Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08566/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th March 2018	**On 26th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MRS ANDILA IFTIKHAR HASHMI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Miah, Counsel instructed by Lee Valley Solicitors
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Lloyd promulgated on 18th May 2017 allowing the appeal of the Appellant on the basis of her human rights in respect of Article 8 of the European Convention of Human Rights. The Secretary of State was granted permission to appeal by Designated Judge Woodcraft. The grounds upon which permission to appeal were granted may be summarised as follows:

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> "The Judge allowed under Article 8 the Appellant's appeal against refusal to grant leave finding that the Appellant had not overstayed by more than 28 days. The case turned on whether in 2015 the Appellant had submitted an application for leave to remain as a spouse in or out of time. Her leave had expired on 17th of October 2015 but she did not make an application for further leave until four days later which was rejected for non-payment of fees. The Appellant's subsequent application dated 24th of December 2015 was outside the 28-day period if calculated from the expiry of her leave.
>
> The rejection of the invalid application was dated 11th of December 2015 and the Judge calculated 28 days from that date rather than 28 days from the expiry of the Appellant's leave. This as the Respondent points out in her grounds was an arguable error of law and materially affected the decision to allow the appeal. Arguably the Respondent is correct to say that time could not be counted from the rejection of an invalid application made after leave had expired. All grounds may be argued."

2. I was not provided with a Rule 24 reply but was addressed by Counsel for the Appellant in submissions.

Error of Law

3. At the close of the hearing I reserved my decision which I shall now give. I do find that there has been an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside. My reasons for so finding are as follows.

4. As is clear from the brief grounds and grant of permission summarised above, the crux of the appeal turned upon the written submissions from the Appellant's representative (not Mr Miah) which relied upon the Immigration Directorate Instructions on Family and Migration: Appendix FM Section 1.0a: Family Life (as a Partner or Parent): 5-Year Routes, which carried within it instructions in relation to the issue of applications made during a period of overstaying by 28 days and the calculation of when that period would start and end. The relevant passages of the instruction read as follows:

> "The 28 day period of overstaying is calculated from the latest of:
>
> > The end of the last period of entry clearance or leave to remain granted
> >
> > The end of any extension of leave under Sections 3C or 3D of the Immigration Act 1971 or
> >
> > The point that a migrant is deemed to have received a written notice of invalidity/rejection in accordance with paragraph 34C or 34CA of the Immigration Rules in relation to an in-time application for leave to remain."

5. As can be seen from the above instruction, and as agreed by Mr Miah for the Appellant, the Appellant's case was pursued and could only be pursued, on the basis of the third alternative, namely that of whether the 28 days would commence after receiving written notice of invalidity of the application of 21st October 2015 which was rejected on 11th December 2015 for non-payment of a relevant fee (which I note is a relevant provision under paragraph 34A(ii) concerning payment of a specified fee).

6. The difficulty that the Appellant faces is that the commencement of the 28 day period will only be in relation to the invalidity or rejection of an application which is made "in-time", as the third category explicitly states. In attempting to persuade me that the 28 day period would cover the application made on 21st October 2015 (and was within 28 days of the expiry of leave on 17th October 2015) and that it was an application that was made "in-time", Mr Miah directed my attention to an unreported decision of the Upper Tribunal, namely *Secretary of State for the Home Department vs Fahima Mallick (IA/35013/2014, unreported)* wherein at paragraphs 9 and 10 the Home Office guidance, in relation to calculating the 28 day period of overstaying, referred to a passage which was in similar terms to the Immigration Directorate Instruction I have referred to above. This decision however does not give any guidance as to whether the third category would cover a situation where an application was made after leave expired but within a 28 day period and still be considered to be an application made "in-time".

7. To my mind, given that the reference to an application being made in-time is not of itself in relation to a 28 day period but refers to a preceding application which would be invalid or rejected which would then trigger the 28 day period does <u>not</u> mean that the application can be made *after* leave has expired and what one would normally refer to as an 'out of time' application. Furthermore, given that the theme of the three categories is linked to the periods of applications being made *before* a previous grant of leave has ended or in relation to the extensions of leave under Section 3C or 3D of the 1971 Act, the third category cannot logically, or as a matter of ots content, be interpreted as relating to an application made whilst an overstayer, as there is no means by which such an application could possibly be interpreted as "in-time" unless it refers to being *within* a 28 day period. However, given that the 28 day period is said to commence *after* that in-time application is ended, Mr Miah's argument, brave as it is, puts the "cart before the horse" because the 28 day period is what follows *after* the invalidity or rejection of that application and so cannot form the basis for the preceding application being made in-time.

8. Consequently, I do find that there is a material error of law in that the First-tier Tribunal Judge misinterpreted the instruction in question and consequently it was incumbent upon the First-tier Tribunal Judge to consider whether insurmountable obstacles did or did not exist in respect of paragraph EX.1. which was not performed, and without which the assessment of the Appellant's Article 8 appeal, under the Rules at least, is incomplete. Consequently the assessment of the public interest outside

the Rules, notwithstanding the standardisation of that public interest under Section 117B(1) of the Nationality, Immigration and Asylum Act 2002, has not been correctly apportioned and therefore balanced, when considering Article 8 outside the Rules.

Notice of Decision

9. The appeal to the Upper Tribunal is allowed.

10. The making of the previous decision involved a material error of law and is set aside entirely. The appeal is to be remitted to the First-tier Tribunal to be heard by a differently constituted bench.

11. No anonymity direction is made.

Signed Date 22/03/2018l

Deputy Upper Tribunal Judge Saini