Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33481/2013

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 12 June 2014	**On 3 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AZIM UL AZAM

Respondent

Representation:
For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Mr A Burrett instructed by Nasim & Co Solicitors

DETERMINATION AND REASONS

1. This determination refers to parties as they were in the First-tier Tribunal.
2. The appellant, a national of Pakistan, appealed to the First-tier Tribunal against the decision of the respondent to refuse his application for leave to remain on the basis of his long residence in the UK. First-tier Tribunal Judge Chowdhury allowed the appeal to the extent that the decision is not in accordance with the law. The Secretary of State now appeals with permission to this Tribunal.
3. The background to this appeal is not in dispute. The appellant entered the UK on 23 May 2001 as a student and was granted subsequent extensions of leave to remain as a student until 31 July 2009. He applied before the expiry

of his leave and was subsequently granted two periods of leave to remain as a Tier 4 general migrant valid until 30 July 2012. The appellant subsequently lodged this application for indefinite leave to remain on the basis of long residence. The date on which this application was lodged is dealt with below. In the reasons for refusal letter dated 8 July 2013 the respondent said that she accepted that the appellant had lawful leave from his arrival on 23 May 2001 until 23 July 2012. However the appellant was without lawful leave from 31 July 2012 onwards. In these circumstances the Secretary of State said that the appellant was unable to meet the requirements of the Immigration Rules in particular paragraph 276B (i) (a) because he had not demonstrated 10 years continuous lawful residence and 276B (v) because his application was lodged 2 months after his leave expired. The Secretary of State then considered the application under paragraph 276ADE and decided that the appellant had not established that he qualified for leave to remain on the basis of his private life in the UK.

4. Paragraph 276B of the Immigration Rules provides as follows;

> **276B**. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
>
> (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
>
> (a) age; and
>
> (b) strength of connections in the United Kingdom; and
>
> (c) personal history, including character, conduct, associations and employment record; and
>
> (d) domestic circumstances; and
>
> (e) compassionate circumstances; and
>
> (f) any representations received on the person's behalf; and
>
> (iii) the applicant does not fall for refusal under the general grounds for refusal.
>
> (iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
>
> (v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.

5. The Secretary of State therefore identified two reasons for refusing the application, paragraph 276B (i) (a) and 276B (v). The First-tier Tribunal Judge allowed the appeal on three grounds. The Judge decided [20] that the

Secretary of State was wrong to conclude that the appellant had not accumulated 10 years lawful residence as required by paragraph 276B (i) (a) because of the delay in making his application when he clearly had. That part of the Judge's decision is not challenged in the grounds of appeal.

6. The Judge further decided that the Secretary of State did not act in accordance with the law in purporting to refuse the application under 276B (v) when that provision was not in force at the date of the appellant's application [21].

7. The date of the appellant's application is relevant because specified amendments to the Immigration Rules came into force on 1 October 2012 through the Statement of Changes in Immigration Rules HC194. Paragraph 86 of HC194 which took effect on 1 October 2012 inserted paragraph 276B (v). However under 'Implementation' there is the following provision;

> "With the exception of paragraphs …the changes set out in this Statement shall take effect on 9 July 2012. Paragraphs … 86… shall take effect on 1 October 2012.
>
> However, if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the rules in force on 8 July 2012."

8. At the hearing in the First-tier Tribunal it appears to have been accepted by the Presenting Officer that the application was received before 1 October 2012 and this is the basis on which the hearing proceeded. Mr Burrett submitted before me that there was a recorded delivery slip dated 28 September 2012 and deemed service was 2 days after posting which was 30 September 2012. Mr Whitwell accepted that the Presenting Officer at the First-tier Tribunal hearing may have conceded that the application was received before 1 October 2012.

9. The Judge, having found that the application was made before 1 October 2012, went on to hold that the Secretary of State's decision was not in accordance with the law as paragraph 276B (v) was not in force at the date of the application. However Mr Whitwell submitted that the Judge erred in light of the transitional provisions set out in the 'Implementation' section. Mr Burrett accepted that because of the transitional provisions paragraph 276B (v) was in force in relation to this application.

10. I am satisfied that the Judge erred in deciding that paragraph 276B (v) did not apply to this application. The transitional provisions mean that paragraph 276B (v0 does apply to applications made after 9 July 2012.

11. The third ground on which the Judge allowed the appeal was that the Secretary of State did not have regard to the guidance issued to caseworkers in relation to considering applications submitted more than 28 days after the expiry of leave to remain. The appellant's representative in the First-tier Tribunal submitted a copy of the case worker guidance on long residence. It applies to out of time applications made on or after 9 July 2012 and states; *'when refusing an application on the grounds that it was made by an*

applicant who has overstayed by more than 28 days you must consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying'. The representatives at the First-tier Tribunal hearing submitted that the reason for the delay in making the application was that the appellant's mother had died. It was also submitted that this explanation was consistent in light of the appellant's history over 10 years of having always made applications on time.

12. Before me Mr Whitwell submitted that there was no evidence of exceptional circumstances and that the appellant's claim that his mother died was not sufficiently exceptional to come within the policy. Mr Burrett submitted that, as the Secretary of State had not exercised her discretion the decision was not in accordance with the law.

13. I am satisfied that the Secretary of State has not considered her policy in this case to determine whether there is evidence of exceptional circumstances which prevented the appellant from applying for leave to remain within the first 28 days of overstaying.

14. The Judge allowed the appeal for three reasons. The first is not challenged. The second I have found to be an error and the third I have found to have been a proper reason. Despite allowing the appeal under the Immigration Rules the Judge allowed the appeal only to the extent that the Secretary of State's decision is not in accordance with the law. It is not clear why she did so. In any event that would be the proper course of action in the event that the appeal is allowed on the basis that the Secretary of State has not exercised her policy in relation to late applications. In these circumstances the outcome is the same as that decided by the Judge. For that reason, even though the Judge erred in deciding that paragraph 276B (v) was not in force at the date of the appellant's application, the error is not material.

Conclusion:

The making of the decision of the First-tier Tribunal did not involve the making of an error on point of law.

The decision of the First-tier Tribunal Judge shall stand in that the appeal is allowed to the extent that the appellant's application remains outstanding before the Secretary of State for the exercise of her discretion in accordance with her policy.

Signed Date: 1 July 2014

A Grimes

Deputy Judge of the Upper Tribunal