



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/24541/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 18<sup>th</sup> June 2018

Decision & Reasons Promulgated  
On 14<sup>th</sup> August 2018

**Before**

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

**Between**

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

**And**

Mr. NURDAULET SAGYNKYK  
(NO ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the appellant: Ms A Everett, Home Office Presenting Officer.

For the respondent: Ms J.E. Norman, Counsel, instructed by Sterling and Law Associates LLP

**DETERMINATION AND REASONS**

**Introduction**

1. Although it is the Secretary of State who is the appellant in these proceedings for convenience I will hereinafter refer to the parties as they were in the First-tier Tribunal.

2. The appellant is a national of Kazakhstan, born on 23 September 1994. On 6 October 2016, he applied for indefinite leave to remain based on long residency. This was refused on 15 October 2016. That refusal forms the basis of the present proceedings.
3. The appellant initially came to the United Kingdom as a student with leave from 20 November 2010 until 26 February 2011. He obtained various other leaves as a student until he made the present application. His application was considered under paragraph 276 B which relates to 10 years continual lawful residence. It was also considered under paragraph 276 ADE. The refusal was on the basis that he had not been continuously resident, and his absences were outside that allowed under the rules. It was also felt that he would not face very significant obstacles reintegrating into life in Kazakhstan where his family remain.

### The First Tier Tribunal

4. His appeal was heard by a First-tier Tribunal Judge Sethi on 18 October 2017 at Taylor house. In a decision promulgated on 24 November 2017 the appeal was allowed on article 8 grounds. The judge recorded that the appellant primarily came to the United Kingdom for medical treatment and was subsequently diagnosed as having juvenile arthritis. Meantime, he pursued his education here and integrated into life in the United Kingdom. It was recorded that he had always lived in the United Kingdom lawfully and that his education and medical treatment had been privately funded. Explanations were given for his absences from the United Kingdom.
5. The judge at paragraph 22 correctly noted that the grounds of appeal were limited to human rights considerations. The effective date was the date of hearing, with the burden of proof upon the appellant to show an interference with his protected rights. If this were established, then it was for the respondent to justify this.
6. The judge found the evidence of the appellant and his grandmother wholly credible. The judge referred to the medical evidence provided and the details of the appellant's education, both of which had been paid for privately.
7. The judge found as a fact that the appellant's residence commenced at the latest by April 2005. It was accepted on behalf of the appellant that continuous residence could not be demonstrated for 10 years, even from this earlier date. This was because the continuity had been broken when the appellant left the United Kingdom on 20 November 2010. Furthermore, his total absences exceeded the permitted 540 days.
8. The judge referred to the respondent's published guidance on the exercise of discretion in respect of access absences where there were compelling or

compassionate circumstances. The judge concluded the respondent had not followed this guidance and highlighted the fact that the appellant had been a minor for the most part of his residence. The judge found a strong private life established.

9. In assessing the proportionality of the decision, the judge had regard to the provisions of section 117 B. The judge noted that the appellant speaks English and there was no evidence of any reliance upon public funds. Whilst here lawfully the judge considered his status as being precarious as understood from the case law.
10. The judge also referred to the provisions of paragraph 276 ADE (v), pointing out that by September 2015 the appellant had spent over half his life in the United Kingdom albeit there were breaks in his residence.
11. At paragraph 51 the judge concluded the break in his continuity of residence was unintentional and caused by exceptional circumstances beyond his control. He had developed a substantial private life and had become strongly integrated. The judge found he would encounter real challenges seeking to establish himself in Kazakhstan. Bearing in mind his history and medical circumstances the judge concluded that in the circumstances the respondent's decision was disproportionate.

### The Upper Tribunal

12. The respondent obtained permission to appeal on the basis the judge's proportionality assessment was flawed. The judge had referred to the respondent as failing to follow its guidance in respect of his absence. However, when the appellant left the United Kingdom on 20 November 2010 he did not have existing leave when he departed. It was also contended the judge failed to have adequate regard to the immigration rules when considering the proportionality of the decision. It was contended that there was no evidence of the unavailability of appropriate medical treatment in Kazakhstan.
13. At hearing Ms. Norman submitted that the respondent's grievance was that the judge did not consider that when the appellant left United Kingdom on 20 November 2010 his leave had expired, and this meant the proportionality consideration was flawed. However, she said that the judge did take cognizance of this and referred to it at paragraph 5 of the decision. The judge referred to the appellant having left the United Kingdom on 20 November 2010; his previous leave having expired on 31 October 2010.
14. Ms. Norman acknowledged that the appellant could not meet the exact letter of paragraph 276 B because there was an absence of 182 days, the permissible absence being 180 days. She made the point that on that occasion it was the

respondent's error which caused his absence. The respondent subsequently acknowledged this in an administrative review. Furthermore, when he left on 20 October 2010 he exceeds the permissible period by a matter of days. By way of explanation for his remaining his grandmother, who was his link here had suffered a stroke. This had been accepted by First-tier Tribunal Judge Sethi.

15. Ms. Norman made the point that the judge was not considering whether the rules were completely met but was considering the appeal based on article 8. The judge clearly noted the absence exceeded 20 days as referred to in paragraph 5 of the decision. That the rules were not met was also acknowledged by the judge at paragraph 29. Consequently, the judge was clear that the rules were not met and had due regard to this fact.
16. Ms. Norman submitted that the respondent's disagreement was with the outcome rather than the judge's reasoning. She describes the decision as one worthy of a textbook example and referred to the findings and conclusions stated in paragraph 22 onwards. The judge there reiterated that the immigration rules are generally compatible with human rights. Relevant credibility findings were made in respect of the evidence of the appellant and his grandmother. The judge found that the earliest the residence began was in 2005, there being insufficient evidence in respect of the earlier periods claimed from November 2003.
17. At paragraph 29 the judge acknowledged that continuous residence for 10 years could not be demonstrated taking either the start date of April 2005 or the later date of 6 October 2006 taken by the respondent. This was because of the situation when the appellant left on 20 November 2010. It was recorded he left United Kingdom when he had no remaining leave, and this caused the break in the continuity of his residence. Furthermore, the overall calculation demonstrated he had been absent more than the permissible 540 days.
18. Ms. Norman said the judge considered whether the respondent had properly considered the issue of discretion and found she had not. This is referred to at paragraph 32 of the decision. The judge then considered there were sufficient factors to require consideration under article 8 and references made to MF Nigeria v SSHD [2013] EWCA 1192. The judge found the existence of a strong family life established; proportionality was considered. The judge then went on to consider the factors in section 117 B and at paragraph 38 referred to the ability to speak English and being financially independent as neutral factors. From paragraph 39 onwards the judge set out why it would be disproportionate to expect the appellant to leave. Ms Norman went on to say the judge acknowledge that article 8 was not a general dispensing power and the decision clearly demonstrated that adequate regard for the rules was had.

19. Ms Everett acknowledge that the case being presented to the judge had strength. She contended that the judge erred at paragraph 33 in finding the respondent had not applied her own guidance. This is on the basis that the appellant's leave had expired before his departure on 20 November 2010 and so the question of discretion in respect of his absence for a period more than 18 month did not arise. The grace period did not mean the appellant had leave when he left. However, she acknowledged this was a narrow point when matters were looked at in the round.

### Consideration

20. I am grateful to both representatives for the sensible way they have approached this appeal. Ms Everett has acknowledged that the point taken by the respondent is a narrow one. Ms. Norman has clearly set out examples of how the judge did have regard to relevant factors in the proportionality assessment. She has described the decision as being worthy of a textbook.

21. Principally, on behalf of the respondent it is submitted that the judge was wrong to say the respondent had not exercised its own guidance because this only applied when the person left with leave. This was not the situation here. However, this is a very narrow point as acknowledged by Ms a Everett.

22. Having been taken through key aspects of the decision by Ms. Norman my conclusion is that the judge clearly had due regard to the overall proportionality of the decision. There was no significant factual dispute. It was acknowledged that the strict letter of the rules could not be met. The judge acknowledged that the rules were meant to be article 8 compliant. The judge also acknowledged that article 8 is not meant to be a general dispensing power. It is clear from the decision that the judge analysed the facts and made appropriate relevant findings. The judge correctly understood the rules and considered the aspects not met. The judge found a strong family life established. The strict application of the respondent's guidance was only part of the proportionality assessment. The judge had due regard to the factors in section 117 B. This was a very balanced and carefully prepared decision. Ultimately, I find no material error of law demonstrated.

### Decision

No material error in the decision of First-tier Tribunal Judge Sethi has been established. Consequently, that decision allowing the appellant's appeal based on article 8 shall stand.

*Francis J Farrelly*

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY