Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19429/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th September 2017	**On 23rd October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS POOJA SHARMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Farhat (Counsel)
For the Respondent: Mr S Staunton (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Porter, promulgated on 22nd November 2016, following a hearing at Hatton Cross on 19th September 2016. In the determination, the judge dismissed the appeal of the

Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of India, who was born on 14th November 1982. She appealed against the decision of the Respondent Secretary of State dated 7th May 2015, refusing her application for leave to remain in the UK indefinitely on the basis of ten years' continuous lawful residency in this country.

The Judge's Determination

3. The judge properly set out the legal requirements for indefinite leave to remain in the UK on the ground of long residence, by reference to paragraph 276B(i)(a) of the Immigration Rules before proceeding to make findings of fact (paragraph 24). The conclusion reached by the judge was that the Appellant had not demonstrated ten years' continuous lawful residence in the UK from the period 12th August 2010 until 28th February 2011 (see paragraph 25) and the reasons for this were that she had been asked at question L6 of the relevant form to confirm that she had £800 for each calendar month of their course up to a maximum of nine months, in order to meet the maintenance requirements, and the Appellant had not completed this section at L6. The judge held that, with respect to this information, "there is no suggestion that this was otherwise available in this application form" (paragraph 27). This was an Appellant who had previously made many applications for leave and "she should and would have been aware of the importance of such information and would have ensured that this was available to her" (paragraph 29).

4. The appeal was dismissed.

Grounds of Application

5. The grounds of application state that it was not open to the judge to exercise discretion as the primary decision maker, and that the guidance as to whether any gap in lawful residence was outside the Appellant's control had been restrictively applied, and there was a misunderstanding of the cause of the gap in residence and that a material submission for the Appellant was not addressed in the determination.

6. On 28th July 2017, the Upper Tribunal gave permission to appeal.

7. On 17th August 2017, a Rule 24 response was entered by the Respondent to the effect that discretion had been considered by the Secretary of State, but was not extended in the Appellant's favour during the consideration of the Appellant's application.

8. It was open to the judge to consider the exercise of the Respondent's discretion and find that it was exercised properly: see **Ukus (discretion: when reviewable) [2012] UKUT 00307**.

Submissions

9. At the hearing before me on 29th September 2017, Mr Farhat, of Counsel, appearing on behalf of the Appellant relied upon his grounds for permission to appeal.

10. First, this was a case where, in a long residence application, there was a gap of six months and fourteen days in the Appellant's lawful residence, from 11th August 2010 until 28th February 2011, which meant that she could not succeed under the Immigration Rules.

11. Second, however, policy guidance gave the Secretary of State discretion to overlook periods of overstaying of over 28 days. Mr Farhat drew my attention to page 6 of the grounds of application, where paragraph 33 sets out the relevant guidance under the heading "periods of overstaying" and states that,

> "When refusing an application on the grounds 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".

12. The guidance goes on to state that what constitutes "exceptional circumstances" is a high threshold but this "could include" delays resulting from "unexpected or unforeseeable causes".

13. Third, if one looks at the Appellant's circumstances, she made her application on 30th July 2010. This was on time. She did not in that application, however, answer one question on the application, namely, L6 (which appears at page 9 of the grounds), and Mr Farhat submitted that this was the only error on the application form. The Secretary of State then, however, returned the entire application form back to the Appellant on 11th August 2010, which was some eleven days later, and this culminated in the period of her overstaying beginning to run. It was, submitted Mr Farhat, no blemish on the Appellant herself. She had applied on time and she had applied on the correct form, and she had applied without having overstayed in any way.

14. Fourth, this was, however, an irrelevancy to all intents and purposes. This is because the Secretary of State refused the application, in breach of the Secretary of State's own policy, and it is this which led to the period of overstaying. Discretion should have been exercised.

15. Fifth, it is a mistake of fact that the information required by question L6 was not available in the application itself, though I had to be accepted it was not available on the form, because it was appended to the application form itself. It consisted of the Appellant's passport which had also the CAS as well as other documents. Therefore, the Secretary of State had the information required and ought to have exercised discretion in the Appellant's favour. The reference in the Secretary of State's own

policy to "unexpected or unforeseeable causes", was a reference to that which "could include" such exceptional circumstances.

16. Finally, and in any event, the Secretary of State could have asked for the information anyway, if it was not in response to question L6, but was included in the documents appended to the application form. Mr Farhat submitted that I should make a finding of an error of law and remit this matter back to the Secretary of State so that discretion can be exercised with a view to determining the application on the basis of the information as provided in the appended documents.

17. For his part, Mr Staunton submitted that he would rely upon the refusal letter. He submitted that the question of discretion was for the Secretary of State. Further, in this case it was not the judge who was exercising the discretion because it was for the Secretary of State to so exercise it. In any event, discretion had been exercised but had not been exercised in the Appellant's favour, and this was clear from page 5 of the refusal letter.

18. In reply, Mr Farhat submitted that what was clear was that, under the policy, the Secretary of State "may" exercise discretion. The question thereafter was what reasons there would be for the Secretary of State exercising such a discretion. In this case there were clearly reasons because the CAS information was provided with the application form and the Secretary of State plainly did not exercise her discretion. She did not look at the application in its entirety. It was not inquired as to what amount of money the Appellant had.

19. Yet, all this information was in the application itself. In **Ukus (discretion: when reviewable) [2012] UKUT 00307**, the Tribunal had held that, "because the discretion is vested in the executive, the appropriate course would be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application …" (at paragraph 2).

20. In this case, submitted Mr Farhat, what was not open to the Secretary of State was to just reject the application because under the policy, there is a section "specified application forms and procedure: mandatory sections", which is to the effect that, "you must not reject an application if an applicant fails to complete non-mandatory sections of the application form".

21. Yet, this is exactly what the Secretary of State had done. She had rejected the application. The policy required the applicant to be given one chance to complete all the mandatory sections and answer every question within ten business days if requested to do so.

Error of Law

22. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

23. This is a case where the Appellant did not complete the answer to question L6. This was an important question. It required the applicant as a student to show that she had £800 for each calendar month available to her during the course. The failure to complete this section was arguably an act of negligence on her part given that, as the judge properly stated, she was not a novice in this respect having made other applications on previous occasions (see paragraph 29).

24. Nevertheless, the information was, it would appear, appended in the attached documentation to the application form, together with her passport. But even if it was not, the Secretary of State had to exercise her discretion by contacting the applicant and ask her to furnish the missing information. It was not open to the Secretary of State, as the guidance makes clear, to reject the application outright.

25. Accordingly, the appropriate course of action now is for the Secretary of State to exercise the discretion that she is duty bound under the law to exercise, and if the information is found not to be in existence, then the decision by the Secretary of State will fall to be made accordingly.

26. If on the other hand the information is there, then the discretion may go the other way. The fact remains, however, that discretion must be exercised by the Secretary of State.

Notice of Decision

27. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I allow this appeal to the extent that I direct that the Secretary of State consider the application on the basis of all the information provided in the application, and not confine herself to the form itself and the answer to question L6, as appears to have been done to date.

28. No anonymity direction is made.

29. The appeal is allowed.

Signed Dated

Deputy Upper Tribunal Judge Juss 19th October 2017