Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14109/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 4th March 2015	**On 9th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

MISS LORRAINE THELMA TSIBO SEBATA
(NO ANONYMITY DIRECTION)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr W Bhebhe
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 11th May 1984 and is a citizen of Zimbabwe. The Secretary of State was granted permission to appeal to the Upper Tribunal against the decision of First-tier Tribunal Judge Majid (the Judge) who, in a determination promulgated on 24th October 2014, allowed the appellant's appeal against the decision to refuse her application to remain in the United Kingdom. The appeal was allowed under the Immigration Rules and on human rights grounds. The matter came before me on 28th January 2015 for an initial hearing at which I determined that the making of the decision of the First-tier Tribunal involved the making of errors on points of law. I set aside the decision and the case was accordingly adjourned for a continuation hearing

before me today for the decision to be remade with a direction that none of the findings of the First-tier Tribunal should stand.

2. The appellant's immigration history in brief is that she arrived in the United Kingdom on 12th July 2003 with valid entry clearance as a student 9th September 2004. Her leave was renewed through subsequent applications until 4th May 2013. It is common ground that the appellant applied on 2nd May 2013 for indefinite leave to remain on the grounds of her length of stay in the United Kingdom and that this claim was rejected by the Secretary of State on 28th May 2013. A further application was made on 29th July 2013 on the basis of 10 years' residence which was further rejected on 21st August 2013.

3. A further application made by the appellant on 27th September 2013 was refused on 5th March 2014 giving rise to the appeal now before me in which the central argument for the appellant is that the refusal of her application by the Secretary of State was unreasonable, wrong and unlawful. The appellant asserts that her period of continuous lawful residence in the United Kingdom was broken as a result of the actions of the respondent.

4. The appellant attended the hearing with a number of witnesses but before I received any evidence Mr Tufan addressed me on behalf of the Secretary of State. He stated that he was not in a position to make any concessions, but on the basis of his research and inquiries into the issues under appeal he very helpfully submitted that there may be a short resolution to matters on the basis of a preliminary view I may take about the lawfulness of the decision made by the Secretary of State for the following reasons.

5. The Secretary of State accepts that the appellant had valid leave to remain in the United Kingdom until 4th May 2013 but her difficulty in showing the necessary period of 10 years' residence in her most recent application arose from the circumstances of the applications she made on 2nd May 2013 and 29th July 2013 which were rejected on 28th May 2013 and 21st August 2013 respectively.

6. The Secretary of State subsequently found that the rejection of the May 2013 and July 2013 applications meant that the appellant's valid leave expired on 26th June 2013, leaving her with no valid leave until 27th September 2013 when her next application was made, thus leaving a 90-day period when she was without valid leave. This break in her continuous lawful residence left the appellant short of the necessary period of residence. The Secretary of State refused to exercise discretion outside the Immigration Rules because the onus was considered to be upon the applicant to ensure that valid applications were made.

7. The application made on 2nd May 2013 was submitted on form SET(O) which was rejected by the Secretary of State on 28th May 2013 on the basis that it had been made on the wrong form and the appellant was

referred to the website for guidance. However, the guidance then available to the appellant was set out in a document valid from 16th April 2013 advising that the relevant form for applications was SET(O), that used by the appellant. New guidance was not issued until 20th May 2013 stipulating that from then onwards form SET(LR) should be used. The rejection of the appellant's form was accordingly in circumstances where the published guidance was that for applications between 16th April 2013 and 20th May 2013 form SET(O) was the correct form to be used.

8. Mr Tufan placed copies of all the relevant guidance before me and submitted that the rejection of the appellant's application on the SET(O) form accordingly appears to have been as a matter of policy, perhaps internal, which was not consistent with the guidance then published. Mr Tufan pointed out that the guidance at page 16 of that effective from 16th April 2013 was that all valid applications for leave must be considered even if, as in the case of this applicant, the applicant had not yet completed the necessary qualifying period for indefinite leave.

9. In these circumstances Mr Tufan said that he could not oppose an argument that the application should have been considered by the Secretary of State and not rejected; the issue was not one in relation to which he wished to test any of the evidence of the appellant or her witnesses present at the hearing. Mr Tufan indicated that he would not argue against a view that the decision of the respondent was not in accordance with the law such that the matter should be remitted to the Secretary of State for further consideration whilst the appellant awaited a lawful decision.

10. Mr Bhebhe stated that he wished to make no submission in the light of my expressed view that the decision of the Secretary of State is, for all the reasons highlighted by Mr Tufan, not in accordance with the law such that the appellant awaits a lawful decision from the Secretary of State.

Notice of Decision

11. The appeal is allowed to the extent that the decision of the Secretary of State is not in accordance with the law. The appellant awaits a lawful decision.

Anonymity

There is no order for anonymity.

Signed: **J Harries**

Deputy Upper Tribunal Judge
6th March 2015
Fee Award

The fee award remains as directed by the First-tier Tribunal.

Signed: **J Harries**

Deputy Upper Tribunal Judge
6th March 2015