Upper Tribunal
(Immigration and Asylum Chamber) Appeal No: IA/33946/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 September 2014	**On 9 September 2014**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL DIGNEY

JIN HEE KIM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the respondent: Mr Duffy, Home Office Presenting Officer
For the appellant: Mr Richardson

DETERMINATION AND REASONS

1. The appellant, a citizen of South Korea, applied for indefinite leave to remain on the basis of ten years' residence. The application was refused because the respondent concluded that there had been breaks in the continuous residence. A First-tier Tribunal allowed an appeal against the decision. The judge concluded that the first gap was, in law, not a gap at all, the second was one that should not have been treated as a gap and in any event, should she be wrong about those matters she would have allowed the appeal under article 8 of the ECHR. Permission to appeal was granted on all grounds.

2. The first ground of appeal concerns the first gap. The facts are not in dispute. The appellant had valid leave until30 June 2004 and so was an overstayer until she left the United Kingdom on 4 July 2004. On 29 August 2004 she re-entered the united Kingdom with valid leave.

3. The relevant law is to be found in paragraphs 276A(a) and 276B(v) of the Immigration Rules. Paragraph 276A(a) reads:

> "continuous residence" means residence in the united Kingdom for an unbroken period, and for these purposes a period shall not be considered to be broken where an applicant is absent for a period of six months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return.

4. Paragraph 276B(v) reads:

> the applicant must not be in the United Kingdom in breach of immigration laws except that overstaying for a period of 28 Days or less will be disregarded.

5. The grounds of appeal argue that the appellant falls foul of 276A(a). She was absent from the United Kingdom for a period of less than six months and she did not have leave to remain when she departed. I have to say that I do not understand the judge's reasoning at paragraph 24 of the determination, where she talks of periods of overstaying being disregarded. Here it is not the overstaying alone that breaks the continuous residence but the fact that the appellant did not have leave both on departure and return in connection with her absence.

6. The appellant was granted leave until 31 October 2007 and she did not apply for further leave until 24 July 2008 and she was in fact granted further leave on 16 February 2010 until 31 October 2010. There was a gap of nine months until the application was made and of two years and three months before leave was granted. It is not necessary to consider whether the leave is retrospective as there is in any event a considerable gap. The appellant had argued that the delay was the fault of her solicitors.

7. The judge concluded that the respondent should have exercised her discretion and disregarded the gap as it was the fault of the appellant's solicitors. She therefore (I do not entirely follow the logic as the gap was clearly there) concluded that the appellant could show ten years continuous residence. The grounds of appeal accept that there was a discretion to overlook gaps, but note that significantly, negligence by a representative is not given as an example of something that may lead a caseworker to exercise a discretion outside the rules.

8. In fact the respondent did consider whether to exercise a discretion outside the rules in the light of what the appellant had said concerning her representatives; fist whole paragraph on page 3 of the Reasons for

Refusal Letter. AS the discretion has been considered, and it is a discretion outside the rules I cannot exercise s fresh discretion and the respondent's can only be impugned on the basis that it is not in accordance with the law. That may be the case where the discretion is exercised on a false basis, which is not the case here, or where the exercise is perverse.

9. The judge said that it was unreasonable of the respondent not to exercise his discretion in the appellant's favour when she had done so previously when an out of time application had been made. It is not clear to me that a discretion was exercised on that occasion, but if it was the situation was quite different as then the appellant clearly met the requirements of the rules. On this occasion she did not and I can see nothing perverse or irrational in the respondent's decision not to overlook the considerable gap in the "continuous residence" and exercise a discretion in her favour outside the rules.

10. The remaining grounds of appeal deal with the judge's treatment of article 8.Given the date of the application the judge should have dealt with family and private life under appendix FM. She did not do so. This would appear to be an error of law because any consideration of article 8 outside the rules has to take into consideration why the application failed under the rules as that is clearly relevant as to whether the case is one of those rare cases that need to be considered outside the rules. The matter was so considered in the Reasons for Refusal Letter and I can only conclude that the judge did not consider it because he concluded that there was no chance of success by that path.

11. The grounds of appeal argue that the judge in carrying out the proportionality exercise did not give sufficient weight to the public interest generally or with regard to the public interest in firm immigration control. I have read the determination with great care and I can find no reference to the public interest at all. It cannot be said that the judge carried out a balancing exercise at all and therefore fell into legal error. I have to remake the decision

12. As I am remaking the decision I have to consider the new section 117B of the Nationality, Immigration and Asylum Act 2002, that reads:

The maintenance of effective immigration controls is in the public interest

13. The first ground of appeal states that the judge's conclusion that he could not be satisfied that the appellant's father had no responsibility for the appellant was perverse. The second ground states that adequate reasons were not given for the conclusion that the appellant's mother did not have sole responsibility for her son. It is then said that the conclusion that the appellant is self-sufficient in China with other family members is based on speculation rather than evidence and the conclusion is at odds with paragraph 16 [it is actually paragraph 15] of the determination,

where the judge accepts that the sponsor has transferred money to the appellant. It is finally said that the decision on article 8 is inadequately explained.

14. Permission to appeal was granted by Judge Cruthers. After summarising the grounds he concluded:

> Given, amongst other things, the history of the appellant's mother, I suspect that in the last analysis it is unlikely that the appellant will be able to establish sole responsibility here. However, it is arguable that the appellant and the sponsor are entitled to a less brief treatment of such case as the appellant does have as regards sole responsibility. Overall, there is sufficient in the grounds to make a grant of permission appropriate.
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> As already intimated, the appellant and sponsor should not take this grant of permission as any indication that the appeal will ultimately succeed.

15. This is a case where various relations and acquaintances of the appellant were interviewed by or on behalf of the respondent in China and their evidence was before the trial judge. There are interviews with two uncles., the appellant's sister and someone from the appellant' school. The appellant was also interviewed.

16. The first ground states that the judge was wrong to conclude that he could not rule out that the appellant's father had some involvement with the appellant. In the light of the interviews I have to conclude that the judge's conclusion was so strongly against the weight of the evidence that it must amount to a factual error. However, it seems to me that even if this is an error of law, it is not material. That is because the absence or otherwise of the father is irrelevant to whether the mother had sole responsibility. There is nothing in any of the interviews that suggest that the mother had any responsibility for the appellant other than occasionally sending money. The responsibility appears to have been shared at various times between the grandparents, one of the uncles and the sister. The appellant says in his statement that his mother made the major decisions in his life, and the mother says the same in her statement. She also said at the hearing that she made all the decisions for her son. Unfortunately these are mere statements and the evidence of the relations in China gives no factual support for these statements. It is for the appellant to prove that his mother had sole responsibility for him and there is no evidence to that effect. The judge was certainly entitled to reach the decision he did on this point and I find it difficult to see how he could have reached any other conclusion on the evidence before him. It follows that there is no error of law in the judge's conclusion that the appellant's mother did not have sole responsibility for

him. The evidence points overwhelmingly to the appellant's various relations in China having responsibility at various times.

17. I am not sure what the relevance of the third ground is and Mr Lam did not refer to it at the hearing. The evidence does in fact show that the appellant is now self-sufficient in China, in the sense that he is living on his own with no day to day help. It is accepted that his mother sends money but the judge was describing the life that the appellant was leading, which it must be admitted does not appear to be a very happy one, living as he does on his own. The third ground does not identify any error either of law or fact.

18. It is finally said that article 8 is not properly treated. Having concluded that the appellant could not succeed under the rules there would have had to be something compelling before an article 8 claim could be successful and there is nothing of that sort. Mr Lam did not in fact mention article 8 in his submissions.

19. It follows that the original judge made no error of law. The original decision stands.

The appeal is dismissed

Designated Judge Digney 2 September 2014
Deputy Judge of the Upper Tribunal