JR/6053/2019 (V)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review
Decision Notice

The Queen on the application of SASSAN HESSAMIAZAR

Applicants

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Canavan

Application for judicial review: substantive decision

1. This application considers the requirements for Indefinite Leave to Remain as a Tier 2 (General) Migrant. In particular, the calculation of the "continuous period of five years lawfully in the UK" and the extent of "allowable absences" during the qualifying period.

2. The applicant seeks to challenge the respondent's Administrative Review decision dated 09 September 2019 and by implication the underlying decision dated 05 August 2019 to refuse Indefinite Leave to Remain (ILR) on grounds of five years continuous lawful residence in the UK as a Tier 2 (General) Migrant.

Background

3. The applicant entered the UK in 2010 as a Tier 4 (General) Student Migrant. He was granted further leave to remain as a Tier 1 (Post Study Work) Migrant until 03 March 2014. The applicant applied for leave to remain as a Tier 2 (General) Migrant on 03 March 2014 to work as a project manager for a newly registered UK company called Mayfair Industry Ltd. In a letter from Mayfair Industry to the Companies Registration Officer dated 15 October 2013 the Director of the company stated that he intended to appoint the applicant as the authorised manager of a branch in Erbil, Iraq. He would deal with all the company administration in that office. On 16 April 2014 the applicant was granted leave to remain as a Tier 2 (General) Migrant valid until 11 April 2017.

4. The applicant made an in-time application for further leave to remain on the same basis. A letter from the applicant's employer to the respondent dated 21 March 2017 explained that the applicant was essential to the survival of the company. The focus of the company's work was in Erbil. The applicant's employer went on to explain his role.

> "The main aim of the company in the first initial months of establishment has been to register an office in Erbil, Kurdistan Regional Government of Iraq, and start to get projects over there. To do so, the company employed Sassan Hessamiazar, for all right reasons, which the last 3 years proved to be truly the case. He was granted Tier 2 visa, which we would like to request to be extended.
>
> He is a first person of contact who represents interest of my company outside of the UK and manages projects in Erbil/Iraq. My decision on choosing this field of work and the region to work, of Erbil/Iraq, is based on his vast knowledge and experience in construction particularly in oil/gas field to manage projects. He not only knows the technical part of the work and knows relevant experts and companies to contact, but have the knowledge of the region, such as language and culture. So, without him I will not be able to run the business ...
>
> At the beginning I thought that I would dispatch him to Erbil/Iraq for the first few months in order to set up the office and register it over there. After a few months, having him over there, while he was doing and improving the company in every aspect beyond our expectations, however unforeseen conditions and unstable environment did unfold many challenges. The situation required him to stay there for longer than initially planned. I did not have anyone else in his capacity in both professional ability and personal strength and trustworthiness which I could trust to hand over the office and projects to."

5. The applicant's employer went on to explain some of the difficulties that led to the need for his continued presence in the Erbil office beyond the period initially anticipated. His employer concluded by saying that because of those problems the company still needed the applicant to be present in the Erbil office until they got to a point where they could establish a trusted team there. The applicant would then be based mainly in London and would only have to travel to Erbil when needed.

6. The applicant's employment contract dated 01 April 2016 stated that he would work at the London and Erbil office, but that his presence in the Erbil office "would be predominant until that office is fully settled and a local office manager" was appointed. The respondent was satisfied that the applicant met the requirements for further leave to remain as a Tier 2 (General) Migrant. Further leave was granted until 16 April 2019.

7. On 19 March 2019 the applicant applied for ILR as a Tier 2 (General) Migrant. A letter from his employer dated 12 March 2019 was in similar terms to the previous letter. It explained the essential role that the applicant played in the operations in Erbil. Now that the company was well established it was

planning more ambitious projects "connecting the UK's businesses and investments to the ones in Erbil/Iraq." The letter went on to say:

> "The core reason for employment of Sassan Hessamiazar was the need for him to represent the company in Erbil and carry out all duties regarding projects over there, very heavy full-on responsibility which required his presence over there undoubtedly. Now that we have established ourselves over there and overcome many obstacles and hard works, thanks to him and his skills and experience, he is needed more than ever; therefore we are looking forward to continue with his employment for years to come, for much bigger projects, more involving UK's businesses and investments in Erbil/Iraq. These new plans would require him to be more present in London and to travel more frequently between London office and Erbil/Iraq office.
>
> …
>
> Sassan Hessamiazar has not only contributed to the success [and] achievements of the company, but has been the core reasons for that; and he will remain so, as we wish to continue his employment, for him to carry on his great work."

8. The written representations made by the applicant's legal representatives accepted that he "exceeded the allowed amount of days outside of the UK" in the relevant five year period, but asserted that the Home Office policy stated that absences that were for a reason consistent with the original purpose of entry to the UK were "allowable absences". The letter went on:

> "Your records will show that our client was offered an employment as a Project Manager with Mayfair Industry Ltd to help to establish a subsidiary office in Erbil, Iraq and to carry out the construction projects there. Mayfair Industry Ltd obtained their sponsorship status to employ Mr Hessamiazar for that specific role. The company secured an extension of their sponsorship status and our client was granted further leave to remain as a Tier 2 Migrant to continue his duties as a Project Manager. As a first person of contact in Erbil, our client has represented the best interests of his employer there. As a result of his vast experience and high education (it should be noted that our client completed his Master Degree course in Management in the UK) he greatly contributed to the growth and expansion of Mayfair Industry Ltd. It is therefore evident that our client absences are directly linked to his permitted employment and therefore are allowed as confirmed in the guidance above. Our client was granted his Tier 2 Migrant status on the basis that he will mainly work outside of the UK as it was evident from the beginning that the constructions projects would take place in Erbil, Iraq."

9. The respondent refused the application in a decision dated 05 August 2019. She was not satisfied that the applicant met the requirements of paragraph 245HF(b) and paragraph 245AAA of the immigration rules for five years continuous lawful residence in the UK as a Tier 2 (General) Migrant. The application indicated that the applicant was absent from the UK for 327 days in the first qualifying year, 366 days in the second (presumably including a leap year), 344 days in the third, 356 days in the fourth and 192 days in the fifth qualifying year. The respondent concluded that the applicant remained outside the UK for more than 180 days during each consecutive 12 month

period. The applicant failed to show that the absences were for a sufficiently compelling or compassionate reason to justify exercising discretion.

10. The applicant applied for Administrative Review of the decision. The grounds for Administrative Review pointed out that the applicant was granted leave to remain as a Tier 2 (General) Migrant to work as a project manager for Mayfair Industry Ltd largely based in Erbil, Iraq. The evidence produced with the applications for leave to remain made this clear. The grounds referred to the respondent's guidance "Indefinite Leave to Remain; calculating continuous period in UK" (06 July 2018), which stated under the heading "Allowable Absences" that "Absences for a reason consistent with the original purpose of entry to the UK" were permitted in relation to applications made under the Tier 2 (General) scheme. The respondent was wrong to apply the test of whether there were sufficiently compelling or compassionate reasons to exercise discretion instead of considering whether the time spent outside the UK was an allowable absence.

11. The Administrative Review decision is dated 09 September 2019. The respondent found that the caseworker was correct to conclude that the applicant remained outside the UK for more than 180 days during a consecutive 12-month period. She acknowledged that the guidance stated that absences must be for a reason consistent with the original purpose of entry to the UK or for a serious or compelling reason. However, the decision went on to say:

> "… It is noted that the guidance also confirms that, "*absences must be consistent with, or connected to, the applicant's sponsored or permitted compliment or the permitted economic activity being carried out in the 11K -for example, business trips or short secondments*". It is additionally noted that the guidance states, "*time spent away from the UK for extended periods, particularly if the business no longer exists, should not be allowed*", and that "*Absences due to employment, whether related to the applicant's job in the 11K or not, count towards the 180 maximum each year.*"."

12. In light of other aspects of the guidance the respondent concluded that the caseworker did not make a mistake in assessing the absences. The respondent maintained the decision to refuse the application with reference to paragraph 245HF(b) and 245AAA of the immigration rules.

13. The applicant filed an application to bring judicial review proceedings on 05 December 2019. Upper Tribunal Judge Coker granted permission following a renewed oral application on 07 February 2020.

The applicant's case

14. The applicant argues:

    (i) During the hearing it was accepted that the applicant does not meet the strict requirements of the immigration rules.

(ii) Mr Halim argued that the respondent's policy guidance "Indefinite Leave to Remain; calculating continuous period in UK" (Version 18.0, 29 March 2019), under the heading "Allowable Absences", provides for absences if they are for a reason consistent with the original purpose of entry to the UK. He called this the "primary provision". When the applicant applied for leave to remain as a Tier 2 (General) Migrant the evidence made clear that he would be employed by Mayfair Industry Ltd as a project manager who primarily worked in Iraq. The primary provision provided for allowable absences of over 180 days. It was argued that this would provide a rational outcome and was consistent with the "coherence of the scheme".

(iii) The respondent's analysis misread the policy. The respondent wrongly applied sections of the policy guidance which did not apply to the applicant. To read the policy in the way contended by the respondent would lead to the primary provision being elided and would create a perverse outcome.

The respondent's case

15. The respondent argues:

(i) The respondent lawfully concluded that the applicant did not meet the requirements of the immigration rules because the applicant was absent from the UK for periods of over 180 days: *R (RN) v SSHD (paragraph 245AAA)* [2017] UKUT 76 referred.

(ii) The meaning of the rules should be discerned objectively from the language used not from guidance documents: *R (Ahmed) v SSHD* [2019] EWCA Civ 1070 referred.

(iii) In any event, the applicant's argument is based on a misreading of the relevant guidance. The guidance does not permit absences of more than 180 days even if the absence is consistent with the original purpose of entry to the UK. The guidance made clear that (a) no more than 180 days absence from the UK is allowed in a consecutive 12 month period; (b) absence must be for a reason consistent with the original purpose of entry to the UK or for a serious or compelling reason; and (c) absence due to employment, whether related to the applicant's job in the UK or not count towards the 180 day maximum each year. When read as a whole, the policy makes clear that absences, in whatever category, can be for no more than 180 days in a consecutive 12 month period.

(iv) Paragraph 245AAA(a)(i) and paragraph 245AAA(c) are separate requirements. The first sets out the 180 day limit and makes provision for exceptions that would not be counted towards the 180 day calculation. The second is a freestanding requirement to show that absences were allowable.

Legal Framework

16. Paragraph 245HF sets out the requirements for Indefinite Leave to Remain as a Tier 2 (General) Migrant. For the purpose of these proceedings, the relevant part is:

> "To qualify for indefinite leave to remain as a Tier 2 (General) Migrant or Tier 2 (Sportsperson) Migrant, an applicant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.
>
> Requirements:
>
> …
>
> (b) The applicant must have spent a continuous period of 5 years lawfully in the UK, of which the most recent period must have been spent with leave as a Tier 2 (General) Migrant or Tier 2 (Sportsperson) Migrant ..."

17. Paragraph 245AAA sets out general requirements for applications for Indefinite Leave to Remain under the Points Based System and defines what is meant by a "continuous period of 5 years lawfully in the UK".

> "245AAA
>
> The following rules apply to all requirements for indefinite leave to remain in Part 6A and Appendix A:
>
> **(a) References to a "continuous period" "lawfully in the UK" means, subject to paragraph (e), residence in the UK for an unbroken period with valid leave, and for these purposes a period shall be considered unbroken where:**
>
> (i) the applicant has not been absent from the UK for more than 180 days during any 12 month period in the continuous period, except that:
>
> (1) any absence from the UK for the purpose of assisting with a national or international humanitarian or environmental crisis overseas shall not count towards the 180 days, if the applicant provides evidence that this was the purpose of the absence(s) and that their Sponsor, if there was one, agreed to the absence(s) for that purpose; and
>
> (2) for any absences from the UK during periods of leave granted under the Rules in place before 11 January 2018, the applicant must not have been absent from the UK for more than 180 days during each consecutive 12 month period, ending on the same date of the year as the date of the application for indefinite leave to remain; and
>
> (3) for any applicant who has or has had leave as a Tier 2 (General) migrant, where the Certificate of Sponsorship Checking Service entry shows that they were sponsored

to work in any of the occupations in table 1 of Appendix J when the absence occurred, any absence from the UK for the purpose of research activities overseas shall not count towards the 180 days, if the applicant provides evidence from their sponsor showing that:

(a) research was the purpose of the absence(s); and

(b) the sponsor, agreed to the absence(s) for that purpose; and

(c) the absence(s) directly related to their Tier 2 employment in the UK; and

(4) for any applicant who has or has had leave as a Tier 1 (Exceptional Talent) Migrant, where they were endorsed by the Royal Society, the British Academy or the Royal Academy of Engineering, any absence from the UK for the purpose of research activities overseas shall not count towards the 180 days, if it occurred while they held this leave.

(ii) the applicant has existing limited leave to enter or remain upon their departure and return, except that:

(1) where that leave expired no more than 28 days prior to a further application for entry clearance which was made before 24 November 2016 and subsequently granted,

(2) where, on or after 24 November 2016, the applicant makes a further application for entry clearance during the currency of continuing limited leave which is subsequently granted, or

(3) where, on or after 24 November 2016, the applicant makes a further application for entry clearance within 14 days of the applicant's leave expiring and the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application for indefinite leave to remain, why the application could not be made during the currency of continuing limited leave, or

(4) where a successful application for entry clearance is made following the refusal of a previous application to which (2) or (3) otherwise applies, and the application was made within 14 days of that refusal (or the expiry of the time-limit for making an in-time application for administrative review, or any administrative review or appeal being concluded, withdrawn or abandoned or lapsing), that period spent without existing leave, pending the applicant's re-entry into the United Kingdom, shall be disregarded; and

(iii) the applicant has any current period of overstaying disregarded where paragraph 39E of these Rules applies; and

(iv) the applicant has any previous period of overstaying between periods of leave disregarded where: the further application was made before 24 November 2016 and within 28 days of the expiry of leave; or the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.

(b) [deleted]

…

(c) Except for periods where the applicant had leave as a Tier 1(Investor) Migrant, a Tier 1(Entrepreneur) Migrant, a Tier 1(Exceptional Talent) Migrant or a highly skilled migrant, any absences from the UK during the relevant qualifying period must have been for a purpose that is consistent with the applicant's basis of stay here, including paid annual leave, or for serious or compelling reasons." [emphasis added]

18. The relevant policy guidance relating to the calculation of continuous periods of residence in the UK was "Indefinite leave to remain: calculating Continuous period in UK" (Version 18.0) 29 March 2019. It is necessary to quote large parts of the guidance to put the section relied on by the applicant in context.

"**How to determine if the continuous period is spent lawfully in the UK**
This section tells you how to decide if the continuous period is spent lawfully in the UK.

The applicant must not have spent any of their time in the UK without valid leave to enter or remain.

You must refuse indefinite leave to remain (ILR) if the applicant does not meet the continuous period requirement set out in the Immigration Rules.

The continuous period requirement is the minimum amount of time which a migrant must spend in employment or being active in the UK economy before being eligible to qualify for ILR.

You must assess if the applicant has spent the required minimum time period in the UK, as well as whether they meet all of the other requirements for ILR set out in the Immigration Rules.

When you calculate if an applicant has met the continuous period requirement, you must examine how many days absence from the UK they have accrued.

The applicant must provide reasons for these absences in all categories except bereaved partner. The majority of applicants are also required to provide evidence of the absence. Evidence is not required from applicants in the following categories:

- Innovator (Appendix W)
- Tier 1 (Investor) (paragraph 245EF)
- Tier 1 (Entrepreneur) (paragraph 245DF)
- Tier 1 (Exceptional talent) (paragraph 245BF)

The Secretary of State retains discretion under the Immigration Act 1971 to grant leave outside the rules in exceptional cases.

Definition of the UK
For immigration purposes, 'UK' means Great Britain and Northern Ireland only.

It does not include the Crown dependencies of the:

- Channel Islands
- Isle of Man

Time spent in the Crown dependencies may count towards the continuous period.

Details of categories of leave that can be included can be found in the Common Travel Area guidance. Where the applicant held leave in a category not included, you must treat any time spent in the Crown dependencies category as an absence from the UK.

Any time spent working off shore on the UK continental shelf, beyond the 12 mile zone defined as UK territorial waters, does not count toward the continuous qualifying period for ILR, for example on ships or oil rigs. You must count this as an absence from the UK.

Absences which will not break continuity in the continuous period
This section tells you when absences will not break continuity when calculating if the continuous period requirement has been met.

Period between the issue of entry clearance and entering the UK
The period between entry clearance being issued and the applicant entering the UK may be counted toward the qualifying period. Any absences between the date of issue and entry to the UK are considered an allowable absence. This period will count towards the 180 days allowable absence in the continuous 12-month period. The applicant does not need to provide evidence to demonstrate the reason for delayed entry.

If the delay is more than 180 days, you can only include time after the applicant entered the UK in the continuous period calculation.

…

180 whole days absence
No more than 180 days' absences are allowed in a consecutive 12-month period.

You must only include whole days in this calculation. Part day absences, for example, less than 24 hours, are not counted. Therefore if the applicant had a single absence during the 12 month period and arrived in the UK on day 181, the period would not exceed 180 days.

…

Allowable absences

Absences must be for a reason consistent with the original purpose of entry to the UK, or for a serious or compelling reason, in the following categories:

- **representative of an overseas business**
- **domestic workers in private households**

And in the following sub categories of the points-based system:

- …
- **Tier 2 (General)** [emphasis added)
- …

The applicant must provide evidence as explained below.

For the categories below, there is no requirement to give a reason for absences if they do not exceed 180 days in a consecutive 12 month period:

- Innovator
- Tier 1 (Exceptional talent)
- Tier 1 (Entrepreneur)
- Tier 1 (Investor)
- UK ancestry
- Retired person of independent means
- Points-based System dependants
- Appendix W dependants

Absences linked to reason for being in the UK — evidential requirements

For all other categories, absences must be consistent with, or connected to, the applicant's sponsored or permitted employment or the permitted economic activity being carried out in the UK for example, business trips or short secondments.

This also includes any paid annual leave which must be assessed on a case by case basis and should be in line with UK annual leave entitlement for settled workers. For example, the statutory leave entitlement is 5.6 weeks' paid holiday each year, which for workers who work a 5 day week is 28 days' paid leave. However, many employers provide 25 or 30 days' paid leave a year, plus bank holidays.

Short visits outside the UK on weekends or other non-working days are consistent with the basis of stay and do not break the continuity of leave. You must count such absences towards the 180 day limit.

Evidence in the form of a letter from the employer which sets out the reasons for the absences, including annual leave, must be provided. Where short visits outside the UK, on weekends or other non-working days have taken place, evidence from the employer should be provided to confirm the applicant's normal working pattern and show the absences occurred during a non-working period.

However, time spent away from the UK for extended periods, particularly if the business no longer exists, should not be allowed.

Employment outside of the UK
If the absences are connected to other employment outside the UK, which demonstrates the UK employment is secondary, these are not permitted absences, and the continuous period requirement is broken. Absences due to employment, whether related to the applicant's job in the UK or not, count towards the 180 day maximum each year.

Continuation of lawful leave during absences from the UK
…

On or after 24 November 2016

The continuous period is maintained if the applicant either:

- leaves the UK with valid leave, applies for entry clearance before their leave expires, is granted and re-enters the UK using that entry clearance
- applies for new entry clearance within 14 days of their leave expiry date, one of the circumstances below applies, their application is granted and they reenter the UK using that entry clearance.

…

Exceptional cases
This section tells you about the exceptional circumstances when you can grant the applicant indefinite leave to remain (ILR) when their continuous leave is broken.

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

Serious or compelling reasons will vary but can include:

- serious illness of the applicant or a close relative
- a conflict
- a natural disaster, for example, volcanic eruption or tsunami

The applicant must provide evidence in the form of a letter which sets out full details of the compelling reason for the absence and supporting documents, for example medical certificates or evidence of disruption to travel arrangements.

Absences of more than 180 days in any 12-month period for employment or economic activity reasons are not considered exceptional.
…

Where an applicant has had a break in their leave while outside of the UK, the entry clearance officer is unlikely to have considered the reason, as any break would be irrelevant to the entry clearance application. As a result, you must consider the reason as part of the ILR application. The

SET(O) form requests that migrants provide evidence demonstrating why previous applications were submitted while they did not have valid leave. Each break must be decided on its merits. There is further information on this type of consideration in the overstayer guidance.

If an applicant's leave expires whilst they are outside the UK and they apply for new entry clearance more than 14 days after their previous leave expires, for any reason, the continuous period is broken and leave is not aggregated, The continuous period would also be broken where the gap is within 14 days but you do not consider the reasons provided to be sufficiently compelling.

Breaks of leave and allowable absences
For any acceptable breaks of leave, the period spent outside of the UK will count towards the 180 days allowable absence. This includes any time:

- while their leave remains valid
- after the expiry of their leave
- while the entry clearance application was under consideration
- before they entered the UK once entry clearance had been granted"

Decision and reasons

19. It is necessary to understand the scheme of the immigration rules first with reference to the language of the relevant rules, construed against the overall purpose of the scheme, in order to place my assessment of the respondent's policy in proper context.

Leave to enter or remain as a Tier 2 (General) Migrant

20. The category of Tier 2 (General) Migrant forms part of the Points-Based System for leave to enter and remain in the UK contained in Part 6A of the immigration rules. Paragraph 245H of the immigration rules states that the purpose of Tier 2 is to enable UK employers to recruit workers from outside the EEA to fill a particular vacancy that cannot be filled by a British or EEA worker.

21. A Tier 2 (General) Migrant applying for leave to remain in the UK under paragraph 245HD of the immigration rules must have a minimum of 50 points under paragraphs 76 to 79D of Appendix A, 10 points under Appendix B, and 10 points under Appendix C. The 'Attributes' contained in Appendix A relate to requirements to pass the Resident Labour Market Test, for a Certificate of Sponsorship and an appropriate salary. Appendices B and C contain 'English language' and 'Maintenance' requirements.

22. The purpose of Tier 2 (General) is to grant leave to enter or remain for a person to work for a UK company. It is reasonable for the respondent to presume that a person who is working for a UK company as a Tier 2 (General) Migrant is

likely to spend most of their time living and working in the UK otherwise they would not need to apply for leave to enter or remain. However, nothing in paragraph 245H, the requirements contained in paragraph 245HD or the Appendices appear to require an applicant to work in the UK for a specified period as a condition for leave to enter or remain in this category.

23. Paragraph 245HE(a) states that a Tier 2 (General) Migrant will be granted leave for a period of five years (245HE(a)(ii)) or up to six years in certain circumstances (245HE(a)(iii)). Again, nothing in the conditions relating to the length of leave contained in paragraph 245HE(d) require an applicant to work in the UK for a specified period.

Indefinite leave to remain as a Tier 2 (General) Migrant

24. Paragraph 245HF sets out the requirements for ILR as a Tier 2 (General) Migrant. One of the core requirements contained in paragraph 245HF(b) is that an applicant must have spent "a continuous period of 5 years lawfully in the UK". First, like other provisions for ILR contained elsewhere in the immigration rules, there is a specified period of continuous lawful residence. Second, in contrast to the requirements for limited leave to enter or remain as a Tier 2 (General) Migrant there is a requirement for the person to have spent the continuous period in the UK.

25. Paragraph 245AAA of the immigration rules sets out general requirements for ILR applications under the Points-Based System. Paragraph 245AAA(a) makes clear that references to a "continuous period" "lawfully in the UK" means residence "in the UK" for an unbroken period with valid leave. The paragraph goes on to list circumstances in which the period shall be considered unbroken even though there might appear to be a break of continuous residence in the UK.

26. In *R (on the application of RN) v SSHD (Paragraph 245AAA)* [2017] UKUT 76 the Upper Tribunal considered the construction of a previous version of paragraph 245AAA(a)(i) introduced on 13 December 2012 (HC 760). By the date of the decision challenged in this case the wording of paragraph 245AAA(a)(i) had been amended by the Statement of Changes to the immigration rules HC 309, which was introduced on 11 January 2018. Although there were several additions, the main elements of the wording of paragraph 245AAA(a) remained broadly the same. In *RN* the Upper Tribunal found that an absence of more than 180 days in a relevant 12 month period would fail to satisfy the requirement of the rules. In order to make sense of the rules the term 'residence' in paragraph 245AAA(a) equated to 'presence' in the UK.

27. I am surprised that neither party referred to the subsequent decision of the Court of Appeal, which considered the background to the scheme contained in paragraph 245AAA in detail: see *R (on the application of Roli Nesiama and others) v SSHD* [2018] EWCA Civ 1369. The Court of Appeal upheld the Upper

Tribunal's decision in *RN*. In assessing the intention of paragraph 245AAA as it stood at the date of the decision in that case the court found that the purpose of the rule was to set a maximum number of days absence from the UK and that the policy was consistent with the construction of paragraph 245AAA [38-39]. I did not find it necessary to invite further submissions from the parties because, aside from the fact that they should have been aware of the decision, it does no more than provide general support for the conclusion that I have come to regarding the scheme in place at the date of the decision in this case.

28. The amended paragraph 245AAA(a)(i) retained the core requirement to spend no more than 180 days outside the UK in any 12 month period and introduced a more detailed series of exceptions. For the purpose of this case, there are two relevant provisions.

No more than 180 days outside the LIK

(i) Paragraph 245AAA(a)(i) contains a requirement that a person with leave to enter or remain as a Tier 2 (General) Migrant must not spend more than 180 days outside the UK in any 12 month period if they intend to apply for ILR under paragraph 245HF, even if they have had continuous lawful leave for five years. I will describe this as the "no more than 180 days outside the UK" requirement.

Paragraphs 245AAA(a)(i)-(iv) set out specific exceptions. Consistent with the primary provision contained in paragraph 245AAA(a) the wording of the exceptions continued to emphasise the 180 day limit on absences from the UK. Where the specified exceptions apply the absence will not count towards the 180 day limit. Nothing in the wording of those provisions expressly permit absences of more than 180 days, equally, nothing would appear to obviate a person who has spent, for example, more than 180 days outside the UK for the purpose of assisting with an international crisis from relying on paragraph 245AAA(a)(i)(1) to say that their period of residence was unbroken because it did not count towards the 180 day limit. The wording and intended effect of the exceptions is somewhat unclear, but it is not necessary to analyse this part of the rules in detail because none of the exceptions or periods to be disregarded contained in paragraphs 245AAA(a)(i)-(iv) apply in this case.

Allowable absences

(ii) Paragraph 245AAA(c) contains a separate but related requirement which applies to Tier 2 (General) Migrants but not to other specified categories. A Tier 2 (General) Migrant must also show that any absences from the UK during the relevant qualifying period was for one of two permitted reasons. I will describe this as the "allowable absences" requirement. The absence must have been for a purpose that is consistent with the applicant's basis of stay or for serious or compelling reasons. The reference to "any" absences indicates that all absences must be for one of the two allowable reasons unless the exceptions to the no more than 180 days outside the UK requirement apply.

29. The provisions contained in paragraph 245AAA must be read with the core requirement to spend a continuous period of five years lawfully "in the UK". The additional provisions contained in paragraph 245AAA recognise that a person might spend time outside the UK as part of their work for a UK company or during periods of annual leave. Alternatively, serious or compelling circumstances might arise whereby a person might need to leave the UK during the five year qualifying period e.g. serious illness of the applicant or a close relative. However, nothing in the wording of paragraph 245AAA(c) disapplies the no more than 180 days outside the UK requirement let alone contains any positive wording to suggest that an applicant is permitted to spend more than 180 days outside the UK in those circumstances without breaking the continuous period of lawful leave "in the UK".

30. When the provisions contained in paragraphs 245HF(b) and 245AAA are read together a Tier 2 (General) Migrant who has spent periods of time outside the UK must satisfy all the relevant requirements. First, the applicant must have spent "a continuous period of 5 years lawfully in the UK". Second, the applicant must not have been absent from the UK for more than 180 days during any 12 month period (subject to the exceptions or periods to be disregarded). Third, any absence is not an allowable absence unless it was for one of the two permitted reasons.

Overview of the Tier 2 (General) immigration rules

31. The scheme contained in the immigration rules indicates that the purpose of leave to enter or remain as a Tier 2 (General) Migrant is to allow UK companies to recruit workers from outside the EEA if a vacancy cannot be filled by a British or EEA worker. Nothing in the immigration rules appears to limit the period of time that a person must work in the UK once they have been granted limited leave to enter or remain. However, there is an underlying presumption, disclosed by the subsequent requirements for ILR, that a Tier 2 (General) Migrant will spend most of his time working in the UK. The scheme is subject to limits on the number of Tier 2 (General) sponsors and a limit on the length of time that a person can be employed by a UK company with limited leave to enter and remain.

32. In contrast to the requirements for limited leave, it is an explicit requirement for ILR as a Tier 2 (General) Migrant to have "spent a continuous period of five years lawfully in the UK". Paragraph 245AAA seeks to define what is meant by the phrase. A person must show that they meet the no more than 180 days outside the UK requirement (245AAA(a)(i)), and if there are absences, they must also meet the allowable absences requirement (245AAA(c)). If a person does not qualify for ILR as a Tier 2 (General) Migrant after five years the scheme appears to leave an applicant and his employer in a difficult position because there seems to be no provision for a further grant of limited leave to remain (245HE(a)).

Policy guidance

33. Having considered the scheme for Tier 2 (General) Migrants with reference to the wording of the immigration rules, I turn to the Home Office policy guidance "Indefinite leave to remain: calculating continuous period in UK" (Version 18.0) 29 March 2019, which forms the central plank of the applicant's case.

34. Mr Halim accepted that the applicant did not meet the strict requirements of the immigration rules. He relied on a single sentence of the 19 page guidance, which he described as the "primary provision" in support of his argument. Under the heading " Allowable Absences" the first line states:

> "Absences must be for a reason consistent with the original purpose of entry to the UK, or for a serious or compelling reason.. ."

35. Mr Halim argued that, despite having absences that exceeded 180 days for each and every 12 month period during the five year qualifying period, the plain wording of the policy entitled the applicant to ILR because the absences, for whatever period of time, were permitted by this wording. He asserted that this interpretation would lead to a rational outcome and was consistent with the coherence of the scheme.

36. The analysis of the Tier 2 (General) scheme set out above indicates the opposite. It was open to the respondent to grant successive periods of limited leave to remain as a Tier 2 (General) Migrant in the knowledge that the applicant spent most of his time working for a UK company in Erbil. Nothing in the scheme of the immigration rules for leave to enter or remain as a Tier 2 (General) Migrant requires an applicant to spend a specified period in the UK.

37. At the point when the applicant applied for long term settlement in the UK the scheme was different. In most cases, the underlying presumption is likely to be that a person who is granted leave to enter or remain to work for a UK company will spend most of their time residing in the UK. By the time they have completed the general limit of five years limited leave to remain most applicants will be eligible to apply for settlement.

38. The policy lists the categories of the immigration rules covered by the guidance. The categories include Tier 2 (General) Migrants. In the section giving guidance on how to decide whether the continuous period is spent lawfully in the UK, it states that the continuous period requirement is the minimum amount of time which a migrant must spend in employment or being active in the UK economy before being eligible to qualify for ILR. The caseworker considering the application is required to examine how many days absence the applicant has accrued. The applicant must provide reasons for the absences and evidence in support. The policy confirms that the Secretary of State retains discretion to grant leave outside the rules in exceptional cases.

What is said in this section of the policy is broadly consistent with the intended purpose of the immigration rules and the overall scheme.

39. The next section outlines the circumstances when absences will not break continuity when calculating whether the continuous period requirement has been met. It begins by discussing the provisions relating to the period between the issue of entry clearance and entering the UK, which will count towards the qualifying period and towards "the 180 days allowable absences". The section relating to PBS dependents also refers to "180 days allowable absences".

40. The section the applicant relies on is headed "Allowable Absences" and is broadly consistent with the terms of paragraph 245AAA(c) of the immigration rules. It confirms which categories must produce evidence to show that any absences are for a reason consistent with the original purpose of entry to the UK or for a serious or compelling reason. The guidance goes on to set out details about the evidence required to explain the absences. It recognises that a person might spend time outside the UK on business trips, short secondments, and during annual leave. It states that short visits outside the UK are consistent with the basis of stay and do not break the continuity of leave. Such absences should be counted towards the "180 day limit". The guidance then states that "… time spent away from the UK for extended periods, particularly if the business no longer exists, should not be allowed". Nothing in this section of the guidance departs from the overall scheme of the rules.

41. The guidance goes on to consider employment outside the UK. Absences due to other employment outside the UK which demonstrates that the UK employment is secondary would not meet the requirements of paragraph 245AAA(c). If there is any doubt about the intention of the guidance relating to allowable absences it is dispelled by the final sentence of that paragraph, which states:

> "Absences due to employment, whether related to the applicant's job in the UK or not, count towards the 180 maximum each year."

42. The scheme of the immigration rules places a clear cap on the number of days that a person can spend outside the UK before continuity of residence is broken for the purpose of paragraph 245AAA(a). A Tier 2 (General) Migrant must show that they have spent no more than 180 days outside the UK in any 12 month period and must justify those absences with evidence to show that they were allowable absences. The fact that the guidance repeatedly refers to "180 day allowable absences" and the "180 day limit" reflects the overall intention of the scheme. The only absences that are not counted towards the 180 day maximum are the ones expressly identified in the rules. The applicant does not come within any of those exceptions.

43. I understand why the open nature of the sentence relied upon by the applicant might be tempting to seize upon when he did not meet the requirements of the immigration rules for continuity of residence. However, what is said under the

heading "Allowable Absences" cannot be read in isolation. It must be considered in light of the overall scheme and the rest of the guidance. The fact that the section relied upon does not repeat the phrase "180 days allowable absence" used elsewhere in the policy does not detract from the intended meaning. Nothing in the wording of the policy makes any express statement permitting more than 180 days allowable absence. In order to depart from the intended purpose of the scheme in the way the applicant contends, the wording would need to be clear. It is not. The wording is consistent with the overall purpose of the provisions relating to continuity of residence, which restrict allowable absences to no more than 180 days in any 12 month period.

Conclusion

44. For the reasons given above, I conclude that the policy is consistent with the broad intention of the immigration rules for ILR as a Tier 2 (General) Migrant and cannot be read in the way the applicant contends. The respondent's decision is lawful. The application for judicial review must be dismissed.

45. I recognise that this leaves the applicant in a difficult position. The representations made with the application for ILR accepted that he did not meet the strict requirements of the immigration rules relating to continuity of residence and relied solely on the narrow reading of the policy without putting it into proper context. As a result, no submissions were made to the respondent asking for discretion to be exercised in this case.

46. The applicant and his employer have been open about the nature of his employment from the start. The applicant's particular skills and experience are said to play an essential role in the company. The scale of the investment made by the company in establishing operations in Erbil is unclear. The applicant's employer has given good reasons to explain why it has taken much longer than anticipated to set up the office. Given the recent history of Iraq no doubt there were significant operational challenges for a new company to overcome. Although the applicant has spent the vast majority of his time working in Erbil, and his absences exceeded the 180 day limit during each and every 12 month period during the qualifying period, the last year indicated a dramatic drop in his absences to 192 days. This is consistent with his employer's initial expectation that the applicant would eventually be in a position to spend more time working in the UK once the office in Erbil was more established.

47. The nature of the scheme appears to leave the applicant and his employer on a cliff edge. It is not possible to apply for further leave to remain as a Tier 2 (General) Migrant because the applicant has completed the five year limit. If he does not meet the strict requirements for ILR his employment and the success of the company might be placed in jeopardy. Although the Tier 2 scheme places limits on the period of limited leave and the number of Tier 2 sponsors, it does have the overall aim of allowing a route to settlement after

five years. It is unlikely that the scheme would intend to place jobs that cannot be filled by British or EEA workers or UK companies unnecessarily at risk.

48. The respondent has discretion to consider whether to grant further leave to remain or ILR in exceptional circumstances. Although the applicant's circumstances are not covered by the examples envisaged in the policy, the respondent has discretion to go beyond the policy in an appropriate case. It is a matter for the applicant whether he decides to make further representations. The facts of the case may justify serious consideration by the respondent if he does.

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JR/6053/2019 (V)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review
Decision Notice

The Queen on the application of SASSAN HESSAMIAZAR

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Canavan

ORDER

UPON HEARING from Mr R. Halim, on behalf of the applicant, and Mr Z. Malik, on behalf of the respondent at a remote hearing held at Field House on 01 October 2020.

AND UPON judgment being handed down on 28 October 2020.

Decision: application dismissed

1. The application for judicial review is dismissed for the reasons given in the judgment (attached).

Permission to appeal to the Court of Appeal

2. Permission to appeal to the Court of Appeal is refused because the Upper Tribunal decision does not contain arguable errors of law. The Upper Tribunal interpreted the scheme from the wording of the immigration rules before turning to consider the terms of the policy. The grounds do not seek to challenge the Upper Tribunal's interpretation of the scheme contained in the immigration rules. Having put the policy in proper context it is not arguable that the Upper Tribunal erred in finding that the wording of the policy did not go so far as to allow any number of days absence so long as they were consistent with the basis of stay. The interpretation of the policy contended for by the applicant was in clear contrast to the intended purpose of the immigration rules, which limit the number of allowable absences to

no more than 180 days in any 12 month period (subject to the exceptions and periods to be disregarded).

Costs

3. The applicant shall pay the respondent's costs of £5,701.

Signed: M. Canavan

Upper Tribunal Judge Canavan

Dated: **28 October 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 28/10/2020

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).