Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/48608/2013**

THE IMMIGRATION ACTS

Heard at Centre City Tower	**Decision & Reasons Promulgated**
On 12 November 2015	**On 16 February 2016**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NADINE ROSE GARRETT
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. I see no need for, and do not make, an order restricting reporting about this case.
2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the Respondent, hereinafter "the Claimant", against a decision of the Secretary of State on 1 November 2013 refusing to vary her leave to remain in the United Kingdom.
3. It was her case that she was entitled to leave because she had accrued ten years' continuous lawful residence. The difficulty is that examination of her record showed that she had not completed ten years' *lawful* residence because her right to be in the United Kingdom had lapsed for a period of

about three months beginning in March 2010. As is made clear, the Secretary of State has some discretion and will treat a break in lawful residence as excusable if particularly compelling circumstances arise. Examples given include an applicant being in hospital and too ill to attend to her affairs or the delay being caused by deficiencies on the part of the Secretary of State.

4. Mr Mills said that the policy has now been explained a little further and an example is given of the Secretary of State frustrating a person's application by wrongly retaining a person's passport. However, discretion will only be exercised in an applicant's favour where there is something very compelling about the person's individual circumstances or where the Secretary of State has acted badly.

5. Significantly in this case the claimant had not made such a claim until she gave oral evidence before the First-tier Tribunal and it is not plain what she said in her oral evidence that prompted the judge to conclude that there were circumstances that required discretion to be exercised in her favour here.

6. The point is dealt with most fully at paragraph 12 of the First-tier Tribunal's determination. The claimant accepted that the application that was made on 23 July 2010 successfully was out of time by some 97 days. The claimant said that the gap had been caused by her application being submitted incompletely or being perceived to be incomplete. The Home Office returned it to her because a page was missing. She believed that she attended to the papers promptly and returned the missing document which related to the college that she was attending.

7. It has never been suggested that the claimant was an untruthful witness and I note that she conducted herself before me in a respectful and straightforward manner. However I do not see how the explanation advanced by the claimant can possibly be right. This is because the explanation that she offered was to do with proving the college that she was attending but the application that succeeded did not relate to study. Rather, the application that succeeded was an application as a Tier 2 worker, in fact a care worker. She had changed the whole basis on which her application was to be brought. It follows that the explanation given cannot be a proper explanation for the delay although it is not clear that it is an explanation that ought to have led to the application being allowed in any event.

8. I make it plain that I am not saying that the claimant was untruthful at any stage. She said she could not really remember. She had been looking at her papers and was doing her best to reconstruct what had happened. That may very well be right. People who are seeking to extend their stay in the United Kingdom do not necessarily understand the nuances of Immigration Rules. Indeed people whose business it is to apply them are puzzled sometimes.

9. I can see nothing in the papers that would justify the judge's conclusion for the reason given or at all.

10. Certainly the fact that the claimant was given permission to stay as a Tier 2 Migrant is not indicative that the application was made in time. As Mr

Mills has reminded me it is not a requirement of a Tier 2 application that the person present in the United Kingdom has leave when the application is made so the fact that she was given leave does not indicate that she had leave when the application was made.

11. One of the few things that is absolutely clear in the case is that the application that was successful was made 97 days late.

12. There is nothing before me that gives me any reason to understand how the First-tier Tribunal could have reached the decision that it did and I must therefore decide that it was wrong in law because it was unsupported by the evidence. I must set aside the decision. I set it aside and I have to substitute a decision dismissing the claimant's appeal against the Secretary of State's decision.

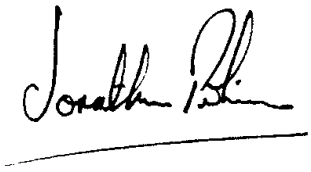
13. I add as a rider to this simply for the benefit of anyone considering any kind of enforcement action that the claimant says that she has subsequently married and prefers to be known by her married name and her husband is an EEA national and an application has been made for an EEA residence card. Clearly I am in no position to make any comment about the prospects of success of that application but it is right to record it on the face of this decision.

Decision

The Secretary of State's appeal is allowed.

The First-tier Tribunal's decision is set aside.

I substitute a decision dismissing the claimant's appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 11 February 2016