Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/30358/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th December 2015	**On 12th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR DONGHYUN LEE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Bazini of counsel
For the Respondent: Mr S. Whitwell, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of South Korea born on 12th December 1973. He appealed against a decision of the Respondent dated 16th March 2014 which had refused his application for leave to remain in the United Kingdom pursuant to paragraph 276B(ii) of the Immigration Rules (ten years' continuous lawful residence). Judge of the First-tier Tribunal Hembrough, sitting at Hatton Cross on 9th March 2015, allowed the Appellant's appeal and the Respondent now appeals with leave against that first instance decision. For the reasons which I have set out below (see

paragraph 14) I have set aside the decision at first instance and have remitted the matter back to the First-tier Tribunal for the appeal to be re-heard. Thus although this appeal comes before me as an appeal by the Respondent I will continue to refer to the parties as they were known at first instance for the sake of convenience.

2. The Appellant last entered the United Kingdom on 1st November 2002. His leave was extended until 28th September 2010. On 22nd September 2010, six days before this leave was due to expire, the Appellant applied for leave as a Tier 4 dependent partner but this application was rejected by the Respondent on 8th October 2010 as the application form was not signed. The Appellant resubmitted his application on 27th October 2010 but unknown to the Appellant the fees for this application had increased in the meantime by £20. The Appellant did not submit enough money to cover the increase and his second application was rejected for insufficient fees on 15th November 2015.

3. The Appellant submitted a third application on 29th November 2010 which was granted on 20th January 2011, just over three months after the first application was rejected. This last grant was valid until 26th November 2013. On 23rd October 2013 the Appellant applied for leave under the ten years' continuous residence provisions. At the date of application the Appellant had been in the United Kingdom for almost exactly eleven years. The refusal of this last application has given rise to the present proceedings. It was refused because the Appellant could not show ten years' continuous lawful residence due to the gap between the rejection of his first application on 8th October 2010 and the grant of the third application on 20th January 2011. That gap of just over three months broke the period of continuous residence.

4. The Appellant's wife, Mrs Deok Kyung Yung brought her own appeal against refusal to grant her leave under the ten year rule. Her appeal was allowed by Judge of the First-tier Tribunal Mailer on 17th April 2014. She has since been granted indefinite leave to remain (on 13th January 2015). The Respondent's decision to refuse the Appellant's application for indefinite leave to remain as a partner was not served properly on the Appellant until July 2014 after which the Appellant appealed and his case was listed for hearing on 9th March 2015 one year after the Respondent's decision was taken. It is not clear from the Appellant's file why the two cases were not joined and heard together.

The Determination at First Instance

5. Counsel for the Appellant (who did not appear before me) relied upon a skeleton argument that submitted that the first application (which was not signed) was validly amended in time by the second application by operation of Regulations 10(2), 16(1)(b) and 17(1)(b) and (c) of the Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007 ("the 2007 Regulations"). Judge Hembrough set out paragraph 17(1) of the 2007 Regulations at paragraph 15 of his determination. Paragraph 17(1) of the 2007 Regulations provides as follows:

> "17.—(1) A failure to comply with any of the requirements of regulation 16(1) to any extent will only invalidate an application if:

(a) the applicant does not provide, when making the application, an explanation for the failure which the Secretary of State considers to be satisfactory,

(b) the Secretary of State notifies the applicant, or the person who appears to the Secretary of State to represent the applicant, of the failure within 28 days of the date on which the application is made, and

(c) the applicant does not comply with the requirements within a reasonable time, and in any event within 28 days, of being notified by the Secretary of State of the failure."

6. At paragraph 16 to 19 the Judge found that the period of continuous leave had not been broken because, as he put it:

"16. The Respondent notified the Appellant of his failure to sign the form on 8th October 2010, i.e. within 28 days of the application as required by Regulation 17(1)(b) and the Appellant resubmitted the same on 27th October 2010, i.e. within 28 days as required by Regulation 17(1)(c).

"17. I find that the Appellant's compliance with Regulation 17(1)(c) meant that the application made on 22nd September 2010 was validated so as to preserve the Appellant's leave under Section 3C of the Immigration Act 1971.

"18. Although on 15th November 2010 the Respondent purported to reject the application resubmitted on 27th October 2010 because of a fee increase in the interim I find that this purported rejection was unlawful because a valid application had been submitted on 22nd September 2010 accompanied by the correct fee at that time.

"19. As a consequence I find that the Appellant's Section 3C leave was preserved during the period 8th October 2010 to 20th January 2011 when he was again granted leave as a Tier 4 dependent partner. I am thus satisfied that he has accrued ten years' continuous lawful residence in the UK."

7. The Appellant's skeleton argument made three other points:

(i) the burden was on the Respondent to show that an insufficient fee had been paid with the second application;

(ii) The second and third applications should be treated as variations of the first (in time) application.

(iii) The appeal should in any event be allowed outside the Rules under Article 8. The Judge did not deal with these three points presumably because having found in the Appellant's favour under the 2007 Regulations point the case stopped there.

The Onward Appeal

8. The Respondent appealed against the decision reiterating her argument that the Appellant could not satisfy the ten years' continuous lawful residence requirements because of the break in continuous residence of more than 28 days from 8th October 2010 to 20th January 2011. Paragraph 5 of the grounds, after noting that the Judge had relied on the 2007 Regulations, stated "those Regulations ceased to have effect as of 29th February 2008 when the enabling provision for them, Section 31A of the 1971 Act, was repealed by Section 50 of the 2006 Act. At the same time Immigration Rules 34A to 34F took over governing the procedural requirements for applications".

9. Although referred to Rules 34A to 34F were not set out in the grounds. At the time of the first of the Appellant's applications paragraph 34A (vi) provided that where an application form is specified the application or claim must comply with certain requirements including where the application or claim is made by post or courier or submitted in person the form must be signed by the applicant. This requirement for signature was added to the Immigration Rules by HC 321 on 29th February 2008.

10. The version of paragraph 34C introduced by HC 321 in force at the date of the application was "where an application … for which an application form is specified does not comply with the requirements in paragraph 34A such application or claim will be invalid and will not be considered". That provision was amended on 6th April 2014 (that is after the date of decision) by HC 1025 which gave discretion to the Respondent. The changes brought in by the 2008 Immigration Rules (which abolished the 2007 Regulations) did not provide for discretion to give an applicant further time. Paragraph 34C(b) now provides that the decision maker may contact the applicant or their representative in writing and give the applicant a single opportunity to correct any omission or error which renders the application invalid save for failure to enrol their biometric information. The amended application and/or any requested documents must be received at the Respondent's address within ten business days of the date on which the request was sent. Transitional provisions apply to the April 2015 amendments.

11. The application for permission to appeal came before First-tier Tribunal Judge Foudy on 22nd May 2015. In granting permission to appeal the Judge wrote that the First-tier had recognised the need for the Appellant to prove that he had at least ten years of continuous residence but it was arguable that the First-tier failed to address a break in residence of three months between October 2010 and January 2011. This lack of reasoning amounted to an arguable error of law.

The Hearing Before Me

12. At the hearing before me Counsel conceded the point that the 2007 Regulations had ceased to have effect in 2008 and therefore did not apply when the Appellant made his three applications in 2010/11. The First-tier Tribunal had erred in law in basing its decision on the 2007 Regulations. Both parties agreed that in the light of the Tribunal's error in taking into account the wrong Regulations, the matter had not been properly heard such that it should be sent back to the First-tier Tribunal to be re-heard. At that point it could be re-examined whether the Appellant could succeed

under the Rules or in any event whether he could succeed outside the Rules under Article 8 given that his wife had now been granted indefinite leave to remain under the ten year Rule.

13. Under the present Rules there was discretion for the Respondent to make further enquiries before finally deciding an application and there may therefore be an issue as to whether the Respondent did make such enquiries at the time (giving rise potentially to an argument that the decision was not in accordance with the law). The Presenting Officer agreed that the present wording of the Rules did give discretion to the Respondent in certain circumstances. At the conclusion of submissions I indicated that I found a material error of law such that the decision of the First-tier Tribunal was set aside. I re-made the decision in this case by remitting the appeal back to the First-tier to be heard again.

The Error of Law

14 The First-tier Tribunal applied the wrong Regulations. The correct provisions to establish whether the Respondent had properly rejected the application form (and thus whether there was a break in lawful residence) were paragraphs 34A to 34F introduced by the 2008 Rule change, Rules subsequently amended in April 2015 subject to transitional provisions. If the Appellant could not bring himself within the Immigration Rules because the relevant 2008 amendments did not provide for any discretion in rejecting an incomplete application form it would then fall to be decided whether the Appellant's appeal should be allowed outside the Rules. Remitting the case back to the First-tier Tribunal affords the Respondent further time to consider this case in the round (before the re-hearing) given the decision in the wife's case and whether to grant indefinite leave to remain to the Appellant in line with the grant to his wife. That last is not a matter for the Tribunal but the Respondent may nevertheless wish to consider that aspect of the case.

15. Accordingly having found a material error of law I set the decision of the First-tier Tribunal aside and remit the matter back to the First-tier to be reheard when all matters may be argued including those matters referred to in the Appellant's skeleton argument which were not considered by the First-tier Tribunal because the appeal was allowed under the 2007 Regulations. (See paragraph 7 above).

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I re-make the decision by remitting this appeal back to the First-tier Tribunal to be heard de novo.

I make no anonymity direction as there is no public policy reason for so doing.

Signed this 11th day of January 2016

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As I have set aside the decision of the First-tier Tribunal I have also set aside the fee award. The First-tier Tribunal will have to reconsider the issue of a fee award thereafter.

Signed this 11th day of January 2016

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Deputy Upper Tribunal Judge Woodcraft