



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

Appeal Numbers: IA/12519/2015  
IA/12515/2015  
IA/12516/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 6<sup>th</sup> September 2017**

**Decision & Reasons Promulgated  
On 3<sup>rd</sup> October 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**AVNEET [B] (FIRST APPELLANT)  
VIVEK [B] (SECOND APPELLANT)  
[T B] (THIRD APPELLANT)  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr Fari Farhat, Gulbenkian Andonian Solicitors  
For the Respondent: Ms N Willocks-Briscoe, a Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants appealed to the First-tier Tribunal against the decision of the Secretary of State dated 18<sup>th</sup> March 2015 to refuse their application for leave to remain in the UK on the basis of their private and family life. First-tier Tribunal Judge Turquet dismissed the appeals in a decision promulgated on 18<sup>th</sup> August 2016. The Appellants' application for

permission to appeal to the First-tier Tribunal was refused as was a renewed application for permission to the Upper Tribunal.

2. The Appellants applied for permission to apply for Judicial Review. That application was granted by the High Court on 7<sup>th</sup> June 2017. The High Court noted that the Secretary of State has a discretion in considering the issue of 'continuous residence' in long residence cases and considered that it was arguable that the Secretary of State ought to consider exercising the same discretion in a case such as the instant one in relation to the question as to whether the Appellants had established continuous residence under paragraph 276A of the Immigration Rules. On 27<sup>th</sup> June 2017, there being no application for a substantive hearing, the decision of the Upper Tribunal to refuse permission to appeal was quashed. Following that decision permission to appeal to the Upper Tribunal was granted by Vice President Ockelton on 21<sup>st</sup> July 2017 in light of the decision of the High Court.
3. The background to this appeal is that the first Appellant entered the UK in September 2001 with entry clearance as a student until 31<sup>st</sup> January 2009 and that leave was extended until 7<sup>th</sup> February 2011 as a Tier 1 (Post-Study Work) Migrant. The Appellants returned to India on 7<sup>th</sup> February 2011 and re-entered the UK on 14<sup>th</sup> September 2011 with the first Appellant having leave to enter as a Tier 4 (General) Student until 2<sup>nd</sup> February 2015. The second Appellant is the husband of the first Appellant and the third Appellant is their son who was born on [ ] 2001 in India. They were issued with leave in line with that of the first Appellant. On 2<sup>nd</sup> February 2015 the Appellants applied for further leave to remain on the basis of private and family life. That application was refused on 18<sup>th</sup> March 2015.

### **Issues and Error of Law**

4. The issue before me centred on the question of the potential exercise of discretion by the Secretary of State in relation to a break in continuity of residence caused by the absence of the parties from the UK for a seven month period in 2011. The Appellants sought to demonstrate a period of continuous residence in the UK from their entry to the UK on 14<sup>th</sup> September 2007 until their application for leave to remain on 2<sup>nd</sup> February 2015. This is significant because, if it were to be accepted that there was a period of continuous residence of at least seven years prior to the application, then at the date of the application the third Appellant would have established continuous residence for at least seven years and there is a possibility that EX.1 of Appendix FM would apply under the parent route.
5. The issue is whether the break during which the family returned to Pakistan between 7<sup>th</sup> February 2011 and their return to the UK on 14<sup>th</sup> September 2011, a period of seven months, broke the period of continuous residence established since September 2007. It is not in

dispute that the period of absence of seven months is in excess of the six months absence permitted by paragraph 276A(a) of the Immigration Rules. However it is the Appellant's case that, under the Home Office guidance on long residence, the Secretary of State could exercise discretion in relation to periods in excess of six months absence in appropriate circumstances.

6. It is the Appellant's case, which is not disputed by the Respondent, that the first Appellant had undertaken her Master's dissertation and had identified an area of research but she was unable to secure an unconditional offer before the expiry of her Post-Study Work visa in February 2011. Therefore the family left the UK on 7 February 2011 planning to return to the UK in April 2011 with a fresh student visa. However as a result of the first Appellant's supervisor going on leave the start date for her PhD was postponed from April to September 2011. As a result she was granted entry clearance and the family returned to the UK in September 2011. During their absence they had continued to pay their rent and council tax and their child remained enrolled at school and followed the school curriculum whilst in India.
7. Paragraph 276A of the Immigration Rules defines continuous residence in the context of the interpretation of paragraph 276B to 276D and 276ADE(1) as follows:

**“Long residence in the United Kingdom**

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:

- (i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or
- (ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or
- (iii) left the United Kingdom 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 18 months absent from the United Kingdom during the period in question.”

8. The First-tier Tribunal Judge found that the Appellants had not established residence from September 2007 as their absence from the UK in 2011 broke their continuity of residence.
9. The judge decided that the Appellants did not have continuity of residence between February and September 2011 because they had leave to remain on the day they left the UK but that leave expired and they did not have any leave for a period of over six months and there was no guarantee they would have been granted leave to return to the UK [46]. The judge found that the Appellants were in the UK until the expiry of their leave in February 2011 but that is not part of any continuous residence after that date and their residence runs from September 2011 [42]. However, it was properly accepted by Ms Willocks-Briscoe that the Appellants did not fall foul of the other provisions of paragraphs 276A because they had existing leave to remain when they left the UK and entry clearance upon their return to the UK. She accepted that such leave did not have to be ongoing during their absence nor did it have to be in the same category. Accordingly the First-tier Tribunal Judge erred in her interpretation of paragraph 276A of the Immigration Rules.
10. The First-tier Tribunal Judge considered the Home Office guidance and found that it was not applicable because it applied to long residence [46]. However, it is clear from paragraph 276A that the definition of continuous residence there applies to 276B to 276D (which deal with long residence applications) and 276ADE (which deals with private life applications). The definition of continuous residence therein is not limited to long residence applications only but also applies to private life applications under 276ADE. Paragraph 276A (c) clarifies that 'lived continuously and 'living continuously' mean 'continuous residence'. Any guidance on the interpretation of the phrase 'continuous residence' is therefore capable of being applied to the interpretation of 'lived continuously' within paragraph 276ADE Accordingly the First-tier Tribunal Judge erred in failing to consider whether the Home Office guidance applied.
11. In the Grounds of Appeal as amplified by Mr Farhat at the hearing, it is contended that, had the First-tier Tribunal Judge considered the Home Office guidance, she should have decided that the Secretary of State had failed to consider exercising the discretion contained in the guidance and concluded that the decision of the Secretary of State is not in accordance with the law. It is contended that such a finding was open to the judge because this appeal was brought under the previous version of Section 84(1) of the Nationality, Immigration and Asylum Act 2002.
12. The issue therefore is whether the period of seven months, which is in excess of the six month period set out in the definition of continuous residence in 276A (a) was a circumstance capable of being considered under the relevant Home Office guidance. For the reasons set out above I am satisfied that the guidance as to the interpretation of 'continuous residence' is relevant to assessing whether a child has established that

s/he has 'lived continuously' in the UK for at least 7 years under 276ADE(1)(iv).

13. The version of the guidance relied on at the hearing in the First-tier Tribunal and in the Grounds for Judicial Review was that dated 8<sup>th</sup> May 2015 and a complete version of that guidance had not been submitted to the Upper Tribunal. When the parties were given an opportunity to obtain the relevant guidance, it became apparent that the relevant guidance applicable at the date of the decision in this case is in fact that dated on 17<sup>th</sup> October 2014 and not the May 2015 guidance. The relevant provisions of both guidances are different.
14. The October 2014 guidance sets out the definition of 'continuous residence' as that set out at paragraph 276A of the Immigration Rules. The October 2014 guidance is divided into a number of sections under the heading 'Long residence'. Page 13 contains a section entitled 'Breaks in continuous residence' which states that continuous residence is considered to be broken if (inter alia) the applicant has been absent from the UK for a period of more than six months at any one time, or is absent from the UK for a shorter period but does not have valid leave to enter the UK on their return, or valid leave to remain on their departure from the UK. The key section of the 2014 guidance is at page 17 which has a section entitled 'Time spent outside the UK' where it states:

"Continuous lawful residence is broken if the applicant has a gap of leave of more than 6 months.

However, it is not broken if the applicant has a gap of leave outside the UK of six months or less. For example, applicants who leave the UK before their valid leave expires and obtain fresh entry clearance and re-enter the UK do not break continuous lawful residence providing the absence from the UK is less than 6 months...

It is also not broken if the applicant leaves the UK after their valid leave has expired and returns to the UK with valid leave that was granted within 28 days of the original leave expiring.

#### **Discretion for breaks in lawful residence**

You must always discuss the use of discretion with a senior caseworker. You must be satisfied the applicant has acted lawfully throughout the whole 10 year period and has made every effort to obey the Immigration Rules. The decision to exercise discretion must not be taken without consent from a senior executive officer (SEO) or equivalent.

#### **Gap(s) in lawful residence**

You may grant the application if an applicant:

- has short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days, and
- meets all the other requirements for lawful residence

You can use your judgment and use discretion in cases where there may be exceptional reasons why a single application was made more than 28 days out of time ...”

15. The equivalent provisions in the May 2015 long residence guidance are at page 13 of that guidance which states:

**“Events that break continuous residence**

Continuous residence is considered to be broken if the applicant has:

- been absent from the UK for a period of more than 6 months at any one time, or is absent from the UK for a shorter period but does not have valid leave to enter the UK on their return, or valid leave to remain on their departure from the UK
- spent a total of 18 months outside the UK throughout the whole ten year period

**Time spent outside the UK**

Continuous residence is not considered broken if the applicant:

- is absent from the UK for 6 months or less at any one time

...

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

This must be decided at senior executive officer (SEO) level with a grant of leave outside the Immigration Rules being the appropriate outcome.

Things to consider when assessing if the absence(s) was compelling or compassionate are;

- 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.

- o you must consider how much the absence was due to compelling circumstances and whether the applicant returned to the UK as soon as they were able to do so

- o you must also consider the reasons for the absence

...

All of these factors must be considered together when determining whether it was reasonable to exercise discretion”

16. Page 18 of the 2015 guidance replicates page 17 of the 2014 guidance to the extent that it deals with time spent outside the UK and gaps in lawful residence. However that section does not deal not replicate the section in the 2014 guidance entitled ‘Discretion for Breaks in Lawful Residence’.
17. Ms Willocks-Briscoe submitted that the 2014 guidance does not give a general discretion which would have been exercisable in the circumstances of this case. She submitted that the guidance at page 17 of the 2014 guidance is in the context of the requirement to show ten years lawful residence under the long residence provisions. She submitted that the 2015 guidance deals with breaks in continuity of residence and does not reflect a similar provision in the 2014 guidance. She submitted that this is a new provision which was added into the 2015 guidance and is not endeavouring to expand upon the 2014 guidance. She submitted that, if the discretion referred to in the 2014 guidance was a wide-ranging discretion applying to everything, it would have been at the start of this section. She submitted that there should be a narrow interpretation to the discretion referred to at page 17 of the 2014 guidance. In her submission the 2015 guidance could not inform the interpretation of the 2014 guidance.
18. On the other hand Mr Farhat submitted that the fact that the discretion referred to in the 2014 guidance was not replicated in the 2015 guidance indicates that the 2015 guidance provides clarification on the existing power to exercise discretion. He submitted that if there was any ambiguity it should be construed in a way in which it could reasonably be interpreted by an applicant without doing violence to the language.
19. As set out above it is clear that the policy can apply to the interpretation of ‘lived continuously’ in the UK in paragraph 276ADE (1) (iv). I have looked carefully at the wording of both versions of the policy. As properly suggested by Mr Farhat as this is guidance I must apply the clear and natural meaning to the wording. The discretion set out in the 2014 version of the policy is set out under the heading ‘Discretion for breaks in lawful residence’ therefore it must be a discretion applicable to situations where there is a ‘break’ in residence. The section dealing with discretion comes after the section looking at ‘Time spent outside the UK’. The following section deals with ‘Gaps in lawful residence’ and goes on to look at

examples where it may be appropriate to grant an application where there is a gap in lawful residence and where it may be appropriate to exercise discretion even though an application was made late. Therefore reading pages 17 and 18 of the 2014 guidance together and looking at the section entitled 'Discretion for breaks in lawful residence' in the context of the preceding and subsequent sections it is clear to me that the discretion referred to must refer to breaks as a result of absence from the UK for a period of 6 months or more. In my view this is confirmed by reading the 2015 guidance which omits this section and replaces it at page 14 with a specific discretion dealing with absences from the UK.

20. In these circumstances I find that, at the date of the decision appealed against, the Secretary of State had a discretion in the context of the Appellants' absence from the UK for a period exceeding 6 months. It is not in dispute that the Secretary of State failed to exercise that discretion. At the time the appeal was lodged the Tribunal had the power to decide that a decision was not in accordance with the law.
21. Accordingly, I find that there is a material error of law in the decision of the First-tier Tribunal in the interpretation of paragraph 276A of the Immigration Rules and the Home Office long residence guidance. Therefore I set aside the decision of the First-tier Tribunal. In remaking the decision I find that the Secretary of State failed to consider exercising discretion in relation to the Appellants' absence from the UK in accordance with her policy and guidance. In these circumstances the application remains outstanding before the Secretary of State to consider the exercise of discretion and to make a lawful decision in relation to the Appellants' applications.

### **Notice of Decision**

22. The decision of the First-tier Tribunal contains a material error of law and is set aside.
23. I remake the decision by deciding that the decision of the Secretary of State is not in accordance with the law and the application remains outstanding before her for a lawful decision to be made.
24. No anonymity direction is made.

Signed

Date: 29<sup>th</sup> September 2017

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**  
**FEE AWARD**



As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award as the application remains outstanding before the Secretary of State.

Signed

Date: 29<sup>th</sup> September 2017

Deputy Upper Tribunal Judge Grimes