IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000587

First-tier Tribunal No: HU/57389/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 November 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

ANNA TEREKHOVA
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Canter, of Counsel, instructed by Quastels LLP
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 5 November 2024

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Russia born on 28th November 1996. She came to the UK as a Tier 4 child student on 4th September 2012 at the age of 15 years and had leave in this capacity until 25th October 2016. She then had leave as a Tier 4 general student migrant until 29th October 2019. She left the UK on 20th October 2019, she applied for a visit entry clearance and re-entered on 4th December 2019 and was granted leave until 15th May 2020. She then had Covid 19 exceptional extensions of leave up until 31st August 2020 when she left the UK. She travelled to Denmark where she married her fiancé, Mr Rain, a British Citizen. She re-entered the UK with a partner entry clearance on 9th October 2020 which was valid until 7th July 2023. She applied for indefinite leave to remain based on having 10 year's long residence

under paragraph 276B of the Immigration Rules on 12th April 2023 in the context of her marriage having broken down. The appellant appealed against the decision to refuse this application dated 5th June 2023. Her appeal was dismissed by First-tier Tribunal Judge L Mensah after a virtual hearing on the 5th January 2024.

2. Permission to appeal was granted and, for the reasons set out in my decision at Annex A, I found that the First-tier Tribunal had erred in law and set aside the decision dismissing the appeal. I preserved the findings that the appellant has ten years lawful residence; that there are no public interest reasons for refusing the application. I found that the question to be remade was whether the appellant should be found to have broken the continuous residence, or not, in the context of the respondent's residual discretion applying the guidance at pages 11 and 12 of the guidance in Long Residence Version 17 published on 11th May 2021 to the facts in this appeal.

3. The relevant parts of the respondent's policy guidance on the residual discretion relating to continuity of residence are that: "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" and that: "you must consider whether the individual returned to the UK within a reasonable time once they were able to do so".

Evidence & Submissions – Remaking

4. The appellant adopted her statement. It was agreed that no further consideration of the evidence was needed although an additional statement had been put in concerning the cancer treatment of the appellant's mother.

5. In the reasons for refusal letter, the respondent's review from the First-tier Tribunal, a skeleton argument from Mr Melvin and in oral submissions from Mr Wain it is argued for the respondent, in short summary, as follows.

6. This is a challenge concerning the residual discretion of the respondent as there is no discretion contained in the Immigration Rule at paragraph 276A(a) with respect to the length of time which breaks continuity of residence and it is accepted that the appellant had been out of the UK for a number of days in excess of the permitted maximum.

7. It is argued that the case law holds that residual discretion, which is not part of the Immigration Rules, is a matter for the Secretary of State and is not a matter for the Tribunal unless exercised in a Wednesbury unreasonable fashion, as held by Mr Justice Haddon-Cave sitting as an Upper Tribunal Judge in Marghia (Procedural fairness) [2014] UKUT 366. When looked at through the prism of the policy, as is done by the respondent in the refusal letter and review, the circumstances of the

appellant are entirely rationally found not to be exceptional or sufficiently compelling to mean that discretion should be exercised in her favour. Consideration is given primarily to the appellant's need to return to Russia for medical treatment because this is how the case is put in the representations and in the witness evidence of the appellant and her mother. The policy guidance gives no indication that absences during school holidays will be discounted for minor students on the basis that they could not reasonably return to the UK when boarding schools are closed.

8. Further, the appellant now has a Tier 2 skilled worker visa which will enable her to apply for indefinite leave to remain in August 2028 and this means she is not being required to leave. This means that this human rights appeal is fundamentally not allowable because there is no removal in prospect and so the refusal of the application does not amount to an interference with the appellant's private life ties with the UK as she is not required to leave the UK.

9. In oral submissions from Mr Canter, referring back to his skeleton argument as before the First-tier Tribunal and other documentation, it is argued for the appellant, in short summary, as follows.

10. With respect to whether the decision amounts to an interference with the appellant's private life ties with the UK, and thus whether Article 8 ECHR is engaged, given that she has Tier 2 skilled worker leave granted until August 2028, it was argued that this was the case because her current leave is tied to her employer and because indefinite leave to remain is a higher status. Mr Canter could not point however to any evidence as to why this amounted to an interference with private life ties on the facts of the appellant's case.

11. With respect to whether there was an error of law in the decision under challenge with regards to the respondent's application of the policy it is argued that because the appellant had to leave the UK whilst she was a child at boarding school, because the school was closed during the holidays, and she was not, as a child, at liberty to return earlier, she should have been seen as returning within a reasonable time, and therefore discretion should have been exercised in her favour by the respondent applying her policy to decide there was no break in continuous residence. These school holidays amounts to 430 days and so if they were discounted then the appellant had not been absent for more than the permitted 548 days. It is argued that whilst medical matters were argued as compassionate factors the fact that the boarding school was closed was also put forward in the appellant's statements, as well as in the representations made by her solicitors when the application was submitted and in the First-tier Tribunal skeleton argument, as a reason why she should have time absent from the UK discounted as she could not reasonably have returned sooner. It is argued that even if the appellant did return to Russia because her mother wanted her to do so for medical treatment from June 2014

onwards the fact remains that she would in any case have been unable to return earlier because her school was closed and therefore she could not have reasonably returned earlier, and so this was a factor which the respondent needed to consider to make her decision on discretion lawful and in accordance with her policy.

12. Mr Canter also argued that Marghia was no longer relevant because it concerned an appeal under the Immigration Rules rather than a human rights appeal, although Mr Wain suggested in response that this was not the case relying upon Ahmed [2019] UKUT 10 at paragraph 77, a human rights appeal, where it was concluded that: ”it is simply not arguable that the Respondent acted unreasonably by failing to reach a decision with respect to the exercise of discretion; and/or by failing to provide any, or any adequate, reasoning as to the exercise of that discretion; and/or by failing to consider material matters and to exercise her discretion reasonably.”

Conclusions – Remaking

13. The first question I must determine is whether the appellant can show that the decision is unlawful under s.6 of the Human Rights Act 1998 under s.84(2) of the Nationality, Immigration and Asylum Act 2002 given that she has leave to remain as a Tier 2 skilled worker until August 2028 and is not being required to leave the UK as a result of the refusal decision under appeal.

14. The appellant clearly has private life ties to the UK but to meet the requirements of Article 8(2) ECHR she must firstly be able to show that the decision of the respondent interfered with her right to respect for private life, and secondly that this interference is disproportionate. No removal can now result from the refusal decision under appeal due to the grant of leave to remain. I find that there is no factual evidence that indefinite leave, rather than limited leave, is needed to ensure that there is no interference with the appellant’s private life ties with the UK. Such evidence is not identified in the skeleton argument before the First-tier Tribunal, despite the appellant having Tier 2 leave at the time of the hearing, and whilst Mr Canter argued that indefinite leave to remain is superior and that the appellant is tied to her current employer there was no witness statement evidence which supports this tie being problematic with respect to the appellant’s work plans. From the very brief witness statement of 1st November 20024 it is clear that the appellant has recently travelled to Canada to see her unwell mother, and whilst she says that that indefinite leave would “give me an opportunity to travel in case of emergency without compromising my work status” I find she has not shown that the refusal of indefinite leave to remain amounts to an interference with her private life ties given her ability to live and work in the UK, and take holidays to see her mother, and given the possibility to apply for indefinite leave to remain at the end of her current period of leave to remain.

15. In case I am wrong however I look in the alternative to consider whether the Tribunal might allow the appeal on the basis that the respondent had failed to exercise her discretion outside of the Immigration Rules in accordance with her own policy when finding that the continuity of the appellant's residence had been broken by her school holidays in Russia. It is clear that the decision of the respondent considers exercising this discretion, it is also clear that this is, both in the decision and the review, solely on the basis of the medical conditions that the appellant has explained she had treated in Russia from June 2014 onwards and not, explicitly at least, on the basis of considering that the appellant could not reasonably have return earlier to the UK because she was a child and her boarding school was closed for the holidays. In the skeleton argument of Mr Melvin it is correctly observed however that there is nothing in the policy guidance of the respondent which identifies school holidays as periods that would be discounted when applying the guidance.

16. I take note of the guidance in Marghia, which I find to be of continued relevance to the consideration of this appeal as it concerns the consideration of Article 8 ECHR through the prism of the private life Immigration Rules. Marghia finds that: "It is a matter for the Secretary of State whether she exercises her residual discretion. The exercise of such residual discretion, which does not appear in the Immigration Rules, is absolutely a matter for the Secretary of State and nobody else, including the Tribunal - Abdi [1996] Imm AR 148." As argued by Mr Melvin for the Upper Tribunal to find any error in the decision of the respondent it would be necessary to find a public law error in the decision applying the policy, such as the decision being irrational in this respect. I find that the respondent considered exercising her discretion outside of the Immigration Rules in circumstances where there were excess absences in this decision, and that this discretion was properly addressed, in accordance with the correct policy, to consider if there were compelling and compassionate circumstances. I find that what is said in the decision by way of reasons for refusing is reasonable and sufficient in the context of this being a decision on residual discretion outside of the Rules. The appellant clearly had identified medical treatment as a reason why she had returned to Russia in her legal submissions and in her statement, and that of her mother. As Mr Melvin identifies in the skeleton argument for the respondent there is no policy guidance indicating that boarding school holidays are to be seen as circumstances preventing a minor returning to the UK; and it is clearly possibly to think of circumstances where a closed boarding house in the school holiday would not prevent an appellant such as this one from remaining in the UK, such as taking some of their school holidays with responsible adults (parents or others) in the UK. The application on the appellant's behalf did not put forward a particularised case as to why this appellant was forced to spend all her holidays abroad rather than in the UK.

17. I find that the decision of the respondent therefore does not err in law either by being irrational, insufficiently reasoned or by failing to apply the policy of the respondent when considering discretion outside of the Immigration Rules in the context of an application under paragraph 276B. It follows that the appeal must fail. This is because it is accepted by the appellant that she cannot show 10 years continuous residence, as she had spent more than 18 months (548 days) absent, as she was absent from the UK for 820 days, and thus cannot meet the requirement of continuity at paragraph 276A and so cannot meet the requirements of the Immigration rules at paragraph 276B.

18. In these circumstances I find that her human rights appeal must fail because despite speaking English and being financially self-sufficient (which are to be treated as neutral matters), it weighs against her that she cannot meet the requirements of the Immigration Rules, and only little weight can be accorded to her private life ties as they have all been formed whilst she has been precariously present, applying s.117B(5) of the 2002 Act. It is not argued that other matters should be given weight in the appellant's skeleton argument so I find that the balance falls in favour of the respondent as the refusal of the application amounts to a proportionate interference with the appellant's Article 8 ECHR rights.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal.

3. I remake the appeal by dismissing it on Article 8 ECHR grounds.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5th November 2024

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Russia born on 28th November 1996. She came to the UK as a Tier 4 child student on 4th September 2012 at the age of 15 years and had leave in this capacity until 25th October 2016. She then had leave as a Tier 4 general student migrant until 29th October 2019. She left the UK on 20th October 2019, she applied for a visit entry clearance and re-entered on 4th December 2019 and was granted leave until 15th May 2020. She then had Covid 19 exceptional extensions of leave up until 31st August 2020 when she left the UK. She travelled to Denmark where she married her fiancé, Mr Rain, a British Citizen. She re-entered the UK with a partner entry clearance on 9th October 2020 which was valid until 7th July 2023. She applied for indefinite leave to remain based on her having 10 year's long residence on 12th April 2023 as her marriage had broken down. The appellant appealed against the decision to refuse this application dated 5th June 2023. Her appeal was dismissed by First-tier Tribunal Judge L Mensah after a virtual hearing on the 5th January 2024.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Saffer on 20th February 2024 on the basis that it was arguable that the First-tier judge had erred in law for the reasons set out in the grounds of appeal.

3. The matter now comes before me to determine whether the First-tier Tribunal had erred in law, and is so whether any such error was material and whether the decision of the First-tier Tribunal should be set aside. At the start of the hearing I asked Mr Canter whether he still wished to pursue his first ground of appeal as it seemed to me from the Rule 24 response that it was agreed by the respondent that the First-tier Tribunal had found that the appellant had been present for the relevant ten year period of lawful residence and that the only reason the appeal had not succeeded was because of her periods of absence. Mr Canter agreed that he did not need to argue the first ground.

Submissions – Error of Law

4. In the grounds of appeal and in oral submissions from Mr Canter it is argued, in short summary, that the First-tier Tribunal erred in law as follows in his second ground. It is argued that there is an error of law with respect to the appellant's absences. It is argued that there was a failure by the First-tier Tribunal Judge to consider the correct guidance with respect to compassionate circumstances as set out in the Long Residence Version 17 of the respondent's policy guidance published on 11th May 2021. Instead of applying the guidance Mr Canter had taken the First-tier Tribunal to at page 12 of 45 as to what was compelling and

compassionate when determining if time spent outside the UK broke continuous residence, which is the relevant guidance for paragraph 276B(i) (a) the First-tier Tribunal had applied the guidance relevant to the public interest part of the Rules at paragraph 276B(ii)(e) found at page 37 of the guidance. It is argued that this was a material error because the appellant had to leave the UK whilst she was a child at boarding school because the school was closed during the holidays and she was not, as a child, at liberty to return earlier and so she should have been seen as returning within a reasonable time, and therefore discretion should have been exercised in her favour to decide there was no break in continuous residence. It was noted that these school holidays amounts to 430 days and so if they were discounted then the appellant had not been absent for more than the permitted 548 days. Further no consideration was given to the part of the guidance that said consideration should be given to the fact that these absences were at the beginning of the period, but that she would not be able to apply until 2030 if she had to start over again due to the change in Rules regarding visitor leave.

5. In a Rule 24 notice and in oral submissions from Mr Melvin the respondent opposed the appeal. In relation to the second ground it is submitted that the First-tier Tribunal was entitled to find that the absences for medical treatment were not compelling compassionate circumstances as per the guidance and that there was no material error but merely as disagreement with the outcome of the appeal.

6. At the end of the hearing I informed the parties that I found that the First-tier Tribunal had erred in law for the reasons I now set out below. Mr Melvin asked that the remaking hearing be adjourned so that he could research the surrounding case law and I agreed to that adjournment. It was agreed that a remaking hearing solely on the issue of the absences would be listed at the first available date. No interpreter was requested, and there was no need for further oral evidence beyond the appellant adopting her statement as it was agreed that the facts were not in in dispute, as recorded at paragraph 8 of the decision of the First-tier Tribunal.

Conclusions – Error of Law

7. As agreed at the hearing the appellant has the required ten years residence, as set out at paragraph 12 of the decision of First-tier Tribunal. The only question that remained for the First-tier Tribunal to determine was whether the continuity of residence was broken by her absences from the UK.

8. I find that the First-tier Tribunal finds at paragraphs 13 to 15 of the decision that the absences do not qualify for discretion because the appellant could have had her medical and dental treatment privately in the UK not Russia, and comes to this conclusion that they are not compassionate circumstances by applying the guidance for refusing

under paragraph 276B(ii) which relates to the public interest part of the Rules. I agree with the argument of Mr Canter this is to apply the wrong part of the guidance from page 37, and to fail to apply the relevant guidance at page 12. I find that this was a potentially material error because there is no consideration of the argument that boarding school holidays might mean that the appellant had, as per the correct section of the guidance, in fact returned to the UK within a reasonable period of time given that she was a child without another place to stay in the UK during holidays. Further, if the 430 days of boarding school holidays were found to amount to a compelling or compassionate absence, due to the appellant not being able to reasonably return sooner, then, applying the guidance at page 12, discretion could have been exercised in the appellant's favour reducing the amount of absent days to below the permissible total amount of 540 days, and so the error in not considering this argument, which was put to the First-tier Tribunal in the appellant's skeleton argument at paragraph 18 of that document, is potentially material.

9. I therefore set aside the decision of the First-tier Tribunal dismissing the appeal but preserve the finding that the appellant has ten years lawful residence. There are no public interest reasons for refusing the application so this will not be an issue in the remaking. The question to be remade is whether the appellant has broken her continuous residence applying the guidance at pages 11 and 12 of the guidance in Long Residence Version 17 published on 11th May 2021 to the facts in this appeal.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal.

3. I adjourn the remaking of the appeal.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27th August 2024