



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/20738/2016

THE IMMIGRATION ACTS

Heard at Field House

Decision and Reasons Promulgated

On 24th July 2018

On 6th September 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Mehul Subhashchandra Halari

(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs De Souza, instructed by PGA Solicitors.

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was granted permission to appeal a determination of First-tier Tribunal Judge Eban, which dismissed the appellant's appeal, on

human rights grounds, against a decision of the Secretary of State dated 12th August 2016.

2. The appellant had applied for Indefinite Leave to Remain under paragraph 276B of the Immigration Rules and on human rights grounds. The appellant entered the UK on 6th September 2006 as a student and his leave was extended under various categories until 31st August 2017. The Secretary of State referred to the provisions on continuous residence under paragraph 276A of the rules, and, noted that the appellant was absent from the United Kingdom from 26th April 2011 until 7th November 2011, a total of 194 days which he had stated was for comparative study for his degree dissertation.

Application for Permission to Appeal

3. The application for permission was founded on five grounds
 - (i) the appellant relied, before the First-tier Tribunal, on extensive submissions and on a similar unreported case where the Upper Tribunal had allowed the appellant's appeal, but this was not addressed in the judge's decision
 - (ii) the judge erred in her construction of paragraph 276A(a) with reference to 'continuous residence'. On the proper interpretation of the above provision there was no breach of continuous residence because the rule states "*for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of six months or less at any one time*". The rule was silent as to whether, if there was residence outside the UK for more than six months, that will or must be considered as having broken continuous residence. Under the subsections of the rule there is no reference to absence from the United Kingdom of more than six months. As such the period of 14 days in excess of the six-month period did not break continuous residence. The same was found in the upper Tribunal's decision which had been referred to in submissions.
 - (iii) the judge referred to the discretion available to the respondent in her guidance but failed to appreciate that there were exceptional circumstances and examples given in the respondent's guidance were not exhaustive. The judge erred in failing to consider and exercise the discretion herself. This was relevant not only to the appeal under 276B but also to the appeal under article 8 ECHR.
 - (iv) the judge stated that she did not consider that there were exceptional circumstances in the case, and she applied the wrong test and not that of proportionality in line with the 'Razgar' approach

(v) given the appellant's education and employment in his contribution to the United Kingdom the judge failed to have regard to the positive benefits of the appellant's presence in the UK in accordance with paragraph 35 of UE (Nigeria) v SSHD [2010] EWCA Civ 975

4. The grant of permission was made on the following terms

'the scope of construction to be placed upon the relevant Rule arguably differs or further analysis was required by the judge taking into account the decision appearing at page 101 of the appellant's bundle. The proportionality exercise has arguably been affected by the weight attached to the factors to be evaluated in the context of the content of the Rule and the scope of its application to the circumstances of the appellant. The scope of the respondent's guidance arguably falls to be interpreted differently in relation to the question of the scope of the rule.'

Conclusions

5. Neither of the cases relied on in the submissions to the First-tier Tribunal were reported decisions.

6. The Practice Directions for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (as amended 2014) at paragraph 11 set out the following guidance:

11 Citation of unreported determinations

11.1 A determination of the Tribunal which has not been reported may not be cited in proceedings before the Tribunal unless: -

(a) the person who is or was the appellant before the First-tier Tribunal, or a member of that person's family, was a party to the proceedings in which the previous determination was issued; or

(b) the Tribunal gives permission.

11.2 An application for permission to cite a determination which has not been reported must: -

(a) include a full transcript of the determination;

(b) identify the proposition for which the determination is to be cited; and

(c) certify that the proposition is not to be found in any reported determination of the Tribunal, the IAT or the AIT and had not been superseded by the decision of a higher authority.

11.3 Permission under paragraph 11.1 will be given only where the Tribunal considers that it would be materially assisted by citation of the determination, as distinct from the adoption in argument of the reasoning to be found in the determination. Such instances are likely to be rare; in particular, in the case of determinations which were unreportable (see

Practice Statement 11 (reporting of determinations)). It should be emphasised that the Tribunal will not exclude good arguments from consideration but it will be rare for such an argument to be capable of being made only by reference to an unreported determination.

11.4 The provisions of paragraph 11.1 to 11.3 apply to unreported and unreportable determinations of the AIT, the IAT and adjudicators, as those provisions apply respectively to unreported and unreportable determinations of the Tribunal.

11.5 A party citing a determination of the IAT bearing a neutral citation number prior to [2003] (including all series of "bracket numbers") must be in a position to certify that the matter or proposition for which the determination is cited has not been the subject of more recent, reported, determinations of the IAT, the AIT or the Tribunal.

11.6 In this Practice Direction and Practice Direction 12, "determination" includes any decision of the AIT or the Tribunal.

7. It is not clear that the Tribunal gave specific permission to the citation of the unreported decisions and if so the first ground of complaint does not assist the appellant. **AD (reporting criteria - unreported cases) Somalia [2011] UKUT 00189 (IAC)** confirmed that it was likely to be rare that an unreported decision would offer significant assistance as guidance to judges in other cases. Evidently the judge did not consider that she would be materially assisted by those unreported cases.
8. That said, it is argued that separate and extensive submissions were made on the point regarding the construction of the rule under Paragraph 276A and which echoed the arguments which found favour in the unreported decisions.
9. Pausing there, I set out Rule 276A of the Immigration Rules relating to long residence in the United Kingdom :-
'276A. For the purposes of paragraphs 276B to 276D and 276ADE (1).
 - (a) *"continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 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, but shall be considered to have been broken if the applicant:*
 - (i) *has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here;*
or
 - (ii) *has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or*

- (iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or
- (iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or
- (v) has spent a total of more than 18 months absent from the United Kingdom during the period in question’.

10. Essentially, the submission expressed by the representative and in the unreported decisions was that the ‘Rule is silent as the situation of an applicant who complies fully with the Immigration Rules but spends more than six months, but less than eighteen months out of the UK’. Further, the Immigration Rule contains a discretion and should be construed ‘sensibly’.
11. I do not accept in the light of the Practice Direction set out above that the judge was in error in failing to engage with the unreported decisions. Nevertheless, I address the arguments made. In the first unreported decision (IA/15717/2014), it was concluded that the appellant had sound academic reasons for being out of the UK for a period just over six months and the decision allowing the appeal was upheld. It was held that further to **BD (work permit ‘continuous period’)** [2010] UKUT 418 where there is no relevant guidance from the Secretary of State as to how to approach the situation in such cases, the Tribunal should interpret the Rules in a sensible fashion. In fact, there is guidance on the Long Residence rule. Specifically, in IA/15717/2014, the judge held that ‘*the Rule does import a discretion. Regard can properly be had to the reason for the absence and the strength of the person’s ties to the UK*’. The reasoning, however, rather glossed over the actual construction of the rule in favour of reliance on the correct exercise of discretion with reference to the guidance (rather than the rule). There was however, no close analysis and for the reasons given below I find the Rule does not import a discretion.
12. The rule is that there should be continuous residence for an unbroken period:
“‘continuous residence’ means residence in the United Kingdom for an unbroken period’.
- That is the underlying rule. There is added to that basic rule that
‘for these purposes a period shall not be considered to have been broken where an applicant is absent from the UK for a period of 6 months or less at any one time’.

That sets out the position in relation to periods of absence of 6 months or under. The underlying rule is not disturbed by that qualification and, therefore for the purposes of construction, the rule is not 'silent' because it is axiomatic that the rule, of unbroken residence, should be complied with. That is consistent with interpreting the Rule in a sensible fashion. In this instance the applicant accepts that he was absent from the United Kingdom for a period of over six months albeit for a matter of 14 days.

13. Nor does this rule import a discretion. It spells out clearly when periods of absence will or will not be characterised as having broken leave. The element of discretion referred above is, in my view, merely the discretion that the Secretary of State retains in all decision making. As such the Judge Eban's interpretation at [11] and [12] that the absence for '*a period of six months or more at any one time, as in this case, the period is broken*' must be correct.
14. In effect counsel's submissions before the First-tier Tribunal and before me, relied on the Long Residence Guidance which stated that it may be appropriate to exercise discretion over excessive absences in compelling or compassionate circumstances. That guidance relates to the wider discretion of the Secretary of State, outside the Rules and as identified above. As the judge stated

'the Secretary of State did consider the reasons for the appellant's absence and undertook an informal interview and that she was aware that the purpose of the absence was academic and was to complete a comparative study of software houses'.
15. The appeal was made on human rights grounds. At the hearing before me the parties were reminded that the appeal rights had been restricted since the introduction of the Immigration Act 2014. It appeared that both unreported decisions related to appeals prior to the amendments. An appeal right under Section 84 of the Nationality Immigration and Asylum Act 2002, now no longer includes a ground that the decision is not in accordance with the immigration rules or that the decision is not in accordance with the law. Nor is there a ground of appeal on the basis that the person taking the decision should have exercised differently a discretion conferred by the immigration rules. As indicated I do not accept that there is any discretion conferred by the immigration rules under paragraph 276A.
16. How was the judge to approach the question of the exercise of discretion? Mrs de Souza submitted that it was open to the judge to exercise her discretion whilst Ms Isherwood argued that **Ukus (discretion: when reviewable)** [2012] UKUT 00307 (IAC) applied. I do not accept Mrs de Souza's submission, that is because the appeal does not encompass the exercise of a discretionary power. In this appeal the Tribunal has no power or jurisdiction to intervene in that decision in relation to the

Immigration Rules. There is no appeal on that basis. The most that can be achieved is consideration of the Policy or Guidance as a relevant factor under Article 8.

17. With regard to the unreported decision of IA/00094/2015 that does not assist the appellant here. The Upper Tribunal Judge in that appeal noted that the judge was unaware of the Policy Guidance and *'he [the judge] erroneously directed himself that there was no such discretion'*. The UTJ specifically stated at [11] of that decision that

'On the basis of the Guidance the respondent's caseworkers do have a discretion and the judge's finding to the contrary is wrong'.

18. That is a different matter. The caseworker does have a discretion but as noted in that decision the Guidance specifically stated (and recorded at [8] of IA/00094/2015)

'Absences of more than 180 days in each consecutive 12-month period before the date of application (in all categories will mean the continuous period has been broken. However, you may consider the grant of indefinite leave to remain (ILR) outside the Rules if the applicant provides evidence to show the excessive absence was due to serious or compelling reasons'.

19. In this instance the judge found that the respondent had engaged with the reasons given by the appellant for his excessive absence. The appeal was allowed by the UTJ on the basis that it was found not to be in accordance with the law. That avenue of appeal is no longer available to the appellant as I have explained. I note the UTJ did not allow the appeal outright and declined to make a decision on Article 8 grounds.

20. At paragraph 13 Judge Eban found

'Mr Karim referred me to the Long Residence Guidance dated 3 April 2017 which confirms that if the applicant has been absent from the UK for more than 6 months in one period, the application should normally be refused. The guidance states that it may be appropriate to exercise discretion over excess absences in compelling or compassionate circumstances, for example where the applicant was prevented from returning to the UK through unavoidable circumstances. It is clear from the refusal letter that the respondent considered the reasons for the appellant's absence and undertook an informal interview, and that she was aware that the purpose of the absence was academic and was to complete a comparative study of software houses. On the basis of this information the respondent exercised her discretion and decided to refuse the appellant's application'.

21. The judge found, therefore, that the Secretary of State had exercised her discretion with regards her guidance or policy and it was clearly not accepted that she had been shown to have departed from that guidance. I do not find that failure to refer to IA/00094/2015 was a material error by Judge Eban.

22. Ground (iii) of the application for permission is thus misconceived. Had the Secretary of State exercised the discretion in favour of the appellant, the appellant could still not have been successful *under the rules* because there is no discretionary element within the immigration rule. It is not within the gift of the judge to consider it in those terms. It is incumbent upon the judge to consider the rules as an expression of the position of the Secretary of State and, in this matter the appellant not only failed under the rules but also discretion was not exercised in his favour outside the rules.
23. That, however, is not the end of the matter because the task for the judge was to factor the considerations regarding the application of the Policy on Long residence into the Article 8 proportionality exercise.
24. The judge, in this instance, addressed the question of the immigration rules and then proceeded to consider article 8 citing **Razgar**, and whether refusal would result in unjustifiably harsh consequences. The judge made a detailed assessment of the best interests of the child born in 2015 but found the child should be with her parents in view of her age and adaptability. There was no challenge on that basis. The judge clearly enlisted the test of 'proportionality' and reference to exceptional circumstances was merely a short hand. Throughout the decision it is clear as to the approach the judge took which was that of whether the decision was proportionate [21].
25. Mrs de Souza submitted that the Secretary of State had not appreciated that the appellant was not merely exercising a choice as to whether to study in the UK or India but was obliged to undertake his comparative study in India and she referred to the permission being granted by the University. Ms Isherwood responded that nothing in the evidence indicated that the appellant was forced to undertake his research for this length of time in India.
26. The appellant before me stated that he was a student and could not afford to return to the UK when he was in India merely to satisfy the rules, but that evidence seems something of a shift and fresh evidence cannot sustain criticism of the judge who recorded at [21(4)], that
- 'There were no exceptional or compassionate circumstances which prevented the appellant from returning during his 194 [days] study absence abroad. He was simply unaware that a period of absence in excess of six months would break his continuous leave'* [21(4)].

A careful reading of the decision demonstrates that the judge did consider the relevant factors, noted the appellant was undertaking a comparative study, and did not confine herself to the examples in the policy. The judge therefore did consider independently the factors regarding the 'absence' and was entitled to attach the weight to the factors that she did. Nothing

in the decision suggests a departure from the Long Residence Guidance which I have read carefully.

27. The judge made reference to the 28-day leeway given with regard to a break in lawful residence but that is a different concept. An applicant must still have achieved the 10 years continuous residence. It is clear that the judge factored this into her balancing exercise at [21]. The judge also factored in that the appellant *did not meet* the requirements of the rules, was not a burden on taxpayers, and spoke English fluently. I am not persuaded, on the facts of this case, there was a failure to follow UE. That authority held that

'while this factor of public value can be relevant in the way which I have described, I would expect it to make a difference to the outcome of immigration cases only in a relatively few instances where the positive contribution to this country is very significant, perhaps of the kind referred to by Lord Bridge in Bakhtaur Singh. The main element in the public interest will normally consist of the need to maintain a firm policy of immigration control, and little will go to undermine that'.

Nothing in the decision of Judge Eban suggests that she failed to recognise and factor in all the relevant facts as presented by the appellant. Although there may have been no negative effect of the appellant's presence, a very significant contribution to the United Kingdom was not evidenced.

28. On the reasoning above I find no material error of law by Judge Eban in her approach to the factors in this case, the construction of the rules and the appellant's human rights. The decision will stand. The appellant's appeal is dismissed.

Signed *Helen Rimington*

Date 31st August 2018

Upper Tribunal Judge Rimington