



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/42973/2014

THE IMMIGRATION ACTS

Heard at: Field House
On 15 June 2017

Decision and Reasons Promulgated
On 28 June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MISS JANICE LOUISE WOOD
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr D Jones, counsel
For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of South Africa, born on 22 October 1979. She appeals with permission against the decision of the First-tier Tribunal dismissing her appeal against the decision of the respondent dated 22 June 2016 refusing her leave to remain in the UK pursuant to Paragraph 276B of the Immigration Rules.
2. In granting permission to appeal, First-tier Tribunal Judge Page concluded that it was arguable that the Judge erred in considering the weight to be given to the respondent's policy guidance in deciding whether there were exceptional circumstances entitling the appellant to succeed under paragraph 276A-D of the rules based on 11 years' residence, despite a period of overstay between March 2007 and August 2009.

The appeal

3. Mr Jones adopted the grounds of appeal for leave. He submitted that it was accepted by the parties that by reason of the respondent's refusal to regularise the appellant's leave on a valid in time application to vary such leave from working holiday maker to student, on 7 March 2007, her eligibility under the long residence rules was dependent upon an acceptance that there were exceptional circumstances justifying the waiver of the irregularity of the appellant's stay thereafter.
4. The appellant had contended before the Tribunal that the respondent's refusal of student leave in March 2007 and at all points thereafter had been wrong in law. The original decision to refuse was also flawed in that it improperly limited the appellant's access to a statutory right of appeal limiting her facility to contest that error; that the appellant had determinedly contested that refusal to her physical and financial detriment; that on all the available indicators she was a genuine student and had genuinely and effectively pursued her course of study, and that but for the respondent's error in refusing leave, her continuous lawful residence would have been unbroken.
5. He noted that there were various affirmative findings. The Judge accepted that all the evidence adduced by the appellant was genuine [33]. He also concluded that had she been granted leave as a student in 2007, she would have completed her BSc and, save for short periods of time, would have remained lawfully in the UK throughout [39].
6. The Judge also found in effect that the respondent erred in declining to grant further leave to remain to the appellant in 2006 and/or had acted unreasonably in failing to exercise discretion in her favour so as to extend leave to remain as a student at that time [38].
7. The respondent did not dispute that there existed facilities to waive even a lengthy period of overstaying. The Judge concluded that whilst the respondent's long residence instructions employed a high threshold with regard to the establishment of exceptional circumstances, that threshold could be met inferentially as a result of administrative errors by the respondent arising from delays from unexpected or unforeseen causes [44].
8. The Judge observed at [53] that had the appellant been granted a student visa when she originally applied she would have been here lawfully for 11 years.
9. The Judge also accepted that had the only issue been the original grant of leave to pursue her studies '..... I accept that there were exceptional circumstances to exercise discretion in her favour' - [43]. He also accepted that it was arguable that the respondent erred in failing to accord her a statutory right of appeal against the flawed decision making recorded in 2007 [44].

10. Mr Jones submitted that notwithstanding those findings, the Judge nevertheless concluded that there were not exceptional circumstances to inform a decision that the appellant should be treated as having enjoyed continuous lawful residence between the period March 2007 until August 2009.
11. Mr Jones also submitted that there was a manifestly material error in that the Judge proceeded on the mistaken belief that there had been a break in the appellant's continuity of residence for a period of 14 months [43-45]. The Judge noted the appellant's return to South Africa in May 2008, signalling the perceived break in continuity of residence as a factor which told against a finding that there were exceptional circumstances.
12. Contrary to the Judge's understanding however, the appellant did not in fact depart from the UK until August 2009, returning with entry clearance a few weeks later. That position was uncontroversial between the parties. Indeed it was confirmed in the respondent's refusal letter dated 22 June 2016, at Annex A, page 2, describing the accepted immigration history to include the departure in Summer 2009, an entry clearance application on 6 July 2009 and re-entry with leave on 17 August 2009. She had accordingly remained outside the UK for a period of a few weeks only and not well over a year.
13. In addition, the circumstances were clearly set out in the appellant's skeleton argument before the Judge. Mr Jones, who appeared on her behalf before the First-tier, confirmed that this was all set out in the skeleton. It had been submitted that she had been present in the UK continuously for a period in excess of ten years, having spent substantially less than 18 months outside the UK during her stay. The fact of her departure from the UK in order to secure entry clearance in 2009 did not operate so as to preclude the establishment of such continuous residence, it being contended that the appellant fell to be treated properly as being in possession of extant leave. She in fact returned within a matter of days with lawful leave to enter. Accordingly that absence did not operate to break continuous residence in accordance with paragraph 276A(a) of the Rules. Mr Jones submitted that the Judge's record was accordingly mistaken.
14. Mr Jones accordingly submitted that continuity of residence had not been an issue before the First-tier Tribunal but whether there were exceptional circumstances justifying the waiver of the irregularity of the appellant's stay between March 2007 and August 2009.
15. On behalf of the respondent, Ms Ahmad very fairly accepted that there had been a material error regarding a break in the continuity of the appellant's residence, presumed to be for a period of 14 months, which was not correct. That moreover affected the conclusion that there were no exceptional circumstances justifying the waiver of the irregularity of the appellant's stay, which had been unlawful, between March 2007 and August 2009.

16. She accepted the earlier findings by the Judge, including administrative errors made and the failure to afford the appellant a statutory right of appeal against a flawed decision making recorded in 2007.
17. In the circumstances, both parties submitted that the decision should be set aside and re-made by the Upper Tribunal.

Assessment

18. I find that Ms Ahmad's concession that there has been a material error of law was properly made. For the reasons referred to above, I find that the Judge's misapprehension as to the period that the appellant was absent from the UK affected his acceptance that exceptional circumstances existed justifying the waiver of the irregularity of the appellant's stay between March 2007 and August 2009. She had always been a dedicated and successful student for that period and continued to be a student after her return having obtained leave to enter the UK.
19. In the circumstances I set aside the decision and re-make it.
20. It was not disputed by Ms Ahmad that there were exceptional circumstances justifying the waiver of the irregularity of the appellant's stay after 7 March 2007. I find that there are such exceptional circumstances for the following reasons. It is accepted that the respondent's refusal of leave in March 2007 and thereafter had been wrong in law. The original decision to refuse improperly limited her access to a statutory right of appeal limiting her ability to contest that error. She had contested that refusal to her financial detriment. It was never contended that she was not a genuine and diligent student. But for the error in refusing her leave her continuous residence would have been unbroken.
21. I find that the provisions of paragraph 276B(i) have been met. A decision under paragraph 276B(ii) remains outstanding.
22. The parties accepted that I am entitled to assume the function of primary decision maker for the purpose of paragraph 276B(ii). There are clearly defined terms set out in the Immigration Rules. In that respect I have had regard to the decision of the Upper Tribunal in MU (Bangladesh) [2010] UKUT 442. The discretion to refuse indefinite leave on long residence grounds is exercisable by the Tribunal if it is the first instance decision maker.
23. I accordingly consider with regard to the public interest issues raised under paragraph 276B(ii) whether there are any reasons why it would be undesirable for the appellant to be given indefinite leave to remain on the grounds of long residence.
24. I take into account the appellant's age and strength of connections to the UK. I find that she has strong connections in the UK. She has been present here for a period

well in excess of ten years, having entered in March 2005 and having spent only a few weeks outside the UK over that time.

25. I have already set out the personal history of the appellant. There is nothing in her character, conduct and associations rendering it undesirable for her to be given indefinite leave to remain. She has overstayed between 2007 and 2009. However, discretion has been exercised exceptionally so as to waive the period of overstaying between those dates. Moreover, she departed from the UK in order to secure entry clearance in 2009.
26. She has made a positive contribution to the UK economy during the period that she has resided in the UK. She has invested funds in her education in the UK.
27. It has been accepted that there were administrative errors and omissions made by the respondent.
28. I have had regard to the fact that the appellant has remained a genuine, dedicated and successful student over the years between 2007 to date. A flawed decision making process during March 2007 affected her health, finances as well as her family and personal circumstances.
29. Among the compassionate circumstances is the fact that her ties to South Africa have substantially diminished over the years. She has family members in the UK to whom she is close. She has also developed a relationship and friends over time. It would be very difficult for her to be returned to South Africa, given her age and gender.
30. Having regard to the circumstances as a whole, I find that there are no reasons why it would be undesirable for the appellant to be given indefinite leave to remain on the grounds of long residence. I accordingly find that the appellant meets the requirements for indefinite leave to remain under paragraph 276B of the Rules.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and the decision is set aside. I re-make the decision and allow the appellant's appeal.

No anonymity direction is made.

Signed

Date 27 June 2017

Deputy Upper Tribunal Judge C R Mailer