



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/12757/2019
HU/12763/2019

THE IMMIGRATION ACTS

**At Manchester (via Skype)
On 15 December 2020**

**Decision & Reason Promulgated
On 26 February 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**MARIYA SHARPAK
TALAL HASSAN**

(Anonymity direction not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik instructed by West London Solicitors Ltd.

For the Respondent: Mr A McVeety Senior Home Office Presenting Officer.

DECISION AND REASONS

- 1.** The first appellant appeals with permission a decision of First-tier Tribunal Judge Andrew ('the Judge') promulgated on the 18 December 2019 in which she Judge dismissed the appellants' appeals on human rights grounds.

2. In relation to the first appellant, at [10] of the decision under challenge the Judge writes:

“I should add that there is no dispute that the First Appellant is unable to meet the Immigration Rules so far as 10 years continuous lawful residents is concerned. This is right. The Appellant has had a break in her continuous lawful residents at least from 30 August 2012 until 12 September 2012. This, I find, is fatal to the First Appellant’s application.”

Error of law

3. The first appellant’s representative sought permission to appeal alleging that it was disputed that she could satisfy the requirements of the immigration rules and asserting legal error by the Judge by reference to the respondent’s guidance in force at the relevant time.
4. Permission to appeal was granted by Upper Tribunal Judge Grubb on a renewed application the operative part of the grant being in the following terms:

2. The issue under the Rules was whether a period of absence from the UK between 29.6.12 and 8.10.12 prevented A1 from establishing 10 years continuous lawful residence. It appears from the skeleton argument of that, contrary to what the Judge says at [10], that the appellants argued it did not. A1 had leave when she left the UK and entry clearance (taking effect as leave) on re-entering the UK. She was absent for less than 6 months. It is arguable that, as a consequence, by virtue of paragraph 276A(a) the continuity of her residence was not broken even if she had different leave on leaving and when returning (see Home Office guidance, 3 April 2017 p43 of 48). It is arguable that the case of R(Ahmed) v SSHD [2019] EWCA Civ 1070 - which dealt with Para 276B(v) - has no application to the present circumstances. However, the relationship of para 276A(a) apply to A1 and para 276A(b) (the definition of “lawful residence”) may need to be explored in the case of an appellant who relies, in part, on a period of time outside the UK. In essence, even if the residence is “continuous” it is also “lawful” when the individual does not have leave for some of the period abroad - as they would require for the whole period if they were in the UK. For these reasons, permission to appeal is granted.

5. The relevant guidance provided:

Continuous residence is not considered broken if the applicant:

- is absent from the UK for 6 months or less at any one time
- had existing leave to enter or remain when they left and when they returned – this can include leave gained at port when returning to the UK as a non-visa national
- departed the UK before 24 November 2016, but after the expiry of their leave to remain, and applied for fresh entry clearance within 28 days of that previous leave expiring, and returned to the UK within 6 months If the applicant had existing leave to enter or remain when they left and returned to the UK, the existing leave does not have to be in the same category on departure and return. For example, an applicant can leave the

UK as a Tier 4 (General) student and return with leave as a spouse of a settled person.

Continuous residence is not broken as the applicant had valid leave both when they left and returned to the UK.

6. Mr McVeety accepted that the first appellant satisfied all relevant requirements on the facts and that the Judge had erred in dismissing first appellant's appeal on human rights grounds when she was entitled to succeed under the long residence provisions of the immigration rules in light of the published policy.
7. I find the Judge has erred in law and failing to consider the policy and its impact upon the ability of the first appellant to satisfy the long residence provisions of the Rules. On that basis I set aside the decision of the Judge as such error is material.
8. In light of Mr McVeety's acceptance that the first appellant satisfied the relevant legal requirements and that the appeal should have been allowed, I substitute a decision to allow the appeal on human rights grounds.

Decision

9. **The Judge materially erred in law. I set the decision aside. I substitute a decision to allow the appeal.**

Anonymity.

10. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 15 February 2021