Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07215/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th February 2015 and 15th May 2015	**On 22nd May 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DR SEONGHYE MOON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Karngong (Norbert & Co) on 20th February.
Unrepresented on 15th May
For the Respondent: Ms A Everett on 20th February. Mr P Duffy on 15th May
(Senior Home Office Presenting Officers)

DECISION AND REASONS

1. This matter first came before me in the Upper Tribunal on 20th February 2015 when I decided as follows:-

(i) This is an application to the Upper Tribunal by the Secretary of State in relation to a Determination and Reasons of Judge Gurung-Thapa promulgated on 3rd September 2014. The Appellant in the case is a South Korean citizen born on 30th March 1968. She had made an application for indefinite leave to remain in March 2013 purely on Article 8 grounds, acknowledge that she did not meet any of the requirements of the Immigration Rules. The Immigration Rules of course include those that deal with Article 8 in Appendix FM and paragraph 276ADE as it applies to private life.

(ii) When she decided the appeal Judge Gurung-Thapa set out the chronology of the Appellant's time in the UK and in that she has made an error because she talks at paragraph 3 about the Appellant arriving in the UK on 8th September 1999 with leave to enter as a student. That it seems was taken from the Respondent's bundle which is in itself in error. I am told that the true picture is the Appellant came first to the UK in February 1995 with a student visa valid until August 1995 to study English and take Cambridge English exams. She did that and she returned to Korea after she had successfully completed that course and before the expiry of her visa. So she was here for under six months. She then returned to Korea and came back to the UK in March 1997, again as a student to prepare for the IELTS exams at Cambridge Centre for English Studies and because her mother had become terminally ill she did not pursue her original plan to study in the UK but returned to Korea.

(iii) She then came to the UK for a third time in April 1998, again as a student to study an MA in English language teaching at Kings College London and she got that MA in December 2000.

(iv) From there the First-tier Tribunal Judge seems to have got the chronology correct because the Appellant arrived on 8 September 1999 with leave valid until October 2000. That was subsequently extended to October 2003. She then made an unsuccessful application as a work permit holder and she left the UK in March 2004. She then came back again in October 2006 with leave until October 2010 extended until August 2011 and then extended again as a Tier 1 Post-Study Worker until March 2013 and it is then that she made the current application. The First-tier Tribunal Judge in paragraph 9 referred to the appellant having established a private life during eighteen years living in the UK. Clearly the Appellant has not lived for eighteen years in the UK. She had two short visits in 1995 and again in 1997. Then she came in 1999 but there was a two year break when she went back to South Korea coming again in 2006. So there were thirteen years pus two short periods.

(v) However the main error by the First-tier Tribunal Judge is the way in which she has approached the appeal. In her Determination and Reasons which start at paragraph 7 she indicated first of all where the burden of proof lies and the standard of proof. She has then noted that the Appellant accepts she does not meet the requirements of paragraph 276ADE, has no claim to a family life in the UK. She then proceeds straightaway to set out the Appellant's history particularly the history of study and work, and a consideration of Section 117 inserted into the 2002 Nationality, Immigration and Asylum Act 2002 by Section 19 of the Immigration Act 2014. Nowhere in the Determination and Reasons does she refer at all to the requirement mentioned in **Gulshan**, **Edgehill** and **Nagre** and confirmed by the Court of Appeal very recently in the case of **Singh EWCA Civ 74**. That makes it quite clear that only where there are circumstances not dealt with by the Immigration Rules is it appropriate to consider Article 8 under the ECHR. The total failure of the judge to recognise that is an error of law such that the decision must be set aside.

(vi) Having said that the factual matters, save for the error I have indicated already, seem to be correct, unchallenged and can be preserved. The question for me to deal with in re-deciding the appeal in the Upper Tribunal is whether it is appropriate to consider this matter outside the Immigration Rules. What is it about the factors in

this case which make it arguable to do so, and if I do consider it outside the Immigration Rules on what basis should it be allowed?

(vii) Relevant to that question is why, when she made her application the Appellant could not bring herself within the Immigration Rules as a worker or a student. She tells me that she has now started employment and indeed had that offer of employment by the time she had her First-tier hearing. It is also relevant therefore to my consideration whether if she made an application today as a worker she would meet the requirements of the Rules.

(viii) It became apparent that we would be unable to deal with those matters at the hearing today and so the case is adjourned to be relisted before me at Field House to deal purely with Article 8 and in particular with reference to the matters I have indicated.

(ix) To that end I direct the Appellant's representatives to file a statement with supporting evidence as to why she did not or could not make an application as a worker or student in March 2013, and why it is on the evidence to support the fact that she would comply with the Rules if she made the application today. I would also like to have a very good chronology of dates when she came, when she went, what she was doing, and I would also like to a skeleton argument.

(x) On that basis the case today is adjourned".

2. The Appellant did not comply with the directions given. In addition to being given orally in court the Directions were sent to the Appellant and her representatives on 12th March along with the Notice of Hearing for the resumed hearing on 15th May.

3. On 29th April the Appellant's representatives wrote to the Tribunal stating that the Appellant was receiving treatment for anxiety and depression and was unfit for work until 22nd May and asking for an adjournment of the hearing on 15th May. Upper Tribunal Judge Rintoul refused the adjournment application. He said that while reference was made to "statements of fitness to work" issued by the Appellant's doctor, these had not been attached. Further, the fact that the Appellant was unable to work and/or being treated for anxiety and depression was not a sufficient basis to conclude she was unfit to attend court. That was communicated to the Appellant's representatives on 12th May 2015.

4. While the doctor's notes arrived they added nothing and there was no renewed adjournment application.

5. On the morning of 15th May neither the Appellant nor her representatives attended. A telephone call was made to the Tribunal that the representative was in hospital and the Appellant was not attending as she was not feeling well. I caused my clerk to contact the representatives to indicate that, the adjournment having been refused; I intended to deal with the appeal and would stand the matter back until later in the day. The telephone was unanswered. No proper explanation having been

given, the adjournment having been refused and my very specific directions having not been complied with I proceeded to deal with the resumed hearing in the Appellant's absence.

6. The Appellant relied solely on Article 8 under the ECHR. She cannot meet the requirements of the Immigration Rules, Appendix FM or paragraph 276ADE. She has adduced no additional evidence as to what circumstances there are in her case warranting a consideration of Article 8 outside the Immigration Rules. She has no family in the UK. Her private life has consisted of studying and working. Although on 20th February she indicated she had a job, no further evidence has been adduced. There is nothing unusual or remarkable about her circumstances that indicate that she should be permitted to remain when she does not meet the requirements of the Immigration Rules. There has been a considerable amount of case law on this point culminating in Singh [2015] EWCA Civ 74 and more recently SS (Congo) & Ors [2015] EWCA Civ 387 which indicate that this Appellant cannot succeed.

7. The Secretary of State's appeal to the Upper Tribunal is allowed such that the First-tier Tribunal Tribunal's decision is aside and in redeciding Dr Moon's appeal against the Secretary of State's decision it is dismissed.

No anonymity direction is made.

Signed Date 20th May 2015

Upper Tribunal Judge Martin

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 20th May 2015

Upper Tribunal Judge Martin