**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: UI-2022-006540
EA/01522/2022

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 14th July 2023** | **On 7th August 2023** |

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**
**DEPUTY UPPER TRIBUNAL JUDGE WILDING**

**Between**

**RITA PINTO LEITE DE BRITO NOGUEIRA**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms S Patuto, Counsel, instructed by SB Immigration Ltd
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Portugal born on 16 July 1999. She appeals against the decision of First-tier Tribunal Judge O'Keefe ("the Judge") who dismissed her appeal against the respondent's decision to refuse her pre-settled status under Appendix EU of the Immigration Rules ("the Rules").

## Background

2. The appellant was born with a congenital heart condition. She arrived in the UK in October 2017. She lived in the UK until March 2020, when at the outset of the pandemic she returned to Portugal. She returned, briefly to the UK in June 2020, before then going back to Portugal again in July 2020. She returned finally to the UK in September 2021, some 14 months later.

3. The appellant applied for pre-settled status on the basis that she was living in the UK. The appellant accepts that she had been outside the UK for more than 12 months but argued that the reason she was outside the UK was due to the impact of the pandemic. In particular she relied on the respondent's own guidance *EU Settlement Scheme: EU, other EEA and Swiss Citizens and their family members* (Version 15.0) 9 December 2021.

## Decision under appeal

4. The Judge dismissed the appeal for the following reasons:

> *'32. There was ample documentary evidence before me to show that the appellant had been studying in the UK from September 2017 at Coventry University. The appellant lived in the UK and also worked in the UK. I accept the appellant's evidence that on 7th January 2020 she started an internship at the Ritz, London. I have no doubt that when she returned to Portugal in March 2020, it was because of the outbreak of Covid. The appellant provided a letter dated 1st June 2022 from Dr Vania Ribeiro, Cardiologist, who wrote that the appellant had Stenosis Aortic which was a lifelong heart disease. As such, the appellant was considered a high risk patient and was recommended to return to Portugal and 'isolate at home with her family during the first few months of the pandemic and until restrictions were lifted'.*
>
> *33. The appellant returned to the UK in June 2020. I accept that having worked in the hospitality industry, there was little opportunity for the appellant to find work in that field at that time in the UK. The appellant's internship at the Ritz could not continue when the hotel closed in March 2020 as a result of Covid. It was accepted that the document from the Ritz Hotel which said that the appellant had completed an internship at the hotel until 31st December 2020 was not correct. I have no doubt that when she returned to Portugal again in July 2020 it was because of Covid and the resulting lack of employment in the UK.*
>
> *34. I do not accept however that her absence from the UK for the period from July 2020 until September 2021 can be attributed throughout to Covid. During that period, the appellant chose to continue her studies in Spain and undertook a master's degree in Marbella. The appellant commenced that course in October 2021 and concluded her studies on 14th June 2021. Whilst travel between Portugal and Spain may have been easier for the appellant, she was clearly then in a position to leave Portugal and continue her studies. The appellant was not advised by a university in the UK not to return to the UK during that time period as her own timeline states that she finished her studies for her undergraduate degree remotely in March 2020.*

*Her Bachelor of Arts degree was awarded from Coventry University in July 2020.*

*35. I was not directed to any evidence to suggest that the appellant was unable to return to the UK because of travel disruption. The medical evidence provided by the appellant does show that she was advised to return to Portugal and isolate there for the first few months of the pandemic. It does not demonstrate, however, that she was required to isolate at home for any longer. The appellant was able to return to the UK in June 2020 and then travel to Spain in October 2021 for at least part of her master's degree.*

*36. The fact that the appellant continued her studies in Spain was, I find, a matter of personal choice. The appellant accepted in cross examination that she had chosen to study in Spain because she had received a scholarship. Whilst Covid 19 might have been a factor that she took into account in deciding where to continue her studies, I find that it did not prevent her from returning to the UK and continuing her studies. There is no medical evidence before me to support any assertion that she had been advised not to return to the UK during the totality of that 14 months period of absence.*

*…*

*39. In conclusion, the appellant was absent from the UK from 4th July 2020 to 18th September 2021. Whilst I am satisfied that she initially returned to Portugal as a direct result of the pandemic, she later made the choice to continue her studies in Spain. She was a student at a Spanish university from October 2020 to 14th June 2021. I was not directed to any evidence to suggest that the appellant could not have undertaken a master's degree at a UK university during this period. The appellant's health did not prevent her from travelling to Spain during this period. There appears to be no reason to suggest that any financial support provided to her in Spain, could not have been provided to her in the UK. Whilst Covid 19 may have influenced the appellant's choice as to where she continued her studies, on the evidence before me considered as a whole, I find that the appellant has not demonstrated that her absence from the UK from July 2020 to September 2021, was a direct result of the pandemic. The evidence does not demonstrate that she was prevented from or advised against returning earlier because of Covid. I find that the appellant does not meet the requirements of Appendix EU for pre-settled status in the UK.'*

## Grounds of appeal

5. Permission to appeal was granted by Upper Tribunal Judge Lindsley on one ground only. That ground was that the Judge has misapplied, or as the case may be not applied at all, the respondent's guidance.

## The hearing

6. At the outset of our list on the 14th July 2023 we asked Ms Patuto to obtain an earlier version of the guidance she relies on, because the one referred to before the Judge and in the grounds of appeal (Version 17.0) was from April 2022, however the respondent's decision under appeal was made on 27 January 2022, and therefore we wanted to ensure we had the operative

guidance when the decision was made. We put the case back to midday for this to happen.

7. Ms Patuto returned and provided the guidance (Version 15.0). We heard submissions from both representatives, a note of which is found in the record of proceedings.

8. Ms Patuto submitted that the guidance clearly allowed personal preference on not returning to the UK, and as such the Judge failed to appreciate that the appellant's personal choice was a permissible reason not to return to the UK until September 2021. The appellant suffers from a heart condition, and so it was understandable why she went back to Portugal, and then having been told that there was little work due to the impact of the pandemic decided to stay in Portugal. That she then looked into studying a masters and undertook that course in Spain should not count against her because throughout this period the pandemic continued to have a significant impact throughout the UK and Europe.

9. Ms Cunha submitted that the appellant's decision to study in Spain was not a 'Covid-19 related decision'. The appellant did not have to study in Spain. That she decided to, and lived on campus for a period of time, demonstrated that it was not a Covid-19 induced decision. Consequently, Ms Cunha submitted that there was no causative link between the pandemic and the appellant's decision not to return to the United Kingdom until September 2021, a period longer than the 12 months allowed by the Rules.

10. At the end of the hearing we found that there was a material error of law and that the decision would have to be remade. We further indicated that in remaking the decision we would allow the appeal.

## Findings and reasons

11. The applicable provision of appendix EU to the immigration rules operative in this case says:

*(i)(ee) below, began before the specified date; and*
*(b) during which none of the following occurred:*
*(i) absence(s) from the UK and Islands which exceeded a total of six months in*
*any 12-month period, except for:*
*[...]*
*(ee) a period of absence under sub-paragraph (b)(i)(aa), (b)(i)(bb), (b)(i)(cc) or (b)(i)(dd) above which exceeded 12 months because COVID-19 meant that the person was prevented from, or advised against, returning earlier; where this is the case, the period of absence under this sub-paragraph exceeding 12 months will not count towards any period of residence in the UK and Islands on which the person relies;*

12. It is plain that there is a discretionary provision whereby the 12-month limitation on an absence from the UK is waived if the absence was because of Covid-19. The circumstances as to when this provision can apply is set out in the guidance of the respondent which outlines, in non-exhaustive terms, the variety of situations whereby an absence can be waived.

13. The relevant guidance was set out before the Judge by Ms. Patuto by both her skeleton argument and her oral submissions. The Judge sought to apply that guidance and found that because there was no confirmation from her employer in the UK that she should not return, then this was determinative of the matter. The Judge found that it was entirely the appellant's personal choice to stay in Portugal, and therefore the appellant was outside of the UK for longer than 12 months for reasons not related to the pandemic. Ms Patuto produced the earlier guidance from January 2022 in existence at the time of the decision.

14. The relevant pages of the guidance are exactly the same in both the January and April 2022 guidance. The section of the guidance that the Judge applied said:

*As also set out above, a period of absence may exceed the 12-month maximum for a period of absence for an 'important reason' where COVID-19 meant that the person was prevented 'from, or advised against, returning to the UK and Islands (or, where applicable, the UK) earlier, such as where they were:*

*• ill with COVID-19*
*• in quarantine, self-isolating or shielding in accordance with local public health guidance on COVID-19*
*• caring for a family member affected by COVID-19*
*• prevented from returning earlier to the UK due to travel disruption caused by COVID-19*
*• advised by their university or employer not to return to the UK, and to continue studying or working remotely from their home country, due to COVID-19*

*This is a non-exhaustive list of such reasons and each case must be considered on an individual basis in light of the information and evidence provided by the applicant. For a non-exhaustive list of examples of relevant evidence, see below.*

*In such a case, the absence beyond 12 months will not be counted as residence in the UK and Islands (or, where applicable under Appendix EU, the UK) for the purposes of the EUSS. Their continuous qualifying period will be paused from the point their absence reached 12 months and will resume from the point of return to the UK and Islands (or, where applicable, the UK).'*

15. Had the Judge continued onwards to the latter section referred to in the appellant's skeleton argument she would have noted the following section (emphasis added):

*'In all cases, the applicant will need to provide evidence of the length of, and reason for, any absence relating to COVID-19 on which they rely. Examples of acceptable evidence include:*

*• used travel tickets confirming the dates the applicant left the UK and returned*
*• confirmation of flight cancellations detailing the dates and times*
*• doctor's letter confirming the applicant contracted COVID-19*
*• doctor's letter confirming the applicant was identified as vulnerable and advised to shield*
*• email or letter confirming the applicant, or a person they were living with, received a positive COVID-19 test result*
*• official letter confirming the applicant was in COVID-19 quarantine*
*• doctor's letter confirming the applicant's family member, for whom they have been caring, contracted COVID-19 or was identified as vulnerable and advised to shield*
*• email or letter confirming the applicant's family member, for whom they have been caring, received a positive COVID-19 test result*
*• email or letter from a university advising that, due to COVID-19, their course was moved to remote learning and they were advised or allowed to return to their home country to study remotely*
*• email or letter from a university or employer advising the applicant not to return to the UK, and to continue studying or working remotely from their home country, due to COVID-19*
***• letter or other evidence from the applicant accounting for their absence for another reason relating to the COVID-19 pandemic, for example, they left or remained outside the UK because there were fewer COVID-19 restrictions elsewhere; they preferred to work or run a business from home overseas; or they would have been unemployed in the UK and preferred to rely on support from family or friends overseas***

*This list is non-exhaustive, and each case must be considered on a case by case basis. As elsewhere under the EU Settlement Scheme, you may exercise discretion in favour of the applicant where appropriate, to minimise administrative burdens, and you must refer to your senior caseworker if you require further advice.'*

16. We find that the Judge materially erred in her application and consideration of the respondent's guidance because the Judge clearly did not go on to consider the rest of the guidance following the section identified above. Nor did the Judge recognise that the list set out in the section she was applying clearly identified itself as non-exhaustive.

17. As can be seen the guidance itself not only sets out a large range of non-exhaustive examples, but also expressly identifies that personal preference to remain outside the UK for Covid related reasons was

perfectly permissible. Had the Judge have considered this section of the guidance then her findings as to the personal choice of the appellant would not only have been inadequate and arguably irrational, but also could well have led to determining the appeal in the appellant's favour.

18. In coming to this conclusion we note the decision of SF and others (Guidance, post-2014 Act) [2017] UKUT 120 (IAC) [2017] Imm A.R. 1003 where this Tribunal identified in the headnote:

*'Even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal.'*

19. We find therefore that the Judge materially erred by failing to properly take the guidance into account and made findings which as a result were inconsistent with that guidance. Consequently, the decision is properly to be set aside.

Remaking the Decision

20. Turning to the remaking of the decision we find that the appellant returned to Portugal in July 2020 as a consequence of the pandemic, she was not able to continue working in London and due to her long-standing heart condition felt it would be safer to return to her family home. She considered the worst of the pandemic to have passed in September 2021 and returned to this country. During those intervening 14 months she studied in Spain, and had expressly chosen the particular university due to the proximity to home, approximately a 6-hour drive. The campus had stringent Covid security arrangements in place such as regular lateral flow and PCR testing, she was also "locked down" on campus for 2 months at the end of 2020. That choice was of course a personal choice of the appellant, but it was one made because of the impact of the Covid-19, and was plainly a considered decision taken by the appellant driven by her preference taking everything into account.

21. In those circumstances it is plainly a set of circumstances which meets the provisions of the guidance outlined above at paragraph 15 above and the immigration rules, Covid-19 prevented her from returning to the UK earlier and as such the 14 months spent outside the UK should not count towards her continuous residence. The appellant succeeds under Appendix EU.

## Notice of Decision

The decision of the First Tier Tribunal was subject to a material error of law and is set aside.

The decision is remade, and the appeal is allowed.

No anonymity direction is made.

T.S. Wilding

Deputy Upper Tribunal Judge Wilding Date 27th July 2023