Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: IA/34602/2013**

THE IMMIGRATION ACTS

Heard at Field House
On 7 February 2014

Promulgated on:
On 11 February 2014

Before

Upper Tribunal Judge Kekić

Between

Ruiko Asaba
(anonymity order not made)

Appellant

and

Secretary of State for
the Home Department

Respondent

Determination and Reasons

Representation
For the Appellant: Mr A Berry, Counsel
For the Respondent: Ms A Everett, Home Office Presenting Officer

Background

1. This appeal comes before me following First-tier Tribunal Judge Grimmett's grant of permission to the appellant in respect of the determination of First-tier Tribunal Judge Kaler who dismissed her visit appeal by way of a determination dated 9 December 2013.

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2. The appellant is a citizen of Japan born on 9 November 1987. She has been lawfully present in the UK since her arrival on 24 April 2000 and on 21 December 2012 applied for indefinite leave to remain on the basis of having completed ten years of lawful residence. The application was refused on 31 July 2013 under paragraph 276B because the appellant had been absent from the UK for a period over the minimum number of days permitted. She lodged an appeal on Article 8 grounds.

3. Following an oral hearing the appeal was dismissed. The judge considered Article 8 but concluded that removal was proportionate. Permission to appeal was granted on the basis that the judge had arguably erred in expressing the necessity for exceptional circumstances when assessing proportionality.

Appeal Hearing

4. At the hearing I heard submissions from the parties. Mr Berry relied upon his grounds and submitted that the judge had made five errors. First, she had applied the wrong test in looking for exceptional circumstances, Secondly, she had inappropriately relied on case law which neither party had submitted and which did not apply to the circumstances of the appellant's case. Thirdly, when carrying out the balancing exercise, she had failed to consider whether the public interest would be served by retaining the appellant. Fourth, the judge had not had due regard to the appellant's integration in the UK following her education here from a young age. Finally, the judge erred in taking account of hypothetical entry clearance applications the appellant might make in the future.

5. Ms Everett submitted that whilst the assessment of Article 8 was brief, all the relevant factors had been taken account of and there was nothing to suggest that the judge had looked for exceptional circumstances. The consideration of future applications was part of the forward looking assessment of how the appellant would cope outside the UK and the reliance on case law to find that a relationship with a girlfriend was not sufficiently serious or settled enough to amount to family life was not erroneous.

6. Ms Everett submitted that once the conclusions of the DVR were accepted then any subsequent documents from the appellant seeking to confirm the disputed document could carry no weight. It could be safely assumed that the official had seen the certificate as the references to it were so specific.

7. Mr Berry responded and I then formally reserved my determination but indicated that I would be setting aside the determination. I now give my reasons.

Findings and Conclusions

8. I have taken into account the submissions made and the determination of the First-tier Tribunal.

9. There is no issue that the appellant does not meet the requirements of the Immigration Rules. The sole question is whether the decision to remove her is proportionate.

10. At paragraph 24, having cited a number of cases which, as Mr Berry rightly pointed out, involved deportation and unlawful residence, the judge proceeded to "consider whether there were any exceptional circumstances in this case". That is the wrong test and the wrong approach. It was submitted by Mr Berry (not Denby as stated in the determination) in his skeleton argument that, as confirmed in Patel [2013] UKSC 72, the test of exceptionality should no longer be used and that instead decision makers should focus on the question of whether the applicant has shown a good arguable case that his or her application should be dealt with outside the rules. The judge appears to have disregarded this guidance. It follows that her reasoning is flawed because one cannot be satisfied that she considered the evidence as she should have done. Once this error has been established then Grounds 3 and 4 do little to advance the case however it has to be said that the judge's assessment of the factors pleaded on behalf of the appellant is cursory and that there is little engagement with the substantial life that the appellant has established here over a number of years and from a young age.

11. The judge relied on case law that neither party had adduced. Given that she used it to make an adverse finding, it would have been fairer had she given the parties the opportunity to address her on it prior to using it against the appellant in her determination. In any event, she did not appreciate that the family circumstances of that appellant differed substantially to those of our appellant. Moreover any finding on a non marital relationship should be based on the particular facts and merits of that case rather than an adoption of a general principle as has happened here.

12. I am not persuaded that the last ground carries much merit. It was open to the judge to look ahead and assess the possible ways in which the appellant might resume her life here in the future.

13. For these reasons, the decision of the First-tier Tribunal Judge is set aside in its entirety except as a Record of Proceedings. There being no clear findings, none can be preserved.

Decision

14. The First-tier Tribunal Judge made errors of law and her decision is set aside. The matter is remitted to the First-tier Tribunal for a re-hearing afresh and for the decision to be re-made.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

7 February 2014