Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12356/2019 ('V')

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th November 2020	**On 30th November 2020**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MR ILLYA GARKAVYY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: *Ms J Norman,* instructed by Sterling & Law Associates
For the respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 9th November 2020.

2. Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to the hearing being via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Talbot (the 'FtT'), promulgated on 5th February 2020, by which he dismissed the appellant's appeal on human rights grounds against the respondent's refusal on 5th July 2019 of the appellant's application for indefinite leave to remain based on long residence (10 years) and on the basis of respect for his private life in the UK, for the purposes of article 8 of the European Convention on Human Rights ('ECHR').

4. In essence, the appellant's claims involved the following issues: whether the respondent had failed to follow her own policy on long residence; whether there were very significant obstacles to his integration in his country of origin, Ukraine; and whether the refusal of his application for indefinite leave to remain was either necessary in the legitimate aims pursued; or the interference with his right to respect for his private life was proportionate.

5. It was not in dispute that the appellant, a Ukrainian national, had been absent from the UK for substantially longer than the 18 months specified in paragraph 276A(a)(v) of the Immigration Rules. He had been absent from the UK for 900 days, during the period in question. The appellant relied on the fact that he had entered the UK as a child student aged 12; that he had chronic medical conditions which required his return on a regular basis to Ukraine; and he argued that absences which related to his need to return to Ukraine, and a period in France when his residence permit had been stolen, should be should be disregarded. The core point taken against the appellant by the respondent related to his absence from the UK. His medical treatment had been scheduled for his school holidays, when he was due to return to the Ukraine in any event and therefore the respondent decided not to exercise her discretion to waive the absences. For the purposes of his private life, the respondent concluded that there were not very significant obstacles to his integration in Ukraine, where he had lived for the majority of his life, returned to regularly, to be with his parents, and he had a high level of education which he could use, given he was now and adult. He could maintain friendships and connections in the UK from Ukraine.

The FtT's decision

6. In a succinct, but clearly reasoned decision, the FtT noted the appellant's absences from the UK and analysed the evidence in relation to his medical condition, but did not accept that most of the absences were unavoidable (§14), referring also to periods of absence in France, the USA and other third countries. The FtT concluded that the appellant did not meet paragraph 276B and, applying the well-known authority of SSHD v Kamara [2016] EWCA Civ 813, agreed that there were not very significant obstacles to the appellant's integration; or exceptional circumstances. Having made a proportionality assessment, the appellant's private life did not outweigh the public interest in immigration control. The FtT therefore dismissed the appellant's appeal.

The grounds of appeal and grant of permission

7. The appellant lodged grounds of appeal, which are essentially as follows:

7.1. Ground (1) – the FtT erred in concluding that the appellant did not meet the requirements of paragraph 276B of the Immigration Rules. His circumstances were exceptional under the respondent's policy. Refusal of leave to remain could not be for a legitimate aim, as the appellant had lived in the UK since 2009 and had paid international student fees;

7.2. Ground (2) – the FtT erred in concluding that refusal of leave to remain was proportionate; the FtT was not entitled to rely on the lack of explanation or justification for excess absences and instead should have considered a 'fair balance' in the proportionality assessment. The FtT erred in concluding that unfairness was of no relevance and even if precarious, the appellant's private life should have had weight attached to it. The FtT should have focussed on the appellant's private life in the UK, rather than in Ukraine, for which there was limited evidence of obstacles to reintegration.

8. First-tier Tribunal Judge Osborne regarded it as at least arguable that in the context of the issue of proportionality, the FtT had erred in failing to take into account the respondent's policy on continuous residence. The grant of permission was not limited in its scope.

The hearing before me

The appellant's submissions

9. In the hearing before me, the appellant referred first of all to the skeleton argument produced by Ms Norman. The absences which ought to have been discounted took the appellant's absences to below 18 months or 540 days, to 526 days. The respondent's analysis of the absences in the refusal letter was perfunctory and it was impossible to determine how the respondent had exercised her discretion. The FtT had failed to provide adequate reasons; failed to consider properly the respondent's policy om continuous residence and failed to consider adequately the appellant's right to respect for his private life under Article 8 of the ECHR and a proper 'Razgar' assessment (see: R (Razgar) v SSHD [2004] UKHL 27.

10. In terms of the respondent's long residence policy, this had stated as follows:

> *"If the applicant has been absent from the UK for more than 18 months in total, the application should normally be refused. However, 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."*

11. The FtT had then gone on to state that this was a power exercised outside the Immigration Rules and was not reviewable by reference to the Rules. That was plainly unsustainable in the circumstances where there was no longer a right of appeal under the Rules and all appeals would be by reference to article 8 of the ECHR. A Tribunal could not formally allow an appeal under the Rules, but if an appellant met the Rules, that would be positively dispositive of his or her human

rights appeal, (see the well-known authority of TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109).

12. Where, as is here, the consideration of the policy in the refusal letter was concise to the point of being 'cavalier,' it was even more important that the FtT reach their own conclusion on the application of the policy. The FtT was bound to have considered the policy affecting a Convention right and in that regard a decision maker who departed from guidance erred in law, as confirmed most recently in the case of: SF and others (Guidance, post–2014 Act) Albania [2017] UKUT 00120 (IAC). In particular, that case was authority for the proposition that the FtT ought to take the FtT's guidance into account if it pointed clearly to a particular conclusion.

13. Next, I needed to consider the effect of the policy. Crucially, there had been no dispute as to the credibility of the appellant's condition. He had an allergy to ragweed and it was necessary for him to spend a considerable time at a health resort. The FtT had accepted that this was a decision taken "*wisely*" (§14). Indeed, there had been numerous references in the medical evidence, which I will not repeat for the purposes of conciseness, as to doctors' recommendations for the appellant to have treatment at a resort in the Ukraine. There was clear evidence, based on medical advice, which had been unchallenged, for specific treatment in Ukraine.

14. The FtT had erred in conflating a test of "*compelling or compassionate circumstances"* with the example given in the guidance of "*unavoidable circumstances*". That was merely one subset of the "compelling and compassionate circumstances" test and there were numerous possible circumstances where there may be circumstances which were avoidable, but the circumstances remained compassionate or compelling. I needed to consider here, in particular, a child with persistent health problems and there was no need in this particular case to consider whether alternative treatment had been sought in the UK and the FtT was not in a position to counter the expertise of a treating physician. Moreover, the respondent had not taken this specific point in the refusal letter so that the appellant should have been on notice of the issue.

15. Next, it was argued, in terms of the appellant's human rights, that the FtT had leapt straight to consideration of "proportionality," without considering whether any interference with the appellant's acknowledged private life was necessary, for the pursuit of the legitimate aim, namely the economic wellbeing of the UK and protection of rights and freedoms for others. The appellant had made a substantial net financial contribution to the UK through payment of tuition fees.

16. In terms of her oral submissions, Ms Norman emphasised that the reasoning in the respondent's refusal letter had been brief in relation to the analysis of the appellant's absences. Pages [11] to [12] of the guidance, suggested a sequence of analysis as follows:

> *"Things to consider when assessing if the absence was compelling or compassionate are:*
>
> - *for all cases you must consider whether the individual returned to the UK within a reasonable time once they were able to do so*

- *for overall absences of 540 days in the ten year period:*
    - *you must consider whether the long absence (or absences) that pushed the applicant over the limit happened towards the start or the end of the ten year residence period and how soon they would be able to meet that requirement*
    - *if the absences were towards the start of the period, the person may be able to meet the requirements in the near future and so could be expected to apply when they meet the requirements*
    - *however, if the absences were recent, the person would not be able to qualify for a long time, and so you must consider whether there are particularly compelling circumstances."*

17. In contrast, the rationale in the refusal letter gave no indication that the guidance had been properly considered.

The respondent's submissions

18. In her Rule 24 response, the respondent asserted that the FtT had correctly referred himself, at §14, to the respondent's guidance. The appellant's absences clearly exceeded the permitted limit, but the FtT had gone on to consider the compelling circumstances at §14 to 16, as well as the issue of whether there were very significant obstacles to the appellant's integration; and the proportionality assessment; and there was no error of law in the FtT's decision. The simple point here was that in terms of "unavoidable circumstances," the appellant had returned home for medical treatment, in periods when he was scheduled to return home for the school holidays anyway. He could not otherwise meet the private life requirements of the Immigration Rules and the refusal of indefinite leave to remain was clearly not disproportionate.

Discussion and conclusions

19. First, I accept Ms Norman's submission, noting SF and others (Guidance, post–2014 Act) Albania, that the respondent's guidance is a matter that could and should be considered in the context of a human rights appeal, if it points to a particular outcome in the instant case. Clearly, if a decision were in breach of the respondent's own guidance it would be difficult, if not impossible, to see how that decision could be proportionate, for the purposes of a 'Razgar' analysis. I further accept the submission that if an individual met the Immigration Rules, that would be dispositive of a human rights appeal for the purposes of a proportionality assessment: see the well-known authority of TZ, already referred to.

20. The crux of the first ground was therefore whether the FtT had impermissibly conflated and considered only one element of the "*compelling or compassionate circumstance*s" guidance in the appellant's case. On the one hand, the guidance refers expressly to "*compelling and compassionate circumstances*"; and at §14 of his decision, the FtT refers to "*unavoidable circumstances*". However, §14 has to be read in the context of §13, which referred expressly to the test of compelling or compassionate

circumstances, and to be read fairly, §14 must be read in that context. The crux of the FtT's analysis on this issue is in the following part of §14:

> "*… The appellant's absences (which were far in excess of the maximum permitted) generally took place during the summer holidays which he spent with his parents in Ukraine. His family wisely decided to spend parts of this period staying at a health resort with their son but no evidence has been provided to show that he could not equally have attended a health resort in the UK. Essentially he spent summer holidays in Ukraine because that is where his family resided. Only a small part of his absences such as when he missed the start of the winter term due to catching pneumonia and possibly when he had his travel document stolen in France could be described as 'unavoidable.'*"

21. What the FtT was entitled to take into account was the fact that the appellant was scheduled to return home for the school holidays, regardless of his medical treatment. This was consistent with the respondent's refusal decision of 5th July 2019, at page [59] of the respondent's bundle, which included the following:

> "*You have stated that some of your absences were for the purpose of undergoing medical treatment. You have also stated that your medical treatment was scheduled for times during official school breaks when you were due to return to your home country. As a result it has been decided not to exercise discretion with regards to absences in excess of 540 days*."

22. The FtT inferred, and was unarguably entitled to infer, that the appellant would have gone home to Ukraine during the school holidays, in any event. While the FtT did not criticise and positively agreed as 'wise' the appellant's parents' decision to schedule medical treatment during the school holidays, the reason for spending time in Ukraine was because his family lived there. In those circumstances, the FtT was entitled to conclude, in the context of compelling or compassionate circumstances, that although the medical treatment, as advised, was to be provided in Ukraine, that causatively was not the reason for the appellant being in the Ukraine. He was in the Ukraine because, as a child student, he was scheduled to be at home with his parents, who live in Ukraine.

23. In those circumstances, even where the FtT had regarded the respondent's discretion within the policy or guidance as not reviewable by the Tribunal under the Rules, he went on to consider, in the alternative, the application of that very policy at §14. I conclude that the FtT did not err in deciding that the appellant's circumstances did not meet the requirements of the respondent's guidance; or that the FtT impermissibly narrowed the test in that guidance, by failing to consider wider compelling or compassionate circumstances beyond those which were 'unavoidable'. The simple point was that the FtT found that the appellant was in Ukraine "*<u>because</u> [my emphasis] that is where his family resided*." The repetition of the phrase "*unavoidable*" in §14 does not undermine the FtT's reasoning. The FtT's reference to an exercise of discretion as not being "*reviewable*" in the context of a statutory appeal (§14), is not material to this appeal, where he clearly considered the respondent's exercise of her discretion in the alternative.

24. The second substantive ground was in relation to the assertion that the FtT had failed to consider the necessity of interference with the appellant's rights in the interests of the economic well-being of the UK or other legitimate aims and had instead gone on to consider proportionality, in the context of the Razgar analysis. I do not accept that the FtT erred in concluding that the maintenance of effective immigration control is the public interest (§17) as this is clearly a reflection of section 117B(1) of the Nationality, Immigration and Asylum Act 2002. The FtT was unarguably entitled not to dwell in any on those legitimate aims and instead focus, as cases of this nature often do, on the proportionality of the refusal of the appellant's application. There was, in my view, a succinct, but sufficient analysis of private life by the FtT at §16 to 17, with a correct initial consideration through the lens of paragraph 276ADE(1)(vi), followed by a wider consideration of article 8 rights. The FtT specifically considered that the appellant was a "*wholly responsible and honest person*" (§17) but his conclusion that the refusal of indefinite leave to remain was proportionate was sufficiently reasoned and discloses no error of law, such that the FtT's decision is unsafe and should be set aside.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

Signed *J Keith* Date: 17th November 2020

Upper Tribunal Judge Keith