Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52862/2013

THE IMMIGRATION ACTS

Heard at Field House

On 31st October 2014

Determination Promulgated
On 6th November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS EUN JUNG PARK
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr S Tarlow, Senior Home Office Presenting Officer
For the Respondent: Mr D Kumu Du Sena, of Liyon Legal Ltd

DETERMINATION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of South Korea. She arrived in the UK on 3rd August 2001 as a student. She had leave to remain in that capacity

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until 11th July 2007. There then followed applications as a student and a spouse, and judicial review proceedings. The outcome of these applications and litigation was that she was granted discretionary leave as a spouse from 24th May 2010 to 23rd May 2013.

3. On 21st May 2013 she made an application for indefinite leave to remain as a spouse. On 20th November 2013 the application was refused because she could not meet the requirement at paragraph 287(a)(i) of the Immigration Rules to have had been granted an extension of stay as a spouse under paragraphs 281 to 286 of the Immigration Rules. The respondent also refused the application under Appendix FM Rules relating to Article 8 ECHR as she said that insufficient evidence had been submitted to show the marriage was subsisting; there was no child of the relationship; and the appellant could not meet the private life requirements at paragraph 276ADE of the Immigration Rules. The appellant appealed this decision. Her appeal against the decision was allowed under the Immigration Rules stating she was entitled to indefinite leave to remain by First-tier Tribunal Judge GJ Napthine in a determination promulgated on the 6th August 2014.

4. Permission to appeal was granted by Judge of the First-tier Tribunal Brunnen on 23rd September 2014 on the basis that it was arguable that the First-tier Tribunal had erred in law as Judge Napthine had not explained how the appellant qualified for indefinite leave to remain under paragraph 287 of the Immigration Rules.

5. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

6. Mr Tarlow relied upon the grounds of appeal. These contended that the appellant could not qualify under paragraph 287 because she had not previously been granted leave as required at paragraph 287(a)(i) of the Immigration Rules. Judge Napthine had not cited any other paragraph of the Immigration Rules to justify his conclusion that the appellant should be granted indefinite leave to remain as a spouse under the Immigration Rules, as set out at paragraph 20 of his determination.

7. Further Judge Napthine had erred in stating that the normal probationary period for a spouse was two years (paragraph 19 of his determination). At appendix FM of the Immigration Rules, paragraph E-ILRP 1.3 the probationary period was either 5 or 10 years.

8. Mr Kumu Du Sena submitted that Judge Napthine had been fully aware that the appellant had discretionary leave and made his decision in the light of this fact so it should be upheld.

9. I informed the parties that I was satisfied that Judge Napthine had erred in law for the reasons set out below.

Conclusions – Error of Law

10. In order to obtain indefinite leave to remain in accordance with paragraph 287 of the Immigration Rules the appellant had to have been previously granted leave to remain as a spouse under the Immigration Rules in one of the ways specified at paragraph 287(a)(i) of the Immigration Rules. Judge Napthine had not specified that the appellant had previously held leave as a spouse in one of these ways, and it was clearly accepted by her own representative that she had not been granted leave as a spouse under the provisions of the Immigration Rules but outside of them in accordance with the UK's obligations under Article 8 ECHR to give respect to her right for family life. Judge Napthine had not referred to another provision of the Immigration Rules which would entitle her to indefinite leave to remain as a spouse, and the appellant's representative could not point to one which enabled her to qualify for this status.

11. As such Judge Napthine erred in law when he concluded that the appellant should be granted indefinite leave to remain as a spouse under the Immigration Rules at paragraph 20 of his determination.

12. Furthermore he was exceeding his jurisdiction if he found that the Immigration Rules could be overridden by his conclusion that they were perverse in not granting the appellant indefinite leave to remain after more than two years discretionary leave on the basis of Article 8 ECHR as a spouse, as he would appear to have done at paragraph 19 of his determination.

13. I therefore set aside the conclusion of Judge Napthine that the appellant was entitled to indefinite leave to remain as a spouse under the Immigration Rules but preserved his findings as to the genuine and subsisting nature of the appellant's marriage as these were not challenged in any way by the respondent.

Submissions – Re-making

14. Mr Tarlow relied upon the refusal letter, but made no further submissions. He did not have authority to concede the appeal but offered no reasons why it should not be allowed.

15. Mr Kumu Du Sena submitted that I should allow the appeal under Appendix FM. The appellant had only been refused further leave on the basis of her marriage by the respondent in the refusal letter because it was not accepted that her relationship was genuine and subsisting. I had preserved the findings of Judge Napthine that the relationship was genuine and subsisting and so following the logic of the respondent's refusal letter the appeal should now succeed on this basis.

16. I informed the parties that I would allow the appeal under Appendix FM of the Immigration Rules.

Conclusion – Re-making

17. I conclude that the appellant is entitled to limited leave to remain as a partner under Appendix FM as when consideration was given to this option in the reasons for refusal letter of the respondent dated 20th November 2013 the only obstacle identified was that the appellant did not have a genuine and subsisting relationship in accordance with E-LTRP 1.7. Judge Napthine found that the appellant and her husband did have a genuine and subsisting relationship having considered the evidence of both parties and documents before him. I adopt these findings at paragraphs 12 to 17 and 19 with respect to the genuine and subsisting nature of the appellant's relationship.

18. I therefore find that the appellant fulfils the requirements of Section R-LTRP of Appendix FM as the appellant and her partner are in the UK; the appellant has made a valid application for leave as a partner and she does not fall to be refused under Section S-LTR and she meets all the requirements of E-LTRP.

Decision

19. The decision of the First-tier Tribunal involved the making of an error on a point of law.

20. The conclusion that the appellant is entitled to indefinite leave to remain is set aside but the findings relating to the genuine and subsisting nature of her marriage are preserved.

21. The appeal is remade allowing the appellant's appeal in accordance with Appendix FM of the Immigration Rules.

Deputy Upper Tribunal Judge Lindsley
4th October 2014

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award as I was not requested to do this and it appears that evidence given at the appeal and further documentation provided at the appeal stage were key in Judge Napthine concluding that the appellant had a genuine and subsisting marriage.

Deputy Upper Tribunal Judge Lindsley
4th October 2014