Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/07303/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th March 2016	**On 22nd April 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MR ALINAGHI ASHKHASI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Karnik, Counsel instructed by Fisher Jones Greenwood
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Iran born on 7th September 1987. He appeals against a decision of First-tier Tribunal Judge Pickup promulgated on 18th June 2015 dismissing his appeal against a decision to refuse to vary leave to remain on the basis of long residence and a decision to remove him under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant was granted leave to remain in the UK as a Tier 4 (General) Student Migrant on 23rd February 2013 valid until 13th May 2014. He came to the UK as a student and had been resident from September 2004 for

about a year. He returned to Iran on 8th September 2005 and came back to the UK on 27th July 2006. He was absent from the UK for a period of 321 days. The reason for his absence was that he had a knee injury and he returned to Iran for treatment which took place between 13th October 2005 and 12th January 2006. The Appellant applied, before the expiry of his leave, for indefinite leave to remain on the basis of long residence under paragraph 276B of the Immigration Rules.

The Respondent's refusal

3. The Respondent refused the application in a decision dated 5th February 2015. The Respondent concluded that the Appellant had entered the UK on 28th September 2004 and had been lawfully resident since then. However, he had not accrued a period of ten years' continuous lawful residence during which he had not been absent from the UK for less than 540 days during the ten year qualifying period and he had been absent from the UK for more than six months at any one time on one occasion.

4. In the refusal letter the Respondent stated:

> "For the purposes of continuous residence 276A(v), that residence is broken if a person has spent eighteen months or more outside the UK. Your application has been carefully considered to see whether the Secretary of State's discretion should be exercised to overlook your excess absences.
>
> As part of your application you have provided a detailed schedule of your absences, which have been checked against the passports that you submitted with your application. It is noted that over the full period of your residence, some ten years, you have accrued 882 days' absence from the UK. When assessing your application UKVI have sought to identify a ten year period with your ten years' residence period in which the least number of absences have been taken. At the time of decision the period used was from 3rd February 2004 to 3rd February 2014 – the absences during this period equated to 882 days in total.
>
> You have stated that the reason for the gap in your lawful residence between 8th September 2005 and 27th July 2006, 321 days, was due to a knee injury. You have provided evidence which states that the treatment was from 13th October 2005 to 12th January 2006, even if discretion were used to disregard this period your absence would still be 194 days which exceeds the permitted maximum of 180 days for one absence, therefore you have broken your continuous residence.
> Even with the evidence provided you still exceed the permitted maximum with the total absence equating to 755 days in total using your actual absence of 194 days.
>
> Furthermore you have submitted evidence that you had treatment outside the UK from 11th August 2007 to 3rd September 2007, 22 days. However, you still exceed the permitted maximum with the total

absence equating to 699 days in total taking the above 22 days into account.

It is considered that the reasons that you have given for the gap in your continuous lawful residence do not come within the category of exceptional reasons as per the modernised guidance. Discretion does not extend to absences outside the UK.

Paragraph 276D does not allow the Secretary of State the use discretion where you are satisfied that 276B has not been met. Paragraph 276D states that ILR is to be refused rather than may be refused or any other use of flexible terminology. Therefore, although your claim is plausible for having excess absences during the ten year period, the Secretary of State has no power to take that into consideration in the application of paragraph 276C of the Immigration Rules. 276D precludes flexible fulfilment of 276B when considering a grant pursuant to 276C.

As detailed above you are considered to have broken your continuous residence in the UK and have not been here legally throughout the ten years. As a result you are unable to demonstrate ten years' continuous lawful residence in the UK and you are not able to satisfy the requirements of the Immigration Rules with reference to paragraph 276B(i)(a)."

Grounds of appeal

5. An application for permission to appeal was made on the ground that the Respondent had misunderstood the nature of the Immigration Rules and misunderstood the nature of the discretion that was exercisable. Consequently the decision was not in accordance with the law and the First-tier Tribunal should have allowed the appeal and remitted the matter back to the decision maker so that a lawful decision could be made, Ukus (discretion: when reviewable) Nigeria [2012] UKUT 307 (IAC). It was submitted that there was a residual discretion within Rule 276B.

6. Further the Respondent wrongly concluded that the discretion which was exercisable outside the Immigration Rules was only in respect of single periods of absence of less than 180 days, but in any event refused to consider her discretion outside the Rules. This was contrary to the Secretary of State's own policy on long residence, which states:

> "If the applicant has been absent from the UK for more than six months in one period and more than eighteen 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.

> 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 the single absence of over 180 days you must consider how much of the absence was due to compelling circumstances and whether the applicant returned to the UK as soon as they were able to do so. You must also consider the reasons for the absence.
>
> 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 end of the ten year residence period, and how soon they will be able to meet that requirement. If the absences were towards the start of that 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 will not qualify for a long time and so you must consider whether there are particularly compelling circumstances.
>
> All of these factors must be considered together when determining whether it is reasonable to exercise discretion."

7. It was also submitted (ground 2) that the Tribunal erred in its approach to Article 8. The judge's finding that Article 8 was not engaged amounted to an error of law and further his consideration under Article 8(2) amounted to an error of law because the judge wrongly relied on Nasim and others, the factual matrix of which was entirely different to the Appellant's case. There were compelling and compassionate circumstances in this case and the judge had failed to properly consider Article 8.

8. Permission to appeal was granted by Upper Tribunal Judge Perkins on the following grounds:

> "I am far from convinced but I am satisfied that the grounds make out an arguable case that the First-tier Tribunal Judge misunderstood the meaning of 'shall be considered' when looking at the length of the Appellant's absence from the UK."

9. In the Rule 24 response, the Respondent opposed the Appellant's appeal and stated that Judge Pickup interpreted and considered the requirements of paragraph 276A(a)(v). The judge found at paragraph 10 that the Appellant had a total of 882 days absence from the UK and even excluding his treatment he had 755 days absence from the UK. Thus he failed to meet the Immigration Rules. The judge found that there was no discretion within the Rules and gave anxious scrutiny to the guidance before arriving at this conclusion. The judge found that even if the compelling and compassionate circumstances of the medical treatment were considered his absence exceeded the 180 day maximum.

Submissions

10. Mr Karnik submitted that there were three points: whether there was discretion within the Rules; the Respondent's failure to exercise discretion outside the Rules; and the judge's error of law in relation to Article 8. There was no dispute on the period of absence from the UK. Within paragraph 276A the Respondent had discretion to consider the periods of absence and there was discretion to disregard a break in lawful residence.

11. Although the Home Office guidance before the judge postdated the decision, it was dated 8th May 2015, it was an explanation of how the Rules should be understood. The Respondent therefore had discretion to consider absences over eighteen months or over 180 days. The judge had erred in law in failing to find that the Respondent's decision was not in accordance with the law. There was discretion under the Immigration Rules and the Respondent had not considered it. The Respondent and the judge had failed to follow the approach taken in Ukus at paragraph 12.

12. Further, having concluded that there was no discretion under the Rules, the Respondent fettered her discretion in failing to exercise her discretion outside the Rules.

13. In relation to Article 8, Mr Karnik submitted that there was no proper reasoned conclusion on Article 8(2). Had the judge looked at the evidence in the Appellant's witness statement he could have come to a different conclusion.

14. Mr Duffy submitted that the word "shall" in paragraph 276A was mandatory in this instance. There was no point in having discretion outside the Immigration Rules if the Rules themselves provided for such discretion. Although "shall" could be discretionary in relation to construction this was not a Rule where that was the case and this interpretation was consistent with the case of Grunwick Processing Laboratories Ltd and others v Advisory, Conciliation and Arbitration Service [1978] AC 655.

15. The Appellant in his submissions had relied on page 698, paragraph H:

> "The result of this appeal turns solely upon whether that part of Section 14(1) which I have cited is mandatory or directory. Prima facie the word 'shall' suggests that it is mandatory but that word has often been rightly construed as being directory. Everything turns upon the context in which it is used – the subject matter, the purpose and effect of the Section in which it appears. In my view Sections 12(1) and 14(1) read together mean that ACAS in considering any recognition issue may make such enquiries as it thinks fit but that it *must* in the course of those enquiries and before deciding the issue ascertain the opinions of workers to whom the issue relates."

16. The Respondent did consider her discretion outside the Rules and this is clear from what is written at page 3 of the decision. Ukus was applicable. The decision was a lawful one and therefore the First-tier Tribunal could not intervene. The Respondent had considered her discretion outside the Immigration Rules and refused to exercise it in the Appellant's favour.

17. In relation to Article 8 the judge had properly directed himself following Nasim and Patel and the Appellant could not succeed on private life alone. The Appellant did not meet the Immigration Rules and paragraph 276B was in relation to long residence. It was not applicable in giving an indication of where the balance would lie in private life cases. There was no deficiency in the judge's reasoning and no material error of law.

18. In response Mr Karnik submitted that the Respondent says the Rules do not afford discretion and therefore there was no discretion to exercise. There was no explicit consideration of an exercise of discretion outside the Immigration Rules despite that being clearly advanced to the decision maker in the application. Therefore, the Respondent's decision was not in accordance with the law. The ten year residence Rule should have been part of the balancing exercise under Article 8(2). The judge should have taken into account the length of lawful residence which was relevant to such a balance.

Relevant Provisions of the Immigration Rules

19. Paragraph 276A states that for the purposes of paragraphs 276B to 276D and 276ADE

(a) continuous residence means residence in the UK 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 six 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 UK having been refused leave to enter or remain here; or

(ii) has left the UK and, on doing so, evidenced a clear intention not to return; or (ii) left the UK 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 eighteen months absent from the United Kingdom during the period in question.

20. Paragraph 276B of the Immigration Rules states that the requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that

(i) he has had at least ten years' continuous lawful residence in the UK,
(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his
  (a) age; and
  (b) strength of connections in the UK; and
  (c) personal history including character, conduct, associations and employment record; and
  (d) domestic circumstances; and
  (e) compassionate circumstances; and
  (f) any representations received on the person's behalf; and
(iii) the applicant does not fall for refusal under the general grounds for refusal.
(iv) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom unless he is under the age of 18 or aged 65 or over at the time he makes the application.
(v) the applicant must not be in the UK in breach of immigration laws, except that any period of overstaying for a period of 28 days or less will be disregarded as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.

21. Paragraph 276C states that indefinite leave to remain on the ground of long residence in the UK may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 276B is met.

22. Paragraph 276D states that indefinite leave to remain on the ground of long residence in the UK is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met.

Discussion and Conclusions

23. I find that on reading paragraph 276A(a)(v), in conjunction with paragraphs 276B and 276D, leave to remain *shall* be refused if the Appellant has been absent from the UK for more than eighteen months during the ten year period. The terms of 276A(a)(v) and 276D are mandatory. The Appellant's own evidence is that he has been absent for 882 days. Even allowing for his period of illness he has been absent from the UK for 755 days. His application was therefore properly refused under the Immigration Rules.

24. I find that neither the guidance nor these paragraphs of the rules provides for discretion within the Immigration Rules such that it would be reviewable by the First-tier Tribunal.

25. I also find that the Respondent considered whether to disregard the periods of absence and to exercise discretion outside the Immigration Rules. It is clear from the Respondent's refusal letter where she states "your application has been carefully considered to see whether the

Secretary of State's discretion should be exercised to overlook your excess absences" and her finding that the gaps in the Appellant's continuous lawful residence did not come within the category of exceptional reasons, as per modernised guidance. I find that that the Respondent's refusal to exercise discretion outside the Immigration Rules was a lawful one and was in accordance with the guidance.

26. Accordingly, I find that the Respondent's decision to refuse indefinite leave to remain on the basis of ten years' lawful residence was in accordance with the law. The question therefore is whether there was an error of law in the judge's decision in reviewing the Respondent's application of the Immigration Rules or indeed her discretion.

27. The same argument that was made before me was made before the First-tier Tribunal. It is clear from paragraph 276D that there is no discretion under the Immigration Rules and the judge rejected Mr Karnik's argument that there was discretion in relation to any one period of 180 days. The judge considered the long residence guidance and found that the exercise of discretion related to that outside the Rules, not a discretion under paragraph 276B or 276D, but in any event it was clear from the refusal decision that even if discretion were to be applied to the period in which the Appellant was receiving medical treatment his absence would still exceed the permitted periods within the Immigration Rules.

28. I find that there was no error of law in the judge's finding that the Respondent's decision was in accordance with the law because the Appellant could not meet the requirements of paragraph 276B of the Immigration Rules and the Respondent has reviewed her discretion and refused to exercise it in the Appellant's favour.

29. I also conclude that there is no arguable error in the judge's assessment of Article 8. Although the judge concluded that Article 8 was not engaged he went on to consider whether the refusal of indefinite leave and the Appellant's removal were proportionate in the circumstances. On the facts before the judge, which he sets out at paragraphs 14 to 21, his finding that the Appellant's removal was proportionate was one which was open to him on the evidence.

30. It was submitted by Mr Karnik that the judge failed to give adequate reasons or indeed to take into account the Appellant's witness statement. However, it is quite clear from paragraph 14 that he considered the Appellant's witness statement and he set out the facts of the Appellant's study, his absence and his medical treatment and the nature of the Appellant's private life in the UK such as it was.

31. The judge properly applied Nasim and others and Patel and Others to the facts as he found them and his conclusion that the Appellant's removal was proportionate was one which was open to him. The decision was not lacking in reasons in relation to Article 8 and the judge properly directed himself in law. There was no arguable error of law in relation to Article 8.

32. Accordingly, in conclusion, I find that the Respondent properly considered the Immigration Rules and properly considered any discretion to overlook any breaks in lawful residence, and concluded that there were no compelling circumstances to do so.

33. The Respondent had considered her discretion under the appropriate guidance and refused to exercise it in the Appellant's favour. There was no arguable error of law in the judge's conclusion that the Respondent's decision was in accordance with the law and that, in refusing to exercise her discretion, she had taken into account all relevant factors and there was nothing compelling to warrant an alternative conclusion. The appeal could not succeed under the Immigration Rules and there was no arguable error of law in respect of the proportionality assessment under Article 8.

34. Accordingly, I find that there was no error of law in the judge's decision promulgated on 18th June 2015 and I dismiss the Appellant's appeal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

J Frances

Signed Date: 31st March 2016

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

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

J Frances

Signed Date: 31st March 2016

Upper Tribunal Judge Frances