this is a

“near miss” situation. In my opinion seven months is far too long to categorise this as a “near miss”. The Tribunal also note in the case of **Nasim and Others (Article 8) Pakistan [2014] UKUT 00025 (IAC)** the Upper Tribunal concluded that when a course of education comes to an end there was no basis for contending that a new freestanding right to exploit that education in the United Kingdom emerged. They also noted that although friendships, employment and studies to be involved by an Appellant in the UK did not restrict a Government’s ability to rely on the enforcement of immigration controls as a reason for interfering with these friendships, employment and studies.

The Grounds Seeking Leave to Appeal and Oral Submissions

7. The grounds seeking leave to appeal argue that the Judge failed to make a finding in relation to whether the decision was in accordance with the law. It is argued that the Secretary of State failed to consider her own published policy in accordance with **Abdi [2005] EWCA Civ 1363** and the First-tier Tribunal failed to make a proper finding in relation to this. It is argued that the First-tier Tribunal misdirected itself in relation to the policy guidance and specific reference is made to [23] of the determination which reads as follows:

“A short gap of approximately ten days is acceptable, if as an administrative error by the UK Border Agency or a postal strike or hospitalisation.”

However, according to the grounds, the policy guidance reads as follows:

“You may use your judgment in cases where there may be exceptional reasons why a single application was made more than 10 days out of time. For example, exceptional reasons can be used for cases where there is:

oa postal strike

ohospitalisation, or

oan administrative error made by the UK Border Agency.”

The guidance goes on to state as follows:

“It may be appropriate to exercise discretion if an applicant has multiple gaps in leave that have been caused by events outside their control such as postal strikes, hospitalisation and so on.”

8. It is argued in the permission application that the Judge placed an unreasonable burden on the appellant.
9. I heard oral submissions from both representatives. Mr Youssefian argued that the Judge did not accept the appellant's evidence relating to what happened after the first late application, but in his view, she accepted the reasons given for the initial late application and that circumstances were outside the appellant's control. He argued that the Judge's approach was prescriptive and, in any event, she applied the wrong policy. The Judge focused on process rather than the end result. The Secretary of State should have considered the policy and did not do so.
10. The Secretary of State in this case had submitted a response under Rule 24 of the 2008 Procedure Rules in which it was conceded that it was arguable that the Judge may have erred in his consideration of the policy for the reasons outlined in the grounds. However, it is immaterial in the light of the fact that the policy, if such a policy is applicable, is to be applied by the Secretary of State and that arguably the Secretary of State would never have applied the policy on the basis that there was no evidence to demonstrate that the appellant's gap in her continuous residence was the fault of her college as claimed and was over six months. In oral submissions Mr Tufan argued that the Judge's findings were open to her and that they were not irrational. He also argued that the Secretary of State had considered discretion under the policy and he referred me to page 3 (paragraph 2) of the Reasons for Refusal Letter of 6 August 2013. His oral submissions were at odds with the response in the Rule 24 response.

The Policy Guidance and the Reasons for Refusal Letter

11. Mr Youssefian provided me with the relevant guidance which is guidance (Long Residence and Private Life - V6.0 valid from 15 November 2012). In relation to a single gap in lawful residence the policy states as follows:

“It may be appropriate to use discretion if an applicant:

o has a single short gap in lawful residence through making one single previous application out of time by no more than 10 calendar days, and

o meets all the other requirements for lawful residence.”

You can use your judgment in cases where there may be exceptional reasons why a single application was made more than ten days out of time. For example, exceptional reasons can be used for cases where there is:

o a postal strike

- o hospitalisation, or
- o an administrative error made by the UK Border Agency

12. The relevant paragraph of the Reasons for Refusal Letter which Mr Tufan referred me to reads as follows:

“It is noted from your representative’s covering letter, dated 14 December 2012 that you claim to have completed an application for further leave and provided supporting documents to Vision College of Theology & Business Studies, prior to the expiry of your leave on 31 May 2009, and that the college failed to submit an in time application on your behalf. It is also noted that Vision College of Theology & Business Studies do not appear to have provided written confirmation that the failure to make an in time application was due to their administrative error. Whilst the reasons for making an out of time application have been noted, it is the responsibility of the applicant to ensure that a valid and in time application is made therefore discretion cannot be exercised. The reasons you have provided are not sufficient to allow us to consider your application outside of the Immigration Rules.”

Conclusions

13. In my view the Judge did not make a material error of law. She did not accept that the appellant believed that the college had submitted the application and that the appellant genuinely thought that she was here lawfully. I refer specifically to [20], [21] and [23] of the findings of the First-tier Tribunal. She did not find that the appellant’s evidence was credible on this issue. Her findings are adequately reasoned, lawful and sustainable.
14. The Judge made reference to the Home Office policy at [23] of the determination. It was incumbent on the decision-maker to consider discretion and the policy guidance. The Judge did not make a finding on whether discretion had been exercised. However, this does not amount to a material error because it is apparent from the decision letter that the decision maker properly considered discretion under the published policy. Thus the decision-maker lawfully exercised discretion that was vested in him. In addition the error is rectified by the Judge because she recognised her statutory power to uphold the decision or to reach a different conclusion. She decided to uphold the decision having been unpersuaded that the decision-maker’s discretion should have been exercised differently. This was based on her findings that the appellant was responsible for the delay and could not benefit from the policy because there were no exceptional reasons for the submission of the out of time applications.

15. The Judge made reference to a short gap of ten days at [23], but considering the paragraph as a whole it is clear to me that she did not misunderstand the policy. In any event, the Judge found that the appellant could not benefit from the policy because in the absence of exceptional reasons why the application was made out of time. The Judge made the relevant findings but did not go on to make her final decision clear at the conclusion of the determination namely that the decision was in accordance with the law.
16. For these reasons I find that there was no material error of law and I dismiss the appeal. The decision of the Judge to dismiss the appeal under the Rules and under Article 8 stands. In addition the decision is in accordance with reference to section 84 (1) (f) of the Nationality, Immigration and Asylum Act 2002.

Signed Joanna McWilliam
2014

Date 6 August

Deputy Upper Tribunal Judge McWilliam