Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14792/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th February 2015	**On 25th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR KAI YANG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr M Shilliday, Home Office Presenting Officer
For the Respondent: Ms J Fisher, Counsel instructed by Immigration UK

DECISION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of China born on 17th December 1983. He first came to the UK on 24th February 2002 with leave as a student, and extended his leave in this capacity until 26th October 2013. He applied, in time, on 2nd October 2013 for indefinite leave to remain based on his long residence with applications also being

made for his partner and daughter who are Japanese nationals. His application was refused on 12th March 2014. He appealed on 26th March 2014. His appeal was allowed in a determination of Judge of the First-tier Tribunal Majid promulgated on 13th November 2014.

3. On 2nd January 2015 Judge of the First-tier Tribunal Pooler found that there was an arguable error of law and granted permission to appeal because it was arguable that Judge Majid had not given adequate reasons for his conclusions; had misdirected himself in giving "paramount" weight to the best interests of the child and had not made it clear on what basis he allowed the appeal.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions

5. The parties were agreed that the determination of Judge Majid erred fatally in law and had to be set aside. Ms Fisher advocated, and Mr Shilliday did not object to my finding, that the decision be remitted to the Secretary of State as it was not in accordance with the law on the basis that the Secretary of State had exercised discretion under his policy with regard to absences under paragraph 276B of the Immigration Rules on a wrong factual basis.

6. I informed the parties that I found that Judge Majid had erred in law and that I would set aside his decision, and would re-make it with a finding that the decision was not in accordance with the law for the reasons set out below.

Conclusions

7. The determination of Judge Majid does not give reasons why the appellant succeeds in his appeal so it is unclear whether the appeal is allowed under a provision of the Immigration Rules or under Article 8 ECHR outside of the Immigration Rules. Judge Majid includes a large amount of irrelevant material in his determination concerning Article 3 ECHR and commenting on the new Article 8 Immigration Rules, and does not make relevant factual findings tied to any legal framework. Whilst reliance is based on the best interests of the appellant's child these are not specified in any way, and Judge Majid errs in law in saying that they should be given "paramount weight" at paragraph 17 of his determination. I therefore find that the determination of the First-tier Tribunal should be set aside in its entirety.

8. The refusal letter of 8th March 2014 examines the appellant's application to remain under paragraph 276B of the Immigration Rules. For the appellant to have ten years of continuous lawful residence for paragraph 276B (i)(a) of the Immigration Rules he has to show that his residence is "continuous residence" as defined in paragraph 276A of the Immigration Rules. At 276A(a)(v) this is defined as meaning that the appellant must not have spent more than 18 months (540 days) absent during the period in question. It is accepted by the appellant that he had exceeded this period of absence from the UK during his period of residence. With his original application he submitted a schedule showing he had been absent from the UK for a total of 675 days in his entire period of residence, from 24th February 2002 to present – a period of 13

years lawful residence. If the ten year period was taken backwards from today's date it would be a lesser number of 582 days absent during this period.

9. In the refusal letter the respondent then rightly went on to consider the Modernised Guidance on Long Residence and Private Life in relation to the exercise of discretion as to whether to treat continuous leave as broken by a period of absence in excess of 540 days. In consideration of the exercise of this discretion the respondent however states that the appellant had had a single absence of 181 days which exceeded six months and therefore counted against him. This is not correct: the appellant's longest absence was for a period of 83 days (his engagement holiday to China between 10th June 2008 and 2nd September 2008). The appellant is a qualified architect working for a high profile architectural organisation, and argues that the respondent should exercise discretion in his favour as 119 days have been spent abroad for his work as an architect (and 35 days were on mandatory study trips) and also because 49 days were spent abroad due to the death of his grandmother. No apparently consideration of these arguments has been made by the respondent although they are made with supporting evidence.

10. In considering the application of the appellant under paragraph 276ADE of the Immigration Rules I also note that the respondent states that the appellant is 50 years old and has been in the UK since March 2001. This is also clearly factually incorrect. The appellant entered the UK on 24th February 2002 and is 31 years old. This is relevant as it means that that the appellant has spent more than a third of his life in the UK rather than just over one fifth.

11. I find that the respondent's decision is not in accordance with the law for want of consideration of the correct facts as set out above in exercising discretion under her policy to disregard absences in excess of 540 days from the UK when assessing continuous residence for paragraph 276B of the Immigration Rules. A new lawful decision should be issued on this point. If the refusal is maintained following a proper and reasoned consideration of this exercise of discretion then the refusal under paragraph 276ADE of the Immigration Rules should also be reviewed in the light of the appellant's correct age and proportion of his life spent in the UK.

Decision

1. The First-tier Tribunal erred in law.
2. The determination of the First-tier Tribunal is set aside.
3. The appeal is remade allowing it to the extent that the matter is remitted to the Secretary of State for a fresh decision on the basis that the current refusal is not in accordance with the law.

No anonymity direction is made.

Signed Date 23rd February 2015

Judge Lindsley
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a partial fee award of £70 as the appellant was entitled to a decision that was in accordance with the law based on the correct facts he had put forward.

Signed Date 23rd February 2015

Judge Lindsley
Deputy Upper Tribunal Judge