



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/30664/2014

THE IMMIGRATION ACTS

Heard at Field House, London

On 16 July 2015

**Determination
Promulgated**

On 13 August 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

MISS PAK YU LEE

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sajid Khan, Solicitor, of SMK Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal

Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant appeals against the decision of the First-tier Tribunal (Judge Taylor) dismissing the appellant's appeal against a decision taken on 1 July 2014 to refuse the appellant's application for indefinite leave to remain in the UK on grounds of long residence.

Introduction

3. The appellant is a British national overseas but requires leave to remain in the UK. She first arrived in the UK on 8 September 2002 in order to attend boarding school. She renewed her leave to remain in the UK on several occasions in order to study at boarding school or university. She eventually made an application on 17 February 2014 for indefinite leave to remain in the UK.
4. The Secretary of State refused the application on the basis that the appellant had been absent from the UK on numerous occasions in the last ten years amounting to 705 days in total; well over the 540 days (18 months) permitted under paragraph 276A of the Immigration Rules ("the Rules"). The appellant's representatives unsuccessfully submitted to the respondent that 174 days absence should be discounted because two periods of absence were due to the ill health of the appellant and the appellant's mother.

The Appeal

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Nottingham Justice Centre on 21 November 2014. She was represented by Mr Khan. The First-tier Tribunal found that the provisions in the Rules were mandatory and did not permit any discretion. The respondent had given due regard to the long residence policy. As the Rules did not permit the exercise of discretion it was not a matter for the judge to review the exercise of discretion or to say that the discretion exercised should have been exercised in a different way. The appropriate course was to commence judicial review proceedings.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law.
7. Permission to appeal was granted by Upper Tribunal Judge Doyle on 12 May 2015. It was arguable that the judge erred in law by giving inadequate consideration to discretion which could have been exercised in the appellant's favour by the respondent.
8. Thus, the appeal came before me

Discussion

9. Mr Khan submitted that the decision of the respondent was procedurally unfair because the respondent failed to exercise discretion in favour of the appellant in light of the compelling evidence of compassionate circumstances which fell for consideration under the respondent's own policy on long residence. The judge failed to conduct independent findings. The policy guidance was put before the judge. One of the grounds of appeal was that discretion should have been exercised differently. The provisions in the Rules are not mandatory. It was an error of law to suggest that the only remedy was judicial review. The judge should have found that the respondent should have exercised discretion. The Upper Tribunal should remake the decision and allow the appeal.
10. Mr Whitwell submitted that the most that the Upper Tribunal could do is to remit the decision to the respondent. Paragraph 12 of the decision contains a concession by Mr Khan that the appeal could not succeed under the Rules. Paragraph 14 of the decision could be viewed as the judge being satisfied with the exercise of discretion by the respondent.
11. I have considered the refusal letter dated 1 July 2014. There is no reference to the long residence policy (Guidance - Long Residence - version 12.0 valid from 17 October 2014). I am satisfied that the respondent has not exercised discretion under the policy. The discretion arises from the policy and not from the Rules.
12. I have considered paragraph 50 of **AG (Policies; executive discretion; Tribunals powers) Kosovo (2008) UKAIT 00082**. There are cases in which a failure to apply a policy should lead to a substantive decision in the claimant's favour with a direction that leave be granted. There will be no need to base such a decision on human rights grounds. But the cases in question are unusual. They are those in which (1) the claimant proves the precise terms of the policy, which (2) creates a presumption, on the facts of his case, in favour of granting leave, and (3) there is either nothing at all to displace the presumption, or nothing that, under the terms of the policy, falls for consideration. If all of those factors apply to the case, the appeal should be allowed, with a direction as indicated. I find that this is not a case where the failure to apply the relevant policy leads to a substantive decision in the appellant's favour with a direction that leave be granted. I have also considered **Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC)** which leads me to the same conclusion; where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction is limited to a decision that the failure renders the decision not in accordance with the law.
13. I find that the judge erred in law at paragraph 15 of the decision by finding that the only remedy open to the appellant was judicial review. The judge did not consider the possibility of remitting the decision to the respondent

for a lawful decision to be made. That is a material error of law. The relevant authorities do not appear to have been cited to the judge.

14. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of an error of law and its decision cannot stand. I am satisfied that the respondent's failure to exercise discretion under the long residence policy renders the decision not in accordance with the law.

Decision

15. Consequently, I set aside the decision of the First-tier Tribunal. I remake the decision by allowing the appeal to the extent that the respondent's decision is not in accordance with the law and a lawful decision is still awaited by the appellant.
16. The respondent must now make a fresh decision and if that decision is not in the appellant's favour then the appellant will have a right of appeal to the First-tier Tribunal. If the decision maker has lawfully exercised his discretion and the First-tier Tribunal has such a statutory power then the First-tier Tribunal must either uphold the decision or reach a different decision in the exercise of its own discretion.

Signed



Date 8 August 2015

Judge Archer

Deputy Judge of the Upper Tribunal