Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33084/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 August 2017	**On 19 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MISS SHAROFAT NAZAROVA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Jones of Counsel
For the Respondent: Mr L Tarlow, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Uzbekistan who was born on 5 April 1975. The appellant arrived in the United Kingdom on 9 January 2005 on a student visa valid until 14 February 2005. Thereafter she submitted various applications for leave to remain as a student. On 29 August 2009 the appellant applied in time for a further grant of leave to remain as a Tier 4 (General) Student. On 29 August 2012 that application was rejected. On 26 September 2012 she again submitted an in time Tier 4 (General)

Student application and was granted leave to remain until 1 December 2014. On 1 December 2014 she submitted an application for indefinite leave to remain in the United Kingdom on the basis of ten year long residence grounds.

2. The respondent refused the appellant's application on 5 October 2015. The basis of the respondent's refusal was that the appellant had obtained her TOEIC certificate from Educational Testing Services fraudulently and therefore that she had used deception in her application. The respondent also refused the application on the basis that the appellant failed to satisfy the continuous residence test because the number of absences from the UK during the relevant period totalled 721 days. Additionally the appellant's absence from the UK between 20 July 2008 and 6 February 2009 amounted to 200 days, which is in excess of the total absence of 180 days.

The appeal to the First-tier Tribunal

3. The appellant appealed against the respondent's decision to the First-tier Tribunal. In a decision promulgated on 17 November 2017 First-tier Tribunal Judge Cameron dismissed the appellant's appeal. Although the judge found that the appellant had not used deception to obtain her TOEIC certificate the judge found that the appellant failed to meet the ten year continuous residence requirement. He considered that although the appellant was unable to travel due to a medical condition of the relevant period she was absent for 721 days whereas the permitted absence is 540 days in total. The appellant's medical issues in 2008 were not sufficient to amount to the considerable period of time that she is above the limit of 540 days.

4. The appellant applied for permission to appeal against that decision to the First-tier Tribunal. On 12 May 2017 First-tier Tribunal Judge Foudy refused the appellant permission to appeal. The appellant renewed her application for permission to appeal and on 6 July 2017 Upper Tribunal Judge Finch granted the appellant permission to appeal.

The appeal to the Upper Tribunal

5. The grounds of appeal state that the appellant was permitted to stay outside the United Kingdom for 540 days or less during the last ten years. The respondent's own stated policy allows exercise of discretion in cases where the appellant has lived outside the UK for more than 540 days due to compelling and compassionate circumstances. Reference is made to the respondent's guidance "Long residence - Version 13.0" at page 14. It is asserted that in this case the appellant had stayed outside the UK for 721 days during the qualifying period. The judge erred in calculating the period of absence by failing to discount the absence of 200 days which, as the judge held, was due to compelling and compassionate circumstances. It is submitted that this absence should have been discounted before calculating the total absence during the last ten years. Once the absence

of 200 days is discounted the appellant's stay outside the UK is less than 540 days. The Home Office Presenting Officer did not provide a copy of the abovementioned policy guidance. Therefore, the judge erred in dismissing the appeal without judicial scrutiny of relevant policy guidance. The respondent to discharge her duties towards the Tribunal - the recent decision of the Supreme Court in the case of **Mandalia (appellant) v SSHD (respondent) [2015] UKSC 59** is relied on at paragraph 19.

6. In oral submissions Ms Jones submitted that the absence related to medical reasons and that the judge accepted the compelling circumstances. She submitted that at paragraph 59 the judge made the crucial findings. The judge's findings were contradictory as having found that the absence was as a result of the medical conditions the judge ought to have deducted the 200 days from the total of 721 days. The purpose of the trip was to receive medical treatment. The appellant's condition worsened while she was outside the United Kingdom and her recovery took considerably longer than she had anticipated. Both the fact that the appellant was unable to return and compelling circumstances apply in this case.

7. The point of the Rule was that if a person could establish long residence in the UK they were entitled to settlement. The reason for the absence criteria is because the appellant needs to demonstrate that they have their life primarily in the United Kingdom. The First-tier Tribunal's decision was inconsistent and not rational as having found that the appellant was unable to travel and that her reason for that amounted to compelling circumstances the judge ought to have deducted the whole of the period of time.

8. Mr Tarlow relied on the Rule 24 response. It was asserted that the maximum period that could be deducted was 20 days i.e. the number of days in excess of the 180 permitted. Mr Tarlow referred to the guidance at page 14 and submitted that the respondent has a discretion and that clearly the guidance indicates only that it may be appropriate to exercise discretion. He submitted that where discretion is exercised any leave that might be granted is outside the Rules, not within the Rules. There is no discretion where an applicant has been outside the United Kingdom beyond the 540 days. He submitted that this is the total amount of days that a person can be outside of the United Kingdom. There is no discretion to be exercised in that case. The discretion arises only in relation to single absences of over 180 days. He referred to the guidance where it sets out "for overall absences of 540 days in the ten year period", submitting that this does not indicate for periods in excess of 540 days.

9. He submitted that the Secretary of State did consider exercising her discretion. He referred to the Reasons for Refusal Letter on page 4. The Secretary of State did not consider that the circumstances justified the exercise of discretion. If an appellant goes abroad and then cannot return within the 180 days that is no reason for requiring the Secretary of State to exercise discretion. He submitted that discretion in any event is only in

respect of the six month period of absence. Absences of 540 days plus are not to be taken into consideration.

10. In reply Ms Jones submitted that the guidance in the second paragraph at page 14 does not separate out that discretion cannot be exercised when considering the eighteen month total.

11. The issues in this case are whether or not the total period of absence over the whole 10 year period cannot exceed 540 days in any circumstances as the respondent argues or whether the discretion set out in the respondent's guidance includes total absences of over 540 days and whether the whole 200 days absence should be deducted from the total number of days of absence. The Home Office Guidance – Long Residence version 13.0, which was applicable at the time, (I note that the guidance on this point remains the same in the latest version) sets out at page 14:

> 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.
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> This must be decided at senior executive officer (SEO) level with a grant of leave outside the Immigration Rules being the appropriate outcome.
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> Things to consider when assessing if the absence was compelling or compassionate are: Page 11 of 43 Published for Home Office staff on 03 April 2017
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> • for all cases – you must consider whether the individual returned to the UK within a reasonable time once they were able to do so
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> • for the single absence of over 180 days:
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> o 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
>
> o you must also consider the reasons for the absence
>
> • for overall absences of 540 days in the 10 year period:
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> o you must consider whether the long absence (or absences) that pushed the applicant over the limit happened towards the start or end of the 10 year residence period, and how soon they will be able to meet that requirement
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> o 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 o 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.

12. The guidance clearly envisages the possibility of exercising discretion when there has been a total absence of more than 540 days. The structure sets out things to consider and then describes what must be considered 'for all cases'. It then separates 2 sets of circumstances. Firstly 'single absences over 180' days and secondly 'overall absences of 540 days'. It cannot mean overall absences that are 540 days or less because there would be no need to exercise discretion. It cannot be the case that these are further factors to consider after considering the single absence in excess of 180 days. That is clear from the bullet points below where it sets out various factors that can only be relevant to absences in excess of the 540 day period, such as whether the absences (this could be several absences so clearly not just a single absence of over 180 days) that pushed the person over the limit (this must refer to the 540 day limit) happened towards the start of the 10 year period

13. When considering the evidence the First-tier Tribunal Judge set out from paragraph 59:

> "59. As indicated I have heard oral evidence from the appellant and I find her to be a credible witness. I accept the evidence available to me that the appellant was unable to travel due to a medical condition and that this led to her being absent from the UK for in excess of the 180 days permitted on any one occasion.
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> 60. It is however the case that the appellant in total over the relevant period was absent for 721 days whereas the permitted absence is 540 days in total. The appellant's medical issues in 2008 are not sufficient to amount to the considerable period of time she is above the limit of 540 days.
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> 61. Although it is submitted on the appellant's behalf that there were other reasons for her being absent such as her mother being ill I do not accept the submission that simply because if it were not for those absences that she would be within the continuity provisions. That argument could be adopted by anyone and would make having the Rule itself unworkable.
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> 62. Taking into account the evidence overall I accept that the appellant has given a reasonable explanation of why she remained beyond the normal 180 days in 2008/2009 however I am not satisfied that she has given a reasonable explanation for the fact that she spent 721 days absent from this country. This may be made up of a number of shorter absences but that does not give a reasonable explanation as to why she would be absent beyond the 540 days permitted to enable her to meet the requirements of the Rules.
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> 63. Taking into account all of the evidence available I am not satisfied therefore that the appellant is able to meet the requirements of the Immigration Rules in relation to long residence under paragraph 276D

> and I find that the respondent's decision to refuse her application was in accordance with the law and the applicable Immigration Rules."

14. The judge accepted that the reason for the absence that was in excess of 180 days (200 in total) was due to a medical condition and that a reasonable explanation had been given for the absence. I note from the evidence that the appellant returned as soon as she was allowed to fly so returned as soon as she was able to do so. I also note that the appellant travelled for the purpose of obtaining medical treatment but her condition worsened whist she was aboard such that form the medical reports (which were accepted by the First-tier Tribunal) she was not permitted to fly until 30 January 2009. The judge appears to have miscalculated the period of absence as he considered that appellant's medical issues in 2008 were not sufficient to amount to the considerable period of time she is above the limit of 540 days. However if the 200 days absence is deducted from the 721 days total absence the appellant would have been absent for 521 days out of the 10 year period. The judge did not appear to consider that discretion can be exercised for absences of over 540 days in total over the 10 year period. As I set out above the guidance indicates that the exercise of discretion should be considered in these circumstances as well as for single absences in excess of 180 days. I do not accept that only 20 days in excess of the 180 days can be deducted. The guidance does not indicate that such an approach should be taken. The guidance sets out that the decision maker must consider **how much** of the absence was due to compelling circumstances. In this case the appellant visited her doctor within a week of arrival and has medical evidence (accepted by the judge) that indicated that she was unable to return to the UK because of her illness which prevented her from flying. She retuned very shortly after being declared fit to fly. In any event as I set out above the guidance is clear – the decision maker has a discretion when considering absences in excess of 540 days. The judge had found that the reason for her absence was because she was unable to travel due to a medical condition which led to her being absent from the UK for in excess of the 180 days. The judge ought to have deducted the 200 days from the total and also considered the respondent's discretion to assess whether there were compassionate and compelling circumstances in relation to absences over 540 days in total. Having found effectively that there were compassionate circumstances then either as a result of deducting the 200 days or considering the same compassionate circumstances should have been applied to the total period the judge ought to have allowed the appeal.

15. The First-tier Tribunal made a material error of law for the reasons given above. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

16. I re-make the decision allowing the appeal for the reasons set out above.

Notice of Decision

The appellant's appeal against the decision of the Secretary of State is allowed.

No anonymity direction is made.

Signed P M Ramshaw Date 19 September 2017

Deputy Upper Tribunal Judge Ramshaw