Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/22701/2015**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 11th December 2017	**On 12th December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

MISS JENNA CHASINGHAWK
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

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

DECISION AND REASONS

1. The appellant, Ms Jenna Chasinghawk date of birth 1 January 1982, is a citizen of the USA. Having considered all the circumstances, I do not consider it necessary to make an anonymity direction.

2. Though this is an appeal by the respondent, the Secretary of State for the Home Department, I have kept the designation of the parties as they appear in the original decision.

3. This is an appeal by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge Moore promulgated on 19th December 2016, whereby the judge allowed the appellant's appeal against the decision of the SSHD. The Secretary of State had refused the appellant indefinite leave to remain in the United Kingdom on the basis of 10 years continuous lawful residence in the UK under paragraph 276 B of the

Immigration Rules and thereby refused the appellant's application under Article 8 of the ECHR, family and private life. Judge Moore allowed the appeal on the basis that the appellant had accrued 10 years lawful residence from 2001 through to 2012.

4. By a decision of 18 September 2017 First-tier Tribunal Judge Doyle granted permission to appeal to the Upper Tribunal. Thus the case appeared before me to decide whether there was a material error of law in the original decision. In granting leave Judge Doyle identified the following issues with regard to the substantive issues in the appeal namely :-

a) the judge failed to engage with the refusal letter and made no findings in relation to the respondent's argument that the appellant did not have leave to remain in the United Kingdom for 633 days.

b) the judge had found that the appellant had been in the United Kingdom since 2001 and had only been out of the United Kingdom since that date for 38 days. However the judge has made no findings with regard to the history of the application for and grants of leave to remain. In the circumstances it is arguable that there are inadequate findings within the decision.

5. The grounds set out that the Refusal letter had identified periods of time when the appellant had been absent from the United Kingdom and periods when the appellant had had no leave. Paragraph 276B not only required a person to be resident but also to have leave, rendering the residence lawful. The appellant's immigration history is according to the Refusal Letter as follows: –

(a) The appellant had entered the United Kingdom firstly on 15 July 1998 with leave valid until 12 December 2001.

(b) After her leave had expired the appellant made an application for leave to remain as a student on 19 December 2001. However that application was withdrawn on 29 May 2002.

(c) The appellant then made an out of time application on 12 August 2002 for further leave to remain as a student. That application was granted on 15 August 2002. The appellant was given leave until 31 October 2002.

However for the period from 13 December 2001 through to the grant of leave on 15 August 2002 the appellant had no leave and was therefore not lawfully in the United Kingdom. That represented a period of 243 days.

(d) The refusal letter states that the appellant then left the United Kingdom but does not give a date for that. Equally it is not clear whether the appellant accepts that she was out of the country and if so for how long.

(e) The appellant re-entered the United Kingdom with leave as a student on 26 September 2003. The appellant's leave was then valid until 31 October 2004.

Therefore between the period of 1 November 2002 to 25 September 2003 again the appellant had no leave and was therefore not lawfully

in the United Kingdom. Otherwise the appellant was also absent from the United Kingdom for a period of time. That represented a period of 327 days without lawful leave.

The argument on behalf of the respondent is that the judge has failed to take that into account in considering whether or not the appellant had been lawfully resident in the United Kingdom for a continuous period of 10 years as required by Paragraph 276B.

Clearly if the matter stopped there then there would be much to say about the calculations made by the judge and whether or not he was right to make the finding that he did. However the later immigration history is of significance.

(f) There is no evidence of the appellant leaving the United Kingdom but on 29 December 2004 the appellant made an out of time application for leave to enter or remain as a student. That application was granted. The appellant was given leave from 30 December 2004 until 30 June 2006.

(g) On 15 August 2006 the appellant applied for leave to remain as a student. That was granted from 4 September 2006 until 30 November 2010.

However again that would mean for the period 1 July 2006 through to 3 September 2006, the appellant again was without leave.

(h) However having been granted leave on 4 September 2006, with leave valid until 30 November 2010, on 10 August 2010, that is whilst the appellant still had lawful leave the appellant applied for leave to remain as the unmarried partner in a same-sex relationship. That leave was granted on 21 September 2010 with leave being granted until 21 September 2012.

(i) On 20 September 2012 the appellant submitted the present application. That application was refused. There are two decisions one made on the 5th June and one made on the 26 June 2013. The decisions made were a decision to refuse her application for indefinite leave and a decision to remove in accordance with section 47 of the Immigration, Asylum and Nationality Act 2006.

(j) It appears that the appellant exercised that right of appeal initially lodging her appeal in time. There were issues with the date of lodging the appeal. However the appellant lodged the appeal in time and subsequently the appeal was reinstated when it transpired that a payment for the appeal had not been assigned correctly. The appeal as lodged was reinstated as of September 2013.

(k) The appeal was heard on 8 April 2015 and First-tier Tribunal Judge Beg remitted the case back to the Home Office for further consideration under the Immigration Rules.

(l) The application was further refused on the 9th June 2015. The appellant appealed in time. The appeal was heard by Judge Moore on the 1st December 2016.

6. In considering the appeal before assessing whether or not the judge correctly looked at the facts prior to September 2006, I wish to look at the period post 4 September 2006.

7. I draw attention to the provisions of section 3C of the 1971 Immigration Act:-

3C Continuation of leave pending variation decision

1) This section applies if-

a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for the variation of the leave,

b) the application for variation is made before the leave expires, and

c) the leave expires without the application the variation having been decided.

2) The leave is extended by virtue of this section during any period when-

a) the application for variation is neither decided no withdrawn,

b) an appeal under section 82 (1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation ignoring any possibility of an appeal out of time with permission,

c) an appeal under that section against that decision brought while the appellant is in the United Kingdom is pending within the meaning of section 104 of that act, or

d) an administrative review of the decision on the application for variation-

i) could be sought, or

ii) is pending

.....

8. At this stage an issue which does not appear to have been considered by any of the parties in the proceedings is the length of time that the appellant has been in the United Kingdom post September 2006 and whether the appellant has throughout that period had lawful leave. There is no evidence that the appellant has left the United Kingdom since September 2006. If the appellant has had lawful leave since September 2006 then the appellant now has 10 years lawful and continuous residence and did so at the time of the hearing before Judge Moore. The appellant would meet the requirements of the rules for the period post September 2006.

9. The appellant had leave from September 2006 through to 21st September 2012. The appellant lodged an in-time application, which was decided on the 26th June 2013. Thereafter the appellant appealed in time in June 2013 and her appeal was reinstated as of September 2013. Given the circumstances it was accepted that the appeal should be reinstated as lodged. In the circumstances this was not an appeal out of time but was the original appeal proceeding.

10. The appeal was heard by Judge Beg, who remitted it back to the respondent for further consideration by decision of the 8th April 2015.

11. By the time that the appeal came to be heard by Judge Moore the appellant had accrued 10 years residence and the residence was lawful by operation of Section 3C.

12. At the beginning of the hearing I pointed out the details to the representative for the respondent. It was accepted that the appellant had therefore accrued 10 years lawful residence from September 2006 through to December 2016. I would note that that lawful residence is continuing.

13. Whilst Judge Moore has failed to assess whether the residence of the appellant was lawful and whether the appellant's leave was lawful may be subjected to scrutiny, it would if the appellant had accrued 10 years lawful leave post September 2006 make no difference. The appellant would meet the requirements of paragraph 276B of the Immigration Rules. In that event the appellant meeting the requirements of the rules the fact that the judge allowed it and the basis upon which the judge allowed it may not be made out on the facts of the case is not a point which matters to the outcome of the appeal. The appellant's application under the Immigration rules should have been allowed on the basis that by the time of the hearing before Judge Moore she had accrued 10 years lawful residence from September 2006.

14. In such circumstances whilst this is an appeal under Article 8 family and private life, significant weight would have to be given to the fact that the Secretary of State has acknowledged in the Immigration Rules where the balance lies with regard to private life. The appellant clearly meets the rules and in the circumstances presented has established family and private life in the United Kingdom. With regard to private life whilst the decision would be in accordance with the law and for the purposes of maintaining immigration control as an aspect of the economic well-being of the country, consideration has to be given to the immigration rules and whether or not the decision is proportionately taking such into account. Whilst consideration has to be given to section 117B of the 2002 Act, even taking that into account I find that the decision would in any event not be proportionately justified.

15. In the circumstances if one were to examine what the First-tier Judge has done the judge has failed to take account of the fact that the appellant did not have lawful leave at material times during the 10 years under consideration. That having been said however given the factors outlined above the appeal stands to be allowed on the basis indicated.

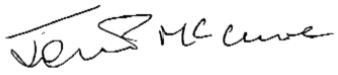
Notice of Decision

16. There is an error of law in the original decision. I set that decision aside

17. I substitute a decision allowing the appeal on Article 8 grounds

18. I do not make an anonymity direction

Signed



Deputy Upper Tribunal Judge McClure

Date 11 th December 2017