Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36624/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 17 August 2015	**On 28 August 2015**

Before

Upper Tribunal Judge Southern
Upper Tribunal Judge Coker

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LM

Respondent

Representation:
For the Appellant: Ms R. Petterson, Senior Home Office Presenting Officer
For the Respondent: Mr A. Williams, of Andrew Williams, Solicitors

DETERMINATION AND REASONS

1. The Secretary of State has been granted permission to appeal against the decision of First-tier Tribunal Judge Birkby, who, by a determination promulgated on 14 January 2015, allowed LM's appeal against refusal to grant him indefinite leave to remain on the basis of 10 years continuous lawful residence in the United Kingdom.

2. That means, of course, that LM is the respondent before the Upper Tribunal and it is the Secretary of State that is the appellant. But for ease of reference, as we shall be reproducing extracts from the determination of the First-tier Tribunal, we shall refer the parties as they were below so that references to "the

appellant" are to LM and references to "the respondent" are to the Secretary of State.

3. The appellant, who is a citizen of the USA born on 24 October 1951, arrived in the United Kingdom on 21 May 2004 with entry clearance for the purpose of work. That leave was progressively extended until 26 July 2014, so that he could continue with that work. He was an engineer employed by the government of the USA and in that capacity was required to travel frequently. The judge described this aspect of the appellant's work as follows:

> "… by reason of his position (he) was expected to travel to areas of conflict like Afghanistan and Iraq on secretive military business to fight terrorism…"

4. Soon after arriving in the United Kingdom in 2004, the appellant entered into a relationship with a British citizen, EH. Having heard oral evidence from both of them, the judge accepted that was a genuine and subsisting relationship amounting to family life. Although they cohabited only at weekends, maintaining separate households as they looked forward to spending their retirement together in the United Kingdom, together they renovated one of their homes with a view to living there together once the appellant's employment finally came to an end.

5. It appears that the appellant and EH have been financially prudent and have provided for themselves well. At paragraph 14 of his determination the judge observed:

> "The Appellant's home is mortgage free and he also has investment property. His US Social Security pension of $1,900 commenced on 1 December 2014. His military pensions come to $1,305 per month and they commence in October 2014. Furthermore, the Appellant is due to receive a life insurance pension of US$350 per month in November 2016 when he turns 65. He has savings of US$350,000 in a savings plan but also £30,000 in premium bonds. The Appellant's partner had an annual income for the current financial year of £11,740 consisting of a state pension and an occupational pension. She also had no mortgage at home and had savings of £103,000."

6. Although the judge found, and was plainly correct to do so, that notwithstanding the precise detail of their living arrangements, the appellant and EH enjoyed together a strong family and private life in the United Kingdom, when the appellant made his application for indefinite leave to remain he made no mention of his relationship with a British citizen. That was because he assumed, incorrectly as it turned out, that it would be sufficient to make his application on the basis of his 10 years lawful residence in the United Kingdom.

7. The respondent refused the application because it was considered that the appellant's periods of absences from the United Kingdom since he arrived in 2004 meant that he could not satisfy the requirements of the applicable immigration rule, para 276B. That was because, as we have observed, the nature of the appellant's work for the US government meant that he was frequently required to travel abroad so that for that reason he was outside the United Kingdom for a total of 398 days and, over the 10 years since his arrival in 2004, the appellant had taken periods of holiday amounting to a total of 366 days Thus, in all, the appellant has been away from the United Kingdom for a

total of 764 days whereas the rules allow only for an overall absence of 18 months, or 540 days, before continuous lawful residence is considered to have been interrupted for this purpose. Paragraph 276B of the rules provides as follows:

> ‘276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
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> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
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> (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
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> (a) age; and
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> (b) strength of connections in the United Kingdom; and
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> (c) personal history, including character, conduct, associations and employment record; and
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> (d) domestic circumstances; and
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> (e) compassionate circumstances; and
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> (f) any representations received on the person's behalf; and
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> (iii) the applicant does not fall for refusal under the general grounds for refusal.
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> (iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
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> (v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period’

Paragraph 276A of the rules states, so far as is relevant to this appeal, that for the purposes of para 276B”:

> (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:
>
> …
>
> (v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.

8. Despite that, the judge allowed the appeal under the immigration rules on the basis that the appellant had demonstrated that he had in fact met the requirements of the rules, even if he had been absent from the United Kingdom for more than the 540 days permitted by paragraph 276A. His reasoning is set out at paragraph 17 of his determination. Although it was accepted that the appellant had been outside the United Kingdom for 366 for holidays or other

personal reasons, the judge considered that the remainder of the period the appellant was absent should be disregarded for the purposes of paragraph 276B because:

> "… the other 398 days were due to official travel … confirmed by the United States Defence Department. It is not in dispute that the Appellant was in effect lawfully resident in the United Kingdom when he travelled outside the United Kingdom on business. Indeed, part of the time he spent in the United Kingdom was in assisting the US Armed Forces in Afghanistan which in turn was clearly assisting the UK forces in Afghanistan. I am not satisfied that the wording "absent from the United Kingdom" can mean someone who is lawfully and necessarily working for his employer outside the UK, while at that time based in the United Kingdom… "

The judge illustrated his reasoning process by drawing an analogy with the work of an airline pilot, who would necessarily be away from the United Kingdom in the course of his work, and continued:

> "Whilst it may be argued that a person in the Appellant's position or indeed an airline pilot would be physically absent from the United Kingdom that would not be in reality absent as it was not their choice, rather the choice of their employers, to be physically absent from the United Kingdom at that time. In those circumstances I have concluded that the fact that the Appellant was physically not present in the United Kingdom does not mean that he was "absent" in the full sense of the meaning and the implication of the meaning of the word."

For those reasons the judge regarded the 398 days spent outside the United Kingdom while working as an engineer for the US government as not having been spent outside the United Kingdom at all so that he had spent less than 540 days absent from the United Kingdom and on that basis found that the appellant meant the requirements of paragraph 276B and so allowed the appeal.

9. We are in no doubt that in taking that approach the judge misdirected himself and so made an error of law.

10. The judge was plainly wrong to say that it is not the choice of the appellant or the hypothetical airline pilot to be outside the United Kingdom when carrying out their work. The choice of employment is theirs and theirs alone. The appellant was not an enlisted serviceman but an employee who engaged in such work as a matter of personal choice. The fact that his work was valuable in terms of advancing the mutual interests of the US and UK governments in their efforts to respond to terrorism abroad was not, strictly, relevant to that. The judge also erred in law in concluding that the days spend outside the United Kingdom while working could simply be disregarded. In taking that approach he was having no regard to matters that the rules specifically required to be considered.

11. It would have been open to the judge to conclude that discretion should have been exercised differently under the rules. He did not, however, take that approach. Instead, having found that the absences for the purpose of work were to be disregarded, that meant that the appellant had not spent more than 540 days outside the United Kingdom and so there was no need to consider the exercise of discretion at all.

12. The judge went on to allow the appeal also on the basis that refusal to grant leave would bring about an impermissible infringement of rights protected by Article 8 of the ECHR. First, he said at paragraph 20 of the determination that he was satisfied that the appellant met the requirements of Appendix FM. In doing so he appears to have concerned himself only with financial considerations, which plainly provided no obstacle for the appellant, but the judge did not address the other requirements to be met not least the requirement of Appendix FM that the applicant must have made a valid application for leave to remain as a partner, which of course the appellant had not. It is plain that the judge erred in law in reaching the conclusion that the appeal fell to be allowed under Appendix FM of the immigration rules.

13. In the alternative, the judge explained why the appeal was allowed outside the rules on Article 8 grounds, on the basis that the circumstances of the appellant and his British citizen partner disclosed exceptional reasons for doing so as the interference with the private and family life they enjoyed together in the United Kingdom was disproportionate to the legitimate aim being pursued of enforcing immigration control.

14. In our judgement, that conclusion cannot stand either, predicated as it was on the flawed reasoning that led to the decision to allow the appeal under the immigration rules.

15. For these reasons we set aside the decision of Judge Birkby to allow the appeal and, having heard submissions from both parties and, having admitted further documentary evidence submitted on the appellant's behalf, without objection from Ms Petterson, we proceed to decide the appeal afresh.

16. First, we address the application made on the basis of long residence under paragraph 276A and 276B of the rules.

17. It is common ground and agreed between the parties that, in respect of an applicant who has spent more than 540 days outside the United Kingdom, there remains a discretion to be exercised within the rules by the decision maker. The existence of that discretion is recognised by the respondent in that she has a published policy as to how that discretion is to be exercised and, indeed, in the decision letter the respondent purported to exercise that discretion in a manner that was informed by that policy.

18. A copy of the current policy was provided by Mr Williams. It is not at all clear that this was the policy or guidance in force at the date of the decision, since on its face is a suggestion that it has been very recently published. However, no point was taken in this regard on behalf of the respondent and it is clear that a form of the policy was considered because in the refusal letter the respondent said:

> "It is noted from your absences that 398 days are due to official travel which has been confirmed by letters from your employers. The other 366 days were personal reasons for holidays and visiting your family. However 540 days is considered generous and (is) designed to cover a number of eventualities. With this in mind, the reasons you have provided are not considered to be exceptional

such that the requirement to be not absent for more than 540 days should be waved."

19. The respondent's policy, expressed as guidance to decision makers, includes, now at least, this (with emphasis added):

> '**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.
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> …
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> Things to consider when assessing if the absence(s) was compelling or compassionate are:
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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
> - For the single absence over 180 days:
>   - 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
>   - **You must also consider the reasons for the absence**
> - For overall absences of 540 days in the 10 year period:
>   - 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 requirements
>   - 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
>   - 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**
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> **All of these factors must be considered together when determining whether it is reasonable to exercise discretion.**'

20. We do not find that any ambiguity about the version of the policy in force at the date of the decision creates any difficulty. Plainly, once a decision maker embarks upon the exercise of considering whether discretion should be exercised in favour of an applicant who has spent more than 540 days outside the United Kingdom, the reason for those absences and the question of whether there are any compelling circumstances are material considerations that must be taken into account.

21. The position in this application was stark. The judge has made an unchallenged finding of fact that in his work for the US government outside the United Kingdom, including in Afghanistan and Iraq, the appellant was engaging in activities that advanced the interests of both the US and the UK forces in Afghanistan and so these activities advanced the interests of the United

Kingdom government. Other than being absent from the United Kingdom for more than 540 days during the ten year period of lawful residence, in every other respect the applicant met the requirements of the applicable immigration rule. It is not apparent that any regard had been had for the reasons for the absences other than that they were in connection with the appellant's employment. No regard was had to the nature of the employment, the circumstances in which the appellant was employed or the value to the United Kingdom of his activities abroad. That is despite the fact that there is a specific requirement within the rule itself to have regard to the applicant's "personal history, including character, conduct, associations and employment record".

22. We are entirely satisfied that, to use the language of section 84 of the Nationality, Immigration and Asylum Act 2002, the person taking the decision should have exercised differently a discretion conferred by the immigration rules. In the unusual circumstances of this application there is, in our judgement, only one sustainable outcome of the exercise of discretion under the rule and that is one in the appellant's favour.

23. That is probably enough to dispose of this appeal, which falls to be allowed on the basis that the appellant meets the requirement of the rules because his ten years' lawful and continuous residence in the United Kingdom is not to be considered to have been interrupted by absences of more than 540 days. However, for the sake of completeness we record also that, although the appellant cannot meet the requirements of Appendix FM of the immigration rules, not least because he has not made a valid application under those provisions, as he does meet the requirements of the rules in respect of his application for leave to remain on the basis of long residence, refusal to grant leave to remain brings about a disproportionate interference with his right to respect for the family and private life he and his partner enjoy together in the United Kingdom.

Summary of decisions:

24. The First-tier Tribunal made an error of law and the decision to allow the appeal cannot stand. To that extent the appeal of the Secretary of State is allowed and the decision of Judge Birkby to allow the appeal is set aside.

25. We substitute a fresh decision to allow the appeal under the immigration rules and on human rights grounds.

Signed
Upper Tribunal Judge Southern

Date: 18 August 2015