



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/34150/2014**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 1 March 2016

**Decision & Reasons
Promulgated
On 22 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

**MISS TAMIWE TRACY MUSYANI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Lourdes, Counsel instructed by Crested Associates Limited

For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me pursuant to permission having been granted by First-tier Tribunal Judge P J M Hollingworth dated 22nd December 2015. The appeal relates to a decision by First-tier Tribunal Judge Suffield-Thompson promulgated on 24 August 2015. The Judge dismissed the appeal based on the Immigration Rules and Article 8 of the European Convention on Human Rights.

2. The Appellant's original application to the Respondent was for indefinite Leave to Remain. She had contended that there had been ten years lawful residence and that therefore she had met Paragraph 276B of the Immigration Rules. Alternatively she contended she ought to be permitted to remain in the United Kingdom based on Article 8 ECHR. The case raises an interesting point in respect of Paragraph 276B and whether the Appellant had broken her continuous lawful residence in excess of 28 days. The Appellant's grounds of appeal can be summarised as:
 - (1)The Judge materially erred at paragraph 29 in failing to consider the burden of proof relating to administrative problems which the Appellant had faced;
 - (2)The Judge erred in failing to take into account the guidance provided in the case of **Basnet (validity of application-respondent)** [2012] UKUT 00113 (IAC); and
 - (3)There was no witness statement and/or administrative related evidence tendered by the Respondent.

4. Mr Lourdes said that he relied on the grounds of appeal and the grant of permission. I was asked to look at paragraph 25 of the decision. Whenever the application was refused the Appellant had made an application within 28 days. Where the Respondent says that there was no leave that was refuted. At paragraphs 22 and 23 the Judge said she followed all of the evidence but that was not the case. She had put a lot of blame on the Appellant. Paragraph 31 cannot be correct. The Appellant had adopted all subsequent applications within 28 days. The grant of permission was being adopted. At paragraph 32 it was said that the Appellant had a good immigration history. In the decision of **R on the application of Shaikh v Secretary of State for the Home Department** [2014] EWCA Civ 2586 (Admin) at paragraph 25 made clear that there is a residual discretion. The headnote of **Basnet** at paragraph 3 was stressed. It was submitted that the case ought to be remitted for rehearing before a different Judge.

5. Ms Fijiwala said she relied on the Rule 24 Reply. It was submitted that the only ground was **Basnet** so it was not appropriate for the Judge to raise other matters. I was referred to paragraph 27(ii) of the Judge's decision. The case of **Mitchell (Basnet revisited)** [2015] UKUT 562 (IAC) at paragraph 11 was referred to. There had never been any suggestion that the form was validly completed. The Appellant had to raise the point at that time. Paragraph 12 of **Mitchell** made that clear. It was also clear that after 18 months payment information is not retained. The 14 November 2009 aspect was not challenged. It was too late to check it by the time of the long residence application. At paragraph 15 in **Mitchell** the Appellant can take it up with their bank at any time. It was a more nuanced burden of proof. They could raise it with their bank at any time and therefore

there needs to be a more nuanced burden of proof. It was submitted that therefore paragraph 29 of the FTTs decision was correct

6. Ms Fijiwala said I should note paragraph 13 of the Judge's decision that the Appellant was asked to pay again by bank card and that time the payment did go through. The fault was with the Appellant. In relation to the other points this was not part of the Appellant's grounds. But if I was to consider these matters then there was no material error of law. On 26 June 2009 the application was refused. It was accepted by the Appellant that the Rules could not be met. Paragraph 13(a) and (b) referred to. As did 13(d). As for the forms the Judge might have erred in respect of the forms which changed in December 2009 and the application was made in November 2009, but the error was not material. At paragraph 13(e) the application had been rejected. There was no application made within 28 days. It was made on 21 September 2010 and therefore 14 days late. The Rules could still not be met Article 8 was not raised in the grounds.
7. Mr Lourdes said in reply that paragraph 3(b) had raised the 28 days ground. He said that there was a material error of law. In respect of paragraph 13(e) there had been a request to resubmit the application and that is what was done. It was an ongoing process and therefore was not outside the 28 day time period. It was not a refusal, it was a rejection. It was submitted the matter be remitted to a different judge to rehear the appeal.
8. The question to be decided can be encapsulated as follows. Was there more than a 28 day gap in the 10 years residence that the Appellant relied upon for her ILR application? The Respondent's case is that there was, even when taking various dates into account. The Respondent says the first gap was after June 2009 when the Appellant's ILR application was rejected on 21 August 2009 and against which there was no appeal. Instead a new application was made 10 September 2009. That application was rejected in November 2009 and it was only by the time of a further payment card being used on 14 November 2009 that the payment cleared.
9. The Appellant submits that the issue is not whether any of the Appellant's applications were rejected but whether they were refused. That is because the Appellant accepted that some of her applications were rejected. Her argument is that she was given opportunities to correct the deficiencies and that they were corrected within 28 days. It is said that the rejections did not cause gaps of more than 28 days.
10. I had reserved my decision.
11. The Judicial Review decision of HHJ Allan Gore QC sitting as High Court Judge in **Shaikh** reviewed numerous cases and he noted that there were a wide variety of full and part time Judges who had

considered issues in respect of invalidity of applications. The Judge said at paragraph 25 of his judgment that in reality each case shows a decision based on its own facts.

12. That indeed does seem to be so. I was referred to the decision in **Basnet** and the later decision in **Mitchell**. I note that the Upper Tribunal made it clear in **Mitchell** that it was rejecting the submission that **Basnet** imposed on the Secretary of State the burden of establishing a previous application was invalid for failure to sign the payment mandate. The Appellant had failed to raise the matter at the time. It was also stressed that no one could be expected to retain documents indefinitely. The payment pages were retained for 18 months.
13. The present appeal before me does not relate directly only to payment pages on application forms submitted by the Appellant to the Respondent, but the totality of the issues which arise are similar. There were previous rejections of this Appellant's application forms for other reasons too.
14. With some hesitation I allow the Appellant's appeal. It does appear that there have been rejections of applications by the Respondent and not refusals. Further it appears that on each occasion there have re-submissions of forms or applications by the Appellant within 28 days thereafter. As indicated by First-tier Tribunal Judge Hollingworth when granting permission, there is some uncertainty in respect of paragraph 29 of the Judge's decision. That aspect remains unclear. It is therefore unsafe to assume that the error did lie with the Appellant. It appears that no evidence was actually filed at the hearing before the Judge, other than a chronology. The subsequent oral evidence did not appear to have cleared up some of the confusion and uncertainty.
15. The Judge may well have taken a different approach if the case law now relied upon had been brought to her attention, but I conclude that there was a material error of law because the rejections of the applications, as opposed to refusal decisions could have made a difference to the assessment of the appeal. There appear to be no gaps of more than 28 days, but this will need to be specifically considered at the remitted hearing. Noting what the decisions in **Basnet** and **Mitchell** state, it will be for the Appellant to produce the necessary evidence to deal with the evidential issues raised and not depend upon the Respondent to produce documents which are unlikely to have been retained.

Notice of Decision

The decision of the First tier Tribunal Judge involved the making of a material error of law and is set aside. None of the findings stand.

The Appellant's appeal shall be reheard at the First Tier Tribunal.

An anonymity direction is not made.

Signed

Date: 15 March 2016

Deputy Upper Tribunal Judge Mahmood