Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30500/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18th July 2014	**On 6th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS SALLY TOURAY
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of the Gambia born on 26th January 1990. The Appellant's immigration history is extensive. She was granted entry clearance originally on 2nd January 2002 as the dependant of a student.

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Thereafter her immigration history is set out in some detail both in the notice letter of the Secretary of State dated 11th July 2013 and thereafter in an immigration chronology provided by the Home Office dated 30th April 2014. The Appellant's final application was made on her behalf by her then instructed solicitors Gracelands on 29th May 2013. That application sought leave to remain in the UK on the basis of her private life. That application was refused by the Secretary of State by notice of refusal dated 11th July 2013.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Seelhoff sitting at Hatton Cross on 23rd April 2014. In a determination promulgated on 14th May 2014 the Appellant's appeal was allowed under the Immigration Rules on the ground of private life and in the alternative under Article 8 outside the Rules.

3. On 22nd May the Secretary of State lodged Grounds of Appeal. The Grounds of Appeal allege two material mistakes of law:

   (i) That the Tribunal erred in law in finding that the Appellant had completed ten years' lawful residence in the United Kingdom and,

   (ii) that the Tribunal had erred in law in its approach to the Article 8 assessment.

   In particular it was contended that following *Gulshan [2013] UKUT 00640 (IAC)* the Article 8 assessment is only to be carried out when there are compelling circumstances not recognised by the Rules. The Secretary of State contends in the Grounds of Appeal that the Tribunal did not identify such compelling circumstances and its findings are therefore unsustainable.

4. On 2nd June 2014 Designated First-tier Tribunal Judge Zucker granted permission to appeal. He considered that all grounds were arguable. Following standard directions being issued by the Tribunal I note that the Appellant's legal representatives have not served a Rule 24 response.

5. The appeal before the First-tier Tribunal Judge was successful. Strictly speaking therefore the Secretary of State should be referred to as the Appellant as this is the Secretary of State's appeal however for the sake of continuity throughout these proceedings and for the purpose of this determination Miss Sally Touray is referred to as the Appellant and the Secretary of State the Respondent.

6. The appeal comes before me firstly to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears in person. She initially sought an adjournment and I explained to her the nature of the proceedings. After giving the matter due thought however the Appellant withdrew that request and indicated that she was prepared to proceed in the absence of legal representatives

and to rely on her own submissions. Mr Bramble did not oppose this approach on behalf of the Secretary of State.

7. Whilst before the First-tier Tribunal the Appellant contended (she was legally represented at that hearing) that she met the requirements of paragraph 276ADE(v) namely,

> *"Is aged 18 years or above and under 25 and has spent at least half of his (her) life living continuously in the UK (discounting any periods of imprisonment)."*

8. At paragraph 18 of his determination the judge concluded that the Appellant had spent twelve years and two months of her life in the UK and that she was still under the age of 25 and that those facts are not contentious and accordingly the only issue was whether or not the Appellant's absences from the UK could be treated as breaching the period of continuous residence. The judge went on to set out paragraph 276A(a) of the Immigration Rules which sought to define "continuous residence".

9. Mr Bramble points out that when the matter came before Judge Seelhoff he indicated at the end of the proceedings that he sought clarification with regard to the Appellant's immigration history and this prompted the Home Office letter of 30th April 2014 which set out the detailed chronology of the Appellant's history. From that letter Mr Bramble points out that it is clear that the Secretary of State's case is that the Appellant was granted leave on 12th November 2007 to remain as a student until 31st October 2008 but that thereafter the Appellant was without leave until she received entry clearance to enter the UK as a Tier 4 Student from 25th February 2011. Consequently the Secretary of State's position was that for a minimum period of at least two years three months between 31st October 2008 and 25th February 2011 the Appellant did not have leave to be in the UK albeit that the Secretary of State acknowledges that on 6th January 2011 the Appellant returned to Gambia for the purpose of submitting a fresh application as a Tier 4 Student.

10. Mr Bramble acknowledges that the chronology as set out from the view of the Secretary of State is in direct contradiction to the evidence provided by the Appellant in her witness statement of 18th April 2014 in particular paragraph 2 where she states,

> "My visa was extended as a student until October 2008. I further made an in-time application to extend my visa. I thought I did everything right and was expecting my passport and visa back as usual. This was the first time I made the application myself and which required the issue of biometric."

He submits that the letter was provided by the Secretary of State at the judge's behest and once that letter was available the judge drafted his determination. He takes me to paragraph 21 of the determination pointing out that the judge states therein,

> "The difficulty I have with this letter is that it is unsupported by copies of the alleged decision letters or notices of invalidation. The language of the letter referring to applications being rejected is unclear as to whether what is meant is a refusal, or an invalidation of an application. I am unable to treat the letter as anything other than an assertion by a party to the proceedings."

11. It is the view of Mr Bramble on behalf of the Secretary of State that bearing in mind the letter had been provided to assist the Tribunal post-hearing that if the judge was not happy with that letter the Secretary of State should have been given the opportunity to provide the evidence that the judge says was lacking. He submits that the judge should have found that there is no continuity and that to give weight to the letter in the manner in which he has done was to create a scenario of procedural unfairness to the Secretary of State.

12. However further he states that the judge has not properly looked in any event at all of the facts and he takes me to paragraph 24 of the determination. He submits the judge has merely accepted the assertion made by the Appellant that there was a further application in 2008 when the Secretary of State clearly states that there was not and that the judge has accepted the assertion without supportive evidence and he submits that those factors create a material error which affect the whole decision. He asks me to find that there are material errors of law, to set aside the decision and to remit the matter back to the First-tier Tribunal for rehearing.

13. Miss Touray indicates that she understands what has been said but that she did make her application and that she has spent the majority of her life in the UK, that she has no connection whatsoever now with the Gambia and that she even went so far as to return to the Gambia to make her further application so as to ensure that she complied with the Immigration Rules. She is uncertain what further steps, if any, she could possibly have taken.

The Law

14. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

15. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as

being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

16. The manner in which this appeal has been addressed by the First-tier Tribunal does, on the way in which it is put to me, cause me concern. I acknowledge that the historical immigration history of the Appellant is crucial and that the judge appears to have sought further clarification by way of a letter from the Home Office. The end product of that appears to have been the letter of 30th April 2014 which was forwarded to the judge along with a copy to the Appellant's instructed solicitors. The judge has drawn conclusions based on that letter to the effect that as the Secretary of State has not attached to that letter copies of the alleged decision letters or notices of invalidation that he is unable to do anything further than treat the letter as anything other than an assertion by a party to the proceedings and he goes on so far as to say what he needed to see were copies of the decision letters or the Home Office case notes that clarified what the decisions actually were and that if the applications were invalidated the Respondent would need to prove that they were correctly invalidated.

17. The author of the letter was the Home Office Presenting Officer before the First-tier Tribunal. Mr Bramble is adamant that on no occasion was the Secretary of State asked to produce the additional supportive documentation merely a detailed chronology and that it does not fall well for the judge to then draw conclusions when the Secretary of State has provided the information that was requested without going back to the Secretary of State and seeking that further documentation. Such a scenario in my view constitutes a procedural unfairness.

18. Further it is not appropriate to ask for further documentation to be provided and then not to give the Appellant the opportunity to challenge it. I acknowledge the copy of the letter was sent to the Appellant's solicitors but for what I understand is financial reasons she is not in a position to retain their instruction at present and has sought fit to attend on her own.

19. The Appellant is adamant that she submitted a further application. There is clearly a conflict of evidence which has not been resolved nor I am satisfied by the manner in which the First-tier Tribunal Judge set about reaching his conclusions has a full and proper opportunity been given

firstly to the Secretary of State to show that the contentions they make with regard to the periods when the Appellant did not have valid leave are appropriate and alternatively for the Appellant to show that she meets the requirements of paragraph 276ADE(v).

20. Such a failing in my view undermines the whole determination. It is consequently appropriate to find that there is a material error of law and to set aside the decision of the First-tier Tribunal and to remit the matter back to Hatton Cross for hearing on all issues before any Immigration Judge other than Judge Seelhoff.

21. I consequently in the decision of this determination set out directions for the continuance of this matter. It is of course a matter for the Appellant as to whether she is or is not legally represented at any future hearing. Bearing in mind that this will be a rehearing of the matter i.e. that the case is remitted with none of the findings of fact to stand back to the First-tier Tribunal it would probably be in her best interest for legal representation to appear on her behalf.

Decision and Directions

1. The decision of the First-tier Tribunal discloses a material error of law. The decision is consequently set aside and none of the findings of fact are to stand.

2. The matter is remitted to the First-tier Tribunal for rehearing at Hatton Cross on the first available date 28 days hence with an ELH of three hours. The appeal is to be heard before any Judge of the First-tier Tribunal other than Immigration Judge Seelhoff.

3. That both parties do file at the Tribunal and serve on the other party at least 14 days pre-hearing a copy of such further bundle of documents upon which they seek to rely at the rehearing. Such bundle must include (but not exclusively) all documentary evidence relating to the Appellant's previous applications for visas and the outcome of such applications upon which they seek to rely in maintaining or challenging whether the Appellant meets the requirements of paragraph 276ADE(v) of the Immigration Rules.

4. It is accepted by the Tribunal that the appeal extant before the First-tier Tribunal is both an appeal under the Immigration Rules and potentially thereafter an appeal outside the Immigration Rules pursuant to Article 8 of the European Convention of Human Rights. It is expected that all submissions and documentation will address both issues.

5. No interpreter is required.

The First-tier Tribunal Judge did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris