Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA 51613 2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 June 2014	**On 25th June 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

HEE JI JUNG

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss J Norman of Counsel instructed by Westkin Associates
For the Respondent: Mr G Jack, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by a person who is a citizen both of South Korea and the United States of America against a decision of the First-tier Tribunal dismissing her appeal against a decision of the respondent not to give her leave to remain on the basis of ten years' residence.

2. Certain things in this case are clear. The appellant's stay in the United Kingdom has been lawful throughout and started with her entering the United Kingdom for the purpose of studying. She has been a successful student. There is a supporting letter from Professor W M C Foulkes at Imperial College London speaking well of her, both for her academic and her personal qualities including her ability to settle in the United Kingdom. Professor Foulkes expressed himself very carefully and does not presume to comment on the Immigration Rules or how the law should be applied, but he tells us something about the person before the tribunal.

3. Although the appellant has been energetically represented by Counsel, I am not persuaded there is any material error in Judge Pedro's decision, and I must dismiss her appeal. I will explain this decision.

4. It is accepted that the appellant has not been in the United Kingdom for the ten years necessary to satisfy the requirements of the Rules. She has had various periods of absence, most of them short, for the purpose of visiting her home, but two of them are rather long. One of them is the result of her studying somewhere in continental Europe as part of her first degree, and the other is a result of her being treated for cancer in her home country of South Korea. I am very pleased to note the evidence that the treatment has been successful and the appellant enjoys good health.

5. Counsel says, and it may well be right, that none of these absences are indicative of a lack of desire to continue to associate with the United Kingdom.

6. The appellant would hardly have chosen to need cancer treatment and taking treatment in the country of which she is a national was the obvious thing to do.

7. Similarly, her course of study in continental Europe was part of the degree offered by Imperial College which is one of the reasons the appellant chose that course. Throughout her time there she was in touch with the college as she needed to be because such contact was part of her studies.

8. These points are well made.

9. It says in the various documents before me that the Secretary of State has a policy which enables her to have discretion outside the Rules and that this can be applied in certain cases. However no copy of the policy was ever relied on or, as far as I can see, even produced to the Tribunal and it is plain from the refusal letter that the respondent did consider the case outside the rules (second paragraph, page 3 of the refusal letter).

10. Counsel says that the policy should have been applied in cases such as this where the long periods of delay (the ones that "cause the trouble" if I can put it like that) were not indicative of a desire to disassociate herself from the United Kingdom but were for clear, understandable and in many ways laudable reasons.

11. The application was to remain under a Rule that applies to people who have ten years' lawful residence in the United Kingdom. The appellant does not have ten years' lawful residence in the United Kingdom. She does not meet the requirements of the Rule.

12. Although the existence of a policy is interesting, nothing was said before me to show how any discretion could have been exercised in the appellant's favour. This is not a case where the Secretary of State has clearly got anything wrong. In fact, as Mr Jack pointed out, the case before the First-tier Tribunal expressly did not rely on failure to follow policy. Although the grounds of appeal to the First-tier Tribunal are fairly described as generic they identified appropriate statutory grounds and did raise the contention that the decision was "not in accordance with the

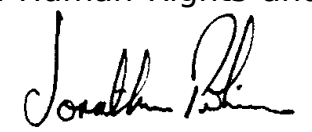
law". That is the way to raise arguments based on failure to follow policy. However, it is plain from the First-tier Tribunal Judge's decision, that those grounds were not only not followed, but were expressly abandoned before the First-tier Tribunal. At paragraph 10 of his determination the judge says that Counsel (not Miss Norman):

> "confirmed that the appellant would be seeking to rely on only one ground of appeal before me", and that is the ground raising that the decision was in breach of the United Kingdom's obligations under the European Convention on Human Rights.

13. I am entirely satisfied that Judge Pedro did not err in any way in failing to consider whether the Secretary of State's polices obliged her to do something that she did not do in this case. Cases involving sensitive issues of the kind frequently seen by this Tribunal are not usually determined justly by an overly zealous regard to procedural points but a judge is really not to be criticised when counsel expressly abandons a point for which no evidential foundation had been laid.

14. The First-tier Tribunal did misdirect itself when deciding if removing the appellant would be a disproportionate interference with her private and family life. At paragraphs 13 and 16 of the determination the judge showed concern that the appellant was working in the United Kingdom in circumstances where the judge thought that she should not have been working and that apparent misconduct made it more important to remove her. The judge said at paragraph 13 "I consider these factors to give added weight to the public interest in this particular appeal". However, the appellant's leave permitted her to work. It follows that the judge took a bad point here but it is not material. It is common ground that the appellant would not pass the tests in Appendix FM or other attempts in the Rules to codify the operation of Article 8 of the European Convention on Human Rights. It is not suggested for a moment that they would assist her, so the case has to be considered jurisprudentially, and whilst there might be ways of criticising the approach taken by the judge on this occasion, for my part I cannot see how a judge could responsibly have come to any other conclusion. This is not a case where there are any of the compelling or exceptional factors of the kind required by decision in **Gulshan v SSHD [2013] UKUT 000640**. Rather this is a quite straightforward case of a person who would like to remain in the United Kingdom but has not lived there long enough to qualify. The fact that there might be policies which might in some circumstances cause the Secretary of State to make a decision outside the Rules is not at all the same as saying that the appellant is anywhere near to establishing a right to remain. It follows that the First-tier Tribunal Judge made no material error.

15. There is nothing in any way satisfying about telling a highly capable and well-motivated woman whose behaviour in the United Kingdom, as far as I know, has been entirely in accordance with the Rules, that she is not allowed to remain but she does not have a right to remain under the rules, removing her is not contrary to the United Kingdom's obligations under the European Convention on Human Rights and the First-tier Tribunal did not err materially.



16. I therefore dismiss this appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal Dated 24 June 2014