Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/35080/2013

THE IMMIGRATION ACTS

Heard at Newport **Promulgated on**
2 October 2014 **14 November 2014**

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

JIANGUO ZHANG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms R Harrington, instructed by Gloucester Law Centre.
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant is a national of China who came to the United Kingdom as a Work Permit Holder and remained during the period of his work, so far as we know, entirely lawfully. He was taken seriously ill. He applied for leave to remain because of his medical treatment and was granted leave to remain from 8 December 2009 for three years; that was discretionary leave. Before the conclusion of that period, indeed on 5 November 2012, he applied for further leave to remain. The application form is in the Home Office's file and Mr Richards has read the important parts of the Form

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FLR(O) which was submitted by the appellant on the date we have mentioned. The application was in the following words:

> "I was previously granted discretionary leave for three years because of my severe illness. I seek a further period of discretionary leave."

2. The application, made on the date that it was, was the subject of a response which treated it as subject to the amendments to the Immigration Rules which came into force on 9 July 2012, and it was refused. The appellant appealed and Judge Troup dismissed his appeal.

3. The appeal to this Tribunal is largely based on a legitimate expectation which has, it is fair to say, taken a good deal of teasing out but which relies on the Secretary of State's policy, published at about the time when the amendments to the immigration rules were introduced and which relates to discretionary leave granted before 9 July 2012. The transitional arrangements declared, so far as individuals who have such leave are concerned, that those who before 9 July 2012,

> "... had been granted leave under the DL Policy in force at the time will normally continue to be dealt with under that policy through to settlement if they qualify for it (normally after a period accruing six years continuous discretionary leave). Further leave applications for those granted after three years DL before 9 July 2012 are subject to an active review".

4. There are other considerations which are set out in that policy, including in particular, any evidence of criminal behaviour and any change of circumstances. Although none of those matters are said at present to apply to the appellant, we do not think it would be right to attempt to substitute for the decision made in the appellant's case a decision by us that the appellant is entitled to discretionary leave. What he is entitled to, however, is a decision which is made according to the correct provisions and policies. The decision which he received was one which was based entirely on the new immigration rules, apparently in ignorance of the possibility that the transitional provisions for those with grants of discretionary leave applied to him.

5. Reading the application as we do, it is clear to us that it was an application for the further period of three years discretionary leave which the policy envisaged and we shall therefore allow the appeal on the ground that the Secretary of State's decision in the appellant's case was one which was not in accordance with the law. The application therefore remains outstanding for the Secretary of State to determine it in accordance with the correct provisions and policies. To that extent therefore the appeal to the Upper Tribunal is allowed.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 10 November 2014