



IAC-FH-AR-V1

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

Appeal Number: IA/00094/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 15 February 2016**

**Decision and
Promulgated
On 8 March 2016**

Reasons

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**DR YIXIAO ZHENG
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss K McCarthy, Counsel, instructed by Newland Chase
For the Respondent: Miss E Savage, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his challenge to the respondent's decision to refuse to grant him indefinite leave to remain pursuant to paragraphs 276A, 276B, 276D and 276ADE. Both the appellant and his wife are citizens of the People's Republic of China.

Background

2. The appellant and his wife both came to the United Kingdom to study and have been here for longer than 10 years. The appellant entered on 27 September 2004 and has studied here for a PhD. He is now employed as an academic researcher at the London School of Economics and Political Science (LSE). Both the appellant and his wife have spent lengthy periods outside the United Kingdom during their studies here, in excess of 540 days.
3. On 19 November 2013, the respondent granted the appellant's wife indefinite leave to remain, although her absences from the United Kingdom were longer than those of the appellant. The appellant's wife is still studying for a PhD in health governance, with particular reference to China as a country case study. She is now an academic specialising in global health governance. The respondent had and exercised discretion in the wife's favour.
4. On 25 July 2014, the appellant also applied for indefinite leave to remain, supplying details of 552 days of absence during the relevant 10-year period, of which 212 days were identified in his covering letter as being for the purposes of fieldwork for his academic studies with the remaining days being vacation and visits to family in China.

10-year long residence route

5. The requirements for leave to remain on long residence grounds are in rule 276B:

"276B. 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) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
- (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 ..."

6. The definition of continuous residence, so far as relevant, is in paragraph 276A:

"276A. For the purposes of paragraphs 276B to 276D and 276ADE(1).

- (a) "continuous residence" means residence in the United Kingdom 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 6 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: ...

(v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.

*(b) "lawful residence" means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; ...

(c) 'lived continuously' and 'living continuously' mean 'continuous residence', except that paragraph 276A(a)(iv) shall not apply.

276C. Indefinite leave to remain on the ground of long residence in the United Kingdom may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 276B is met.

276D. Indefinite leave to remain on the ground of long residence in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met."

7. The granting of indefinite leave to remain on the 10-year route remains discretionary. The respondent has issued Policy Guidance explaining how she proposes to exercise that discretion.

The respondent's Policy Guidance

8. The respondent's caseworkers are provided with guidance as to how to calculate the continuous period in the United Kingdom and when to apply discretions, in a document headed 'Guidance - ILR - Calculating continuous period in the UK'. The version in force when the decision was made read as follows:

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

The applicant must provide evidence in the form of a letter which sets out the full details of the compelling reason for the absence and supporting documents.

Absences of more than 180 days in any 12-month period for employment or economic activity reasons are not considered exceptional. You can only apply discretion where it has been authorised at senior executive officer level."

Refusal letter

9. The respondent in her refusal letter relied on paragraph 276A(v) and dealt with the appellant's 552 days' absences as follows:

“Your representative has put forward your argument that you came to the United Kingdom as a foreign student to study and that because students have extensive holidays during the academic year it is expected that you should have longer absences than a person who came here to work so that you could travel home to China to visit your family during your vacation time and your ... absences are justified.”

However the Immigration Rules are clear for applications for indefinite leave to remain on the grounds of 10 years long residency regardless of the reasons for you being here and you have exceeded the allowed 540 days. You are considered to have broken your continuous residence at this point. As such you have not satisfied the requirement to have completed at least 10 years’ continuous lawful residence in the United Kingdom and cannot meet the requirements of the Immigration Rules with reference to paragraph 276B(i)(a).”

The respondent noted that the appellant had a partner, in fact his wife, in the United Kingdom and took that into account but did not take account of the fact that the wife was settled at the material time. That part of the letter is factually erroneous.

10. In concluding the respondent dealt with exceptional circumstances under Article 8 ECHR:

“It has also been considered whether your application raises any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. You have not raised any such exceptional circumstances so it has been decided that your application does not fall for a grant of leave to remain outside the Rules. Regard has been given to all the representations you have submitted. However for the reasons given above, it is considered that your removal from the United Kingdom is appropriate.”

The respondent’s decision carried an in-country right of appeal.

First-tier Tribunal decision

11. The respondent did not assist the First-tier Tribunal judge by arranging for representation at the hearing. Perhaps for that reason, the judge was unaware of the respondent’s policy guidance and he erroneously directed himself that there was no such discretion at [28]:

“28. ...In the present case however there was no discretionary power vested in the decision maker and so there is simply no basis to interfere with that aspect of the decision.”

On the basis of the Guidance the respondent’s caseworkers do have a discretion and the judge’s finding to the contrary is wrong.

12. There is also a factual error in the decision, as there was in the refusal letter, regarding whether the wife was settled at the date of the

respondent's decision. Again, it seems unlikely that if the respondent had been represented, she would have sought to argue that indefinite leave to remain granted by her to the wife was a matter of which she had no knowledge when she made a decision on the husband's application.

Grounds of appeal

13. At ground 1, the appellant contended that the First-tier Tribunal had failed to consider the decision maker's discretion to grant indefinite leave to remain despite absence of more than 540 days.
14. At ground 2, the appellant stated that the First-tier Tribunal had made an error of fact in stating that the appellant's wife was not settled in the United Kingdom.
15. At ground 3, the appellant asserted that counting back from 4 July 2015, just a few days after the refusal letter, his absences drop below 540 days and on Article 8 grounds, the Upper Tribunal could make the initial decision and find him to be entitled to indefinite leave to remain.
16. At ground 4, the appellant relies generally on Article 8, on his wife's settled status and her ongoing PhD studies, which mean that she cannot yet return to China with him. The wife's life is now in the United Kingdom and she intends to make her career here. The couple have bought a house in the United Kingdom and the appellant contends that he has substantial private life here. He argues that the interference with his private and family life is disproportionate and contrary to the United Kingdom's best economic interests as the failure to take account of study visits will deter students from overseas from studying in the United Kingdom at all.

Permission to appeal

17. Permission to appeal was granted on the basis that it was arguable that the First-tier Tribunal erred in finding that the respondent lacked discretion to take the reasons advanced for the absences into account and grant him indefinite leave to remain. In particular, when granting permission, Upper Tribunal Judge Kekic noted that many of the absences were attributable to academic work linked to his employment at the London School of Economics, and that, in addition, the judge erred in finding that the wife's settled status was not before the respondent when the application was assessed.

Rule 24 Reply

18. In her Rule 24 reply the Secretary of State says this:

"3. ...In respect of ground 1 the Secretary of State considers that the judge did not err in his consideration of the issue of discretion. The Guidance relied on in the ground was not placed before the judge. Furthermore, if the judge did err in this respect it is not material. As the Guidance

quoted in paragraph 22 of the grounds points out, the appellant would need to provide a compelling reason for exceeding the limit and absences for employment are not considered exceptional.

4. Ground 2 does not make it clear what documents it is said related to appellant's wife's status were included with the application. I do not have access to the file but it is not clear from the notes on our system that this was included as claimed. Furthermore, again this is not material as the judge considered the position of the appellant with respect to his wife's status himself and found against the appellant.
5. The Secretary of State considers that ground 3 has no merit. The judge carefully considered the arguments put forward with respect to the rolling 10-year point but correctly concluded that it was his role to review the decision of the Secretary of State and it was not in question that at the time of the decision the appellant had exceeded that absence."

Upper Tribunal hearing

19. For the appellant, Ms McCarthy made the arguments already set out. There is no need to rehearse them here.
20. For the respondent, Ms Savage contended that the need for the appellant, as an academic, to spend time abroad on his study (212 days) was not an exceptional circumstance and that no serious and compelling reason had been advanced for the caseworker to exercise discretion. The decision was adequate, she argued, and any want of reasoning or error therein was immaterial, on the facts of this application.

Discussion

21. Both in the refusal letter and in her Reply, the respondent has used standard text which does not engage properly with the appellant's reasons for absence, clearly set out in his application. The appellant's case in relation to his absences was not primarily that 'because students have extensive holidays during the academic year it is expected that you should have longer absences than a person who came here to work so that you could travel home to China to visit your family during your vacation time': 40% of his absences were related to the doctoral studies for which leave to enter had been given. The appellant set out details of 212 days of absence which were so connected: he undertook a think tank internship in Shanghai, PhD research fieldwork in Canberra, Sydney, Beijing and Shanghai, and attended two conferences, an academic conference in Shanghai and an international studies conference in Montreal, Canada.
22. The point made in the respondent's Reply at [5] is correct: the 540-day absence limit in a 10-year period is to be assessed at the date of decision. In this case, that was unfortunate, as the appellant's absences then exceeded the limit by 12 days, so that had the decision been made two weeks later, the excess would have been reduced below the limit and there would have been no difficulty.

23. The failure to consider that the wife is settled is a relevant Article 8 point which should have been given weight.
24. Ground 1 of the grounds of appeal is made out. It is clear that the respondent's caseworker did have discretion, which has not been properly exercised in this appeal. I am not satisfied on the basis of the letter of refusal or the arguments before the First-tier Tribunal or the Rule 24 that the Secretary of State has considered the actual reasons for the appellant's absence from the United Kingdom properly or at all.
25. Ground 2 also has merit: the respondent, who granted indefinite leave to remain to the wife in November 2013, cannot be heard to say that she was unaware of her own grant of indefinite leave to remain when considering the appellant's application a year later.
26. Ground 3 is without merit. The number of days' absence is counted, at the latest, from the date of decision, not from a future date at which it would be lower.
27. Ground 4 (the Article 8 ECHR arguments) is not reached. The respondent in reconsidering this application and giving a lawful decision thereon will take account of the appellant's section 120 response and consider Article 8, having regard to all relevant factors, including the fact that the appellant's wife is settled here.

28. **Conclusions**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

I allow the appellant's appeal to the extent that his application remains before the respondent for a lawful decision under the Immigration Rules. I make no decision on Article 8 ECHR as that will form part of the respondent's consideration of the application when she makes her decision.

Signed: *Judith A J C Gleeson*
2016

Date: 1 March

Upper Tribunal Judge Gleeson