Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33946/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination promulgated**
On 1 September 2014 and 21 January 2015	**On 5 February 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL DIGNEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JIN HEE KIM (MS)

Respondent

Representation:

For the Appellant: Mr Duffy, (1 September 2104) and Ms Everett (21 January 2015), Home Office Presenting Officers
For the Respondent: Mr Richardson, (1 September 2104) and Ms Shaw (21 January 2015)

DECISION AND REASONS

1. The respondent, a citizen of South Korea, applied for indefinite leave to remain on the basis of ten years' residence. The application was refused because the appellant concluded that there had been breaks in the continuous residence. A First-tier Tribunal allowed an appeal against the decision. The judge concluded that the first gap was, in law, not a gap at all and the second was one that should not have been treated as a gap and in any event, should she be wrong about those matters she would have allowed the appeal under article 8 of the ECHR. Permission to appeal was granted on all grounds.

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2. The first ground of appeal concerns the first gap. The facts are not in dispute. The respondent had valid leave until 30 June 2004 and so was an overstayer until she left the United Kingdom on 4 July 2004. On 29 August 2004 she re-entered the United Kingdom with valid leave.

3. The relevant law is to be found in paragraphs 276A(a) and 276B(v) of the Immigration Rules. Paragraph 276A(a) reads:

> "continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to be broken where an applicant is absent for a period of six months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return.

4. Paragraph 276B(v) reads:

> the applicant must not be in the United Kingdom in breach of immigration laws except that overstaying for a period of 28 Days or less will be disregarded.

5. The grounds of appeal argue that the respondent falls foul of 276A(a). She was absent from the United Kingdom for a period of less than six months and she did not have leave to remain when she departed. I have to say that I do not understand the judge's reasoning at paragraph 24 of the determination, where she talks of periods of overstaying being disregarded. Here it is not the overstaying alone that breaks the continuous residence but the fact that the respondent did not have leave both on departure and return in connection with her absence.

6. The respondent was granted leave until 31 October 2007 and she did not apply for further leave until 24 July 2008 and she was in fact granted further leave on 16 February 2010 until 31 October 2010. There was a gap of nine months until the application was made and of two years and three months before leave was granted. It is not necessary to consider whether the leave is retrospective[1] as there is in any event a considerable gap. The respondent had argued that the delay was the fault of her solicitors.

7. The judge concluded that the appellant should have exercised her discretion and disregarded the gap as it was the fault of the respondent's solicitors. She therefore (I do not entirely follow the logic as the gap was clearly there) concluded that the respondent could show ten years' continuous residence. The grounds of appeal accept that there was a discretion to overlook gaps, but note that significantly, negligence by a representative is not given as an example of something that may lead a caseworker to exercise a discretion outside the rules.

8. In fact the respondent did consider whether to exercise a discretion outside the rules in the light of what the appellant had said concerning her representatives; see

[1] As the application was out of time the leave was probably not retrospective.

the first whole paragraph on page 3 of the Reasons for Refusal Letter. As the discretion has been considered, and it is a discretion outside the rules, a fresh discretion cannot be exercised unless it can be said that the exercise was not exercised in accordance with the law. That may be the case where the discretion is exercised on a false basis or where the exercise is perverse.

9. The judge said that it was unreasonable of the appellant not to exercise her discretion in the respondent's favour when she had done so previously when an out of time application had been made. It is not clear to me that a discretion was exercised on that occasion, but if it was the situation was quite different as then the appellant clearly met the requirements of the rules. On this occasion she did not and I can see nothing perverse or irrational in the respondent's decision not to overlook the considerable gap in the "continuous residence" and exercise a discretion in her favour outside the rules.

10. The judge erred in law with regard to her treatment of the law with regard to all these matters and on the evidence before her the appeal of the Home Office should have been allowed.

11. The remaining grounds of appeal deal with the judge's treatment of article 8. Given the date of the application the judge should have dealt with family and private life under appendix FM. She did not do so. This would amount to an error of law because any consideration of article 8 outside the rules has to take into consideration why the application failed under the rules as that is clearly relevant as to whether the case is one of those rare cases that need to be considered outside the rules. The matter was so considered in the Reasons for Refusal Letter and I can only conclude that the judge did not consider it because she concluded that there was no chance of success by that path.

12. The grounds of appeal argue that the judge in carrying out the proportionality exercise did not give sufficient weight to the public interest generally or with regard to the public interest in firm immigration control. I have read the determination with great care and I can find no reference to the public interest at all. It cannot be said that the judge carried out a proper balancing exercise and therefore fell into legal error. I have to remake the decision.

13. As the decision had to be remade as at the date of hearing it was necessary to hear up-to-date evidence and none was available on 1 September 2014. The matter was adjourned so that statements could be produced. Unfortunately that did not happen and at the adjourned hearing oral evidence was given by the respondent and Jack Allen, her partner.

14. The situation as in May 2014 is set out in the First-tier Tribunal determination and there is no reason to suggest that it is not true. The respondent has been here since January 2003 and has set up a business known as "Luxe Lash Beauty Salon". She owns a property that she bought in 2008 and was in a relationship with a United Kingdom national that the judge considered to be genuine and subsisting. They have been living together since November 2013.

15. At the adjourned hearing the respondent gave evidence. She said that the statement prepared for the First-tier Tribunal was true. Her business, which started in March 2010, is going very well and she has a contract with *Nicky Clarke,* whom Ms Everett kindly told me was a well known and fashionable hairdresser in Mayfair. She entered into this contract on 3 September 2014. She is an eyelash extension specialist and she sees customers every four weeks. Her tax return for 2013/14 shows profits of over £10,000 and she expects to have profits of over £30,000 for this tax year. I have seen documentation that supports what she says and I was also given the address of both her website and that of *Nicky Clarke.*

16. She plans to get engaged this year and marry next. The reason for the delay is that she wants Jack to meet her parents. This could not happen whilst the appeal is outstanding. They started dating in November 2012 and living together in 2013. She owns a property worth £550,000 with a mortgage of £273,000.

17. In cross-examination she said that she could not carry out her work in Asia; her skill is only relevant to European eyes and not Asian ones. She also paints portraits. Her partner would support an application from Korea for her to join him here.

18. In answer to questions from the Tribunal she said that that she was in no doubt that she would obtain a visa on the basis of her ten years' lawful residence. She thought that she complied with the rules. The agency said that everything was all right as the Home Office had granted the earlier visa and she thought that all would be well.

19. Jack Allen gave evidence. He was paid just under £38,000 a year. They want a further mortgage so that they can buy a house to let and live in one of the properties. Their relationship is very serious.

20. Ms Everett said that she did not dispute that the evidence given by the respondent and her partner was truthful and she accepted that the relationship was subsisting. There was, however, no reason why the respondent could not return to Korea and make an application, supported by her partner, to return.

21. I turn to the question of private and family life. In considering the appellant's claim under article 8 I have reminded myself of the questions set out by Lord Bingham at paragraph 17 of the opinions in the House of Lords decision in Razgar v SSHD [2004] UKHL 27. These are:

    (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life.

    (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

    (3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

22. Whilst it is clear that the appellant enjoys family life with Jack Allen, I do not believe that an ECHR claim can succeed based on that relationship. That is because the Immigration Rules make proper and adequate provision for family life such as this and there is nothing about this case that would justify going outside thee rules.

23. I turn to private life. The respondent has lived in this country since January 2003 when she was twenty. She was involved in study until 2010 and after that she was entitled to work. It is not clear precisely when she started to work but it would appear that it was some time in 2010. I conclude that the respondent does enjoy private life in this country and the answer to questions 1 to 4 is yes. The question is whether removal would be proportionate.

24. As I am remaking the decision I have to consider, in relation to proportionality, the new section 117B of the Nationality, Immigration and Asylum Act 2002, that reads:

> (1) The maintenance of effective immigration controls is in the public interest.
> (4) Little weight should be given to—
> (a) a private life, or
> (b) a relationship formed with a qualifying partner,
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

25. The respondent has spent some twelve years training for and practicing the work that she now carries out. It is clear that she is very good at her work and is successful. Whilst I do not doubt that she will be able to earn a living in Korea it appears that her skills are particularly appropriate to European women and she is likely to be more successful here than in Korea but she is clearly a very enterprising person who is likely to be successful wherever she is. There are strong personal arguments in favour of the proposition that removal would not be proportionate and they hardly need spelling out. I would add that some matters that might support that proposition cannot be relied on. The fact that she has always paid her way and her taxes and would appear to be a useful and productive member of society is not something that she can rely on in this regard. Many people would be useful members of society but that does not give them a right to remain here. Good

conduct may be a *sine qua non* underlying a right to remain but it does not found one.

26. The arguments in favour of removal being proportionate are to be found in section 117B above. It is clear that the respondent overstayed on one occasion for four days and on another she made an out of time application. Her leave expired on 31 October 2007 and she applied for further leave on 24 July 2008. She was therefore here unlawfully for nearly nine months. I accept that the respondent was not personally to blame for the second of these breaches. She does not dispute the first but that is for a very modest amount of time. When one looks at the picture as a whole we are dealing with a person who is attempting to conform with the Immigration Rules and do things by the book. The respondent's immigration history is not perfect but it is not seriously bad and I accept that she did not intend to breach the rules.

27. I turn to the giving of little weight to a private life that is established when the person is in the United Kingdom unlawfully or when their immigration status is precarious. The private life established here is, in reality, the establishing by the respondent in work here, and perhaps also the purchase of a house. That happened in the period between 2010 and the present time and during that time her immigration status was precarious, in that there was no certainty or even likelihood that she would be allowed to stay permanently.

28. However, I am satisfied that the respondent, during that period, honestly believed that she was likely to be allowed to remain in this country, and her belief was not, in the light of the facts as she believed then to be, irrational. I reach that conclusion on the basis of her evidence that is set out in paragraph 18, above. I believe that an honest and rational belief that one's immigration status is not precarious is a factor that can allow a judge to mitigate the force of section 117B in this regard. I agree with Ms Everett that an applicant cannot evade responsibility for errors of an agent, but where that is where the responsibility lies. An applicant can rely on her good faith, if that is accepted, as it is here.

29. A proportionality exercise is always difficult as one is balancing something that is abstract, namely the public interest, against something that is real and tangible, namely the life and experience of an individual, and like is not measured against like. Here I conclude, in the light of what I have said above, that the Public Interest that is clearly a serious factor, is outweighed by the personal matters that militate in favour of removal not being proportionate.

30. It follows that the original judge made an error of law. I substitute an identical decision allowing the appeal

The appeal is dismissed

Designated Judge Digney
Judge of the Upper Tribunal 30 January 2015