



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35017/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28 July 2015

Determination Promulgated
On 9 September 2015

Before

UPPER TRIBUNAL JUDGE STOREY
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS DIANE ANGELA FINN

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer

For the Respondent: Mr B Hoshi, Counsel instructed by Haq Hamilton Solicitors

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State for the Home Department (hereafter “the respondent”) against the decision of the First-tier Tribunal (FtT) (Judge Shergill). On 28th January 2015 the FtT allowed the appeal of Ms Finn (hereafter “the claimant”) against a decision dated 19th August 2014 giving directions for her removal under section 10 of the Immigration and Asylum Act 1999.

2. The claimant came to the UK on 30th January 2002 with entry clearance as a visitor conferring leave to enter until 30th July 2002. Thereafter, she was granted successive periods of leave as a student leading to an accumulation of leave which the claimant considered entitled her to apply for indefinite leave to remain on the basis of ten years long residence on 19th March 2012. That application was refused. The claimant sought reconsideration of that refusal on two occasions. Those requests however were met with no response. That prompted the claimant to lodge a second application on the same basis on 25th March 2014. The second application was refused as there was a period of overstaying of 1 year and 7 months. Whilst it was this refusal that was the subject matter of appeal before the FtT, the earlier refusal and the reasons for it, were paramount to the decision reached by the FtT.
3. Before the FtT the claimant argued the first refusal was wrong as the gaps in periods of leave identified by the respondent were incorrect or capable of being discounted under the respondent's policy through the exercise of her discretion specified therein. Reliance was placed on published Home Office guidance on long residence date 17th October 2014, a copy of which was placed before the FtT by the claimant's representative.
4. The FtT conducted a forensic analysis of the periods of leave granted to the claimant. It is not necessary for us to rehearse that analysis in any detail as it is not contentious but, in summary, the FtT found that the respondent was wrong to refuse the first application on the basis that the claimant had overstayed between 30/05/07 to 18/08/07 and between 16/11/09 to 15/03/2010. The FtT found that during the currency of a ten year period the claimant had overstayed a total period of 37 days between 5th February 2010 and 14th March 2010 (32). The FtT further concluded the claimant had overstayed from 21/08/12 to 25/03/2014. Whilst this was out with the currency of the ten year period, the FtT noted the claimant's two unanswered requests for reconsideration of the first refusal. The FtT was satisfied the respondent's failure caused the claimant to lodge a second application and found the claimant was entitled to a decision as to whether or not her case would be reconsidered in-line with the respondent's policy of undertaking reconsiderations. The FtT was satisfied that the respondent's failure to even acknowledge the claimant's request for reconsideration was "tantamount to maladministration" (39). The FtT took account of the policy and noted that had the respondent considered it, she may have taken a different view regarding the 37 day period of overstay and viewed the period of overstay post 21/08/12 in a different light. The FtT thus concluded that the respondent had failed to discharge her public law duty and had acted unfairly.
5. The FtT accepted the claimant could not now meet the requirements of the relevant Rule due to the period of time since leave lapsed, but found there were exceptional circumstances in that the first refusal wrongly asserted that there was a significant period of time without leave where in fact that period amounted to a much shorter period of 37 days. That period had arisen on account of the respondent's conduct and accepted delay leaving the claimant with insufficient time to make an in-time application before the expiration of her leave to remain. The FtT was satisfied that

the circumstances surrounding the 37 day period were likely to amount to an exceptional circumstance and found that it was analogous to the situations identified in the policy as to what could constitute exceptional circumstances [52].

6. Thus the FtT allowed the appeal to a limited extent on the basis that the respondent had failed to adequately consider the exercise of her discretion in accordance with her policy in light of the exceptional circumstances found to exist in this case.
7. The matter came before us to determine whether the FtT erred in law.

Submissions

8. On behalf of the respondent Mr Bramble submitted that the FtT made a material error of law. Whilst he was not the author of the grounds and had some difficulty in formulating the essence of them into defined categories of errors, he submitted the FtT had failed to set out its reasons for finding that the 37 day period of overstay was likely to fall into the type of situation which could amount to an exceptional circumstance in accordance with the respondent's policy. He submitted that the judge had identified the claimant as an overstayer at (32). He referred us to page 17 and 18 of the policy document and the examples pleaded therein as to the type of situations that could amount to an exceptional circumstance. He submitted the judge erred at [52] in failing to set out his reasons as to why exceptional circumstances existed in this case. He submitted that the judge failed to set out the factors that could have led the claimant to succeed if the guidance had been considered. He submitted that this was a material error. He pointed out that the judge found the claimant could not meet the requirements of the Rules and the claimant's history did not disclose any factors that would show she could succeed.
9. In response Mr Hoshi submitted that there was no such error. He submitted that the grounds now argued were different to those upon which permission was granted. He said that permission was granted on the basis that the judge erred in applying a current policy and took into account substantive rather than procedural unfairness. He submitted the grounds were misconceived. He said that at [39] to [43] the judge was considering the period after the first refusal from 2012 onwards. He directed us to [39] and said the judge was considering procedural unfairness and maladministration of the claimant's application. He submitted that the judge set out at [44] to [48] why he considered the decision was infected by procedural unfairness and correctly found that the longer period of overstaying was caused by the respondent's failure to consider the claimant's requests for reconsideration. He noted that at [49] to [58] the judge looked at other factors and his reasoning at [52] was not the basis on which the appeal was allowed and thus not material. He submitted that the judge was entitled to find that the respondent's conduct leading to a 37 day period of overstay could amount to an exceptional circumstance, and that the longer period of overstay of 1 year and 7 months held against the claimant was procedurally unfair as there was a failure to consider the reconsideration request. He referred us to the respondent's refusal letter which failed to deal with these issues. He submitted

that the respondent had a reconsideration policy in 2009 and that she had a duty to consider any applicable policy in force at the date of decision.

10. In reply Mr Bramble said the judge considered there had been a failure by the respondent to reconsider the case. He submitted that the judge went beyond the parameters of the guidance at [52].

Conclusions

11. We are satisfied that the decision of the FtT did not involve the making of a material error of law.
12. We agree with Mr Hoshi that the respondent's application has been put to us on a different basis to that upon which permission to appeal was granted. The respondent's grounds of appeal sought to argue firstly that, the judge erred in relying on the respondent's policy on long residency of 20th October 2014 concerning the accumulation of lawful residence periods when it did not apply to the claimant and, where there was no evidence of any equivalent policy applying during 2009, the relevant date when she was not lawfully in the UK. Secondly, it was contended that the judge erred in finding that there had been substantive unfairness which had not been shown to be Wednesbury unreasonable.
13. Turning to deal with the first point as to whether the FtT erred in its consideration of the application of the respondent's policy, the FtT had before it copies of the respondent's policy on Long Residence and Reconsiderations dated 17th October 2014 and 20th October 2014 respectively. Mr Hoshi helpfully provided us with copies of these policies in addition to the corresponding policies that were in force at the date of decision. Whilst it was incumbent on the parties to ensure that copies of the relevant policies, as they stood at the date of decision, were placed before the judge, there is no dispute that the relevant sections of these respective policies are essentially the same. Thus, whilst we consider that the judge fell into error in failing to consider the relevant policy at the date of decision, we do not consider it was material to the outcome of his decision. We note that the respondent's refusal letter did not touch upon her policy document regarding reconsiderations. The relevance of that policy must have been apparent to the decision-maker in light of the claimant's unequivocal requests for reconsideration in light of the respondent's conduct and delay in dealing with her first application on the mistaken belief that she had overstayed for a significant period. We are satisfied that it was open to the judge to conclude that the claimant was entitled to a decision in respect of her request and that the respondent's failure to answer that request and apply a relevant policy was unlawful. We are satisfied that there was no error in the judge's approach in so finding.
14. We are also satisfied that no error is evinced by the respondent's assertion that her policy on Long Residence did not apply to the claimant because she could not benefit from its provisions in respect of the 37 day period of overstay. Mr Bramble took us to page 17 and 18 of that policy document. Therein guidance is given to the caseworker as to how he should consider breaks in lawful residence and in what circumstances discretion may be exercised for short breaks in lawful residence where, inter alia, a

single application was made more than 28 days out of time. The guidance goes on to give examples of what could constitute an exceptional reason such as a postal strike, hospitalisation or an administrative error made by the Home Office. Mr Bramble submitted that the judge had simply found at [32] that the claimant was an overstayer and erred at [52] in failing to adequately reason why making an application and awaiting reconsideration could be considered as exceptional circumstances in line with the guidance.

15. We consider this challenge is formulated upon the basis of a narrow reading of the decision. We are of the view that upon a holistic reading of the decision it is abundantly clear why the judge considered the policy was applicable to the claimant and had not been adequately considered by the respondent. We note the guidance lists three examples of circumstances which may arise where the decision-maker may consider whether to waive period of overstay in periods of excess of 28 days. This is a non-exhaustive list and it was open to the judge to consider the context in which the decisions to refuse were made and whether this could be considered as an exceptional circumstance. We agree with Mr Hoshi that the judge at [52] was addressing one of several factors he considered may constitute an exceptional circumstance. Even if we are wrong about that, we consider that the judge at [58] made clear the basis upon which he considered the claimant's history and the handling of her application by the respondent was sufficient to fall to be considered as exceptional. The judge took account of the respondent's delay in deciding the first application leaving the claimant with insufficient time to lodge an application before her leave expired thus depriving her of an opportunity to apply whilst she had extant leave and thereby preserving the continuity of her leave pursuant to s.3C of the Immigration Act 1971.
16. We are satisfied that the judge gave clear and cogent reasons why he considered the policy applied to the claimant and should have been properly considered within the context of the claimant's immigration history. We are satisfied that this conclusion was properly open to the judge and that there was no error in his approach.
17. As to the second issue, we are satisfied that there was a policy that conferred discretion to be exercised by the decision maker. As a matter of law the claimant was entitled to benefit from its application to the circumstances of her case within the context identified by the FtT. We consider that it is clear that the judge found that this failure gave rise to a procedural unfairness and he said as such at [39], [42] and [55] of his decision. We are satisfied that the conclusions reached by the judge were open to him on the evidence.
18. On the whole, we consider that the judge's decision is a careful, well-reasoned and thoughtful decision. We are not satisfied that the respondent properly and lawfully exercised discretion and that there was no unfairness. We are satisfied the decision of the FtT is not vitiated by an error of law. Accordingly, the decision of the FtT shall stand. The effect of this decision is that the respondent must now reconsider the claimant's application which remains outstanding in light of the findings made by the FtT and taking into account the applicable policies. In particular, the respondent

must address the 37 day period of overstay and the claimant's request for reconsideration.

Notice of Decision:

19. The making of the decision of the FtT did not involve the making of an error on a point of law. The decision of the FtT shall stand.

No anonymity direction is made.

Signed:

Date:

A handwritten signature in black ink, appearing to be 'J. Bagral', written in a cursive style.

Deputy Upper Tribunal Judge Bagral