



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

Appeal Number: IA/38695/2013  
IA/38689/2013  
IA/38720/2013  
IA/38709/2013

**THE IMMIGRATION ACTS**

**Heard at Birmingham**

**On 14 July 2014**

**Determination  
Promulgated**

**On 29 September 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**MR LENORD LUPIYA (A1)  
MRS MAILES MBEWE LUPIYA (A2)  
MASTER SHAMMAH LEONARD LUPIYA (A3)  
MISS TEHILLAH LUPIYA (A4)  
(ANONYMITY ORDER NOT MADE)**

Respondents

**Representation:**

For the Appellant: Mr D Mills, Senior Presenting Officer

For the Respondent: Mr K Thathall, Counsel, instructed by UK Immigration Law Chambers

**DETERMINATION AND REASONS**

**Introduction**

1. The Appellant in this appeal was the Respondent at the First-tier Tribunal hearing. However, for ease of reference, the Appellants and Respondent are hereafter referred to as they were before the First-tier Tribunal; Mr and

Mrs Lupiya and their two children are referred to as the Appellants and the Secretary of State is referred to as the Respondent.

2. A1 applied for indefinite leave to remain after a period of five years with leave as a Tier 1 Minister of religion. The applications of his wife (A2) and his children (A3 and A4) are dependent on his application. For the purposes of my determination I will refer to A1 as the Appellant unless the context otherwise admits or requires.
3. The Appellants' appeals were allowed under the Immigration Rules by First-tier Tribunal Judge A J Parker (the Judge) against the refusal by the Respondent to grant indefinite leave to remain under the provisions of paragraph 245HF(c) and 245AAA of HC 395, amended (the Immigration Rules). However, the Judge then decided their appeals under Article 8 in the event that they did not meet the requirements of the Immigration Rules and dismissed their appeals under Article 8. Under the Immigration Rules, the matter in dispute before the Judge was simply whether the Appellant had been able to demonstrate a continuous period of five years lawful residence which fell to be determined pursuant to the provisions of paragraph 245AAA. A1 had been absent from the UK for a period of 223 days during the period 2009/2010; 191 days absence was work related and 32 days absence was to visit his mother-in-law who had cancer and subsequently passed away. The Judge found that the Appellant had spent a continuous period of five years lawfully in the UK.
4. The grounds of application are that the Judge had materially misdirected himself as to the interpretation of paragraph 245AAA. The grounds of application are clear and I will not seek to summarise them but will state them in full, as there was little that Mr Mills, who drafted the grounds, needed to amplify during the hearing:

“Rule 245AAA, so far as is relevant to the appellant’s case, states as follows:

*(a) “continuous period of 5 years lawfully in the UK” means, subject to paragraphs 245CD, 245GF and 245HF, residence in the United Kingdom for an unbroken period with valid leave, and for these purposes a period shall be considered to be broken where:*

*(i) the applicant has been absent from the UK for a period of 180 days or less in any of the five consecutive 12 month periods preceding the date of application for leave to remain;*

*(ii)...*

*(iii)*

*(b)...*

*(c) Except for periods where the applicant had leave as a Tier 1 (Investor) Migrant, a Tier 1 (Entrepreneur) Migrant, a Tier 1 (Exceptional Talent) Migrant or a highly skilled migrant, any*

*absences from the UK during the five year period must have been for a purpose that is consistent with the applicant's basis of stay here, including paid annual leave, or for serious or compelling reasons.'*

"The appellant accepted that in one of the five year periods, he had been absent from the UK for 223 days. He argued that because this period was made up of work related absences combined with 'compelling reasons' absences (the illness of a relative), it was covered by 245AAA(a) and did not break his 'continuous residence.

"The Judge placed reliance on BD (work permit - "continuous period") Nigeria [2010] UKUT 418 and Vellore R (otao) v SSHD [2013] EWHC 724 (Admin) to establish the principles that "continuous period must be construed sensibly" and "where the absence has been required by the employer in the course of his employment, it need not impair the strength of his connection to the UK" (para 20).

"As the Presenting Officer very clearly pointed out (paragraph 20) these cases related to the previous rule (134) in which there was no definition of 'continuous residence'. The rules do now very clearly define 'continuous residence', at 245AAA. Indeed, the rule can be seen to have incorporated the principles of BD and Vellore. There is no need to apply any 'sensible' interpretation to 245AAA, as its terms are perfectly clear.

"The Judge has found that paragraph 245AAA (c) is an exception to 245AAA (a). He considers that if the absence is work related or compelling reasons, then the 180 day limit does not apply. The Judge goes on to say at paragraph 22 that if the rules intended to impose a 180 day limit on all absences, then they would say so clearly.

"With due respect to the Judge, the rules do say so very clearly, at 245AAA (a)(i). There is no exception to this requirement, 245AAA (c) being an additional criterion, not an alternative one.

"On the facts of the case, had the Judge properly directed himself as to the meaning of the rules, he could only have dismissed the appeal under the Rules, as he correctly did under Article 8".

5. Permission was granted because the grounds were arguable.
6. As to oral submissions, Mr Mills stated that it was accepted that the Appellant had been absent from the UK for 223 days and that this was as a result of work related absence and family reasons. He submitted that the Judge was 'misled' by the interpretation forwarded on behalf of the Appellant and there was nothing within paragraph 245AAA which suggested that paragraph 245AAA (c) was an alternative provision to paragraph 245AAA (a). There was no application on Article 8 grounds but the Judge was correct to dismiss it under Article 8.

7. Mr Thathall stated that he had provided a Rule 24 response on 29 May 2014, but neither I nor Mr Mills appeared to have received it. The Rule 24 response was copied and supplied to me and to Mr Mills, who was given an opportunity to read it.
8. In reply to the Response, Mr Mills submitted that:
  - a. Yes, the Respondent was trying to re-argue the merits of the case because the Judge had misdirected himself over the provisions of rule 245AAA (c) which had resulted in a material error of law.
  - b. The Appellant was prevented from cross-appealing by submission of a Rule 24 response pursuant to **EG and NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia [2013] UKUT 00143(IAC)**, which provided that a party must first seek permission to appeal from the First-tier tribunal before an application for permission to appeal could be made to the Upper Tribunal. Mr Thathall submitted that as far as the Appellant was concerned, there was no need to appeal the decision because he had been successful under the Immigration Rules. It was only when the Respondent sought permission to appeal that they had cause to appeal. Mr Mills responded that the Appellant had notice of the application by the Respondent and it was open to him to apply to the First-tier Tribunal for permission to appeal, asking for an extension of time if it seemed appropriate.
  - c. Apart from submitting that the Respondent was simply trying to re-argue the merits of the case, Mr Thathall submitted, in his Rule 24 response, that the Respondent's assertion that paragraph 245AAA (c) was an additional criterion was erroneous and misconceived and that the Judge had considered the arguments and given reasons for the finding that there was no overall limit of 180 days of absences in each year. He also submitted that the Respondent had stated that the principles of **BD** and **Vellore** had been incorporated into paragraph 245AAA without stating how this had been achieved.
9. In the alternative, in his cross-appeal Mr Thathall submitted that:
  - a. The Judge erred in failing to consider the exception to the definition of 'continuous residence' in paragraph 245AAA (a) of paragraph 245HF, which incorporates periods of leave under the (now deleted) paragraphs 170 - 176 of the Immigration Rules, which do not define any periods of absence. As the new paragraph 245AAA was not introduced until after the absence in 2009/2010, it fell to be considered under the pre-existing law in **BD** and **Vellore**. He stated that the Respondent was estopped from denying leave.
  - b. The decision was not in accordance with the law because the Respondent had failed to consider her own policy guidance headed 'Indefinite Leave to Remain', version 110 at pp 28/31 dated 23

January 2014 which recognised 'exceptional cases/circumstances' to grant indefinite leave to remain. In oral submissions he referred to pages 20, 23, 28 and 31 of the guidance, and stated that there was discretion within the policy where there were compelling reasons and it was accepted that the Appellant's mother-in-law was ill. It was not determined how long the illness was but his mother-in-law lived in Zambia which was where he was stationed for work.

- c. The Judge erred in failing to consider aspects of legitimate expectation, retrospective application of the Rule, estoppel, common law fairness and or the welfare/ best interests of the child and/or failed to give reasons.
  - d. The Judge erred in failing to apply a structured approach to the Article 8 assessment; failing to identify the legitimate aim under Article 8(2), failing to consider all the circumstances of the case, and arriving at an erroneous assessment of proportionality as provided in **Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC)** at paragraph 107 by failing to take into account the positive features of the Appellant's case in determining proportionality. He also submitted that the Judge failed to have regard to the **Chikwamba** principle as applied in **Zhang v SSHD [2013] EWHC 891 (Admin)**. In oral submissions he stated that **Shahzad** at paragraph 8 assisted the Appellant because the Respondent should have in mind that the Appellant was a lawful permit holder with a wife and children.
10. In reply, Mr Mills submitted that nowhere in the submissions made by Mr Thathall had be put forward a reason as to why paragraph 245AAA (c) was an exception to 245AAA (a); it is not stated that an applicant can be out of the UK for 180 days 'unless' it is for work related absences or due to compelling reasons. Mr Thathall had relied on the word 'any' with rule 245AAA (c) to justify a conclusion that it was an alternative. No argument had been put forward to establish that it was an alternative to 245AAA (a). The Judge erred in his reasoning at [21] and [22] because the rules were clear.
  11. As to the policy guidance, Mr Mills submitted that the pages referred to by Mr Thathall in fact undermined his arguments.
  12. As to any arguments based on legitimate expectation, Mr Mills submitted that the Immigration Rules were generous. Where it was provided within the Rules that someone could be absent from the UK for reasons that were consistent with the terms of their leave, it was difficult to argue that more leave should be granted than was envisaged by the Rules.
  13. As to Article 8, the Respondent had considered the application of Appendix FM and paragraph 276ADE of the Rules and then considered the exercise of discretion. The Appellant could not cross-appeal the Article 8 decision.
  14. Following submissions, I reserved my decision.

## **Decision and reasons**

15. The terms of paragraph 245 AAA are set out in the grounds of application. As to the guidance referred to by Mr Thathall, the terms of it are:

“No more than 180 whole day absence are all allowed in any of the five, four, three or two consecutive 12 month periods, depending on the category, preceding the date of application”.

“Absences must be for a reason consistent with the original purpose of entry to the UK or for a serious or compelling compassionate reason” (p 19)

“Absences must be connected to the applicant’s sponsored or permitted employment, or the permitted economic activity being carried out in the UK, for example, business trips or short secondments. This also includes any paid or annual leave which must be assessed on a case by case basis and must be in line with the UK statutory annual leave entitlement” (p20)

“For Tier 1 (investor), Tier 1 (Entrepreneur), Tier 1 (Exceptional talent) and highly skilled migrant (applying under Appendix S of the rules) categories there is no requirement to give reason for absences if they do not exceed 180 days in any of the five, four, three or two consecutive 12 month periods of the continuous period, depending on the category, counted backwards from the date of application” (page 21).

“Absences of more than 180 day in each consecutive 12 month period before the date of application (in all categories) will mean the period of continuous leave 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 compassionate reasons”

“The applicant must provide evidence in the form of a letter which sets out full details of the compelling reason for the absence and supporting documents. Absences of 180 days in any 12 month period for employment or economic activity reasons are not considered exceptional” (page 28).

16. It is clear from the head note to **BD** that the Upper Tribunal considered this case under paragraph 134 of the old rules for work permit holders. At that time, there was no provision in the Immigration Rules for deciding what constituted a ‘continuous period of 5 years lawful residence’. **Vellore**, which was decided before **BD**, also dealt with the old paragraph 134 and therefore the lack of guidance as to what constituted a ‘continuous period of 5 years lawful residence’ was decided using a

'common sense approach', adopted by the Tribunal in both cases. However, I accept, as submitted by Mr Mills, that the inclusion in the Rules of paragraph 245AAA deals with the manner in which the continuous period of 5 years lawful residence is to be calculated. The plain meaning of Rule 245AAA is that 180 days is the maximum period of absence in any one of the five consecutive years of residence with valid leave and, as provided by paragraph 245AAA (c), the absences which are to be counted towards the 180 day limit must be '*consistent with the applicant's basis of stay here, including paid annual leave, or for serious or compelling reasons*'.

17. It is clear that the Judge had regard to **BD** and **Vellore** in reaching the conclusion that a 'common sense approach', which was necessary when there was no express provision within the Rules, can be substituted for the clear terms of the Rules. He thereby misdirected himself as to the provisions of paragraph 245AAA and materially erred in law. There is no merit to the submission that the Respondent is simply trying to reargue the merits of the case; a material misdirection in law cannot be put right because a judge has given reasons for his decision.
18. The submissions made by Mr Thathall under the policy, the provisions of which are set out at paragraph 18 and 19 above, do not support his submission that there is no overall 180 day limit. To the contrary, they undermine his argument that there is no overall 180 day limit.
19. This takes me to the cross-appeal. I have considered the contents of the Rule 24 response in the context of whether the submissions are in fact a cross-appeal or a response to the Respondent's grounds of application. In general terms, pursuant to **EG and NG (Ethiopia)**, in the Upper Tribunal a respondent to an appeal is limited, in the Rule 24 response, to responding to the issues raised in the grounds of application. However, **EG and NG (Ethiopia)** also provides that the party whose appeal was allowed by the First-tier Tribunal may not wish to appeal a decision if he has succeeded on one ground raised before the First-tier Tribunal but, where permission is sought by the other party, he may wish to rely on other grounds raised before the First-tier Tribunal which were unsuccessful. The Upper Tribunal gives the example, at paragraph 46, of an entry clearance case where entry clearance was refused due to failure by the applicant to meet the maintenance and accommodation requirements and the judge hearing the appeal wrongfully decides that the accommodation requirement is met, but that the maintenance requirement is not. As the appeal has been dismissed, the ECO may not wish to appeal it but if the applicant seeks permission on the ground on which he was not successful, the ECO may wish to challenge the wrongful conclusion in relation to the accommodation requirement. The ground which is relied on by the appellant in that case is the 'not in accordance with the immigration rules' ground, and the only challenge by the respondent ECO is in relation to that ground. I will bear this guidance in mind in my determination.

20. I also bear in mind that the Judge stated at [17] that the “appellant’s representative’s submissions is adequately dealt with in the skeleton argument and need not be repeated by me”, which, in the absence of any evidence to the contrary, I will take to be the extent of the submissions forwarded on behalf of the Appellant. I will therefore use the skeleton argument before the Judge to identify if the submissions which are now advanced for the Appellant were in fact ever put to the Judge; if they were not, it is not an error for him not to have considered them. I will take each of Mr Thathall’s submissions in turn:
21. His first submission (which he characterised as a ‘cross-appeal’, at paragraph 7(i) of his Rule 24 response) is that the Judge
- “failed to consider the definition of ‘continuous residence’ in Para 245AAA(a) of para 245HF, which incorporates periods of leave under the (now deleted) Para 170-176 of the immigration rules, which did not define any periods of absences, hence the reliance on **BD (work permit - “continuous period” Nigeria [2010] UKUT 418 (IAC)**, at para 11 of the determination, approved in R (Vellore) v Secretary of State for the Home Department, [2013] EWHC 742.; as the relevant period of absence was during 2009/10 before the introduction of the new Para 245AAA”.
22. This submission in fact relates to the interpretation of paragraph 245AAA and is not, therefore, a cross-appeal. However, there is no evidence before me that any arguments based on the now deleted paragraphs 170 – 176 were before the Judge, except in so far as they were based on the failure to define ‘continuous residence’ as set out in **BD**. Any additional submissions based on paragraphs 170 – 176 are not referred to in the determination or contained within the Appellant’s skeleton argument before the Judge. Unless submissions are sufficiently particularised before the Judge, it is not an error for him not to deal with them. An application for permission to appeal to the First-tier Tribunal that a Judge had not considered arguments that had not been put to him is bound to fail.
23. Mr Thathall also submitted that the relevant period of absence was in 2009/2010 and that Rule 245AAA came into force after that date. Mr Thathall stated that the absence of 223 days had occurred in 2009/2010 but the rule was not changed until after that date and therefore the old learning in **BD** and **Vellore** must apply to that period of leave. I considered whether I should even at this stage consider it as an application to cross-appeal and consider it in my capacity as a First-tier Tribunal Judge. However, there is no prospect that I could grant permission to appeal on this basis simply, because, in the absence of transitional provisions, the law to be applied is the law as at the date of decision and Mr Thathall did not refer to any transitional provisions. This submission therefore fails, whether or not characterised as a cross-appeal or as a response to the Respondent’s submissions.
24. At paragraph 7(ii) of his Rule 24 response, Mr Thathall submitted that the Judge failed to consider the provisions of the policy, which are set out at



paragraphs 18 and 19 above. A full copy of the policy was provided by the Presenting Officer at the hearing, it is clear from the skeleton argument submitted by Mr Thathall (at paragraphs 2 – 6, which deal with paragraph 245AAA) that, despite the reference to the failure by the Respondent to exercise discretion at paragraph 6 of the skeleton argument, no reference was made to the terms of the policy. However, as a rebuttal of the Respondent's position with regard to the interpretation of the provisions of paragraph 245AAA, the provisions of the policy, as set out at paragraphs 18 and 19 above, do not assist the Appellant; there is only provision for a consideration of the grant of ILR outside the Immigration Rules if compelling circumstances can be established.

25. As to the fourth of the submissions in the 'cross-appeal', at paragraph 7 (iii), (that is, the Judge erred in failing to consider aspects of legitimate expectation, retrospective application of the Rule, estoppel, common law fairness and or the welfare/ best interests of the child and or failed to give reasons), it is clear that estoppel and fairness was raised under the Immigration Rules (paragraph 7 of the skeleton argument) and that legitimate expectation and s 55 were raised in relation to Article 8 (paragraph 8 of the skeleton argument before the First-tier tribunal). However, estoppel cannot succeed; the Immigration Rules which determine the application are those in force at the date of decision (see paragraph 26 above). Even if legitimate expectation was referred to before the Judge in relation to the Immigration Rules, there is no evidence before me that the legitimate expectation argument was sufficiently substantiated before the First-tier Tribunal (as to which see paragraphs 62 – 104 of **AA and Others (Highly skilled migrants: legitimate expectation) Pakistan [2008] UKAIT 00003**).
26. Pursuant to **EG and NG (Ethiopia)**, can I consider the Article 8 issues raised by the appeal? My view is that I cannot. Although the process of seeking permission to appeal under Article 8, having been notified that the Respondent has sought, and obtained permission to appeal under the Immigration Rules, is cumbersome, I cannot consider the cross-appeal because permission to appeal was not sought.
27. Even if I were to consider it, as to legitimate expectation under Article 8, Mr Thathall referred to the decision of the Upper Tribunal in **Philipson (ILR - not PBS: evidence) India [2012] UKUT 00039 (IAC)**. However, firstly, as stated above, the legitimate expectation ground was not sufficiently developed before the Judge so even if he had erred in failing to consider it, there is no evidence before me to establish that such a failure would be material because on the evidence before him it could not succeed. Secondly, **Philipson** was decided before the changes in the Immigration Rules governing the determination of applications under Article 8 came into force. These now set out the weight to be given to the public interest in the Article 8 proportionality exercise and there is no need to consider the **Razgar** approach unless circumstances are identified which establish an arguably good case for consideration of the Appellant's circumstances outside the Immigration Rules (**Gulshan** and **Nagre**); there is a need to identify compelling circumstances which would result in an

unjustifiably harsh outcome, i.e. a finding that there are insurmountable obstacles to the family relocating to the country of origin.

28. The family would be removed together, so there is no interference with family life as a result of the decision [26]. The Judge properly directed himself at [24], considering the Appellants' appeals on the basis of private life under paragraph 276ADE at [24] - [26], which include reference to the family remaining together as a unit and the children having been in the UK for less than 7 years.
29. This brings me to the final submissions in the 'cross-appeal', which relate to considerations under Article 8 (the s 55 considerations/ **Chikwamba [2009] UKHL 40 /Zhang [2013] EWHC 891 (admin)** considerations). The Judge dealt with s 55 issues; he noted that the family would remain together [26] and in the absence of any contraindications, it is in the best interests of the children to remain with their parents. This is not a case which is covered by **Chikwamba**; a separation between the Appellants is not contemplated. The Appellant's case is one to which the new post July 2012 Rules apply; **Zhang** was decided on the basis of the old Rules, as was **Philipson**. The Judge properly finds that the Appellants cannot succeed under Appendix FM and paragraph 276ADE and, because all that is required is that they make an out of country application which can be turned around in under five days, no compelling or compassionate factors have been established for a consideration of the application outside the Rules. This reasoning is entirely in keeping with **Nagre [2012] EWHC 720 (Admin)**, **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)** and **Shahzad (Article 8: legitimate aim) [2014] UKUT 85 (IAC)**. The need to identify the legitimate public aim is only necessary where compelling circumstances have been established. The Judge found that there were no arguably good grounds for granting leave outside the Immigration Rules at [25] and that decision was open to him on the evidence before him. No arguable errors of law are disclosed

## **Decision**

30. The Judge materially misdirected himself as to the provisions of paragraph 245AAA. I set aside his decision. On the basis of the submissions and the evidence before the Judge, I remake the decision to dismiss the appeal under the Immigration Rules.
31. There is no error of law in the Judge's decision under Article 8 ECHR and this decision therefore stands.
32. The Respondent's appeal is allowed.
33. The FtT did not make an order as to anonymity pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed

Date

M Robertson  
Deputy Judge of the Upper Tribunal

**TO THE RESPONDENT  
FEE AWARD**

In light of my decision, as the First-tier Tribunal decision is set aside and the Respondent's appeal is allowed, I make no fee order.

Signed

Dated

M Robertson  
Deputy Upper Tribunal Judge.