Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30125/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 July 2017	**On 07 August 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

MISS DO HYANG LEE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Kadri (QC) instructed by Lexlaw Solicitors
For the Respondent: Mr P Armstrong, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born in 1985 and is a national of South Korea. According to the immigration history provided by the respondent the appellant entered the UK in 2003 to join her parents. She had an entry clearance issued from 13 March 2003 until 13 August 2004. It is the

respondent's case that the appellant overstayed for three years without regularising her stay in the UK. However she applied on 30 July 2007 for leave to remain as a student which was granted from 5 March 2008 until 31 October 2009. An application for leave to remain on the basis of long residency made on 2 November 2012 came before First-tier Tribunal Judge Scott-Baker on 30 March 2015. The judge noted that it was accepted at the hearing that the appellant could not come within the terms of the Rules but no consideration had been given as to whether the Secretary of State had complied with her own policy contained in the Long Residence Guidance valid from 11 November 2013. The appellant believed she had been included in her father's work permit but could produce no evidence of this. There was a discretion to consider applications exceptionally and at the material time she had been aged 17 and a minor. The proportionality of the decision was questioned given that the Secretary of State had granted the appellant a student visa on 30 July 2007 "which would have implied that the respondent was aware of the appellant's own circumstances in the period 2004 to 2007 and no issue had been taken that there was no valid leave at that time." Being satisfied that the respondent had failed to consider her discretion under the policy, the decision was not in accordance with the law and was remitted to the Secretary of State to consider the matter.

2. A further decision was taken by the respondent on 20 August 2015 and the appellant brought an appeal against that decision. The matter came before First-tier Judge Kaler on 4 August 2016 who required the respondent to issue a supplementary decision dealing with the exercise of discretion among other directions. Further directions were made requiring the respondent to serve evidence supporting an allegation of deception on the part of the appellant that had been made.

3. The appellant's appeal came before First-tier Tribunal Judge Hussain on 27 February 2017.

4. The judge noted that the Secretary of State had alleged the appellant had made false representations in her decision on 24 August 2015 but that despite directions from the Tribunal the respondent had not produced the evidence to support the allegations. It is to be noted that there was no Presenting Officer at the hearing before First-tier Judge Hussain. The judge concluded that the burden of proof was on the Secretary of State and the allegations had not been proved.

5. The judge then turned to consider the claim that there was a gap in the appellant's long residence. He noted that the respondent's position was straightforward in that there had been a gap in the continuity of the appellant's lawful residence between the expiry of her initial leave on 13 August 2004 and the grant of leave to her subsequently on 5 March 2008. The judge noted that it was accepted that there was such a gap in paragraph 17 of his determination.

6. The judge then refers to the respondent's letter of 13 January 2017 which had been issued in response to the directions that had been made. The judge set out an extract from page 4 of the refusal letter as follows:

> "It has been decided that exercising discretion to your client is not appropriate because it was her responsibility to ensure she has valid leave in the UK when her entry clearance expired. Your client knew when she entered the UK that her entry clearance was limited. Your client claims the reason her father left the UK was because his employer had not renewed his work permit visa. Your client came to the UK as her father's dependent, she was aware that her father no longer had any valid leave and has not produced with anything to suggest that she had valid leave. Your client's claim that she was unaware her visa had expired is unsubstantiated. When your client did eventually apply for further leave in the UK, she provided false information on the method of entry questionnaire to the home office..."

On the issue of the apparent gap in leave the judge took into account the following extract from the decision:

> "Your client has also raised that although she had a gap in leave from 13 August 2004 until 05 March 2008, she was still issued 2 student visas and discretionary leave. The only application submitted when your client did not have valid leave was her student application submitted on 30 July 2007. Our records confirm that the case worker at the time was aware that your client was an overstayer, but this was not an application which required the applicant not to be in breach of immigration laws."

7. The judge then dealt with the submission made by the appellant's Counsel and concluded his determination as follows:

> "21. Mr Blake sought to prove that the claim that the application made by the appellant did not require her not to be in breach of the immigration rules to be wrong produced an extract of the Immigration Rules from the time. It does appear that paragraph 60(i)(d) does require an applicant to have valid leave in order to obtain an extension.
>
> 22. I have taken into account all of the submissions made on the appellant's behalf and I recall that they have been made with serious enthusiasm. However the plain fact remains that the appellant has accepted and in my view for good reasons, that there was a long period in her immigration history when she was without any leave. As such the continuity of her lawful residence was broken.

23. As is well known the tribunal can only interfere with a decision taken under the immigration rules if it is not in accordance with it. The tribunal can also remit a decision for reconsideration if, as in this case, there has been a failure to exercise a discretion outside of the immigration rules. In this case there clearly was a failure to exercise the discretion which is why no less than two previous judges required the Secretary of State to make a decision exercising that discretion. That discretion has now been exercised. The tribunal can well understand that the appellant is unhappy with the outcome of the exercise of discretion but it is not within the gift of this tribunal to substitute its own decision for that of the Secretary of State. This is because, to repeat the point, the exercise of the discretion in this case was outside of the immigration rules. It is for the Secretary of State to exercise that discretion which she has done. It is not within the powers of the tribunal to interfere with the outcome of that exercise. If, as the appellant appears to contend, that the outcome is either irrational or for some other reason unlawful, then any challenge must lie elsewhere.

24. In view of the above, I conclude that I do not find that the respondent's decision to refuse the appellant's application for leave on long residence grounds contrary to the Immigration Rules.

25. I note that the tribunal's direction of 15 February 2017 records that the ground on which the appellant will rely was article 8. However what is not clear is whether this reliance is within the immigration rules or outside. For completeness, I have considered the appellant's claim under the immigration rules as far as long residence is concerned. In so far as the appellant is also able to rely on the separate immigration rule dealing with private life, that needs to be found in paragraph 276ADE. The sub-paragraph that the appellant is able to comes closest to is (vi) which requires her to show that there would be very significant obstacles to her integration into South Korea. Given that she came to this country at the age of 17 when she would have been almost an adult and given that she has resided in this country for only 13 years, I find it difficult to conclude that the appellant has not retained real ties with her home country. Her parents still reside there. She clearly has linguistic cultural as well as national ties with Korea. Whilst no doubt she, like anyone else, would find settling in a little difficult to start with, there is no reason with a bit of support from her family and friends she cannot re-integrate into Korean society again.

26. In so far as the appellant's claim under article 8 outside of the immigration rules is concerned, as is well established, any such consideration is only merited if the appellant's circumstance is

> exceptional. I have considered the evidence before me and do not find anything that suggests that despite failing to satisfy the immigration rules, the appellant should nevertheless be granted leave outside of it."

8. The judge accordingly dismissed the appeal. There was an application for permission to appeal and permission to appeal was granted on 5 June 2017 by the First-tier Tribunal. A response was filed by the respondent on 20 June 2017. It was submitted that the grounds were without merit. The discretion had been considered in the refusal letter and there were no exceptional circumstances warranting discretion being granted in the appellant's favour. The appellant had been an adult during the period where she had no leave. The discretion was to be found in the Long Residence Policy Guidance and not under the Rules. It was a fact that the appellant had been in the UK unlawfully for three and a half years and it had not been disputed in the grounds of appeal that the discretion had not been exercised. Reference was made to **AG (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082** and paragraphs 4 and 5 of the head note which stated:

> "(4) If the policy was taken into account and the claimant can show that the terms of the policy and the facts of his case are such that there was no option open to the decision-maker other than to grant him the remedy he seeks, his appeal should be allowed with a direction.
>
> (5) But where within the terms of the policy the benefit to the appellant depends on the exercise of a discretion outside the Immigration Rules, the Tribunal has no power to substitute its own decision for that of the decision-maker."

9. It was submitted that the grounds failed to identify what in the policy could lead to the conclusion that the only option open to the decision-maker was to grant the appellant the remedy sought. The Secretary of State had not waived the period of unlawfulness as argued. No unambiguous promise had been made to that effect and reference was made to **Jakhu v Secretary of State for the Home Department (ETS: legitimate expectations) IJR [2015] UKUT 00693 (IAC)**.

10. Reference was then made to the Long Residence Policy Guidance v.15 which had been in effect at the date of hearing on the issue of overstaying:

> *"When refusing an application on the grounds it was made by an applicant who had overstayed by more than 28 days from 24 November 2016, you must consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying.*

The threshold for what constitutes 'exceptional circumstances' is high, but could include delays resulting from unexpected or unforeseeable causes. For example:

- *serious illness which meant the applicant or their representative was not able to submit the application in time – this must be supported by appropriate medical documentation*
- *travel or postal delays which meant the applicant or their representative was not able to submit the application in time*
- *inability to provide necessary documents – this would only apply in exceptional or unavoidable circumstances beyond the applicant's control, for example:*
  - *it is the fault of the Home Office because it lost or delayed returning travel documents*
  - *there is a delay because the applicant cannot replace their documents quickly because of theft, fire or flood – the applicant must send evidence of the date of loss and the date replacement documents were sought*
  - *Any decision to exercise discretion and not refuse the application on these grounds must be authorised by a senior caseworker at senior executive officer (SEO) grade or above.*
  - *When granting leave in these circumstances, the applicant must be granted leave outside the rules for the same duration and conditions that would have applied had they been granted leave under the rules."*

11. It was submitted that there was nothing stopping the appellant regularising her stay for three and a half years and the appeal had been correctly dismissed.

12. Mr Kadri submitted that the respondent had known that the appellant had overstayed and had not applied the Rules. The Rules required her to have had leave in order to be granted leave to remain. Discretion had not been exercised, and in any event the Secretary of State had been asked to consider the case outside the Rules. The allegations of falsehood had not been made good. The Secretary of State had not considered the appellant's private life. She had put down roots and would suffer unjustifiably harsh consequences when returning to South Korea. Reference was made to **Nagre v Secretary of State [2013] EWHC 720 (Admin)** and the submissions that had been made in paragraphs 31(ff) of the skeleton argument.

13. The appellant had been granted leave to remain and her studies and expertise would confer a public benefit. She was a genuine student.

14. In reply Mr Armstrong relied on the Secretary of State's response. The appellant had been an adult when her leave expired in 2004 and had taken no steps to regularise her stay. She had not completed ten years' residence and there were no exceptional circumstances. There was not a discretion under the Rules and the First-tier Judge had correctly decided the matter in paragraph 23 of his determination. In the light of **AG and Others** there was no power to substitute a discretion in this case. Reference was made to the Long Residence Policy Guidance as set out in the response, although I was also provided with a full copy of the Guidance published on 3 April 2017. In relation to Article 8 the appellant needed to establish twenty years' residence and had only achieved fourteen and time spent studying would not weigh in the scales so far as private life was concerned. There was no material error of law.

15. In reply Mr Kadri submitted that the judge had been wrong to find there was no jurisdiction to consider discretion outside the Rules. If discretion had not been exercised properly then the judge should quash it. The decision of **AG and Others** supported this proposition. Reference was made to the findings of Judge Scott-Baker. None of these matters had been taken into account. Mr Kadri referred to the case of **Butt [2017] EWCA Civ 184**. As in that case, the appellant would provide a benefit to the UK. I was referred to the appeal bundle and the references in paragraph 32 of the skeleton argument were helpfully cross-referenced to the page numbers in the appellant's bundle. I should also mention that I was referred to file copies of the respondent's case records and it was confirmed that these were not before the First-tier Judge.

16. Although the issue of a wasted costs order was raised in relation to the proceedings before the First-tier Tribunal, it was accepted after reflection I had no jurisdiction in the circumstances to deal with it and I say no more about that issue.

17. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law.

18. At the hearing before the First-tier Judge it was submitted that the appeal should be allowed on the basis that the Secretary of State had waived the period of overstay by granting leave on 5 March 2008. While the Secretary of State had argued that the application the appellant had then made did not require the applicant not to be in breach of immigration laws, the judge accepted that the Rules had required an applicant to have valid leave in order to obtain an extension.

19. I do not consider that any argument can be advanced to the effect that the appellant's gap in residency was waived by the Secretary of State to the

extent that it should somehow be overlooked when calculating the period of long residence. It is clear from the case of **Thebo v Entry Clearance Officer Islamabad [2013] EWHC 146 (Admin)** that the Secretary of State has power to exercise discretion in favour of a migrant "which is more favourable than a literal reading of the Rules allows". In other words it was open to the respondent to grant the appellant leave in this case even though she did not have leave to remain as a student and indeed was without leave at the material time. Indeed, it is now accepted that the appellant was without leave for the relevant period. It is said that the appellant was unaware of the position and she was young and this should be weighed in the balance. Reference was also made to the admirable progress the appellant has made as a student and to the glowing testimonials made on her behalf to which Mr Kadri rightly drew my attention. While it was said that the appellant was unaware that she did not have leave, it is pointed out by the respondent that she was an adult when her leave expired and she is, of course, an intelligent individual.

20. The judge deals with the question of the gap in the residence pithily in paragraph 22 of his determination in observing that the plain fact remained that the appellant had accepted, and in his view for good reasons, that there was a long period in her immigration history when she was without any leave.

21. The Rules are clear as set out in paragraphs 276B to 276D in requiring a period of continuous residence as defined. In order to succeed under the Rules ten years' continuous lawful residence is required and the judge was correct to conclude that the appellant had had a long period in her immigration history when she was without any leave. The judge was also correct to conclude that the respondent had exercised discretion. The respondent refers to the Policy Guidance in the response and I have set out the extract relied upon above. As made clear in the Guidance, the threshold as to what constitutes exceptional circumstances is high and it is clearly not the case, and it is not argued, that the appellant comes within the circumstances that are described. It is then argued that the judge failed to consider matters properly outside the Rules and reference is made to **Nagre**.

22. The judge notes in paragraph 25 of his decision that it was not clear, in relation to Article 8, whether reliance was placed within or outside the Rules. The judge makes reference to paragraph 276ADE and the requirement that there would be very significant obstacles to the appellant's integration into South Korea and he deals with that issue satisfactorily in paragraph 25. In paragraph 26 the judge identified no exceptional circumstances and his approach appears to be consistent with what is said in **Nagre** and it was not necessary for him to go further than he did. Neither the grounds of appeal nor the points emphasised by Mr Kadri (including reference to the appellant's praiseworthy achievements and testimonials) raise any material error of law with his approach.

24. The judge dealt with the issues putting out of his mind the false representation allegations. He was entitled to conclude that the respondent had exercised discretion and he did not arguably err in law or misdirect himself in concluding as he did in the light of what the Tribunal decided in **AG (Kosovo)**. I do not find that this authority assists the appellant as Mr Kadri argued, and I accept the points made by Mr Armstrong.

25. I am not satisfied that the determination of the First-tier Judge was materially flawed in law and accordingly his decision stands.

Notice of Decision

Appeal dismissed.

Anonymity Direction

The First-tier Judge made no anonymity direction and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 3 August 2017

G Warr, Judge of the Upper Tribunal