In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR/941/2019

In the matter of an application for Judicial Review

The Queen on the application of

SAMIA AKTER

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ORDER

BEFORE Upper Tribunal Judge O'Callaghan

UPON hearing Ms. S Naik QC and Mr. R Sharma, Counsel, instructed by St Martin Solicitors, for the Applicant and Mr. Z Malik QC, Counsel, instructed by the Government Legal Department, for the Respondent at a hearing held at Field House on 1 September 2021

HAVING considered all documents lodged including the written submissions of the Applicant, dated 6 September 2021 and 6 January 2022, and the respondent, dated 17 December 2021

UPON the parties having been unable to agree an order

AND UPON the Tribunal adjourning the final hearing disposing of immigration judicial review proceedings to a future date: rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008

IT IS HEREBY ORDERED THAT:

(1) The application for judicial review is refused.

(2) The handing down of the decision upon an application for permission to appeal at a date to be fixed following the filing of written submissions by the parties will constitute the final hearing disposing of immigration judicial review proceedings in this matter: rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

(3) The issue of costs will be considered following the filing of written submissions by the parties.

IT IS DIRECTED THAT:

(4) The applicant is to file written submissions as to (1) permission to appeal to the Court of Appeal and (2) costs by 4pm on Friday 14 January 2022.

(5) The respondent is to file a written response by 4pm on Monday 17 January 2022.

Reasons

(6) Consequent to the truncated time period in which the applicant was permitted to consider the draft judgment and secure appropriate advice it is considered just that she be provided further time to file written submissions as to an onward appeal and the issue of costs.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Dated: 13 January 2022

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): ***13 January 2022***

Solicitors:
Ref No.
Home Office Ref:

Case No: JR/941/2019

In the Upper Tribunal
(Immigration and Asylum Chamber)

Field House
Breams Buildings
London, EC4A 1WR

13 January 2022

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

REGINA

On the application of
SAMIA AKTER

Applicant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Sonali Naik QC and Rajiv Sharma (instructed by St Martin Solicitors) for the Applicant
Zane Malik QC (instructed by the Government Legal Department) for the Respondent

Hearing date: 1 September 2021
Further Written Submissions: (Applicant) 6 September 2021 and 6 January 2022; (Respondent) 17 December 2021

JUDGMENT

Judge O'Callaghan:

This judgment is in five main parts, as follows:

I. Overview

1. This claim has a lengthy procedural history and was recently remitted to this Tribunal from the Court of Appeal: *R (Akter) v. Secretary of State for the Home Department* [2021] EWCA Civ 704.

2. At the outset I wish to take the opportunity to thank counsel for the high quality of their written and oral submissions.

3. The applicant's present solicitors and counsel were instructed following the refusal by UTJ Owens to grant permission to apply for judicial review following an oral hearing held on 9 August 2019. They were not responsible for the poor drafting of certain documents referenced below.

4. The case turns on technical points of law and it is necessary to summarise the factual and procedural background in some detail, particularly regarding events following an application for leave to remain in this country made by the applicant in 2014.

5. The applicant seeks a quashing order in respect of a decision of the respondent dated 19 November 2018 ('the November 2018 decision') by which her application for indefinite leave to remain on long residence grounds under paragraph 276B of the Immigration Rules ('the Rules') was refused.

6. By her November 2018 decision the respondent refused the application observing, *inter alia:*

> 'Consideration has been given to your application and it is noted from your immigration history that you had lawful leave following your arrival in the United Kingdom on 7 March 2008 until 31 January 2013.
>
> You did seek to vary your leave on 31 January 2013. However, this application was refused with a right of appeal, following an

> unsuccessful appeal your appeal rights were exhausted on 13 August 2014. It is noted you made a further attempt to vary your leave on 9 September 2014 and 24 February 2015. However, these applications were submitted out of time. It must be pointed out that any time spent following the submission of an out of time application awaiting for consideration of the application is not considered lawful even if that application is subsequently granted. Therefore, you were without valid leave from 13 August 2014 when your appeal rights were exhausted, until your next grant of leave to remain on 9 June 2016, a period of 665 days. As such your period of continuous lawful residence is considered to have been broken at this point.
>
> As you have remained without any leave to enter or remain between 13 August 2014 and 9 June 2016 you cannot demonstrate 10 years continuous lawful residence in the UK and cannot meet the requirements of the Immigration Rules with reference to Paragraph 276B(i)(a).'

7. The respondent accepts that the applicant applied for leave to remain on 9 September 2014 ('the September 2014 application'), 27 days after she became appeal rights exhausted on 13 August 2014. It is further accepted this was a valid application in proper form and brought within the Rules. At this time, the applicant was an overstayer. The respondent refused the application by a decision letter dated 24 November 2014 ('the November 2014 decision').

8. At the date of the application, the relevant regime then existing under the Immigration Rules, introduced by Statement of Changes HC 194, was that while applications for further leave to remain for many Rules-based applications were expected to be made in time, any period of overstaying for 28 days or less was not a ground for refusal as far as those applications are concerned. The Rules therefore permitted a disregard in identified Rules-based applications. However, applicants remained overstayers, present in this country in breach of immigration laws. The 28-day period was originally brought in so that applicants who had made an innocent mistake in the preparation of their in-time applications for further leave were not penalised by being treated as unlawfully present in this country.

9. The disregard rules relevant to the respondent's consideration of the applicant's November 2014 application were:

i. Paragraph E-LTRP.2.2 of Appendix FM in respect of limited leave to remain as a partner

ii. Paragraph E-LTRPT.3.2 of Appendix FM in respect of limited leave to remain as a parent

10. The applicant contends:

a) The respondent's November 2014 decision was withdrawn, or in any event the September 2014 application was not determined until 11 May 2015.

b) Upon successfully exercising her right of appeal in relation to the May 2015 decision, the September 2014 application was not lawfully determined until the respondent granted her leave to remain on 9 June 2016.

c) She has established 10 years' lawful continuous residence in this country for the purpose of paragraph 276B of the Rules.

II. Legislative Framework

Statute

11. If an application has been made to vary leave before the expiry of extant leave, section 3C of the Immigration Act 1971 ('the 1971 Act') automatically extends an applicant's leave by operation of law, while they are waiting for their in-time application for leave to remain, at the time when the application to vary is made.

12. Section 3C has been subject to amendment over the years but the core provisions have remained the same and read as follows:

> "3C Continuation of leave pending variation decision
>
> (1) This section applies if –
>
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
>
> (b) the application for variation is made before the leave expires, and
>
> (c) the leave expires without the application for variation having been decided.
>
> (2) The leave is extended by virtue of this section during any period when –
>
> (a) the application for variation is neither decided nor withdrawn,
>
> (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or
>
> (c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).
>
> (3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.
>
> (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.
>
> (5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).

> (6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section …."

13. Regulation 2 of the Immigration (Continuation of Leave) (Notices) Regulations 2006 provides that for the purposes of section 3C an application for variation of leave is decided when notice of the decision has been given in accordance with regulations made under section 105 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'); or where no such notice is required, when notice of the decision has been given in accordance with section 4(1) of the 1971 Act.

14. Section 10(1) of the Immigration and Asylum Act 1999 ('the 1999 Act'), as material in 2014, provided that a person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if –

> '(a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave;'

15. Section 10(1) of the 1999 Act was substituted by section 1 of the Immigration Act 2014 ('the 2014 Act') with general effect from 6 April 2015 subject to saving provisions:

> '(1) A person may be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer if the person requires leave to enter or remain in the United Kingdom but does not have it.'

16. Sections 82(1) and 82(2)(d), (g) of the 2002 Act, as material in 2014:

> '(1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
>
> (2) In this Part 'immigration decision' means
>
> …
>
> (d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain.
>
> …
>
> (g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), or (c) of the Immigration and Asylum Act 1999 (removal of person unlawfully in the United Kingdom)'

17. Section 82 was substituted by section 15 of the 2014 Act in respect of decisions made on or after 6 April 2015. Section 82(1), as amended:

> '(1) A person ('P') may appeal to the Tribunal where -
>
> …
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P, …'

18. Section 47 of the Immigration, Asylum and Nationality Act 2006 ('the 2006 Act'), as material at the relevant time in 2014:

> **'Removal: persons with statutorily extended leave**
>
> (1) Where a person's leave to enter or remain in the United Kingdom is extended by section 3C(2)(b) or 3D(2)(a) of the Immigration Act 1971 (extension pending appeal), the Secretary of State may decide that the person is to be removed from the United Kingdom, in accordance with directions to be given by an immigration officer if and when the leave ends.
>
> (2) Directions under this section may impose any requirements of a kind prescribed for the purpose of section 10 of the Immigration and Asylum Act 1999 (removal of persons unlawfully in United Kingdom).'

19. Section 47 was repealed by the 2014 Act.

Immigration Rules

20. Paragraph 276B of the Rules, concerned with settlement consequent to long residence, reads, so far as material:

> '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:
>
> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
>
> (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, … and
>
> (iii) the applicant does not fall for refusal under the general grounds for refusal.
>
> …
>
> (v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –
>
> (a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or
>
> (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied."

21. Some of the terms used in paragraph 276B are defined either in paragraph 276A or in paragraph 6; the latter containing definitions applicable to the Rules generally.

22. The two elements found in "continuous lawful residence" - sub-paragraph (i) - are defined in paragraph 276A as follows (so far as relevant):

> ‘(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 ...
>
> (b) 'lawful residence' means residence which is continuous residence pursuant to:
>
> (i) existing leave to enter or remain; or
>
> (ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or
>
> (iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.’

23. The phrase “in breach of immigration laws” in sub-paragraph (v) is defined in paragraph 6 as meaning “without valid leave where such leave is required, or in breach of the conditions of leave”.

24. The word “overstaying” which appears in sub-paragraph (v) is defined in paragraph 6 as meaning that:

> ‘... the applicant has stayed in the UK beyond the latest of:
>
> (i) the time limit attached to the last period of leave granted, or
>
> (ii) beyond the period that his leave was extended under sections 3C or 3D of the Immigration Act 1971.’

25. Paragraph 276C provides that the respondent may grant indefinite leave to remain if she is satisfied that each of these conditions is met; and paragraph 276D provides that she must not grant it if she is not so satisfied.

26. As to the relevant disregards, paragraph E-LTRP.2.2 of Appendix FM detailed at the material time in 2014:

> ‘E-LTPR.2.2 The applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1 applies.’

27. Paragraph E-LTRP.2.2 was amended from 3 August 2015 and again from 24 November 2016 for applications made on or after that date:

> ‘E-LTPR.2.2 The applicant must not be in the UK
>
> ...
>
> (b) in breach of immigration laws except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded, unless paragraph EX.1 applies.’

28. Paragraph E-LTRPT.3.2 of Appendix FM at the material time in 2014:

> 'E-LTRPT.3.2 The applicant must not be in the UK in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1 applies.

29. Paragraph E-LTRPT.3.2 was amended from 19 November 2015 and again from 24 November 2016 for applications made on or after that date:

> 'E-LTPRT.3.2 The applicant must not be in the UK
>
> …
>
> (b) in breach of immigration laws except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded, unless paragraph EX.1 applies.'

30. Paragraph 39E of the Rules was inserted into the Rules from 24 November 2016 subject to saving provisions. It provides exceptions for overstayers in respect of applications for leave to remain. It defines circumstances in which the fact that an applicant for further leave to remain is an overstayer may be disregarded.

> '39E. This paragraph applies where:
>
> (1) the application was made within 14 days of the applicant's leave expiring and the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in-time; or
>
> (2) the application was made:
>
> (a) following the refusal of a previous application for leave which was made in-time; and
>
> (b) within 14 days of:
>
> (i) the refusal of the previous application for leave; or
>
> (ii) the expiry of any leave extended by section 3C of the Immigration Act 1971; or
>
> (iii) the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable); or
>
> (iv) any administrative review or appeal being concluded, withdrawn or abandoned or lapsing.'

III. The Facts

Immigration History

31. The applicant is a national of Bangladesh and is presently aged 45. She has two children. It is relevant to these proceedings that the elder child was born in December 2010.

32. She arrived in the United Kingdom with entry clearance as a student on 7 March 2008 and initially enjoyed leave to enter until 31 May

2011. She secured an extension of leave to remain as a student until 31 January 2013. On the final day of her leave, she lodged an application for leave to remain outside of the Rules. The respondent refused the application with an attendant right of appeal on 15 May 2013. The applicant's appeal was dismissed by the First-tier Tribunal on 14 April 2014 and the applicant became appeal rights exhausted on 13 August 2014.

September 2014 application

33. On 9 September 2014, less than 28 days after her leave had expired, the applicant applied for leave to remain on human rights (article 8) grounds for herself and for her elder child who had by that time been residing in this country for over 3 ½ years.

34. The making of the application during such grace period did not permit the applicant to enjoy the benefits of section 3C of the 1971 Act: *Secretary of State for the Home Department v. Waqar Ali* [2021] EWCA Civ 1357, [2021] I.N.L.R. 720.

November 2014 decision

35. The respondent refused the application on 24 November 2014. That the refusal did not give rise to a right of appeal to the First-tier Tribunal was due it not being an "immigration decision" within the meaning of section 82 of the 2002 Act then in force as the applicant did not enjoy leave at the date of her application.

36. The applicant filed an appeal with the First-tier Tribunal on 10 December 2014 which was struck out as inadmissible on 23 December 2014.

Judicial Review: JR/2209/2015

37. In the meantime, on 5 December 2014, the applicant served a pre-action protocol letter in respect of the respondent's November 2014 decision. The purported illegality was identified as a failure by the respondent to exercise her discretionary power by disregarding the applicant's compassionate circumstances. Complaint was made as to the substance of the respondent's decision, not to the failure to issue a removal decision that would give rise to appeal rights. Reliance was placed upon the health of both the applicant and her child, as well as the applicant's husband being eligible for settlement on long residence grounds.

38. By means of her pre-action protocol response sent to the applicant on 29 January 2015 (dated 18 December 2014), the respondent affirmed her November 2014 decision. Though the applicant had not addressed the failure to issue a removal decision, the respondent expressly noted the judgment of the Court of Appeal in *Daley-Murdock v. Secretary of State for the Home Department* [2011] EWCA Civ 161, [2011] Imm. A.R. 500 confirming that it was contrary to the policy and objects of the 2002 Act to impose an obligation on the

respondent, when refusing an overstayer's application for leave to remain, to make an appealable refusal decision at the same time.

39. However, by means of the same response the respondent accepted that as the applicant had a dependant child aged under 18 who had been resident in this country for over 3 years her policy was to issue a removal decision. The respondent confirmed she would refer the applicant's matter to a relevant casework team who would contact the applicant "in the near future".

40. On 23 February 2015 the applicant lodged a judicial review challenge to the respondent's November 2014 decision (JR/2209/2015). It is appropriate to observe that the challenge was solely directed to the November 2014 decision and not to the absence of a removal decision.

41. On 17 March 2015 the respondent informed the applicant that her removals unit was deferring consideration pending the outcome of the judicial review proceedings.

42. Permission to apply for judicial review was refused on 5 May 2015 following a paper consideration. In her decision UTJ Pitt reasoned, *inter alia*:

> '2. It is not arguable that the respondent's Article 8 decision is unlawful. All the material factors were considered within the correct legal framework. Proper consideration was given to the children and to the medical evidence. The fact of the applicant's partner being eligible to apply for ILR as of November 2014 is not something capable of making a material difference to the respondent's decision. At the time of the decision no such application had even been made and even if had (as now) the outcome of any such application is uncertain.
>
> 3. The respondent has undertaken to provide the applicant with a removal decision so that issue can go no further here …'

43. The applicant renewed her application for permission to apply for judicial review.

May 2015 decision

44. In the meantime, on her own initiative, the respondent sent a section 120 notice to the applicant, requesting any further grounds upon which the applicant wished to rely in seeking to be allowed to stay in this country. The notice detailed, *inter alia*:

> 'Additional grounds
>
> There is no need to repeat reasons or evidence that you have already given if you have made an immigration application.
>
> If you have no more reasons to give, tick the first box [A], then sign, date and return the form. '

45. The applicant's then legal representatives wrote to the respondent on 12 March 2015 confirming that there were no further grounds to

submit. A copy of the PAP letter of 5 December 2014 was enclosed, and a request made that the respondent take the contents of the letter into consideration "while assessing the applicant's circumstances in regards to her application …"

46. Subsequent to the decision of UTJ Pitt the respondent issued a decision refusing to grant the applicant leave to remain. The decision was dated 11 May 2015 ('the May 2015 decision'). The decision states that on '24 February 2015' the applicant made a human rights application for leave to remain in the United Kingdom on the basis of her family and private life as well as the complex medical conditions afflicting one of her two children. It is now accepted by the respondent that reference to '24 February 2015' is an error as the applicant made no such application on that day.

47. The decision addresses the applicant's immigration history and details, *inter alia*:

> 'On 09 September 2014, you applied for leave to remain based on your Family and Private Life with [the applicant's child] named as your dependant, however, your application was refused on 24 November 2014 with No Right of Appeal. On 10 December 2014, you attempted to lodge an appeal however this was struck out on 23 December 2014 and your appeal rights were exhausted.'

48. The respondent proceeded to address the 'application' of 24 February 2015, and concluded the applicant failed to meet the requirements of the Rules, and she did not fall for a grant of leave outside the Rules.

49. The May 2015 decision confirmed that the applicant must leave the country if she did not appeal and enjoyed no other legal basis to remain; but in form and substance it also considered the question of the applicant's right to remain. This was made expressly clear by the covering letter which stated that "We have considered your application for leave to remain and have refused it. Your human rights claim has therefore been refused. … If you do not appeal and do not have any other legal basis to remain in the United Kingdom you must leave the country." The applicant exercised appeal rights on 27 May 2015.

JR/2209/2015: Consent order

50. Consequent to filing her appeal with the First-tier Tribunal the applicant withdrew her judicial review claim by means of a consent order approved by UTJ Eshun on 24 June 2015 and sealed on the same day. The consent order details:

> 'UPON the Applicant having an alternative remedy, namely an appeal in the First-tier Tribunal.
>
> IT IS AGREED:
>
> 1) The Applicant have leave to withdrawn [sic] her judicial review claim; and
>
> 2) There be no order as to costs.'

First-tier Tribunal: IA/20109/2015 + 1

51. The applicant's husband secured indefinite leave to remain in July 2015. Her elder child secured British citizenship on 7 March 2016.

52. The applicant's hearing was heard by the First-tier Tribunal on 26 April 2016. The applicant was legally represented. The respondent was unrepresented. By a decision dated 18 May 2016 the applicant's appeal was allowed by Judge of the First-tier Tribunal Robinson. In setting out the background, the Judge stated:

> '3. … On 9 September 2014 [the applicant] applied for leave to remain based on her family and private life, with [her elder child] named as her dependant, however her application was refused on 24 November 2014 with no right of appeal. On 10 December 2014 she attempted to lodge an appeal. However, this was struck out on 23 December 2014 and her appeal rights became exhausted.
>
> 4. On 23 February 2015 the appellant lodged an application for Judicial Review to the Upper Tribunal. On 24 June 2015 a consent order was made by the Upper Tribunal whereby the parties agreed an alternative remedy, namely an appeal to the First-tier Tribunal.
>
> 5. This appeal is therefore an in-country appeal against the decision made on 11 May 2015.
>
> 6. The respondent's reasons for refusing the application were set out in a letter to the appellant dated 11 May 2015. It refers to the application made on the appellant's behalf for further leave to remain in the United Kingdom on the basis of her family and private life.
>
> 7. Her application was considered on the basis of family and private life in the United Kingdom under Appendix FM and paragraphs 276ADE(1) - CE of the Immigration Rules, and outside the rules on the basis of exceptional circumstances.'

53. Having reviewed all the evidence, including the immigration status now enjoyed by the Appellant's husband and elder child's British citizenship, the First-tier Tribunal allowed the appeal on human rights (article 8) grounds. Judge Robinson observed at [44] of her decision that "circumstances have changed with regard to her elder child and her husband's immigration status since the decision was made. These facts weigh in her favour in the proportionality assessment."

54. On 9 June 2016 the applicant was granted leave to remain outside of the Rules until 8 December 2018.

Indefinite leave to remain decision – 19 November 2018

55. On 12 November 2018 the applicant applied for indefinite leave to remain under the Rules. By means of the November 2018 decision the application for settlement was refused, with the applicant being alternatively granted limited leave to remain subject to the payment of the immigration health surcharge. The respondent's reasons for refusal were concisely set out:

> ‘Consideration has been given to your application and it is noted from your immigration history that you had lawful leave following your arrival in the United Kingdom on 7 March 2008 until 31 January 2013.
>
> You did seek to vary your leave on 31 January 2013. However this application was refused with a right of appeal, following an unsuccessful appeal your appeal rights were exhausted on 13 August 2014. It is noted you made a further attempt to vary your leave on 9 September 2014 and 24 February 2015 however these applications were submitted out of time. It must be pointed out that any time spent following the submission of an out of time application awaiting for consideration of the application is not considered lawful even if that application is subsequently granted. Therefore, you were without valid leave from 13 August 2014 when your appeal rights were exhausted, until your next grant of leave to remain on 9 June 2016, a period of 665 days. As such your period of continuous lawful residence is considered to have been broken at this point.
>
> As you have remained without any leave to enter or remain between 13 August 2014 and 9 June 2016 you cannot demonstrate 10 years continuous lawful residence in the UK and cannot meet the requirements of the Immigration Rules with reference to Paragraph 276B(i)(a).’

Judicial Review: JR/941/2019

56. The parties engaged in the pre-action protocol process and the applicant filed her present judicial review claim with this Tribunal on 18 February 2019.

57. At an oral hearing held on 9 August 2019, UTJ Owens refused the applicant permission to bring judicial review proceedings challenging the respondent's decision.

Court of Appeal: [2021] EWCA Civ 704

58. Following a hearing held on 6 May 2021 the Court of Appeal (Newey, Coulson, Stuart-Smith LJJ) allowed the applicant’s appeal to the extent that the claim was remitted to the Upper Tribunal with permission to apply for judicial review.

59. The Court held that it was reasonably arguable that the chronology of events and decisions was such that the application on 9 September 2014 for leave to remain had not been determined by the respondent until 9 June 2016 when leave to remain was granted outside the Rules, meaning that the applicant had established continuous lawful residence.

60. The Court concluded, at [32]-[38]:

> ‘32. Mr Malik concedes that, if it is reasonably arguable that the decision of 11 May 2015 involved and included a reconsideration of the Appellant's 9 September 2014 application, the appeal should be allowed and the case remitted to the Tribunal for determination of these JR proceedings. In my judgment, that concession is correctly

made because, if the Respondent reconsidered the Appellant's original application on 11 May 2015, it is reasonably arguable that there is an unbroken line of decisions and actions by the Respondent that are founded on the Appellant's original application and which continue with the successful appeal in April 2016 against the 11 May 2015 decision and lead directly to the grant of limited leave on 9 June 2016. If that is the correct view of what happened, then it is reasonably arguable that the decision to grant limited leave on 9 June 2016 marks the real conclusion of the original Application made on 9 September 2014.

33. The Respondent says that is not the correct interpretation of what happened. Mr Malik submits that the decision taken on 11 May 2015 is to be seen solely as a decision on removal. So, he submits, the Appellant's challenge to the Respondent's decision of 24 November 2014 finished with the withdrawal of the First JR Proceedings by the consent order on 24 June 2015. He points to the fact that, on present information, the Respondent did not at any stage state that she was withdrawing her decision of 24 November 2014 and that, had that been her intention, she would have said so. He also points to the fact that what was intended to generate the "alternative remedy" of appeal to the Tribunal was the removal decision and not the underlying decision that had previously been taken on leave to remain, and that the appeal to the Tribunal that the Appellant brought was, as a matter of fact, an appeal against the decision of 11 May 2015.

34. These submissions are persuasively advanced and may succeed if these proceedings are permitted to proceed to full resolution. In particular, I accept that, on the plain words of the relevant provisions, it was the decision in May 2015 which generated the right of appeal to the FTT. I also accept the submission that consideration of the Appellant's human rights grounds would be a necessary part of the process for making a removal decision. But that submission was accompanied by an acceptance that, if review of the Appellant's human rights grounds had justified or compelled it, it would at least be open to the Respondent to reverse her decision on leave to remain even though the primary purpose of the process was intended to be reaching a removal decision.

35. While taking into account the submissions I have summarised above, it is in my judgment reasonably arguable that, interpreted objectively, the decision of 11 May 2015 went beyond simply providing a decision on removal and did, in fact, include and involve a reconsideration of the underlying application for permission to remain. I reach this conclusion because of the features I have identified in [18] and [19] above.

36. I am strengthened in this view by the Respondent's submission, which I accept, that the 11 May 2015 decision

> should be seen as a response to the 2014 PAP Letter because it is plain that the 2014 PAP Letter was an integral part of the Appellant's challenge to the 24 November 2014 refusal of her 9 September 2014 application. On this basis, therefore, and without the need to analyse the terms of the 11 May 2015 letter, I would conclude it to be reasonably arguable that the 11 May 2015 decision should be seen as an integral part of the Respondent's continuing review and assessment of the Appellant's September 2014 application for leave to remain.
>
> 37. That being my conclusion on the function and interpretation of the decision of 11 May 2015, it would be both unnecessary and wrong to go further and to consider the subsidiary questions that may arise on the full hearing of these proceedings. A number of such questions were raised during the hearing, such as whether thought was given to what the effect of the apparently benign course of giving the Appellant an "alternative remedy" might be for the future. However, such issues only need to be stated for it to be obvious that this court hearing this appeal does not have full or sufficient information to enable it to reach valid or reliable conclusions on them. I therefore say nothing about them.
>
> 38. I would therefore allow the appeal on the narrow basis that the Appellant's three propositions that I have set out at [29] above are reasonably arguable because the decision of 11 May 2015 covered both the underlying right to remain and liability to removal. If my lords agree, I would remit the case to the Tribunal with leave to the Appellant to bring the proceedings. Nothing I say should be taken as limiting the issues for determination when the proceedings come to be decided.'

61. The Court of Appeal took care to observe that it was applying the test of whether the applicant's proposed appeal was reasonably arguable, and nothing stated in its judgment should be construed as expressing a view on the merits of proposed appeal, at [31]. The Court went no further than finding that it is 'reasonably arguable' that the May 2015 decision should be seen as an integral part of the respondent's continuing review and assessment of the appellant's September 2014 application for leave to remain, at [36].

IV. Conclusions

(i) Whether September 2014 application was not determined by the respondent until 11 May 2015?

62. The applicant's leave to remain granted to her on 20 May 2011 was valid until 31 January 2013. Given that she applied for further leave to remain before the expiry of that date, as a matter of law her leave did not expire on 31 January 2013 but was automatically extended under section 3C of the 1971 Act. The extension of leave came to an end on 13 August 2014 when the applicant's appeal rights were exhausted. She became an overstayer on that day.

63. When making a further application for leave to remain in this country on 9 September 2014, less than 28 days after her leave had expired, the applicant enjoyed the benefit of the Rules that defined circumstances in which the fact that she was an overstayer may be disregarded. However, she remained an overstayer.

64. At the material time, the disregard applied to the consideration of the application for leave to remain in the United Kingdom. It concerned an applicant avoiding being treated as unlawfully present in this country which would defeat their application for leave to remain from the outset. The disregard enjoyed no part in the respondent's consideration as to whether to issue a removal decision following an adverse decision on the application as the applicant remained an overstayer throughout.

65. The respondent refused the application but did not issue a removal direction generating a right of appeal under section 82(2)(g) of the 2002 Act. Nor did the applicant enjoy a right of appeal under section 82(2)(d) of the 2002 Act because she was required to possess leave to remain at the time the application was made: *Khan v. Secretary of State for the Home Department* [2017] EWCA Civ 424, [2017] Imm. A.R. 1409, at [2].

66. At the material time in 2014 there was no time limit, or even a requirement, that a removal decision be issued to an overstayer following the refusal of an application for leave to remain. Lord Carnwath (with whom Lord Kerr, Lord Reed and Lord Hughes agreed) confirmed in *Patel v. Secretary of State for the Home Department* [2013] UKSC 72, [2014] A.C. 651 that the power to issue removal directions under section 10 of the 1999 Act and section 47 of the 2006 Act did not impose any obligation upon the respondent to make a removal direction, nor did they create a link between a failure to do so and the validity of the immigration decision, at [27]. The respondent did not "thwart the policy of the Act" if she proceeded in the first instance on the basis that unlawful overstayers should be allowed to leave of their own volition, at [29]. The respondent was not obliged to issue removal directions relating an applicant when refusing a variation application, and such refusal was not invalidated by her failure to do so, at [30].

67. A failure to issue a removal decision in this matter did not render the refusal of the applicant's September 2014 application unlawful. The respondent's decision of November 2014 was therefore valid.

68. The applicant's former OISC representatives filed a pre-action protocol letter on 5 December 2014. It is a poorly drafted document, and it is relevant to observe that it seeks to rely upon evidence not previously placed before the respondent. The focus of the document is upon securing "leave for only six to 8 months so that [the applicant] can stay in the UK until her spouse completes the procedure in relation to his settlement application." Reference is also made that "any sudden removal" of the applicant's child "will be

against his psychological and physical welfare and contrary to section 55 of the Borders, Immigration and Asylum Act 2009."

69. I observe that there is no express request in the pre-action protocol letter for the issuing of a removal decision, so as to secure appeal rights. However, paragraph 16 details, "It will be, on the balance of probabilities, unreasonable to expect the applicant and her children to leave the UK and later make out-of-country application to join her spouse as it will incur them huge amount of money and unnecessary travel." It is sufficiently clear in terms that the applicant did not wish to voluntarily leave the United Kingdom.

70. At the time the parties engaged in the pre-action protocol process the respondent had published guidance concerned with the making and issuing of removal directions in respect of overstayers: "Requests for removal decisions". The context was that overstayers or illegal entrants whose applications for leave to remain had been refused without a right of appeal could request the respondent to make a removal decision which, under the law as it stood at the material time, would generate a right of appeal. The guidance was primarily concerned with the timing of a removal decision and was not concerned with the substance of the removal decision or of any appeal that might in due course be lodged.

71. The lawfulness of the guidance was confirmed by the Court of Appeal in *Oboh v. Secretary of State for the Home Department* [2015] EWCA Civ 514, [2015] INLR 633.

72. The guidance informed immigration officers how to respond to such requests and concerned persons who:

> • had made a valid 'out of time' application for leave to remain which was refused
>
> • did not receive a removal decision when the application for leave to remain was refused
>
> • failed to leave the UK voluntarily
>
> • had requested in a letter before action, that a removal decision is made.

73. The applicant did not seek by means of her pre-action protocol letter that a removal decision be made, though she expressed no intention to voluntarily leave the country. The respondent favourably treated the letter as requesting a removal decision and by means of her response expressly considered relevant guidance which confirmed, *inter alia*:

> 'The Home Office is not required to routinely make a removal decision at the same time as refusing leave to remain from an applicant with no current leave.
>
> If a removal decision is not made and served alongside a decision to refuse of [sic] an out of time application for leave to remain, a

> removal decision will be made if the applicant later requests it and it is appropriate to do so.'

74. Under the heading 'Responding to the Pre-action protocol (PAP)' the guidance detailed, *inter alia*:

> 'You must first review the refused application for leave to remain and any other information submitted and consider if the decision should be maintained.
>
> If the original refusal decision was incorrect or made on incorrect grounds, a new decision must be made and either leave granted or a new refusal decision served on the applicant.
>
> If you decide that the refusal decision should be maintained, you must consider the information in the refused application for leave to remain and any relevant UK Border Agency databases. You must then decide if the applicant meets the criteria for a removal decision to be made.'

75. One of the criteria permitting the making of a removal decision when requested was:

> 'the refused application for leave to remain included a dependant child under 18 who has been resident in the UK for three years or more'

76. The identification of this criteria was consistent with the respondent's acceptance in *Daley-Murdock*, at [11], that the need to achieve timely decisions where children were involved would be a relevant factor when deciding whether, in any particular case, it would be unfair or irrational not to make a removal decision at the same time as the refusal of leave. Each case would be fact sensitive.

77. Persons capable of benefiting from the criteria were limited. In addition to dependant children who had been present in this country for 3 or more years, the guidance identified the following cohorts:

> '• the applicant has a dependant child under the age of 18 who is a British citizen
>
> • the applicant is being supported by the UK Border Agency or has provided evidence of being supported by a local authority (under section 21 of the National Assistance Act 1948 or section 17 of the Children Act 1989), or
>
> • there are other exceptional and compelling reasons to make a removal decision at this time.'

78. Consequently, many overstayers who enjoyed the benefit of the disregard when applying for leave to remain could expect from the outset not to benefit from the guidance if their application was refused.

79. The guidance further provided as to what was to happen when the criteria was identified as being met:

> 'If one or more of the criteria outlined above are met, you must send the applicant the criteria met letter. …

> A removal decision must be made and served within 3 months of the date of this response. ...'

80. In this matter, and in accordance with her guidance, the respondent undertook the first step of reviewing the refused application for leave to remain and confirmed by her pre-action protocol response that she maintained her decision of November 2014: "... it is evidence that your client's case was properly considered, and it was decided not to exercise the SSHD's residual discretion and grant leave outside of the Immigration Rules. It is further noted that this same approach was taken in your client's application for leave to remain which was refused on 15 May 2013 and this approach was accepted at the appeal."

81. The respondent therefore considered that the November 2014 decision was not incorrect or made on incorrect grounds. Having decided to maintain the decision, she proceeded to consider whether the applicant met the criteria for the making of a removal decision and concluded that she did in respect of her dependant child aged under 18 who had been resident in this country for 3 years or more. Consequently, the respondent informed the applicant that she could properly expect a removal decision to be made and served within 3 months of the response.

82. The steps undertaken were in accordance with lawful guidance.

83. Unsatisfied with the response addressing the November 2014 decision letter, the applicant filed and served a judicial review claim in February 2015.

84. By the time her judicial review claim was filed with the Upper Tribunal, the applicant was by now represented by solicitors, though not her present representatives. The grounds of claim, which are not signed by counsel, are poorly drafted. The focus of the challenge is directed towards the November 2014 decision, with a myriad of challenges, identified in the section "Main Grounds" at paragraphs 2 to 7 as:

> '2. The Respondent failed to give proper consideration to the medical condition of the Applicant dependent son.
>
> 3. The respondent also failed to give sufficient importance to the fact that the Applicant's husband has been living in the UK for a long time and has sought a valid visa for a couple of more years.
>
> 4. The Respondent deliberately failed to consider the legitimate expectation of the Appellant to get her son treated in the UK for his medical condition and to live with her family at least as long as her husband lives in the UK.
>
> 5. The Respondent wrongly considers the policy of 'effective immigration control' in deciding the Applicant's application for further leave to remain and that prejudge her application.
>
> 6. The Respondent failed to consider and take necessary measures to protect the best interests of the children.

7. The Respondent wrongly set high threshold to define ‘exceptional circumstance’.

85. Paragraph 20 of the grounds:

> ‘20. The Applicant seeks justice from the Honourable Court even on humanitarian grounds and the opportunity to present and prove her case at hearing with relevant documents and evidence. Otherwise, she will suffer an injustice as a result of the infringement of her Art 8 Rights.’

86. I have considered whether this is an oblique challenge to the failure to issue a removal decision. The poor drafting evident throughout the document makes it difficult to identify with certainty the intentions of the author, but there is no reference to such challenge in the “Main Grounds” section, and so I am satisfied that this paragraph is a request for an oral hearing in respect of the judicial review claim. I therefore conclude that the proceedings were solely directed to the November 2014 decision.

87. Two separate actions by the parties co-existed at this time: the applicant’s public law challenge to the November 2014 decision and the respondent’s acceptance that she should properly issue a removal decision permitting the applicant to enjoy a right of appeal to the First-tier Tribunal.

88. A key event in this matter is the respondent sending a section 120 notice to the applicant on 12 March 2015. After being served with the notice the applicant was required to provide her reasons for wishing to remain in this country, any grounds on which she should be permitted to remain and any grounds on which she should not be required to leave. There was no requirement to reiterate the same grounds or reasons previously provided to the respondent. The notice abided by the stated intention of the 2002 Act that all outstanding issues relating to a person’s entitlement to enter or remain in the United Kingdom be dealt with in one appeal.

89. The respondent was not under a duty to serve a section 120 notice. I find that such service as occurred in this matter was consequent to the sending of the response in January 2015.

90. The applicant relies upon the notice being returned with the observation that there were no further grounds to submit and a request that the respondent take the contents of the pre-action protocol letter into consideration. I find that the assertion that there were no further grounds to submit after her previous application was inaccurate. The December 2014 pre-action protocol letter details, *inter alia*:

> ‘9. … It is material here that the applicant’s first child [reference to health concerns] and requires regular medical attention. There are hospital and/or GP appointments at least once in every month. We have herewith enclosed some of his most recent appointment letters.

> 10. … Pertinent to mention that his next hospital appointment with the specialist consultant is on 03 March 2015. Most recent appointment letters are also herewith enclosed.
>
> …
>
> 13. Also, since the applicant's spouse has been granted Discretionary Leave to Remain in the UK and in November 2014 [the letter was written in December 2014] he is going to be eligible to make application for Indefinite Leave to Remain under the 10 Years long residence rule, it is understandable that, removing the applicant with his child from the UK who is undergoing treatment would violate the right of the child which is protected under s.55 of the Borders, Citizenship and Immigration Act 2009.
>
> …
>
> 15. It is apparent from the documentary evidence that, the applicant's husband will be eligible for ILR in November 2014 on the basis of his 10 years long residence in the UK. Then the applicant will also be able to switch in the spouse category as being a spouse of a settled person. Moreover, her right to stay in the UK will establish further based on the fact that both of her children are born in the UK and they will achieve registration as British citizens upon her spouse's grant of ILR. Hence, the applicant wishes to continue her stay here in the UK until her spouse is granted ILR. The applicant requires leave for only six to 8 months so that she can stay in the UK until her spouse completes the procedure in relation to his settlement application.'

91. The applicant expressly sought to rely upon medical documents that did not accompany the September 2014 application. Reliance was also placed upon the applicant's husband having recently attained 10 years lawful residence in this country and so being capable of making a settlement application under the Immigration Rules. Both were identified as strengthening the applicant's article 8 case. I am satisfied that in respect of the section 120 notice the applicant advanced further grounds that she be permitted to remain in this country, including her husband now being able to seek settlement on the basis of 10 years lawful residence, though in general the substance of the applicant's position remained that as detailed in her September 2014 application.

92. I turn to the respondent's decision of 11 May 2015 which, as noted by the Court of Appeal, is of significance in this matter. It is unfortunate that the letter makes erroneous reference to a human rights application purportedly made on 24 February 2015. The section 120 notice was served under cover of a letter on the that date, as confirmed by the applicant's legal representatives in their letter of 12 March 2015 when returning the notice to the respondent. I am satisfied that the respondent erroneously referred to the date the notice was sent to the applicant, rather than its subsequent receipt.

93. Ms. Naik contended that the November 2014 decision enjoyed no legal effect upon the issuing of the May 2015 decision and there being a clear nexus between the application of September 2014 and the decision of May 2015, which led to appeal rights being successfully exercised before the First-tier Tribunal.

94. Her primary argument was that the November 2014 decision was withdrawn by the Respondent following the issuing of the 'replacement' decision of 11 May 2015. In advancing this argument, Ms. Naik relied upon the recital to the consent order: "Upon the Applicant having an alternative remedy, namely an appeal in the First-tier Tribunal."

95. When considering this matter Stuart-Smith LJ, (with whom the other members of the court agreed), observed, *inter alia*, at [18]-[19]:

> '18. Meanwhile, on 11 May 2015 the Respondent made the decision that lies at the heart of this appeal. Its timing is consistent with the suggestion (to which we have referred above) that the removal unit was deferring consideration of the Appellant's case pending the outcome of the JR proceedings. The letter dated 11 May 2015 included a decision that the Appellant must leave the country if she did not appeal and had no other legal basis to remain; but in form and substance it also considered the question of the Appellant's right to remain. This was made expressly clear by the covering letter which stated that "We have considered your application for leave to remain and have refused it. Your human rights claim has therefore been refused. … If you do not appeal and do not have any other legal basis to remain in the United Kingdom you must leave the country."
>
> 19. The reasons for the decision set out in Annexe A to the letter stated that the Appellant had made on "24 February 2015" a human rights application for leave to remain in the United Kingdom on the basis of her family and private life as well as the complex medical conditions afflicting one of her two children. It is now accepted by the Respondent that the Appellant made no such application on that day: the only relevant application she had made was her application of 9 September 2014. The reasons addressed all of the submissions that had been advanced by the Appellant in the application that she had made on 9 September 2014 and in the 2014 PAP Letter and the JR proceedings. The reasons for the 11 May 2015 decision included express statements that the Appellant had applied for leave to remain, that her application failed to meet the requirements of the rules, and that her application did not fall for a grant of leave outside the Rules. Annexe B provided information including information about her liability to removal if she did not appeal the decision refusing her leave to remain or when any appeal was finally determined.'

96. Stuart-Smith LJ considered the consent order to be of importance, at [21]:

> ‘21 It is to be remembered that the First JR Proceedings were in form and substance a challenge to the Respondent's decision of 24 November 2014, which was the Respondent's decision rejecting the Appellant's application for leave to remain made on 9 September 2014 i.e. less than 28 days after the expiry of her previous leave to remain. Neither the consent order nor any other document that we have seen says that the Respondent withdrew her decision of 24 November 2014; however, the terms of the consent order state expressly that the consent order was made on the basis that the Appellant now had "an alternative remedy." The First JR Proceedings were intended to provide a remedy against the Respondent's decision of 24 November 2014, refusing the Appellant's application of 9 September 2014. On its face, therefore, the consent order supports the inference that the Respondent had provided an alternative remedy for the Appellant's challenge to the decision of 24 November 2014. This might seem strained if the decision of 11 May 2015 had only addressed the question of removal; but it did not. As I have said, it went further in expressly addressing the Appellant's claim for leave to remain as made in her 9 September 2014 letter, and pursued by her 2014 PAP Letter and her First JR Proceedings.’

97. The only positive step required under the order, in addition to there being no order for costs, was that the applicant had leave to withdraw her claim. The recital simply recorded the factual basis of the operative provisions of the order. It did not, in this matter, establish that the challenged November 2014 decision was quashed, that it was withdrawn or that it had no legal effect. The recital lacks the clarity required for Ms. Naik’s submission to establish the respondent’s *bona fide* intention to withdraw the decision. Various plausible reasons exist as to why the applicant may have desired to bring proceedings to an end, for example she may have been content to pursue her human rights (article 8) challenge before the First-tier Tribunal, where she could – and did – adduce further evidence, in contrast to the limitations of a public law challenge. However, I am satisfied that in taking steps under relevant guidance, the respondent had decided to maintain the November 2014 and confirmed the same in her pre-action protocol response whilst informing the applicant that a removal decision would be issued at a time when section 82(2)(g) of the 2002 Act was in force, establishing a right of appeal following a decision that a person was to be removed from the United Kingdom by way of directions under section 10(1)(a) of the 1999 Act. She defended the claim, and upon UTJ Pitt refusing the applicant permission to apply for judicial review she proceeded to issue her May 2015 decision. Such action was consistent with her confirmation in the response that she would issue a removal decision, which ultimately necessitated the refusal of a human rights claim as required by recent amendment of section 82 of the 2002 Act. In such circumstances, I am unable to properly infer from the consent order that the respondent agreed to withdraw her November 2014 decision.

98. To support the submission that the November 2014 decision was withdrawn, Ms. Naik relies upon the content of the May 2015 decision addressing the applicant's grounds for seeking leave to remain as advanced in the September 2014 application. I conclude that the express wording of the May 2015 letter does not aid the applicant. Under "Immigration History" there is express reference to the September 2014 application, and the subsequent November 2014 refusal. There is no reference to that decision having been withdrawn. Nor is it said that the decision is an addendum to the earlier one.

99. I am further satisfied that the May 2015 decision was issued independent of the judicial review proceedings, save that its issue was unilaterally stayed until the Upper Tribunal refused permission by its order sent to the parties on 5 May 2015. The forwarding of the applicant's matter to the relevant casework team was confirmed in the pre-action response and there is no reference to ongoing judicial review proceedings in the decision. Indeed, the identification of the applicant's immigration history concludes when her appeal was struck out by the First-tier Tribunal on 23 December 2014.

100. I conclude that the decision of 24 November 2014 was not withdrawn by the respondent consequent to judicial review proceedings.

101. The respondent was required under her guidance to issue the applicant with a removal decision having confirmed in her pre-action protocol response that the criteria for issuing such decision was met: "If one or more of the criteria outlined above are met … A removal decision must be made …"

102. By the time the application returned the section 120 notice and the respondent considered the further information provided, the "Requests for removal decisions" guidance had been withdrawn on 13 April 2015 following changes to Part 5 of the 2002 Act made by the 2014 Act and brought fully into force on 6 April 2015. The effect of these changes was the establishment of a unified removal power. A right of appeal is now granted on the refusal of a human rights or protection claim, or the revocation of protection status, not on the refusal of an application for leave to remain or on a removal decision: section 82 of the 2002 Act (as amended). The issuing of a removal decision alone no longer secures a right of appeal.

103. Having accepted that a decision as to whether the applicant should be removed was properly to be made, and with the applicant not having made an application for international protection, on and after 6 April 2015 the respondent was required to make a human rights decision which would either permit the applicant leave to remain in light of all of the evidence now presented or permit her a right of appeal against an adverse decision. I find that the respondent could properly consider the section 120 notice as constituting a human rights (article 8) claim in its own right. The respondent had before her the grounds and reasons advanced by the applicant for leave to remain advanced at her appeal hearing in April 2014 and in her

September 2014 application, as well as the further reasons provided in the pre-action protocol letter, relied upon by the applicant when returning the section 120 notice. The adverse decision of May 2015, refusing the applicant's human rights claim, permitted the applicant a right to appeal to the First-tier Tribunal: section 82(1)(b) of the 2002 Act (as amended).

104. In the circumstances, the making of the May 2015 decision did not require the withdrawal of the November 2014 decision. The latter decision ended the application for leave to remain commenced in September 2014 and was not withdrawn consequent to judicial review proceedings concluding in June 2015.

105. I deal with related submissions advanced on behalf of the applicant briefly, as they ultimately provided no benefit to my consideration.

106. Reliance was placed upon the respondent's records disclosed on 8 July 2021 under the Data Protection Act 2018. The applicant sought to establish that the respondent's contention that a human rights claim was advanced by the section 120 notice was unsustainable.

107. Ms. Naik relied upon entries placed on the respondent's General Cases Information Database ('GCID'). Section 4(1) of the 1971 Act requires that the powers exercised by the respondent to give or refuse leave to enter shall be exercised by notice in writing. Whilst GCID records can be helpful in certain assessments, they do not constitute a decision, nor can they be read as enhancing the contents of a decision.

108. I was referred to a paragraph of an entry dated 29 January 2015. I detail the following two paragraphs for context:

> 'We have decided to apply Daley Murdock in this case and a removal decision will be reissued as her refusal application for leave to remain included a dependant child [...] who is under 18 and has been in the UK for more than 3 years.
>
> Response also maintains original refusal decision.
>
> Emailed RCC workflow to issue a removal direction.'

109. Ms. Naik relied upon the word "reissue", however as no removal decision had been issued, it could not be reissued. The note is clear that the original refusal decision was to be maintained.

110. An entry on 17 March 2015 detailed:

> 'Ongoing JR unable to serve full removal notice as final decision on application has not been undertaken. SCW [senior case worker] confirmed that as ongoing JR the HR consideration will remain outstanding until JR concluded. IS151A papers served to applicant and her 2 children. Both children have no valid leave in the United Kingdom and have not made applications to be dependant of father who has been granted leave until 2017. Letter and IS151A papers served to rep.'

111. I conclude that it is not possible to ascertain what precisely is meant by "final decision on application" but it is sufficiently clear that it is linked to the service of the removal notice, consistent with the then existing guidance and statutory appeal regime.

112. Reliance was also placed upon an entry dated 14 December 2018, the material elements of which detail:

> 'Please see attached correspondence …
>
> … applicant who arrived in the UK in 08 she has lawful LTR until she became ARE [appeal rights exhausted] on 13/8/14. She submitted an application out of time but less than 28 days. This was refused with no ROA [right of appeal]. The refusal was correct at the time. The apps husband was not settled and her children were not 7.
>
> Because there was no ROA she JRd the decision. As a result of the JR Removals casework reconsidered the application and again refused this time with a ROA.'

113. Ms. Naik detailed that this entry establishes that when viewed with fresh eyes the November 2014 decision was reconsidered, strongly suggesting that the previous decision had been withdrawn. I conclude that the entry cannot properly bear the weight placed upon by the applicant. The entry was made some 3 ½ years after the May 2015 letter was issued, by a caseworker reviewing the file consequent to the request by Stephen Timms MP to reconsider the December 2018 decision. There was no requirement that the author of the entry be precise as to previous actions. There is no reference in this entry to the November 2014 decision having been withdrawn. I am satisfied that it should be read in conjunction with entries from 2015 that are consistent as to the original decision being maintained on review with a removal decision to be issued permitting the exercise of appeal rights.

114. Ms. Naik drew my attention to a letter from the respondent to Stephen Timms MP, dated 27 December 2018, stating, *inter alia*, that the applicant had lodged a judicial review claim on 24 February 2015 and "won". I am satisfied that no proper reliance can be placed on a factual inaccuracy. The 2015 judicial review claim was withdrawn by the applicant prior to an oral permission hearing on the basis that she was pursuing an alternate remedy. She did not secure her costs, nor did she secure the withdrawal of the November 2014 decision. It cannot properly be said that she was successful in her public law challenge.

115. Reliance was placed by Ms. Naik upon the decision of Judge Robinson dated 18 May 2016, submitting that it was clear at [3]-[8] that the appeal proceeded on the basis that the May 2015 decision emanated from the September 2014 application. I observe that the judge noted, at [5], that she had before her an in-country appeal against the decision made on 11 May 2015. However, there is no express reference that the May 2015 decision emanated from the September

2014 application. In any event, if the judge's mind did turn to the issue now before this Tribunal, and I conclude it did not, it is unclear as to what clarity she would have secured at the hearing with the respondent not being represented and the applicant being represented by a solicitor from a firm that had not been involved in either the September 2014 application or the 2015 judicial review proceedings. No proper weight can be placed upon the decision of Judge Robinson.

116. I conclude that the final decision upon the applicant's September 2014 application was the decision issued by the respondent in November 2014. The subsequent May 2015 decision considered a range of material known to the respondent, including further information provided by the applicant in the pre-action protocol letter and relied upon when returning the section 120 notice. That the respondent was required to issue a decision upon a human rights claim consequent to the amendment to the statutory appeal regime cannot properly deflect from the respondent's stated intention in her pre-action protocol response that she maintained her decision on the September 2014 application and would issue a removal decision, a matter to which the disregard was irrelevant, thereby generating a right of appeal to the First-tier Tribunal.

117. This element of the applicant's challenge is dismissed.

(ii) Whether September 2014 application was not determined by the respondent until 9 June 2016?

118. If I am in error above as to the application of 9 September 2014 having been finally determined on 24 November 2014, I turn to the applicant's second contention: that the September 2014 application was not determined by the respondent until she issued a grant of discretionary leave to remain on 9 June 2016.

119. Ms. Naik submitted that the May 2015 decision was effectively quashed by the First-tier Tribunal and so the respondent cannot properly rely upon it. I observe reference by the Court of Appeal, at [24], to it being "common ground" that the decision of the First-tier Tribunal did not quash the respondent's May 2015 decision. This appears to be an inaccurate understanding of the applicant's position as presently advanced, which I proceed to consider.

120. This challenge can be dealt with briefly. An appeal under section 82(1)(b) of the 2002 Act must be brought "on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998": section 84(2). On appeal, the First-tier Tribunal does not undertake a review of the respondent's human rights decision subject to appeal but makes its own decision based on the evidence and circumstances available at the date of decision: *Huang v. Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 A.C. 167, at [11]. Consequently, as it does not undertake a review the First-tier Tribunal does not enjoy the power to quash or set aside the decision under

appeal, in this matter the May 2015 decision. Accordingly, there is no merit in the applicant's contention.

(iii) Whether applicant had established 10 years continuous lawful residence in the United Kingdom by 19 November 2018?

121. I turn to the applicant's third contention: that she has established 10 years continuous residence in this country for the purpose of paragraph 276B of the Rules.

122. The applicant accepts that she was an overstayer when she made her application on 9 September 2014. It was made within the 28-day disregard period then permitted following the refusal of an in-time Rules-based application. In respect of her settlement application, she relied upon the first disregard established by paragraph 276B(v)(a) of the Rules, as considered by the Court of Appeal in *Hoque v. Secretary of State for the Home Department* [2020] EWCA Civ 1357, [2021] Imm. A.R. 188, namely that any previous period of overstaying between periods of leave will also be disregarded where the previous application was made before 24 November 2016 and within 28 days of the expiry of leave.

123. The proper construction of paragraph 276B(v) was considered by the Court of Appeal in *Hoque* where a majority of the court (Underhill and Dingemans LJJ; McCombe LJ dissenting) held that whilst the first sentence of subsection (v) is focused on the time when the decision on the application is made, the second sentence is really misplaced and should be considered as qualifying section 276B(i)(a). The latter sentence focusses upon past periods of overstaying which occurred between periods of lawful residence, such periods being 'book-ended' by periods of lawful residence pursuant to leave. These contrast with open-ended periods of overstaying, caught by the first sentence in sub-paragraph (v), which typically occur when an application for leave is refused so that there are not two separate and distinct periods of lawful residence pursuant to leave. The Court held that the effect of reading the provisions in this way is that periods of historic overstaying must be disregarded when assessing whether the ten-year period of continuous lawful residence has been satisfied, provided these periods of overstaying meet the conditions specified in paragraph 39E of the Rules.

124. I note that in *Hoque* all four appellants had open-ended periods of overstaying.

125. The judgment in *Hoque* has recently been considered by the Court of Appeal in *R (Afzal) v. Secretary of State for the Home Department* [2021] EWCA Civ 1909 where the appellant's overstaying was 'book-ended' by periods of lawful residence pursuant to leave, as is the case in this matter. Whilst the observations of the Court in *Hoque* to the effect that section 276B(i)(a) is qualified by the second sentence of subsection (v) are strictly *obiter*, since the *Hoque* case itself concerned the first sentence of subsection (v), the Court in *Afzal* found the reasoning on that issue convincing.

126. In *Afzal*, Sir Patrick Elias (with whom Males and Peter Jackson LJJ agreed) identified the issue before the Court at [11(5)]:

> '11(5) What is very much in issue, however, is precisely what is meant by the period of overstaying being "disregarded". It is common ground that the effect of the disregard is at least that these periods of historic, book-ended overstaying will not break the period of continuous residence so that earlier periods of lawful residence can be taken into account when determining the relevant accumulated period. The court in *Hoque* went further, however, and held that para.39E periods of overstaying should positively count towards the period of continuous lawful residence. The Secretary of State submits that the court was wrong to do so.'

127. The meaning of 'disregard' was considered through the prism of paragraph 39E of the Rules, but such consideration was of general applicability to the circumstances where the fact that an applicant for further leave to remain is an overstayer may be disregarded when considering an application for leave to remain.

128. The Court stated as to the underlying policy:

> 44. First, the reason for many applications being made a second time once the first one is rejected is specifically to put right the defects in the original application which led to that rejection. Para.39E enables such an applicant to avoid being treated as unlawfully in the UK – which would defeat the application – provided certain requirements are met. One of these is that the original application must have been made before leave (including any extended leave) expired. That would not be possible if an invalid application was treated as a nullity and an important objective of the provision would be defeated. This factor admittedly has less force than it did given that the rules now generally allow for a grace period to put mistakes right before the initial application is determined, but it still carries some weight.
>
> 45. Second, contemporaneous documentation makes it clear beyond doubt that the policy behind the overstaying provisions was to treat invalid applications as applications within the meaning of this rule, notwithstanding that they would not be so treated for the purposes of section 3C. When the first of the overstaying provisions was brought into the Immigration Rules in 2012 - then the 28 day grace period - the explanatory memorandum stated that it was to:
>
> > "…introduce a consistent approach to dealing with applications for leave to remain from migrants whose previous period of leave has expired".
>
> …
>
> 47. When the 28 day grace period was replaced in 2016 by the different scheme reflected in para.39E, with the lower 14 day grace period, there was no indication that the basic policy was intended to change. On the contrary, the Long Residence Policy Guidance expressly stated that the period of

> overstaying would be calculated from the latest of the following: the expiry of leave, or the expiry of extended leave, or
>
> > "the point at which the migrant is deemed to have received a written notice of invalidity….in relation to an in-time application for further leave to remain".'

129. The Court emphasised the importance of keeping in mind the two definitions in paragraph .276A: "continuous residence means residence in the UK for an unbroken period"; and "lawful residence means residence which is continuous residence pursuant to existing leave to enter or remain", at [53].

130. As to whether the period of overstaying counted towards the 10-year requirement, the Court concluded:

> '56. Third, in my view the natural meaning of a period being "disregarded" is simply that one should not to have regard to it; it should be ignored. It is important to note that in para.276B(v) it is not the fact of overstaying which is to be ignored when para.39E is engaged; rather, it is the period of overstaying. That is so with respect to both open-ended and book-ended periods of overstaying.
>
> …
>
> 70. We are not bound by the view of the court in *Hoque* on this point, and for the reasons I have given, I would respectfully not follow it. Whilst I accept that para.39E periods of overstaying do impact upon the question of continuous lawful residence, as the majority in *Hoque* thought, they do so because they ensure that such periods do not break continuity of residence. But for this provision, continuity would be broken. But it is not expressly stated that they should actively count towards the period of lawful residence, and in my view this is not a necessary implication. The concept of "disregard" in para.276B can be given a perfectly cogent meaning which in my view accords with its natural meaning and does not require the term being deemed to have two different meanings in the same paragraph.'

131. The respondent filed and served a copy of the judgment in *Afzal* on 17 December 2021, a time when this Tribunal was commencing steps in relation to handing down its judgment. Such steps were delayed, and the applicant was granted permission to file a response by 6 January 2022.

132. By means of helpful written submissions, the applicant advances two arguments in respect of the judgment in *Afzal*:

1) The decision of the Court of Appeal in *Afzal* is wrongly decided
2) In the alternative, if *Afzal* is correctly decided with regard to paragraph 39E/paragraph 276(v) of the Rules and the period to be disregarded, the decision under challenge is still materially flawed and falls to be quashed.

133. The applicant submits that the panel in *Afzal* impermissibly overruled the decision in *Hoque* contrary to the *stare decisis* doctrine. I am mindful of the rules of precedent laid down in respect of the Court of Appeal in *Young v. Bristol Aeroplane Co*. [1944] KB 718.

134. I am satisfied that reference by the panel in *Afzal* to not being "bound" as confirmation they considered the discussion as to periods of overstaying positively counting towards the period of continuous lawful residence in *Hoque* to be *obiter*; the *ratio* being concerned with the proper construction of the first sentence of paragraph 276B(v) of the Rules.

135. Insofar as the applicant seeks to establish the period of overstaying should positively count towards the period of continuous lawful residence, I conclude that this Tribunal is required to follow the Court of Appeal judgment in *Afzal*.

136. The period of overstaying runs from the date the applicant became appeal rights exhausted on 13 August 2014 until 9 June 2016 when she was granted leave to remain outside of the Rules. Having enjoyed lawful leave in this country from 7 March 2008, and not counting the gap of almost 22 months (or 665 days) in accordance with *Afzal* I conclude that the applicant had not enjoyed 10 years continuous residence by the date of the challenged decision of 19 November 2018.

137. In respect of (b), the applicant submits that if the paragraph 39E/paragraph 276(v) interpretation had been correctly identified in the respondent's decision of 19 November 2018 she would have been properly advised to make an application for indefinite leave to remain at a later date. I conclude that there are no merits in this argument. The applicant does not presently accept the judgment in *Afzal* to correctly identify the law. The submission simply amounts to a complaint as to having brought unsuccessful judicial review proceedings and is not a proper basis for exercising discretion and setting aside a lawful adverse decision.

138. I observe that upon the application of the *ratio* in *Afzal* the applicant attained the requisite period of ten years' lawful residence in or around January 2020, but such date post-dates the challenged decision in this matter.

139. For the reasons detailed above, I dismiss the applicant's claim having found:

(1) The respondent issued her only, and final, decision upon the applicant's September 2014 application on 24 November 2014.

(2) The respondent did not withdraw her November 2014 decision.

(3) The respondent's decision of 11 May 2015 was made consequent to the return of a section 120 notice and the

applicant's additional reliance on reasons and documents that were not placed before the respondent when considering the September 2014 application. The return of the section 120 notice constituted a human rights claim.

(4) The First-tier Tribunal did not quash the decision of 11 May 2015.

(5) The applicant had not, by the date of the November 2018 decision, completed 10 years' lawful residence consequent to the gap from 13 August 2014 to 9 June 2016. In the circumstances the respondent's November 2018 decision is not subject to public law error.

V. Further Steps

140. I invite the parties to agree an order reflecting my decision, with attendant consequential orders if deemed necessary.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 13 January 2022