Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/34847/2014**

THE IMMIGRATION ACTS

Heard at: Manchester
On: 27th March 2015

Decision Promulgated
On: 21st May 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Mercy Kadewa
(no anonymity direction made)

Respondent

Representation:
For the Appellant: Mr Harrison, Senior Home Office Presenting Officer
For the Respondent: Ms Barton, SABZ Solicitors

DECISION AND REASONS

1. The Respondent is a national of Malawi born 21st August 1979. On the 1st December 2014 the First-tier Tribunal (Judge Herwald) allowed her appeal against a decision to refuse to vary her leave to remain and to remove her from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006. The Secretary of State now has permission to appeal against that positive determination, granted by Judge Keane of the First-tier Tribunal on the 27th January 2015.

2. The case before Judge Herwald concerned whether or not Ms

Kadewa met the requirements of the Immigration Rules relating to continuous lawful long residence. It was accepted that Ms Kadewa had come to the UK as a visitor in December 2001 and had thereafter varied her leave so as to be granted further leave to remain as a student, and subsequently as a highly skilled migrant. She had remained here ever since. Her application for indefinite leave was however refused by the Secretary of State on the grounds that there was a period in which she had not had lawful leave to remain: the refusal letter identified this period as 30th September 2005 to 23rd February 2009.

3. Judge Herwald heard, read and accepted evidence from Ms Kadewa about what had happened during the period in question. She had valid leave to remain as a student when, on the 27th April 2005, she had made an application for further leave to remain in the same capacity[1]. Her solicitors chased the Home Office[2] but she heard nothing until November of that year when she received a "holding reply"[3]. On the 18th August 2006 the Home Office wrote to Ms Kadewa informing her that her application had been "considered and granted" on the 26th May 2005 and that her passport had been returned to her via Royal Mail[4]. The letter suggested that she take the matter up with them. On the 30th August the Home Office wrote again, to inform Ms Kadewa that the Royal Mail accepted responsibility for losing her passport, and that she could apply for compensation from them. The same day the Home Office wrote to the High Commission of the Republic of Malawi explaining that the passport had been lost by the Royal Mail and respectfully asking that they deal with any application by Ms Kadewa for a replacement as a matter of urgency. Yet another letter of the same date informed Ms Kadewa that the leave she had been granted in May 2005 had expired on the 30th September 2005 had expired and that she should "make arrangements to leave this country" as soon as possible.

4. The Malawian authorities did not issue a new passport until the 20th November 2006. Judge Herwald accepted Ms Kadewa's oral evidence that she did not receive it until some time in 2007. On the 5th July 2007 she made a new application. Her solicitors set out the full history of the matter and pointed out that none of it was Ms Kadewa's fault. The Home Office did not respond. Ms Kadewa's solicitors made a further application with representations on the 7th November 2008; Ms Kadewa was subsequently granted leave to remain which was then renewed on three occasions.

5. As can be seen from that history Ms Kadewa was technically became an overstayer on the 30th September 2005. It can also be seen that the Home Office accept that she cannot have known

[1] See page 100 of Ms Kadewa's First-tier Tribunal bundle

[2] Page 99

[3] Page 98

[4] Page 97

about that at the time, since as far as she was concerned her application was then outstanding. She was not informed that her leave had been granted, and lapsed, until the 30th August 2006. She could not at that point do anything at all about it. She had no passport, no endorsement and was therefore not in a position to make a further application, nor even to lodge an out-of-time appeal with the First-tier Tribunal. That this was so was apparently accepted by the HOPO who appeared before Judge Herwald, a Ms Horren. She accepted that Ms Kadewa could only reasonably be held culpable for the delay between her having received her passport "sometime" in the first part of 2007 and making the new application in July of that year: see paragraph 19(a)&(d) of the determination. This concession considerably narrowed the gap in continuous lawful leave. Of that remaining gap Judge Herwald found as follows:

> "The Secretary of State opined that this was a significant break in her lawful residence, but I note from the refusal letter that the Secretary of State has a discretionary power to waive a breach of the Immigration Rules and in this case one wonders why she did not do so, given that the reasons why the Appellant might have become an overstayer were plainly and obviously not down to her, but to a greater extent down to the Home Office and its apparent policy of lengthy delay"

This reference to delay was, as I read it, to the period between April 2005 when Ms Kadewa had made her application and the 18th August 2006 when the solicitors finally receive a reply to their chasing letters. The determination goes on:

> "It is impossible to ignore the potent argument put forward in the Grounds of Appeal as to legitimate expectation. By repeatedly granting further periods of leave it could be said that the Home Office had created a legitimate expectation that her presence in the UK had been lawful and continuous for the requisite period, but even if I am wrong in that regard, I am not satisfied that the Home Office has in this case acted fairly in all the circumstances.."

6. The determination concludes: "I am not persuaded that the Home Office acted fairly, and I am persuaded that the Secretary of State should have exercised her discretion differently. For the avoidance of doubt, had the Appellant not succeeded under the Immigration Rules, I would have been persuaded that given the length of time she has spent in this country, and the possibility of a settled partner in this country (which issue was not necessarily argued before me) the Appellant would have succeeded under Human Rights Provisions". The appeal is thereby allowed under the Rules.

7. The Secretary of State now appeals the decision on the following grounds:

   i) The Appellant has remained in the United Kingdom without leave between 30 September 2005 and 23rd February 2009. As

such her period of continuous lawful residence was considered to be broken at that point. Even if the loss of the Appellant's passport and the leave contained within it was taken into account, the Appellant was aware that she was in the UK without leave from 30th August 2006 yet did not attempt to regularise her status until the 5th July 2007. That is a period of more than 28 days.

ii) The Respondent maintains that the Appellant cannot satisfy the requirements of the Immigration Rules.

My Findings

8. Before me Ms Barton expressed some surprise that the Secretary of State was appealing this decision. Mr Harrison very candidly said much the same.

9. The ground of appeal initially suggest that the Secretary of State seeks to go behind the concession made by Ms Horren on the day, that the break in question is in fact much shorter than that claimed in the refusal letter. The grounds then protest that the period between 30th August 2006 (when she discovered that her leave had lapsed) and the 7th July 2007 (when she made her application) is "longer than 28 days". Quite what the point is of that statement of fact, I am unsure. As Mr Harrison agreed, there was not a lot Ms Kadewa could have done until she got her new passport "sometime in 2007". The period under consideration was therefore narrower still.

10. This was not the period considered by the Secretary of State when she declined to exercise her discretion in Ms Kadewa's favour. The refusal letter is concerned with a break in continuous lawful residence of 3 year and 4 months, a period which both Ms Horren and Mr Harrison agreed the Secretary of State could not rationally rely upon. There was no evidence before Judge Herwald that the Secretary of State had given consideration to exercising her discretion in Ms Kadewa's favour in respect of the weeks between her receiving her new passport and making her new application. In those circumstances he was entitled to make the criticisms he does of the Secretary of State's approach. The factors he highlights as relevant to that consideration are the fact that the passport was lost, that there was considerable delay on the part of the Home Office in dealing with this matter and that in making three successive grants of leave the Home Office had given Ms Kadewa a legitimate expectation that her period of overstaying was to be overlooked and that indefinite leave would eventually be granted. In respect of this last point I note that this has not been challenged. It was a finding that was open to Judge Herwald on the evidence before him and is highly pertinent. Ms Kadewa has always been self-funding, investing considerable amounts of money in her education in this country, and then taking up work as a highly skilled migrant. She continued to do that in the legitimate

expectation that she would be eventually granted indefinite leave to remain in the UK.

11. The fault, if it can be found, lies in the concluding line of the determination. The appeal is allowed "under the Immigration Rules", when in fact the reasoning suggests that it should have been allowed as "not in accordance with the law" and, in light of paragraph 19(e), on human rights grounds. It was not open to the First-tier Tribunal to allow the appeal under the Rules outright, since success under paragraph 276A depended on the Secretary of State considering whether to exercise her discretion in respect of the period of overstaying in the first few months of 2007, taking into account the factors highlighted by this determination. Following the finding that this had not been done and that the Secretary of State had not acted fairly in her consideration of this matter, the proper course would have been to allow the appeal as "not in accordance with the law". I set aside and re-make the decision to that extent.

12. As for human rights it is true that the reasoning in 19(e) is scant, but I am satisfied that it is sustainable. The reference to Ms Kadewa's partner was to unchallenged evidence before the Tribunal that she was a long-term relationship with a Malawian national with indefinite leave to remain. The central point being made however was that this appeal should have succeeded "under human rights provisions" because there was, in light of the earlier findings about unfairness, very little weighing on the Secretary of State's side of the scales in respect of proportionality. It could not in the circumstances be shown that Ms Kadewa's removal from the UK would be necessary in pursuit of the legitimate aim of protecting the economy. She speaks perfect English, is entirely financially self-sufficient and apart from the brief period that was the focus of the appeal had always had lawful leave in the UK. Judge Herwald had made his findings about the fairness of holding that against Ms Kadewa perfectly clear. The grounds make no challenge to the findings in paragraph 19(e). I therefore re-make the decision to the extent that I would also allow it on human rights grounds.

Decisions

13. The determination of the First-tier Tribunal contains an error of law in that the finding that the appeal should be allowed "under the Immigration Rules" is set aside.

14. The determination is upheld save that paragraph 20 should now read:

    "The appeal is allowed as the decision of the Secretary of State was not in accordance with the law.

    The appeal is allowed on human rights grounds".

15. I was not asked to make a direction as to anonymity and on the

facts I see no reason to do so.

Deputy Upper Tribunal Judge Bruce
1st May 2015