Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07127/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 03 October 2017	**On 27 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

Shajedah Koussa
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Megha, of Campbell and Co solicitors
For the Respondent: Mr T Melvin, senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Mauritius, born in 1981. She 1st entered the United Kingdom on 22 April 2005 with entry clearance as a student. Her leave has been extended subsequently on many occasions, finally expiring on 12 April 2013.

2. On 01 June 2015, the appellant made an application for indefinite leave to remain on the basis that she had accumulated 10 years' continuous lawful residence in the United Kingdom. She relied on residence accumulated since the expiry of her leave to remain on 12 April 2013, on the basis that

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prior to the expiry of leave, on 05 April 2013, she had completed and posted a valid application to extend her leave, using the specified form valid at the time, and submitting the right fee. The form and the fee had changed on 6 April 2013. By posting her application on 5 April she was entitled to use the form and pay the fee that she did. Before me her counsel explained that it was her contention that the operation of section 3 (C) of the 1971 Immigration Act, the respondent having never served a proper notice, because of the omission of any notification of a right of appeal, her extended lawful leave had not been stopped in 2013, and as a result lawful leave continued to accrue. Accordingly, calculating from 22 April 2005 when the appellant had arrived in the United Kingdom, the requisite 10 years had been exceeded by the time of the application on 1 June 2015.

3. On 16 September 2015, the application was refused. The respondent reasoned that no valid application had been made prior to the expiry of leave. The forms had changed on 6th April and the application had not been received until 9th April. The form and the fee were out of date. Leave expired on 12 April 2013. On 17 April 2013, the application was treated as invalid and returned to the appellant. On 20 April 2013, the appellant resubmitted her application by which time her leave had expired. In short, she had made no valid in-time application so that leave was not automatically extended by the application of 3C of the Immigration Act 1971.

4. The appellant appealed to the First-tier Tribunal. The First-tier Tribunal dismissed her appeal, but she was successful in obtaining permission to appeal to the Upper Tribunal on the basis that it had been established in court proceedings elsewhere that she had in fact submitted her application on 5 April 2013 so that the form and fee were correct. In those circumstances, the Home Office's rejection of the application as invalid on 17 April 2013 was in error. The application should have been processed and, if refused (and it had been determined in the higher courts that the application was entirely without merit so that it would have been bound to be refused), the appellant would have had an in country right of appeal, and section 3C/D of the Immigration Act 1971 would have operated to extend lawful leave. At a hearing on 26 May 2017 the respondent conceded an in-time valid application had been submitted, and in those circumstances, that the judgement of the First-tier Tribunal was materially flawed by legal error.

5. Upper Tribunal Judge O'Connor, in light of the concession, set the decision aside, the matter was retained in the Upper Tribunal, and the appeal was listed for a continuation hearing so as to remake the decision. The case came before me on 27 July when the respondent sought to reopen the error of law hearing and withdraw the concession upon which the error of law had been found. Mr Melvin explained that a full examination of the earlier Home Office file had revealed a letter from the appellant in which she expressly stated that she had made her application on 8 April, using an old form and with the incorrect fee. The parties were in agreement that

the appellant should have time to consider the implications of that evidence and to respond to it, and the case was adjourned.

6. When the matter came before me again on 3 October 2017 I indicated from the start that I did not propose to reopen the error of law decision. I took the view that the issue had been concluded by the decision of Upper Tribunal Judge O'Connor setting the decision aside. However, in remaking the decision I found it was incumbent upon me to reach my new decision on a correct factual basis. In that context, I proposed admitting the evidence now brought forward by the respondent, and the witness statements filed in response, provide an opportunity for oral evidence and submissions, and then to make findings of fact as to when the 2013 application had been submitted, and apply the law to questions of the application's validity and the operation of section 3 of the 1971 Immigration Act. I invited representations as to my adopting that process and, neither side objecting, proceeded on that course.

The remaking of the decision

7. Mr Megha called the appellant, and in turn her husband, both adopted their witness statements. No supplemental questions followed.

8. The appellant and her husband were cross-examined. The appellant confirmed that she had come as a student intending to return to Mauritius but, sometime after, she felt she had contributed sufficiently enough to society here, through being a student and part time work so as to settle, and that was why she made the application in 2013. As she had not had help from the government she thought she should be allowed to stay.

9. The appellant conceded that on 20 April 2013 she had written a covering letter enclosing her resubmitted application in which she stated that:

   (a) she had completed the earlier submitted application form prior to the form changes on 6 April 2013, which was why it had been completed on the form, and submitted it with the fee applicable before 6 April 2013. She said that because of the weekend the post office was closed and therefore it was posted on the 1st available date which was on 8 April 2013. She asked the respondent to treat the application is being submitted in time on 8th of April. She explains that although the fee was incorrect that was through no fault of hers or her husband, and she points out that the old version of the form from before 6 April remains valid until 27 April 2013.

10. The appellant told me that when she wrote that letter she was telling the truth as she knew it at the time. However, subsequently she spoke to her husband who told her that her recollection was entirely wrong. He had reminded her that she had met with him when he had left the mosque after Friday prayers on 06 April 2013 and they had gone to the post office together and posted the application form.

11. The appellant said that she did not discuss the letter that she sent to the respondent with her husband before she sent it, and so he did not have the opportunity to correct her memory at that time. She was upset and depressed about the rejection of the application and in a panic to resubmit. She thought it was the Home Office's fault because they had put her under too much pressure. The appellant's husband had also prepared a witness statement on the same lines, and he gave oral evidence in the same terms, as that of his wife. He told me he was a bit ill when the refusal came and so he thought that added to why his wife did not discuss it with him before she replied, and he agreed that that the reference to the post office being closed was a fiction, but he thought it was adequately explained by the fact that his wife was in a panic caused by the Home Office letter.

12. Mr Melvin put it to each of them that their evidence was expedient, being given for the 1st time in the face of the letter of 20 April 2013, and in response to their recognising the importance of changing the evidence in that letter. The appellant and her husband denied that and reiterated their recollection of the application being posted on 5 April.

13. There was no re-examination.

14. Mr Melvin submitted that whilst the appellant was right to point out in her letter that following the change to the form on 6 April applications made on the old form continued to be treated as valid for a period of 21 days, the fees were a separate issue. To be a valid application the application had to be accompanied by the correct fee and the appellant had paid the old fee. The failure to pay the right fee was sufficient to invalidate the application and the respondent's decision was correct. So far as the date of submission of the application was concerned the letter accompanying the resubmitted application was where the truth lay. The disruption caused by the Post Office being closed was significant. The witnesses were being untruthful, distancing themselves from the letter in order to succeed.

15. In terms of Article 8 the appellant and her husband did not meet the rules, no compelling circumstances had been put forward requiring consideration beyond the considerations provided for in the rules, and the decision was proportionate.

16. In submissions Mr Megha confirmed that he resiled from the earlier statements, in the grounds of the application, that both the Upper Tribunal and Court of Appeal had found as fact that the appellant had sent her application in on 05 April 2013, recognising that on the face of the judgements produced following Judge O'Connor's directions, it is apparent that they did not.

17. Mr Megha asked me to place weight on the oral evidence and to find the appellant and her husband credible in their claim that the application had been sent in on 05 April 2013. The evidence of the latter stood alone and

was adequately explained by the appellant and her husband. He pointed out that ever since the refusal of the resubmitted application in May 2013, the appellant and her husband had asserted that the application had been made on 05 April 2013. They had taken judicial review proceedings on the basis of that assertion and renewed to the Court of Appeal on that basis. The respondent had not produced the letter now relied on, and had not contested the position. The court had found that the application had been unlawfully rejected as invalid. Even if the application had in fact been sent on the 08 April 2013 under rule 34G(I) the respondent was wrong to reject the application on the basis that the form was invalid because there is provision for applications made on the old version of the form to continue to be treated as valid for 21 days i.e. until 27 April 2013. In terms of the fee he said it was incoherent that an earlier applicable form should be acceptable but the earlier fee was not. Even taking the appellant's position at is lowest, the only irregularity was the fee. Now the rules at 34B allowed that where a single mistake had been made it was open to the respondent to give an opportunity to the appellant to correct it. That was in accordance with principles of fairness, and it would simply be unfair for the appellant if she had to bear the consequences of the respondent unfairly rejecting the application of April 2013 as invalid or what was a single technical error.

18. This was a case where I should use Article 8 ECHR to right a wrong. The appellant had been here for 8 years when she made the 2013 application, it was rejected as invalid because of home office error and the subsequent application refused and wrongly she was deprived of a right of appeal. Although technically overstaying she had to stay to apply for a remedy, and although it was refused on the basis that it was academic, it was clearly proper that she should stay because she had a properly arguable complaint.

Discussion

19. I had the benefit of hearing and seeing the appellant and her husband give their oral evidence. The respondent apparently failed to produce the evidence in the JR proceedings which the appellant brought in order to obtain a right of appeal. It appears that the discrepancy between what was written in the letter on 20 April and the appellant's subsequent account have never been put to the appellant before, so that this is the first time that the letter and the explanation for it have been considered.

20. I am satisfied that the evidence of the 20th April is the best evidence of what happened. It was written close to the date of the events. The appellant shows in the letter that she is well informed, being aware of the detailed provision of the rule including that at Rule 34G(I) to the point of the extended validity of the old form. She is also clearly aware that the rule does not extend to the fees specified under the regulations. I do not accept that at that early point following the submission of the application she would have forgotten what happened. I am fortified in my conclusion by her explanation that the post office was closed. If the account she and

her husband now offer was correct that would simply be untrue. I found the explanation that the appellant had not spoken to her husband about her recollection before responding to the Home Office most improbable given the importance of their immigration status. I find on balance that the evidence of the appellant and her husband is expedient.

21. The letter rejecting the application, dated the 17/04/2017, is provided in the appellant's bundle, at Judge O'Connor's direction. The letter makes it quite clear that the application was only returned because the fee was wrong. The appellant is cautioned that when resubmitting with the right fee she should use the right form, which she does. The appellant's letter accompanying the resubmitted application on the 20th April letter also makes it quite clear that she understands that the reason for rejection is that the fee was wrong. It is quite clear that the application form was never returned or treated as invalid because of the use of the earlier applicable form. That is a mischaracterisation which has pervaded these proceedings.

22. The issue was always whether the payment of the wrong fee invalidated the application. The only argument to the contrary is predicated on the elision of the position in respect of forms to that of fees. There is no basis to extend the rule concerning forms to the position in respect of fees. The fees are set out in the relevant orders. Mr Megha's reference to the current rules permitting the respondent to exercise discretion in respect of a single error takes the matter no further. Not only is the power a discretion, his submission omits to mention that the error in respect of form would now have to come under that rule, because 34(I) permitting the continued use of an old form for 21 days has been deleted, so that the fee error would not be the single error, but in any event the current position is not relevant to the 2013 position.

23. I accept the submission of Mr Melvin. The application was made on the 08 April and it was invalid for the failure to pay the right fee.

24. Turning to the appeal against the September 2016 refusal the respondent was right to find that the appellant had not obtained the relevant 10 years lawful residence.

25. In his submission, the point that Mr Megha relied on was that the appellant had been wronged by the Home Office. For the reasons, I have already set out I do not agree. The reality is that even in 2013 she had no proper expectation of being able to remain, her position was without merit. Upper Tribunal Judge Jordan found, even if her application had been valid at that time it would be bound to have been refused, and any appeal would have failed. No remedy had been forthcoming on the basis that the application had been hopeless to the point that any right of appeal would have been academic. The Court of Appeal agreed. Mr Mehga's efforts to pray that position in aid of an Article 8 case now is misconceived. It considered an insufficient basis then, when it seems her case was considered at its highest. Currently when it is clear that in fact the decision of invalidity was

correct, and s3 of the 1971 Act has no actual or hypothetical application, her position is not improved.

26. Mr Megha's skeleton argument resurrects Article 8 ECHR points in respect of obstacles to integration, highlighting the appellant's witness statement evidence that neither she nor her husband have assets or property in Mauritius, have severed all ties to the country and so have no one to whom they could turn for help, and that in the global economic crisis jobs would be virtually impossible. He adds that the husband has medical conditions and the appellant is his carer, and that the husband is challenging his own refusal of leave in the Court of Appeal. References are made to documents in the bundle before the First-tier tribunal. He did not address me on those issues in his submissions. In the circumstances, I can deal with the matters succinctly. I have looked at the documents in the bundles, including the references, examination results, medical notes and correspondences, including that from the MP that take the matters any further with regard to their position here. So far as the birth and death certificates go they do not of themselves establish any significant difficulties for the appellant in terms of return to Mauritius. In light of my adverse credibility findings I find that the bare assertions of the witness statements fall far short of establishing, on balance, a factual matrix in the UK or as anticipated on return, of any significant obstacles on return or of relevant factors amounting to compelling circumstances sufficient to displace the public interest, described in s117 of the 2002 Nationality, Immigration and Asylum Act, in the removal of the appellant.

Decision

27. The decision of the First-tier Tribunal has previously been set aside by the Upper Tribunal. The decision is remade dismissing the appellants appeal on all grounds.

Signed E. Davidge Date 24 October 2017

Deputy Upper Tribunal Judge Davidge