Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05938/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 November 2021	**On 16 December 2021**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MS KAWALJIT KAUR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Georget, Counsel instructed by Sterling Chance Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is brought by the Appellant against the decision of Judge of the First-tier Tribunal G Black dated 5 March 2021. The decision of the Secretary of State which gave rise to that appeal was a refusal of an application for indefinite leave to remain and a refusal of a human rights claim, that decision being made on 19 May 2020. It is appropriate in this

matter to set out the Appellant's immigration history leading up to her application for indefinite leave to remain.

2. The Appellant first entered the United Kingdom on 18 December 2009 with entry clearance as a Tier 4 (General) Student valid until 9 April 2012. Prior to the expiry of that leave to enter she applied on 17 March 2012 for further leave to remain as a Tier 4 (General) Student. Leave to remain was granted on 14 June 2012 until 24 July 2015. The immigration history set out in the Respondent's decision then asserts that on 1 May 2013 the Appellant's leave to remain was curtailed. The reason why the Appellant's leave was curtailed was not set out in the decision letter, and those reasons remain unknown. The immigration history records that the Appellant appealed against the decision to curtail her leave and the appeal was allowed on 17 September 2013. Very much in this appeal to the Upper Tribunal depends on what the Appellant's immigration status was after her earlier appeal was finally determined in or around September 2013.

3. The immigration history thereafter sets out that on 18 March 2019 the Home Office received a letter from the Appellant's representatives regarding the allowed appeal. On 24 October 2019 she was granted leave to remain for 60 days, i.e. until 23 December 2019. On 18 December 2019, prior to the expiry of that leave, the Appellant applied for indefinite leave to remain based on an asserted ten years of continuous lawful residence.

4. In the decision of 19 May 2020 the Secretary of State sets out that immigration history and directs herself in law as to the application of paragraph 276B of the Immigration Rules relating to long residence. The Secretary of State correctly directed herself in law that a principal requirement for indefinite leave to remain under that route was that an applicant has had at least ten years' continuous lawful residence in the United Kingdom. However, the Secretary of State stated as follows with regards to the Appellant's immigration history, at page 3 of the decision:

> "Consideration has been given to your application. It is noted that following your arrival to the United Kingdom on 18 December 2019 you held valid leave until the expiry of your Tier 4 (General) Student visa on 24 July 2015. As you failed to submit a further application for leave to remain after this date you are not considered to have had any lawful leave until you were granted leave to remain on 24 October 2019 when you were given 60 days to find a new Sponsor. As a result you are unable to demonstrate ten years' continuous lawful residence in the United Kingdom and you are not able to satisfy the requirements of the Immigration Rules with reference to paragraph 276B(i)(a)."

5. The Respondent's decision thereafter considered the Appellant's private and family life in the United Kingdom. It was noted that the Appellant had not asserted that she had any partner or children in the United Kingdom

and when considering the Appellant's private life in the UK the Secretary of State's position was that the Appellant was not entitled to leave to remain under paragraph 276ADE(1)(vi) because there would not be very significant obstacles to her integration into the country of her origin were she required to leave the United Kingdom. It was stated that whilst it was acknowledged "that you may face a period of re-adjustment upon your return it is considered that you lived in your country of origin for approximately 30 years prior to your departure". Under Exceptional Circumstances the Secretary of State considered whether there were any exceptional circumstances outside of the Rules under Article 8 ECHR and found that there were not.

6. The Appellant appealed against that decision on form IAFT-5. It is not often necessary to consider in detail the nature of the grounds of appeal that are set out against the Secretary of State's decision to the First-tier Tribunal but this Tribunal notes that at section 3 of the form IAFT-5 under the title Human Rights Decision no grounds of appeal are set out in any way arguing that the Respondent's decision breached the Appellant's human rights under Article 8 of the ECHR. Under the title E on the form IAFT-5 entitled New Matters it is asserted in summary that the decision-maker had erred in refusing the Appellant's appeal (*sic* –this must mean 'decision'). It was asserted that: the Appellant's leave to remain having been curtailed on 1 May 2013; her appeal later being allowed in September 2013; and the "Home Office only implemented the decision in October 2019 and granted the Appellant a 60 days' visa until 23 December 2019"; the Appellant had thus "clearly lived in the UK with valid leave at all times". It was also asserted that the Respondent had 'failed to follow their own policy guidance on lawful continuous long residence'. The arguments were not particularised any further than that.

7. The Appellant elected to have her appeal determined on the papers and that appeal came before First-tier Tribunal Judge Black on 3 March 2021. In considering the appeal the judge had the benefit of a witness statement from the Appellant dated 2 March 2021. Essentially, the Appellant sets out her immigration history and asserts that she has had continuous lawful leave to remain for ten years. There was no information set out within that witness statement as to what private life she may or may not have developed, what she has been doing with her time, whether she continued to study after the curtailment, whether she worked or had any relationships. There is simply no information about her private life contained in that witness statement at all.

8. Also contained within the Appellant's bundle before the First-tier Tribunal was a copy of the Home Office's Long Residence policy, version 16 dated 28 October 2019.

9. The judge made certain findings in relation to the appeal. Clearly, no oral evidence had been called before her and under the title 'Findings of fact and conclusions' the judge found as follows:

> "6. The Tribunal find that the Appellant entered the UK on 18.12.2009 with valid leave as a Tier 4 Student until 9.4.2012. She applied for further leave in March 2012 which was granted until 24.7.2015. On 1st May 2013 her leave was curtailed. She appealed that decision which was allowed on 17.9.2013. A letter was sent to the Respondent on 18.3.2019 regarding the allowed appeal and the Appellant was granted valid leave to remain from 24.10.2019 until 23.12.2019. She applied for ILR on 18.12.2019. The Appellant failed therefore to demonstrate ten years' continuous lawful residence in the UK.
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> 7. The Tribunal is satisfied that the Appellant failed to provide any evidence to show that they would be unjustifiably harsh circumstances in the event of a return to India. The immigration rules have not been met in terms of continuous lawfully for 10 years and Article 8 outside of the rules is not considered. In the alternative by reason of her length of residence in the UK she has established private life in the UK, that (*sic* – but?) this was as a student at which time her status was precarious and temporary. The Appellant submitted grounds of appeal arguing that her previous appeal was allowed in September 2013 but that the decision was not implemented by the Respondent until October 2019 when she was granted leave. The Appellant has not produced any further evidence in support pursuant to her grounds of appeal or any evidence to explain if and when she provided a new sponsor. In particular the Appellant has not produced correspondence from her solicitors dated 18.3.2019 and which was sent to the Respondent about her appeal in 2013 and or any information as to what her circumstances were since her appeal was allowed or what steps you took to obtain a new sponsor within the required period of time.
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> 8. The Tribunal conclude that Article 8 outside of the rules cannot be considered and/or there (*is*) no breach of human rights under Article 8 (1) which is not engaged."

10. The Appellant sought permission to appeal against that decision in grounds of appeal dated 19 March 2021. The Appellant's immigration history was again set out. The grounds refer to s.3D of the Immigration Act 1971 and assert at paragraph 6 that the judge misconstrued the law in relation to the Appellant and her claim. It was submitted that the period between 1 May 2013 and 24 October 2019, when the Appellant's allowed appeal was 'implemented', the Appellant's leave was lawful, as it was deemed to have been extended by the provisions of s.3D, Immigration Act 1971, so as to provide the Appellant with continuous lawful leave. The grounds refer in alleged support of that proposition to page 22 of the Long Residence Guidance Version 16. The grounds otherwise do not argue that the First-tier Tribunal erred in law in any other way, for example they do not argue that the judge erred in law in her assessment as to the Appellant's rights under Article 8 ECHR.

11. Permission to appeal was granted by Judge of the First-tier Tribunal Chohan in a decision dated 30 April 2021 essentially saying that the grounds were arguable.

12. The matter now comes before us. There is a Rule 24 reply from the Secretary of State dated 17 June 2021 essentially asserting that the judge directed herself correctly in law, that the Appellant did not have continuous lawful leave for 10 years, but also asserting that the Respondent had received no correspondence from the Appellant or her representatives between the appeal being allowed in September 2013 and the letter of March 2019. That latter assertion would represent an assertion of fact which was not made before the judge.

13. The Tribunal today has heard submissions from the parties. For his part Mr Georget accepted that s.3D Immigration Act 1971 did not operate in the way that is asserted for in the Appellant's grounds of appeal. It is appropriate at this juncture to set out the terms of s.3D of the 1971 Act. This provided as follows:

> "Continuation of leave following revocation
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> (1) This Section applies if a person's leave to enter or remain in the United Kingdom –
>
> (a) is varied with the result that he has no leave to enter or remain in the United Kingdom, or
>
> (b) is revoked.
>
> (2) The person's leave is extended by virtue of this Section during any period when -
>
> …
>
> (b) an appeal under that Section against the variation or revocation brought while the Appellant is in the United Kingdom, is pending within the meaning of Section 104 of that Act."

14. It is also appropriate to refer to s.104 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002'). That provides as follows:

> "104 Pending appeal
>
> (1) An appeal under Section 82(1) is pending during the period
>
> (a) beginning when it is instituted and

(b) ending when it is finally determined, withdrawn or abandoned or when it lapses under Section 99)."

15. It was agreed between the parties that an appeal is to be treated as finally determined upon the expiry of the time limit that exists for an onward appeal after the promulgation of the determination of the First-tier Tribunal. The 2013 determination of course was in favour of the Appellant, allowing her appeal. We are told by Ms Isherwood that there was an attempt by the Secretary of State to appeal against that decision to the Upper Tribunal, albeit unsuccessfully. Whatever the exact date that the appeal was finally determined following the September 2013 decision, it would have been around the end of 2013.

16. For his part, Mr Georget accepts as a matter of law that the leave to remain which the Appellant had at the date of the curtailment, ceased and was brought to an end by that curtailment. In our view, that is a correct analysis; the decision to curtail the Appellant's leave to remain was an immigration decision as defined under s.82(2)(e) NIAA 2002, being a 'variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain'. If the Appellant's leave to remain had been curtailed in a way that resulted in her still having leave to remain, she would not have had a right of appeal.

17. It has been suggested by Ms Isherwood for the Secretary of State that the result of Appellant's successful appeal may have been that her previous leave to remain would somehow have been automatically renewed and re-instated, up to 24 July 2015, merely upon her 2013 appeal having succeeded. We do not consider that to be a correct analysis of the law, for reasons we set out at [16] above. We find that any suggestion at page 3 of the Respondent's decision of 19 May 2020 that the Appellant had leave to remain until 24 July 2015 was erroneous. We are of the view that upon the Tribunal allowing the Appellant's appeal against curtailment in 2013, a positive act needed to be carried out by the Secretary of State to grant her leave to remain again, for such a period of time as would be appropriate.

18. However, that did not happen. Both parties invited this Tribunal to admit into evidence under Rule 15(2A), Tribunal Procedure (Upper Tribunal) Rules 2008 certain entries from the Secretary of State's CID Information System regarding the steps that the Secretary of State took to contact the Appellant after the 2013 determination. We declined to admit such evidence into these proceedings on the basis that whatever steps were taken at that time, they did not result in the Appellant being granted further leave to remain, until 2019. Such evidence would not establish that the judge proceeded under any material mistake of fact when considering the Appellant's appeal.

19. Mr Georget and Ms Isherwood both ultimately agree that following the Tribunal's decision of 2013, no further leave to remain was granted to the Appellant until 2019. Mr Georget does not positively assert that the

Appellant had lawful leave to remain between 2013 and 2019. Rather, he says that her status was 'uncertain'. He asserts that because the Secretary of State failed to grant the Appellant further leave to remain again in 2013 after her successful appeal, the Appellant ought to be treated as being akin to a person with temporary admission.

20. We reject that proposition. It is plain that the Appellant's leave to remain was curtailed; it was not re-instated to her; and she had no leave to remain from 2013 to 2019. The Appellant could, in our view, have sought judicial review of the failure of the Secretary of State to re-instate leave to remain to her but there was no suggestion that she took such steps.

21. Mr Georget argued before us that even if as a strict matter of law the Appellant did not have leave to remain between 2013 and 2019, the judge nonetheless erred in law by failing to make a sufficiently clear finding of fact as to whether or when the Appellant's leave to remain had expired. That argument was not advanced in any grounds of appeal to the Upper Tribunal, but in any event, we would reject any proposition that the judge erred in law in such a manner. After setting out the Appellant's immigration history at paragraph 6 of the decision, the judge held at the end of that paragraph that 'The Appellant failed therefore to demonstrate 10 years continuous lawful residence in the UK'. Further, the judge stated at paragraph 7 that 'The immigration rules have not been met in terms of continuous lawful leave for 10 years…'. This represents a sufficiently clear finding that there had been a break of leave to remain from the time that the Appellant's appeal had been determined, until 2019. There is nothing in Mr Georget's point in that regard.

22. Mr Georget also submits that the judge also erred in law in failing to have regard to the Long Residence Policy, in particular pages 16-18 thereof which deal with 'Breaks in lawful residence'. This section provides instructions to the Secretary of State regarding 'circumstances that break lawful residence for long residence applications and when you can use discretion for short breaks in lawful residence'. There is a section entitled 'Periods of overstaying' which includes a reference to the consideration of any evidence of exceptional circumstances preventing an applicant from applying for further leave to remain within the first 28 days of overstaying.

23. We note that the grounds of appeal from the Respondent's decision of 19 May 2020, bringing the appeal to the First tier Tribunal in the first instance, and described at [6] above, assert that the Respondent had failed to follow their own policy guidance on lawful continuous long residence. However, it was not asserted on those grounds in what way the Respondent had failed to follow that policy. Further, we note that the grounds of appeal against the judge's decision, bringing the appeal to the Upper Tribunal, refer to page 22 of the Long Residence Policy. However, we note that page 22 of the policy relates to the application of s.3D Immigration Act 1971 where an appeal is brought following a curtailment of leave to remain. That part of the policy is uncontentious and required no reference to it by the judge; all parties now agree that s.3D

Immigration Act 1971 applied so as to extend the Appellant's leave to remain from the date of the curtailment decision on 1 May 2013, until her appeal was finally determined at the end of 2013. s.3D Immigration Act 1971 (now repealed in any event) had no further relevance to the question of the Appellant's leave to remain from the end of 2013 onwards, and it cannot be said that the judge erred in law in failing to have regard to page 22 of the Long Residence Policy.

24. Hence, Mr Georget's argument that the judge erred in law in failing to have regard to pages 16 to 18 of the policy represents a ground of appeal which was not advanced in the Appellant's grounds of appeal against the judge's decision, to the Upper Tribunal.

25. We decline to entertain such an argument. The judge was never asked to consider that part of the Long Residence Policy; the only arguments advanced before the judge were that the Appellant had lawful continuous residence; an argument which the judge correctly rejected. No other arguments were advanced before the judge that the Long Residence Policy had any relevance to the way that the judge ought to have treated the very significant period of overstaying between 2013 and 2019.

26. Any argument now advanced relating to the application of pages 16 to 18 of the Long Residence Policy is very far from a 'Robinson obvious' point (Regina v. Secretary of State for the Home Department, ex parte Robinson [1998] QB 929) establishing that the judge ought to have considered the point for herself.

27. In any event, the Appellant provided no evidence at all to the First tier Tribunal as to why the lengthy gap in her leave to remain had arisen, or what steps she took to contact the Secretary of State after her successful appeal in 2013. There was no evidence of any exceptional circumstances before the judge which might have even remotely engaged this part of the Respondent's Long Residence Policy. We find that the judge made no error in not referring to the Long Residence Policy in her decision.

28. For these reasons, we find that the decision of the First-tier Tribunal contains no material error of law and the Appellant's appeal is dismissed.

Notice of Decision

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed *Rory O'Ryan* Date 8 December 2021

Deputy Upper Tribunal Judge O'Ryan

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed *Rory O'Ryan* Date 8 December 2021

Deputy Upper Tribunal Judge O'Ryan