



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

Appeal Number: IA/03485/2013

THE IMMIGRATION ACTS

Heard at Field House

On 27th June 2013

Determination

Promulgated

On 8th July 2013

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

GRACE KWAPI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Torro of Counsel instructed by Turpin and Miller Solicitors

For the Respondent: Mr P Nath, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Dove made following a hearing at Birmingham on 25th March 2013.

Background and immigration history

2. The Appellant is a citizen of Uganda, born on 26th September 1976.
3. She entered the UK with leave as a student on 15th August 2002 and over time her leave was extended until 31st May 2009.
4. She made an in time application for further leave to remain as a Tier 4 (General) Student on 29th May 2009 which was refused on 9th July 2009.
5. In the reasons for refusal letter relating to the application which was the subject of the appeal before the judge, that is for indefinite leave to remain on the basis of continuous residence in the UK, the Secretary of State erroneously stated that the application refused on 9 July 2009 was with no right of appeal which is plainly wrong. The application was refused because no bank statements had been submitted.
6. On 28th August 2009, following the refusal the Appellant did not appeal but wrote to the Respondent stating that she wished to resubmit the application, explaining that whilst she accepted that she did not have adequate funds in her bank account at the time of sending in the original application, she attached a bank statement as new evidence.
7. On 14th September 2009 the Respondent replied, stating that the bank statements which had now been submitted still did not show adequate funds in the account.
8. On 29th September 2009 the Appellant had obtained sufficient funds and re-submitted the application. She was advised on 6th November 2009 to submit a fresh application, which she did on 3rd December 2009. That application led to the grant of leave to remain as a Tier 4 (General) Student from 18th February 2010 to 1st May 2010.
9. On 29th April 2010 the Appellant submitted a further application. It was refused on 3rd June 2010 because the Appellant was not able to satisfy the requirements for a Confirmation of Acceptance for Studies or the maintenance requirement. She made a further application on 16th June 2010 and was then granted leave from 5th July 2010 to 30th July 2012.
10. On 27th July 2012 the Appellant applied for indefinite leave. On the 8th January 2013 the Respondent refused and relied on the gaps in the Appellant's continuous residence, namely the five month gap from July 2009 until December 2009 and a fifteen day gap in June 2010.

The judge's determination

11. The judge recorded that the Appellant's representative conceded that there was more than one gap in the Appellant's residence. In fact that was wrong. The decision notice received by the Appellant was dated 3rd June 2010, the deemed date of service being 7th June 2010. The Appellant was afforded a full right of appeal against the refusal providing her with

ten clear days of continuing leave pursuant to Section 3C of the Immigration Act 1971. The expiry of that appeal window was on 21st June 2010. Since the re-application was made on 16th June 2010 within the appeal window, there was no gap in lawful residence.

12. The Appellant sought to challenge the judge's decision on the basis that he had made a fundamental error in respect of the gaps in the Appellant's leave since he had dismissed the appeal on the basis that she had more than one gap which was wrong.
13. Permission to appeal was granted for the reasons stated in the grounds by Judge Sharp on 20th May 2013.
14. On 4th June 2013 the Respondent served a reply opposing the appeal. It is the Respondent's case that even if the judge had erred in finding that there had been multiple gaps, on the incorrect concession of the Appellant's representative, it was immaterial in the light of the fact that the first gap in residence was over five months and for none of the reasons specified in the policy relating to the exercise of discretion.

The Hearing

15. Mr Torro argued that the judge had erred in law and the appeal should be allowed insofar as the matter should be remitted to the Secretary of State in order to consider it in the light of her policy relating to continuous lawful residence.
16. The policy states that where there is a single gap in lawful residence 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 ten calendar days, and
 - o meets all the other requirements for lawful residence."
17. Caseworkers are instructed to use their 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.
18. Caseworkers are advised not to normally use discretion for cases where an applicant had more than one gap in their lawful residence due to submitting one or more of their previous applications out of time although

it could be appropriate to exercise discretion if there are multiple gaps which have been caused by events outside their control.

19. Mr Torro submitted that the evidence showed that the Appellant had at all times maintained proper contact with the Border Agency and was in correspondence with them throughout the period between July 2009 and December 2009. This was not a case of a person being refused and then doing nothing, which was relevant to the question of whether discretion should have been exercised under the policy. The evidence was that she had made a continuous effort to keep in touch. It could not be said that the decision letter of 8th January 2013 was a proper reflection of the facts. He relied on the case of D S Abdi where it was held that the decision in that case was not in accordance with the law on the basis that there had been factual error.
20. Mr Nath submitted that even if the judge had been wrong with respect to the number of gaps in lawful residence the mistake was immaterial because the length of the gap between the expiry of leave and her subsequent grant was five months and much longer than the ten day gap cited in the policy.

Findings and Conclusions

21. The Respondent made a factual error in stating that the Appellant had two gaps in lawful residence and this error was repeated by the judge. The case should therefore have been assessed on the basis of a single gap of five months.
22. It is the Appellant's contention that, because of the misapprehension of facts, the decision was not in accordance with the law because the Secretary of State did not consider the exercise of her discretion as she was required to do under the policy.
23. However the policy simply does not apply to the Appellant. This is not a case of a short period of time between the expiry of lawful leave and a subsequent application. Nor is it a case where matters have been delayed because of factors beyond the Appellant's control.
24. When she made her initial application in July 2009 she could not meet the requirements of the Rules. She did not have the requisite funds in her bank account. It seems that she only managed to get those funds together at the end of September 2009, some four months later. This situation is entirely outwith the terms of the policy which envisage a much shorter break in lawful residence not a four month gap when the requirements of the Immigration Rules were not met. In these circumstances there is nothing unlawful in the Respondent's decision not to refer to her policy.
25. The fact that it seems to have been accepted that the Appellant maintained contact with the Respondent at all times and sought to rectify

the situation as soon as she could will be relevant when and if any decision is made to remove her in the context of arguments raised under Article 8 of the ECHR.

Decision

26. The decision of the Immigration Judge is set aside and re-made as follows. The Appellant's appeal is dismissed.

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Signed

Date

Upper Tribunal Judge Taylor