Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35013/2014

THE IMMIGRATION ACTS

Heard at Field House
On 14th July 2015

Decision and Reasons
Promulgated
On 30th July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE D KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS FAHIMA MALLICK

Respondent

Representation:
For the Appellant: Mr Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr N Leskin, Solicitor

DECISION AND REASONS

Introduction

1. The Secretary of State appeals against the decision of First-tier Tribunal A. Kelly to allow the appeal against her decision to refuse Ms Mallick's application for leave to remain on the basis of 10 years' continuous residence in the United Kingdom. For convenience, I shall refer to the parties in accordance with their status in the First-tier Tribunal; that is to say, I shall refer to Ms Mallick as 'the appellant' and to the Secretary of State as 'the respondent'.

Background

2. The appellant first entered the United Kingdom, with valid entry clearance and leave to remain, on the 23rd June 2004. She thereafter received successive grants of further leave to remain, the most recent of which ended on the 21st March 2015. On the 20th March 2015, she applied for indefinite leave to remain on the basis of 10 years' continuous residence under paragraph 276B of the Immigration Rules. By that time she had continuously resided in the United Kingdom for a period of 10 years and 9 months. The sole issue, therefore, was whether there had been any break in the lawfulness of that residence.

The reasons for refusal and findings of the First-tier Tribunal

3. On the 27th February 2009, the appellant had submitted an application for further limited leave to remain, some two days before her then extant leave to remain was due to expire. That application was rejected as invalid on the 19th March 2009. On the 24th April 2009, the appellant submitted a valid application. This was granted on the 24th July 2009.

4. The respondent gave her reasons for refusal in the following terms –

> When an application is rejected, you then have 28 days to submit another application which will subsequently be granted. You did not submit another application until 24th April 2009. This was 36 days after your application was originally rejected. Although you were then granted further leave to remain on 14th July 2009 (sic) you were in fact without leave from the 20th March 2009 (the day after your application was rejected) to 13th July 2009 (the day before your next period of leave was granted). This was a total of 116 days without leave. As such it is not considered that you have had 10 years continuous lawful residence and your application does not satisfy Paragraph 276B(i)(a).

5. It was the appellant's case before the First-tier Tribunal that she had not been served with notice of the invalidity of her application of the 27th February 2014 until the very end of March. Judge Kelly found this to be a fact. She did so because (i) the appellant had given a plausible reason for being able to recall when she received the notice of notice of invalidity (its late receipt had left her with insufficient time to submit a further application prior to the introduction of the Tier 4 system, on the 31st March 2009) and (ii) the application fee was returned to her under cover of a letter dated the 27th March 2009 which, being a Friday, may have meant that it was not delivered until the following Monday. The judge therefore concluded that the 28-day period of grace had only started to run on or around the 30th March and, therefore, that her application of the 24th April 2009 had been made well within that period.

The respondent's grounds of appeal

6. Although not specifically drafted as such, the application leading to the grant of permission to appeal in effect raised two grounds –

(i) Home Office records show that the letter rejecting the application for want of correct photographs was sent on the 19th March 2009;

(ii) even if the rejection letter was sent at the end of March (which is not accepted), it cannot have the effect of conferring leave to remain on the appellant between the 29th March 2009 (the date the Judge Kelly found that the application was rejected) and the 13th July 2009 (the day before her next period of leave to remain was granted.

Analysis

7. The first ground of appeal is easily disposed of and was not pursued with any degree of vigour by Mr Duffy. I am satisfied that the judge's finding that the appellant did not receive a notice of invalidity until the very end of March 2009 was one that was reasonably open to her on the evidence, and that the reasons she gave adequate reasons for that finding (see paragraph 5, above).

8. The legal issue throughout these proceedings has been the method of calculating the continuity of the appellant's lawful residence in the United Kingdom. This is set out at sub-paragraph (v) of the Rule -

> The applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.

9. The Home Office guidance to caseworkers concerning the calculation of 10 years' continuous lawful residence reads as follows –

> The 28 day period of overstaying is calculated from the latest of the:
>
> - end of the last period of leave to enter or remain granted
> - end of any extension of leave under sections 3C or 3D of the Immigration Act 1971
> - the end point that a migrant is deemed to have received a written notice of invalidity , in line with paragraph 34C or 34A of the immigration Rules, in relation to an in-time application for further leave to remain

10. It is possible to read paragraph 276B(i)(v) as meaning that the 28 day-period of grace is calculated from the <u>first</u> of the three events that are listed in the Home Office guidance. Thus, if an applicant submitted a valid application for further leave to remain on the 27th day of a period of overstaying, the period of grace would nevertheless expire on the following day. This is essentially the interpretation that would need to be adopted if the respondent's second ground of appeal is to succeed. However, the respondent's own guidance interprets the provision as meaning that the 28-day period of grace is calculated from "the latest" of

the three events. Thus, in the example quoted above, the period of grace would not end until 28 days after the application had been determined, notwithstanding the fact that the applicant had already overstayed by some 27 days prior to submitting her application. On this interpretation of the provision, it was right for Judge Kelly to conclude that there had not been any break in the continuity of the appellant's lawful residence during 2009.

11. I have concluded that there is merit in both interpretations of paragraph 276B(v). That being the case, it is perhaps ironic that the success of the respondent's appeal is dependent upon my adopting an interpretation that runs counter to her own guidance on the matter. Moreover, Mr Duffy did not strenuously argue that I should do so. I therefore hold that the relevant Home Office guidance correctly reflects the proper construction of paragraph 276B(v) of the Immigration Rules. It follows from this that the respondent's appeal must be dismissed.

Notice of Decision

12. The appeal is dismissed.

Signed Date

Judge Kelly
Deputy Judge of the Upper Tribunal