Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24061/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 April 2019	**On 29 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ARBER HOXHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Haywood, Counsel, instructed by Farani Taylor Solicitors
For the Respondent: Mr J McGirr, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Nightingale ("the judge"), promulgated on 8 November 2018, by which she dismissed the Appellant's appeal against the Respondent's decision of 5 October 2016, refusing his human rights claim made on that same day.

2. The Appellant, a national of Albania, born on 3 May 1991, came to the United Kingdom in March 2006 to attend a privately-funded boarding school in this country. At all material times, his family remained in Albania. Having been granted a

number of extensions to his initial Tier 4 leave, the Appellant eventually made an application for indefinite leave to remain (this being the human rights claim leading to the decision which was appealed to the First-tier Tribunal).

3. In refusing that claim the Respondent concluded that the Appellant had spent a total of 898 days out of the United Kingdom during what was then the relevant ten-year period of lawful residence. This was clearly substantially in excess of the 540-day limit imposed by the combination of paragraphs 276B and 276A of the Immigration Rules ("the Rules"), and therefore it was said that the Appellant could not satisfy the ten years' continuous lawful residence provision. In addition, it had been concluded that the Appellant was not assisted by either paragraph 276ADE(1)(vi) of the Rules or Article 8 in its wider context.

The judge's decision

4. Having summarised the evidence before her and setting out a number of relevant legal provisions, the judge states her findings and conclusions at [31]-[35]. She notes that the Appellant, through his representative at the hearing, had expressly accepted that the total number of days absent from the United Kingdom was 898. The judge observes the absence of any policy guidance from the Respondent, at least insofar as the Appellant's representative was able to direct her. She notes that the Appellant's brother had been granted indefinite leave to remain but concluded that this had no relevance to the Appellant's case. There is a reference to the Respondent having disregarded a certain number of days of absence from the United Kingdom in respect of medical treatment received by the Appellant whilst in Albania.

5. Ultimately, the judge concludes that the Appellant was unable to satisfy the requirements of paragraph 276B of the Rules. Similarly, on the facts, the Appellant could not succeed under paragraph 276ADE(1)(vi). In [34] and [35] the judge considers Article 8 in its wider context, taking into account a number of factors relating to his circumstances, both in this country and if returned to Albania.

The grounds of appeal and grant of permission

6. Having been refused permission by the First-tier Tribunal, the Appellant renewed his application for permission to the Upper Tribunal. This was granted by Upper Tribunal Judge Grubb on 12 March 2019. With reference to the reformulated grounds submitted with the renewed application, he deemed it to be arguable that the judge had not considered the correct ten-year period when reaching her overall conclusions with the consequence that the number of absences from the United Kingdom was significantly fewer than the 898 relied on. Judge Grubb was of the view that this lower figure might have affected the overall assessment of Article 8. In addition, it was deemed arguable that a discretionary policy published by the

Respondent and relating to long residence had not been drawn to the judge's attention.

The hearing before me

7. Mr McGirr quite rightly accepted that the Appellant had had leave (including that extended by virtue of section 3C of the Immigration Act 1971) at all material times.

8. It was agreed by both representatives that that ten-year period should have been viewed by the judge as running back from the date of hearing (25 October 2018) and therefore beginning on 25 October 2008.

9. There then followed a discussion and recalculation of the precise number of days of absence from the United Kingdom relating to the correct relevant ten-year period. It was agreed that the figure of 898 days was incorrect, despite the acceptance of the Appellant's representative before the judge.

10. Having regard to the clear dates and figures set out in the Appellant's unchallenged witness statement (which was before the judge) and disregarding the period of 115 days in respect of the Appellant's medical treatment in Albania (as the Respondent had done when considering the human rights claim in the first place – see page 3 of the reasons for refusal letter and [32] of the judge's decision), the final total figure was agreed as being 710 days of absence from this country.

11. Having arrived at this agreed position, Mr Haywood relied on the grounds and submitted that the significant reduction in the number of absent days from 898 to 710 was of itself a material factor which rendered the judge's Article 8 assessment unsafe. He emphasised the fact that the number of days spent outside the United Kingdom in excess of the 540-day limit had been 170 rather than the 300-plus considered by the judge. He submitted that any Article 8 proportionality exercise must be fact-specific and it was essential that the correct factual matrix be taken into account.

12. Mr Haywood then turned to the issue of the policy guidance. He submitted that whilst the Appellant's representative before the judge (not Mr Haywood) might have been at fault for not drawing her attention to any published policy, it was also the case that the Presenting Officer had not done so. Mr Haywood confirmed that the relevant policy guidance entitled "Long residence Version 15.0" and published on 3 April 2017 had been in place at the time of the hearing before the judge. He referred me to pages 9-11 of the guidance, specifically a passage which confirmed that there was a discretion to disregard absences where "compelling or compassionate circumstances" existed. An example of these are said to be a situation in which an individual was prevented from returning to the United Kingdom through "unavoidable" circumstances.

13. Mr Haywood submitted that in the Appellant's case there were a number of such compelling and/or compassionate circumstances: the fact that during school

holidays he had had to return to his family in Albania as he had nowhere to live in the United Kingdom; that his mother had been ill in Albania and he had needed to be there with her for a period of time; that he had had to wait for a fairly substantial period on two occasions for new entry clearance to be granted from Albania; and the Appellant's own medical treatment in his home country. Mr Haywood accepted that the last factor had been accounted for by the Respondent in the first instance, but he submitted that because the policy guidance had not been brought to the judge's attention, she had not taken any of the other factors into account. He submitted that given the appeal was on Article 8 grounds only the judge was bound to take all relevant considerations into account when considering proportionality and that she had not only factored in too many days of absence, but had failed to consider whether any other factors in relation to absent days were also relevant.

14. Finally, Mr Haywood relied on the Appellant's brother's circumstances. Unchallenged evidence from the brother had been before the judge and he had set out details of his absent days from the United Kingdom, these being significantly in excess of 540. Notwithstanding this, the Respondent had granted him indefinite leave to remain. Mr Haywood acknowledged that the brother's case was not in any way decisive in respect of the Appellant's, but submitted that it was nonetheless relevant and the judge had erred in rejecting it out of hand.

15. For his part, Mr McGirr submitted that any errors by the judge were not material. In respect of the absent days relating to school holidays, it was a case of the Appellant simply complying with the conditions of his Tier 4 leave and there was nothing compelling or compassionate in this. The same applied to his mother's illness. Mr McGirr submitted that issues such as family illness were part and parcel of the 540-day "allowance" which was already provided for in paragraph 276A of the Rules. In addition, the fact that the Appellant had had to wait for the grant of entry clearance on two occasions was no different from anybody else applying to get back into the United Kingdom.

16. Finally, Mr McGirr submitted that the brother's evidence was insufficient to have made this matter of any material relevant to the Appellant's case.

17. At the end of the hearing I reserved my error of law decision. Both representatives were agreed that if I set aside the judge's decision, I could and should remake the decision in this appeal based on the evidence before me. In respect of further submissions on the remaking issue, Mr Haywood essentially relied on the points he made in support of the error of law argument. Mr McGirr did not seek to challenge any of the evidence and submitted that the Respondent's decision was proportionate.

Decision on error of law

18. The first thing to say is that there are several unsatisfactory aspects of this case which have their genesis in the approach of the representatives before the judge. I have a good deal of sympathy for her and the conclusions I have reached, below, say a lot

more about the way in which the appeal was presented to her than about her overall diligence.

19. With the above observations in mind, I nonetheless conclude that the judge did err in proceeding on the basis that the total number of absent days was 898. Although the Appellant's representative had expressly accepted that figure at the hearing, it was the case that the relevant ten-year period should have been assessed from that date backwards (in other words, from 25 October 2018 to 25 October 2008). If this had been done, and taking into account the unchallenged figures contained in the Appellant's detailed witness statement running from December 2008 onwards, the total figure was in fact 710, a total significantly lower than 898.

20. However, the total clearly remained in excess of the 540 days permitted by paragraph 276A of the Rules. I conclude that the error in respect of the total number of absent days is not, in and of itself, material to the outcome of the Appellant's appeal. It is, however, relevant, bearing in mind the Appellant's other arguments, to which I now turn.

21. I conclude that the judge inadvertently erred in failing to have regard to the Respondent's published policy on long residence. Both representatives before the judge were at fault for this omission. Although the judge recalls that she had asked the Appellant's representative as to whether any such policy guidance existed, in my view the onus was as much on the Respondent's representative (see, for example, UB (Sri Lanka) [2017] EWCA Civ 85, at [16]-[22]). In any event, one or other of them should have been able to reply in the affirmative when asked about the existence of a policy which clearly had potential application to the instant case.

22. The question is then whether this error, alone or in combination with the first identified above, is material. Page 10 of the policy guidance does state a broad discretion based on the existence of "compelling or compassionate circumstances":

> "If the applicant has been absent from the UK for more than 6 months in one period or 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."

23. This stated discretion was relevant not because it could have allowed the judge to directly substitute her own view for that of the Respondent in respect of a discretion outwith the Rules (she could not), but because it raised the possibility of additional factors relating to absent days which could have been material to the wider Article 8 balancing exercise.

24. It is right that the judge has recognised the Respondent's disregard of the 115 days spent by the Appellant receiving treatment for back problems in Albania. What she did *not* consider were the circumstances behind three other categories of absence, all of which were specifically highlighted by the Appellant himself in his unchallenged

witness statement: the school holidays; the mother's illness; and the waiting for further entry clearance to be granted. A number of the school holiday absences were when the Appellant was still a minor. Given the fact that he was a boarder and that his family live in Albania, on the face of it, it would seem to be relevant that he was having to leave the United Kingdom during school holidays and return to Albania, there being nowhere else for him to stay in this country during the breaks, even once he had reached his majority. There is no "bright line" upon reaching adulthood and the need to return to Albania during school holidays just after his eighteenth birthday could also be said to be relevant.

25. In respect of the Appellant's mother's illness in 2012, this would arguably appear to be circumstances deserving of compassion.

26. Finally, the periods during which the Appellant was awaiting decision on entry clearance applications in 2013 (64 days) and September 2015 (51 days) were fairly significant in duration and would, on the face of it, arguably amount to circumstances beyond the Appellant's control which prevented him from re-entering this country. This is a factor alluded to in the policy guidance.

27. Whilst I acknowledge Mr McGirr's argument that the school holidays would apply to any individual being educated at a boarding school and was simply a consequence of the Tier 4 conditions of leave, and that everybody has to wait for entry clearance decisions, in my view all of the factors put forward by Mr Haywood and arising out of the widely expressed discretion in the Respondent's policy guidance were capable of being material factors in the wider Article 8 balancing exercise.

28. When this point is combined with the error on the calculation of absent days, I conclude that the judge has materially erred in law. The error could arguably be said to relate to whether or not the Appellant in fact satisfied the requirements of paragraph 276B of the Rules. The better view, as I see it, is that the error goes to the approach to the wider Article 8 assessment.

29. If all relevant matters had been taken into account it is quite possible that the total number of relevant absent days would have been found to fall below 540. Even if that were not the case, the total number was substantially fewer than the judge believed and relevant considerations of a large number of those days might well have counted in a manner favourable to the Appellant.

30. My conclusions on the two issues discussed above are sufficient for the judge's decision to be set aside.

31. For the sake of completeness, I now turn to the issue of the Appellant's brother. The judge did apply her mind to this. It is clear that she did not have any detailed information from the Respondent about the granting of his application, but that was unsurprising. His application was granted and there would not have been any reasons given for the decision. However, the brother had provided a very detailed witness statement which was before the judge (88-92 of the Appellant's bundle). This sets out the number of days absent from the United Kingdom in his case. It can be

seen that this was well in excess of the 540 days (797 to be precise). Although in no way decisive, the Appellant's brother's situation did bear marked similarities to that of the Appellant, in particular the absences during the secondary schooling (they both attended the same institution) and his evidence was, in my view, of relevance to the Appellant's case, at least insofar as proportionality was concerned. In my view the judge was wrong to have concluded that it bore no relevance whatsoever.

32. Overall, I regard this as a further material error.

Remaking the decision

33. In remaking the decision in this appeal I have had regard to the evidence contained in the Respondent's original bundle, the Appellant's bundle (indexed and paginated 1-191, and the submissions of the representatives.

34. There has been no challenge to the reliability of any of the evidence before me. I find it all to be entirely credible.

The essential facts

35. In light of the above, I make the following essential findings of fact.

36. The Appellant came to the United Kingdom in March 2006 and has been in this country lawfully ever since, albeit on a precarious basis. He attended a boarding school between August 2006 and July 2010. He was wholly dependent on his family in Albania during this time. Between December 2008 and the end of the summer holiday following the completion of his secondary school studies, the Appellant was, out of necessity, staying with his parents in Albania during all holidays for a total of 215 days (2 and 17 of the Appellant's bundle).

37. Between May and September 2011 the Appellant spent 115 days in Albania receiving treatment for a spinal problem. The evidence shows that the Appellant's mother was ill in 2012 and, to a lesser extent, 2015. I accept that the Appellant spent 73 days in Albania caring for her.

38. In July 2013 and August 2015 the Appellant returned to Albania to obtain further entry clearance. I accept that he had to wait for 64 and 51 days respectively before being granted the required visas. Although there has been no conclusive evidence on why these delays occurred, Mr McGirr indicated (I put it no higher than that) that administrative restructuring was taking place and certain visa posts were moved: it was a possibility that the Tirana post was effected by this. I find that it is probable that there were administrative delays caused by restructuring. But whatever the precise reason, I find that it was not down to the Appellant in any way and that the delays were beyond what might have been expected.

39. The Appellant continues to have statutorily extended leave to remain. Taking the date of the hearing before me as the end point, the relevant ten-year period is therefore 15 April 2009 to 15 April 2019. Applying this timeframe and using the figures set out in the Appellant's witness statement at 2-4 of his bundle, I recalculate the number of days absent from the United Kingdom as being:

    175 (school holidays)

    14 (additional holidays whilst at school)

    9 (waiting for further entry clearance in October 2010)

    214 (holidays whilst at university)

    115 (spinal treatment in Albania)

    73 (caring for sick mother)

    115 (waiting for entry clearance in 2013 and 2015)

    53 (holidays with a former girlfriend between 2012 and 2014)

    14 (miscellaneous absences in 2016)

    Gross total: 782

40. I then disregard (as the Respondent did in his original decision) the 115 days spent receiving medical treatment in Albania. This leaves a total of 667 days.

41. I accept the Appellant's brother's evidence as to the circumstances in which he came to be granted indefinite leave to remain in the United Kingdom. His total absent days was 797 but it is more likely than not that the school holidays were disregarded, together with absences on account of employment in later years.

42. It is clear that the Appellant has put down significant roots on the United Kingdom. I find that he has a mortgage on a property and has studied and worked here for a substantial period of time.

Conclusions

43. It was never suggested that the judge erred in respect of her consideration of paragraph 276ADE(1)(vi) of the Rules, nor has any reliance been placed upon this provision in terms of the remake decision. It is clear that the Appellant cannot succeed by reference to that particular Rule.

44. I turn to a consideration of paragraph 276B of the Rules, in conjunction with paragraph 276A.

45. The 540-day limit in paragraph 276A(a)(v) is not the subject of a discretion within the Rule itself: continuous lawful residence "shall" be considered to be broken if the limit is exceeded. The discretion stated in the policy guidance is, by definition, one existing outside of the Rules.

46. In the present case it is a fact that the Appellant has a total of 782 days outside of the United Kingdom during the relevant ten-year period. Even accounting for the 115 days for medical treatment disregarded by the Respondent in the exercise of his discretion when deciding the application, the total remains in excess of the 540-day limit.

47. In my view, given the wording of the Rule itself and the location of the discretion, it would impermissible for me to simply purport to exercise my own discretion and apply it directly to paragraphs 276A and 276B.

48. Instead, I take all relevant circumstances (of which the absent days are certainly one) into account when considering whether the Respondent's refusal of the Appellant's human rights claim strikes a fair balance between his Article 8 rights on the one hand, and the important public interest on the other.

49. There is no suggestion by the Respondent that the Appellant does not enjoy protected Article 8 rights in the United Kingdom, specifically the right to respect for his private life. It is clear that he has, over the course of time and in light of his overall circumstances in this country, established such a life.

50. It is equally clear that the Respondent's decision constituted a sufficiently serious interference with the private life, that the decision is in accordance with the law (as that term is properly understood in the context of Article 8), and that it pursues a legitimate aim.

51. I turn to the question of proportionality, having regard to section 117B of the Nationality, Immigration and Asylum Act 2002, as amended.

52. The following factors weigh in the Respondent's favour. The public interest in maintaining effective immigration control is, of itself, a significant matter. The fact that the Appellant has not been able to meet the specific requirements of the Rules is also a matter deserving of considerable weight.

53. It is the case that the Appellant has always been in the United Kingdom on a precarious basis. I have regard to this mandatory consideration. Although the strength of the Appellant's private is reduced, there are particular circumstances in this appeal which mitigate that reduction. I will set these out, below.

54. The Appellant has never relied on public funds and he is a fluent English speaker. These are effectively neutral factors.

55. I now consider the Appellant's side of the balance sheet. He has an unblemished immigration history. He has studied and worked hard in this country and clearly regards the United Kingdom as his home now.

56. More importantly, the issue of the absences from the United Kingdom falls to be assessed more favourably to the Appellant than the position adopted by the Respondent.

57. It was clearly right that the 115 days spent receiving medical treatment in 2011 was disregarded in the original refusal. In my view, other absences also fall into the category of what I consider to be either compelling or compassionate circumstances.

58. First, there are the secondary school holidays. Although the relevant number of days away (175 or even just 90 if one excluded the summer holiday following the completion of the studies) occurred when the Appellant had turned eighteen, he was nonetheless wholly dependent on his parents in Albania, had nowhere to live in this country, could not remain in the school during the breaks, and, as Mr Haywood rightly pointed out, there is no "bright line" between the final year of minority and the first couple of a person's majority. I conclude that the conditions of the Appellant's Tier 4 leave related to his studies and did not, of themselves, require him to return to Albania. Thus, in the particular circumstances of this case, the Appellant was effectively compelled to be absent from the United Kingdom for at least 90 days during his schooling.

59. I bear in mind the fact that the Respondent disregarded school holidays in the bother's case but not in the Appellant's. That is odd and displays a lack of consistency. I would emphasise that this factor is not of significant weight, although it is relevant.

60. I regard the mother's illness and need for care by the Appellant as constituting a compassionate circumstance. I disagree with Mr McGirr's suggestion that this would simply fall within the "allowance" of 540 days provided for by the Rules. If this argument were correct, the same could be said for any similar occurrence and the notion of compelling and/or compassionate circumstances would lose its utility.

61. In respect of the Appellant's lengthy wait for entry clearance in 2013 and 2015, it is, as I have alluded to previously, difficult to know what caused the delay. It is of note that in 2010 he only had to wait for eight days before receiving the grant. I have found that there were delays caused by administrative restructuring by the Respondent. Even if that were not the case, the Appellant was, through no fault of his own, prevented from re-entering the United Kingdom for two significant periods in 2013 and 2015. I conclude that these absences, or at the very least, a substantial portion thereof, are to be seen as a compelling circumstance.

62. In light of the above, I would assess the absences from the United Kingdom as follows:

Gross total: 782 days

Disregard 115 days for the Appellant's medical treatment

Disregard 90 days for school holidays

Disregard 73 days for caring for the mother

Disregard at least 90 days for the entry clearance grants.

63. On this fairly conservative but in my view entirely reasonable assessment, the total number of absent days is 414, significantly fewer than the 540 limit imposed by paragraph 276A of the Rules.

64. The effect of this is twofold. First, the assessment discloses strong factors which go to justify a mitigation of the reduction in weight attributable to the Appellant's private life, by reference to section 117B(5) of the 2002 Act. Second, and more significantly, whilst not being able to satisfy paragraph 276B of the Rules, my conclusion on the absent days places the Appellant in the position of being able to show that his time away from the United Kingdom *not* covered by compelling and/or compassionate circumstances has actually been significantly shorter than the limit imposed by the Rules. This in turn represents a strong Article 8 claim.

65. Having weighed up all relevant factors in this case, my ultimate conclusion is that the factors in favour of the Appellant outweigh those on the Respondent's aide of the balance sheet. The refusal of the human rights claim does not strike a fair balance and the Appellant's appeal falls to be allowed.

Anonymity

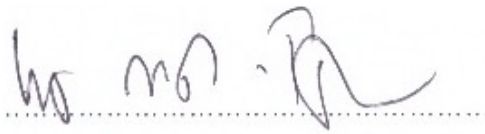
66. No anonymity direction is made.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I remake the decision and allow the Appellant's appeal.

The Respondent's refusal of the Appellant's human rights claim is unlawful under section 6 of the Human Rights Act 1998.



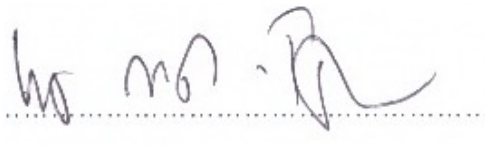
Signed Date: 24 April 2019

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have remade the decision in this case and allowed the Appellant's appeal, I make a full fee award of £140.00.

Signed  Date: 24 April 2019

Deputy Upper Tribunal Judge Norton-Taylor