



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/29291/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 27th July 2017

Decision & Reasons

Promulgated

On 02nd August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

ANINE SUTHERLAND
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Chapman, Counsel

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of South Africa born 15th October 1976. She appeals with permission against the decision of FtTJ A. W. Khan, promulgated on 2nd December 2016, dismissing her appeal against the Respondent's decision of 13th August 2015 refusing her leave to remain in the United Kingdom on the basis of ten years lawful residence. The Respondent did not accept that the Appellant had fulfilled the requirements of the Immigration Rules because her continuity of leave had been broken by a gap of 94 days from 1st December 2007 to 5th March 2008 when, it was said, the Appellant was here without valid leave.

Background

2. The Appellant arrived in the United Kingdom on 7th February 2002 and was given leave to enter as a working holidaymaker valid until 6th February 2004. She made an in-time application for further leave to remain as a work permit holder which was granted on 1st December 2003 until 1st December 2007.
3. On 31st August 2007 her employer, Homerton School, closed and on 7th September 2007 her new employer, the Skinners' Company's School for Girls, applied to the Home Office for her work permit to be transferred to them.
4. On 15th October 2007 the Home Office initially refused the application for transfer, but by 5th February 2008, after receiving further information pointing out that the refusal had been made on an erroneous basis, the decision to refuse was reversed and the transfer granted. On 19th February 2008 the Appellant made an out of time application for further leave to remain as a work permit holder which was granted on 5th March 2008 until 31st December 2008. It is this sequence of events which causes the gap in the Appellant's immigration history.
5. On 21st January 2009 the Appellant submitted an application for further leave to remain under Tier 2 which was granted to 1st January 2012. She was then granted further periods of in-time leave under Tier 2 valid until 14th April 2015. By this time the Appellant had been in the UK 13 years employed as a school teacher.
6. On 30th March 2015 the Appellant made an application for indefinite leave to remain on the basis of her length of residence. It is accepted that she made an error in her application, in that she made her application on the wrong form. She intended to apply for ILR under paragraph 245HF of the Rules on the basis of five years' continuous leave as a Tier 2 Migrant. The application for long residence was refused in a decision dated 13th August 2015 with reference to paragraph 276B(i)(a) of the Rules on the basis that continuity of leave was broken on account of the fact that the Appellant was without leave between 1st December 2007 and 5th March 2008 (94 days).
7. The Appellant appealed against this refusal and her appeal came before FtTJ A.W. Khan.
8. FtTJ Khan heard the Appellant's appeal on 4th November 2016. He set out the history of the Appellant's application for leave to remain at paragraphs 1 and 2 of his decision. He noted at [14] that under the Respondent's Long Residence Policy, she must consider any evidence of *exceptional circumstances* which prevented an applicant from applying within the first 28 days of overstaying. It has always been accepted that the relevant period of "overstaying" in this Appellant's case is a gap of 94 days. In considering the LR policy on exceptional circumstances, the judge said at [15] "the only factor which could help the Appellant would be serious

illness." At [16] he said, "Since the gap was more than 28 days, I do not find that the Appellant made out that exceptional circumstances exist whereby the Respondent could have exercised discretion in her favour in granting leave to remain under paragraph 276B because I simply cannot see that such circumstances exist."

9. At [18] somewhat in contradiction of the above, the FtTJ expressly accepted that the original decision by the Respondent to refuse the application for a work permit (referring to the refusal on 15th October 2007), was "incorrect as to the law" but went on to find that the Respondent "corrected" the situation by eventually granting the application. The judge then dismissed the appeal.

Onward appeal

10. An application for permission to appeal was made on the basis that the FtTJ had misdirected himself and/or misinterpreted the Home Office policy on Long Residence. Firstly, he had erroneously stated that the only factor which could help the Appellant would be serious illness and secondly, although he accepted that the original decision by the Respondent to refuse the application for a work permit in 2007 was incorrect as to law, he erroneously failed to take into account a material consideration which is that the Respondent's refusal of the work permit application was not only incorrect as to the law but was the sole reason why the Appellant became an overstayer.
11. Permission to appeal was granted by FtTJ Astle in the following terms:

- "2. The grounds argue that the Judge misapplied or misinterpreted the Respondent's policy on long residence saying that the only factor that could excuse a period of overstaying was serious illness. He noted that the Respondent was incorrect in law in refusing an earlier application but corrected the problem by subsequently granting it. He failed to take account of the fact that the first refusal was the sole reason why the Appellant became an over stayer. Secondly it is argued that the Judge erred in his assessment of proportionality and misunderstood the test under the Rules and where the public interest lay.
3. The first ground is arguable and permission is granted. The second ground may be argued at the same time although I see less merit in this."

Thus the matter comes before me to decide whether the FtT's decision contains such error of law, as to require it to be set aside and be re-made.

Error of Law Hearing

12. I heard submissions from Ms Chapman on behalf of the Appellant and Mr Avery for the Respondent. Ms Chapman's submissions centred on the judge's failure to properly appreciate that the Respondent had improperly

considered her own policy set out in the Policy on Long Residence version 13, updated May 2015. She drew my attention to the relevant provisions which say as follows:

“3.3. ‘any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying.

The threshold for what constitutes ‘exceptional circumstances’ is high but could include delays resulting from unexpected or unforeseeable causes. For example:

- *serious illness which meant the applicant or their representative was not able to submit the application in time – this must be supported by appropriate medical documentation*
- *travel or postal delays which meant the applicant or their representative was not able to submit the application in time*
- *inability to provide necessary documents – this would only apply in exceptional or unavoidable circumstances beyond the applicant’s control. For example:*
 - *it is the fault of the Home Office because it lost or delayed returning travel documents*
 - *there is a delay because the applicant cannot replace their documents quickly because of theft, fire or flood. The applicant must send evidence of the date of loss and the date replacement documents were sought.’*

13. She submitted that it is clear that the Appellant’s specific circumstances can properly be considered under the heading of an ‘inability to provide necessary documents’ which amounted to an error on the part of the Home Office. There was an undue delay of nearly 5 months in issuing the Appellant with her work permit. The FtTJ expressly accepted that the reasons for this delay were legally unsustainable. The Respondent herself subsequently accepted that the original refusal to issue the work permit was incorrect. She said so when eventually issuing the permit. The error was compounded by requiring the Appellant to make an out of time application for renewal of the work permit. What should have happened is that the Home Office should simply have backdated the grant and thereby the appellant would not have been deemed to have a gap of 94 days in her immigration history.

14. She emphasised that it follows that the appeal should have been allowed by the FtTJ on the basis that the Respondent’s decision in the present case was not in accordance with the law (the third of the five Razgar tests)

because it was not in accordance with the Long Residence Policy. It was, for the same reason, not proportionate.

15. This she submitted had resulted in the judge failing to appreciate it was the Respondent's own error when refusing to transfer the Appellant's work permit from Homerton School to Skinners' School. The Respondent had wrongly thought that the Appellant was no longer eligible for a work permit because she was an overseas trained teacher and thus needed to have obtained a qualified teacher status within four years. This was an error. It was rectified by a letter from the Institute of Education dated 17th January 2008 explaining that the Appellant is not an overseas trained teacher and therefore such a restriction did not apply to her. Instead she was required to undertake the graduate training programme (which she commenced in January 2008 and completed in December 2008). Critically however, as set out in the Institute of Education's letter, there was no time limit by which she was required to do this and therefore no reason to refuse the transfer of her work permit.
16. This factor was sufficient to satisfy the high threshold in the Respondent's own policy when looking at the third bullet point in what constitutes exceptional circumstances, namely an inability to provide necessary documents.
17. She said it was clear that the Appellant's specific circumstances can properly be considered under that heading and it was a failure to consider this heading, both by the Respondent and by the FtTJ, which led to the material error in the judge's decision.
18. Mr Avery, although filing a Rule 24 response to the grounds seeking permission and whilst not conceding the issue, quite sensibly did not seek to press the points strongly.

Consideration

19. I am satisfied that the decision of FtTJ Khan contains a material error in that he confined himself when considering the Home Office Policy to saying that only serious illness could help the Appellant. For some reason he failed to properly identify that the appellant could bring herself within the exceptional circumstances (bullet point 3) set out in the Policy. I find that this was a material error and is one which requires the decision to be set aside. I therefore set aside the decision preserving the finding that the Respondent was incorrect in law in refusing the transfer of the Appellant's work permit in October 2007. I find I am in a position to remake the decision.
20. I find that there are good grounds demonstrating that in the Appellant's case there were exceptional circumstances beyond her control such as to bring her within the Home Office policy on Long Residence. I am satisfied that the Home Office error in refusing the Appellant's application for a work permit in 2007 was the sole reason for the 94 day gap in her continuity of residence. This was compounded by the Appellant being

informed that she needed to make an “out of time” application for further leave to remain and that somehow this “corrected” the error made. It did not. The Appellant’s transfer application should have been backdated which would have placed her in her rightful position.

21. It follows for the foregoing reasons that the Appellant’s appeal must be allowed on the basis that the decision to refuse her application for Indefinite Leave to Remain is not in accordance with the law, because it has been made without proper regard to the Respondent’s own published policy.
22. Following discussion with Ms Chapman and Mr Avery both were of the view that I can only allow or dismiss the appeal. Both agreed it will now be incumbent upon the Secretary of State to make a fresh decision in respect of this Appellant. By way of general comment I was informed by Ms Chapman that the delay in these proceedings has had an impact upon the health of the Appellant. It is therefore hoped that the Respondent will make a fresh decision in this matter sooner rather than later.

Decision

23. Appeal allowed.
24. No anonymity direction is made.

Signed
2017

C E Roberts

Date

01 August

Deputy Upper Tribunal Judge Roberts