IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003230

First-tier Tribunal No: HU/01021/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25th of October 2024

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

Nazanin Arab
(no anonymity order made)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms D Revell, Counsel instructed by Premium Solicitors
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 2 October 2023 and 9 November 2023

DECISION AND REASONS

1. The appellant is a citizen of Iran. With the permission of the First-tier Tribunal, she appeals a decision of the First-tier Tribunal, promulgated on 21 June 2023, to dismiss her appeal on human rights grounds against the decision of the respondent on 15 June 2022 to refuse her application for Indefinite Leave to Remain (ILR) in the United Kingdom on the basis of her claim to have completed 10 years' lawful residence.

2. It is agreed that the appellant has *lived* in the United Kingdom since September 2011 and that she had "lawful residence" within the meaning of paragraph 276B of HC 395 until 30 January 2021 when her last period of extended leave ran out. It follows that she indisputably had leave to remain in the United Kingdom for a period of nine years and four months which is (obviously) less than the ten years required to be eligible for ILR under the "long residence" route.

3. On 4 February 2021, that is a few days after her leave was due to expire on 30 January 2021, the appellant was given "Exceptional Assurance" that was extended by stages until 5 December 2021. On 4 December 2021 she applied under the long residence Rule for ILR. As we explain in more detail below, "Exceptional Assurance" was a concept created by the Secretary of State during the international emergency surrounding the notorious Covid 19 pandemic. In different parts of the papers it is also called "exceptional assurance", "Covid Assurance" and "Immigration Assurance" but these phrases clearly describe the same state at least for the purposes of this appeal.

4. It is the respondent's view that the Exceptional Assurance granted to the appellant was not leave and was not to be treated as leave and so the appellant did not satisfy the requirements of paragraph 276B for ILR based on ten years' lawful residence.

5. It was the appellant's case, first, that Exceptional Assurance does count as leave and should be treated as such and so she satisfied the requirements of the Rules for ILR and, second, that if she is wrong and Exceptional Assurance does not count as leave, the appellant had a legitimate expectation that it was leave, or counted as leave, because of representations made by the respondent when she was given "Exceptional Assurance". It is the appellant's case that, in the circumstances, there was no public interest in her removal and she should be allowed to remain in the United Kingdom on human rights grounds.

6. Given its potential importance to this case we find it surprising that neither party has provided a copy of any of the appellant's applications for Exceptional Assurance. It might have been helpful to know exactly what she sought and to what extent, if any, the application was guided by the terms of any standard form relied upon, but we have to work with the material we have. It is not disputed that the appellant was given Exceptional Assurance on three occasions.

7. Some insight into the appellant's reasons for seeking Exceptional Assurance were set out in paragraph 5 of her witness statement. There she explained that she was near to completing her doctoral thesis but was not ready to complete her final chapter because her professor had been unwell. The paragraph continues:

> "My previous legal representatives applied for exceptional assurance before expiry of my leave in January 2021, on my behalf and I was granted confirmation of exceptional assurance from the Home Office, UK Visas and Immigration (UKVI)."

8. We find this surprising. As will become apparent, we do not find Exceptional Assurance an appropriate capacity for someone seeking to extend their stay as a student.

9. Be that as it may, it is not disputed that the appellant applied before her leave expired on 30 January 2021 and that Exceptional Assurance was not granted until 4 February 2021 but the parties do not agree on her status in the United Kingdom in the time between the lapse of her undisputed leave and her being given Exceptional Assurance. It is the appellant's case that she applied for Exceptional Assurance before her leave expired on 30 January 2021 and so any gap between her undisputed leave expiring and the grant of Exceptional Assurance should not be treated as a break in her leave. It is the respondent's case that her leave expired on 30 January 2021 and although Exceptional Assurance was granted to protect her from adverse consequences she was not given further leave and so the leave that expired on 30 January 2021 was not extended at all.

10. The appellant's appeal to the First-tier Tribunal was dismissed and she was given permission to appeal to the Upper Tribunal on three grounds. She was expressly refused permission on a fourth ground and, as far as we can ascertain, the application for permission to appeal on the fourth ground was not renewed to the Upper Tribunal. The First-tier Tribunal Judge's grant of permission on the first three grounds said that they "involve scrutiny of the SSHD Decision, decision making process and legality of a process." This is accurate but not illuminating and we turn to the grounds of appeal themselves to outline the criticism of the First-tier Tribunal's decision. The grounds are drawn by Ms Revell. She said at paragraph 3 of her grounds:

> The Appellant seeks permission to appeal on the grounds that the Judge made the following material errors:
> (1) failing to hold that the exceptional assurance periods constituted leave to remain as a matter of law;
> (2) failing to make a finding as to whether the Appellant had a legitimate expectation that she would not be refused leave to remain on the basis that she had overstayed during the exceptional assurance periods;
> (3) wrongly holding that the Appellant's (allegedly mistaken) belief that she was lawfully resident during those periods did not reduce the 'considerable' public interest in her removal; and
> (4) [irrelevant].

11. In outline, the grounds complain first that the judge was wrong to find that being allowed to stay under the label "Exceptional Assurance" was other than a grant of leave. Second, even if the grant of Exceptional Assurance was not a grant of leave, the appellant had a "legitimate expectation which the respondent has frustrated, that she would not be refused leave in future by virtue of that lack of leave." The grounds then argued that this was an understandable and proper construction of the respondent's own policy and grant of Exceptional Assurance. This was raised but, according to the grounds of appeal to the Upper Tribunal, not decided by the judge. Ground 3 contends that the judge erred in her analysis of the appellant's contention that the public interest in her removal was reduced because she believed herself to be lawfully resident and compliant with immigration law throughout.

12. The judge is particularly criticised for finding that the appellant "may well have been under a genuine misapprehension as to the nature of the exceptional assurance" but stating that "the language of the assurance and guidance … was unambiguous" and the misapprehension was therefore "not reasonable". The finding that the belief was "not reasonable" is criticised for being both unsustainable and irrelevant.

13. The point is developed at paragraph 17 of the grounds, which we set out below. It states:

> "This is erroneous in two respects. Firstly, the principle in *Birch* is not qualified by reference to the mistaken belief being reasonable. Secondly, the Judge's finding that the misapprehension was unreasonable is perverse. She has already recognised at para 26 that the legal basis for the exceptional assurance is unclear, but nevertheless maintains that the Appellant, a lay person, should have understood her legal position. The Appellant was told that she would 'not be regarded as an overstayer' and consequently believed that she had not overstayed. It is, with respect, perverse to describe that belief as unreasonable."

14. As the grounds explain at paragraph 15, the reference to "Birch" is a reference to **Birch (Precariousness and mistake; new matters) Jamaica** [2020] UKUT 86 (IAC) where the Tribunal said at paragraph 18:

> "The Judge should have treated the period during which the appellant thought she had leave differently from the periods in which she knew she had no leave. Given the extent of the former, and the relationships and the conduct of her private life during it, it is impossible to say that the result in general, and in the application of s 117B, would or should have been the same if this factor had been taken into account. The Judge's decision must be set aside."

15. In response to the grant of permission the respondent served a notice under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 which states:

> "The respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant's case had any purchase before the FtT. The SOS recognises there may indeed be some merit in paragraph 17 of the grounds."

16. The phrase "does not oppose the appellant's application for permission to appeal" is odd because there is no mechanism for opposing an application for permission except, perhaps, in the almost unknown event of an oral application but it is frequently used in Rule 24 notices and means, usually, that the respondent concedes that there is an error of law. Mr Terrell produced a detailed skeleton argument for the hearing before us. He said there that the Rule 24 notice conceded that there was a material error of law with reference to ground 3. He then set out his reasons why the Secretary of State maintained that the judge was right in important parts and grounds 1 and 2 were not made out.

17. He also asserted at paragraph 3 that:

> The resolution of issue 1 in the Appellant's favour is, in particular, an issue that could have serious and wide-ranging consequences if correct. The SSHD has never acknowledged that periods of Exceptional Assurance were periods of leave. Over 100,000 grants of Exceptional Assurance were made over the course of the pandemic and a finding that such grants were grants of leave is likely to have a significant impact for a number of individuals. In the circumstances, the Respondent does seek an extension of time for this skeleton argument to considered by the Tribunal.

18. Mr Terrell, wisely, did not suggest that the large number of cases was a reason to decide the appeal in any particular way, but it is an illustration of the potential importance of cases based on Exceptional Assurance and we admitted the Rule 24 Notice.

19. We consider now the First-tier Tribunal's Decision and Reasons.

20. The judge began, uncontroversially, by setting out agreed facts and then summarised the respondent's case. The judge particularly set out a paragraph from the Reasons for Refusal Letter which we set out below. The letter stated:

> "CVA [Covid Assurance] or any form of immigration assurance is not a form of leave to remain; the purpose of immigration assurance is to guarantee that you will not be removed from the UK as an overstayer whilst that assurance is engaged as you were at that time unable to leave the UK. You did not attempt to regularise your stay in the UK from 30 January 2021 until

> you raised this Long Residence ILR application which was raised out of time after your leave to remain expired. We acknowledge that you could not leave the UK during the periods CVA was engaged, however, you could have and should have raised a leave to remain application before your last leave expired or as soon as possible thereafter to regularise your stay in the UK. You still would have overstayed your leave after 30 January 2021, but we could have sought to apply discretion for a short period of time which you were without leave to remain; as you did not raise a leave to remain application after 30 January 2021, we are unable to consider applying discretion to the protracted period of time you were in the UK without leave to remain."

21. The judge outlined a summary of the appellant's case.

22. The primary assertion was that the appellant did satisfy the requirements of the Rules because Exceptional Assurance constituted a grant of leave to remain. The appellant asserted, correctly, that Exceptional Assurance came with conditions restricting the appellant's work although, in this case, it was restricting it to the conditions that applied during a grant of leave. It was the appellant's case that the respondent could only impose work restrictions when granting leave or under immigration bail. Further, it asserted that the respondent has no power to authorise her presence in the United Kingdom except by granting leave. Still further, there is no mechanism by which a person's existing conditions remain in force pending resolution of an application other than Section 3C of the Immigration Act 1971. The grounds assert that if it was the respondent's case that periods of Exceptional Assurance were times when the appellant was unlawfully present in the United Kingdom, the respondent, by undertaking not to remove her and by inviting her to apply for Exceptional Assurance, was encouraging her to commit a criminal offence.

23. Further, even if Exceptional Assurance did not constitute leave to remain, the appellant had a legitimate expectation that the respondent would exercise discretion in future applications not to treat her as an overstayer and that any future application would not be refused because she had overstayed. This could be done pursuant to the general discretion to grant leave outside the Immigration Rules.

24. Finally, it was the appellant's case that she had established a private life in the United Kingdom and the respondent's decision interfered with it disproportionately because it frustrated the legitimate expectation that she would not be regarded as an overstayer during the times of Exceptional Assurance. This was described as a "powerful factor" to determine the public interest in her removal.

25. The judge then set out the relevant law including necessary and appropriate self-directions and the text of certain provisions.

26. We find it important to note that the judge, correctly, drew attention to paragraph 276A of HC 395 which, in the material parts, said that:

> "For the purposes of paragraphs 276B to 276D.
>
> …
>
> (b) 'lawful residence' means residence which is continuous residence pursuant to:
>
> (i) existing leave to enter or remain, …."

27. The point for our purposes is that lawful residence within the meaning of paragraph 276D is a defined term and residence that is not within the terms of the definition is not lawful residence for the purposes of paragraph 276D.

28. We have considered the effect, if any, of section 3C of the Immigration Act 1971. Broadly, this extends any leave that a person has until an application for further leave is resolved. It provides that

> "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,"

29. This does not help the appellant. It is clearly a precondition of leave being extended by section 3C that a person applied for further leave which is not what this appellant did.

30. To further our understanding of Exceptional Assurance we turn to the document in the bundle [NA v SSHD Appellant's Bundle 05.06 pdf page 25] entitled "Coronavirus [COVID-19]: advice for UK visa applicants temporary UK residents". This was published on 24 March 2020 and this version was last updated on 17 January 2021. It explains under the heading "If you're in the UK", that the person is expected to take all reasonable steps to leave the UK where possible or to apply to regularise their stay. It goes on to explain that a person who intends to leave the United Kingdom but has not been able to do so and that person's visa expires between 1 January and 28 February 2021, may request additional time to stay, known as Exceptional Assurance. It then explains how to apply. It is made plain that the application should, inter alia, attach evidence explaining why the applicant cannot leave the United Kingdom and gives a possible explanation by way of illustration that it is impossible to get a flight. It also explains that if the person is suffering from coronavirus they will need a test result to confirm that.

31. The guide continues:

> "If you are granted 'exceptional assurance' it will act as a short-term protection against any adverse action or consequences after your leave has expired. If conditions allowed you to work, study or rent accommodation you may continue to do so during the period of your exceptional assurance. Exceptional assurance does not grant you leave. It is a means to protect those who are unable to leave the UK due to COVID-19 restrictions and not to facilitate travel, other than to return home."

32. The same guide then explains under the heading "If you intend to stay in the UK" that such a person must make an application to regularise their stay. It shows that the application can be made from the United Kingdom where ordinarily it would have to be made from elsewhere (we understand that is benefit may have been removed as some stage). It is clear from this that Exceptional Assurance was not appropriate for people who wanted permission to stay in the United Kingdom. They could apply without reference to the policy, except that applicants who ordinarily would have to leave the United Kingdom to apply could rely on the policy to apply from within the country.

33. We consider too the terms of the grant of Exceptional Assurance. The extract is from the letter of Confirmation of Exceptional Assurance dated 26 September 2021. The important parts are the same in all the letters. The letter begins by thanking the applicant for contacting the Coronavirus Immigration Assurance Team and explains that the applicant will be allowed to remain in the United Kingdom under the terms of that grant until 5 December 2021, a period of about

14 weeks, and that the applicant must re-apply if they could not depart from the United Kingdom by then. It explained that the appellant has the same conditions attached to their stay under Exceptional Assurance that were attached to the grant of leave, such as permission to work or whatever but it includes the phrase "Please note that this is not an extension of your leave".

34. The letter continued:

> "During this time, you will not be regarded as an overstayer or suffer any detriment in any future applications. However, you must make plans to leave the UK prior to the date that your assurance expires. If you do not leave on or before this date, you will be classed as an overstayer."

35. The judge looked carefully at the guidance and correspondence dealing with exceptional assurance. She noted that it was a persistent theme that exceptional assurance was not an extension of leave. She found that it was "entirely clear" from the confirmation letters of Exceptional Assurance to the Appellant and the linked guidance that Exceptional Assurance only provides:

> "'short-term protection against adverse action or consequences' after immigration leave has expired and does not in itself constitute immigration leave. The guidance also refers to the need to apply for leave to remain to regularise stay following a period of Exceptional Assurance which further indicates that an Exceptional Assurance is only a permission to stay rather than formal immigration leave. Looking at these documents in the round there is, I find, nothing in them giving rise to any expectation that the Appellant would have leave during any period of Exceptional Assurance."

36. The judge continues at paragraph 25:

> "The letters and linked guidance also state that the Appellant would not be regarded as an overstayer during the period of exceptional assurance or that she would 'suffer any detriment in any future applications'. The meaning of this phrase is, in my judgment, clear, namely that the Appellant would not be prejudiced in future immigration applications by virtue of having stayed in the UK in pursuance of the exceptional assurance. However, there is, I find, no suggestion that this period would retrospectively be regarded as leave when making any such future applications and the Appellant can have had no expectation that this would be the case on the basis of the letters and guidance. Whilst she correctly believed that she was allowed to stay in the UK during the period of exceptional assurance, there is no suggestion that this phrase meant that this stay constituted 'lawful residence' under the Immigration Rules."

37. The judge then noted that the legal basis for granting Exceptional Assurance was not clear but the judge did note that the Secretary of State has a "residual discretion outside the Immigration Rules".

38. The judge was quite clear that the appellant had not completed ten years' lawful residence within the meaning of the Rules and so did not meet the requirements for indefinite leave to remain based on ten years' lawful residence.

39. The judge then looked at Article 8 of the European Convention on Human Rights outside the Rules. The judge set out a list of factors favourable to removing the appellant. High on this list was the fact the appellant did not meet the requirements of the Immigration Rules. The judge regarded this as something to which considerable weight is to be attached. The judge balanced against that the length of residence and noted that it was just eight months short of the ten-year

lawful residence requirement and that the appellant had sought to regularise her stay before the periods of Exceptional Assurance had expired.

40. The judge then accepted that the appellant "may well have been under a genuine misapprehension as to the nature of the Exceptional Assurance" but found that the language asserted by the respondent was unambiguous and the misapprehension was not reasonable. The judge then found that the balancing exercise tipped against the appellant and dismissed the appeal.

41. We have considered Ms Revell's very detailed grounds of appeal to the Upper Tribunal and the skeleton argument before the First-tier Tribunal as well as her oral submissions. We appreciate that it is her case that the grant of Exceptional Assurance is so akin to leave that it is leave by another name and, assuming that the Secretary of State was acting lawfully, must on its proper construction be seen as leave even though it has been called something else. This is partly because there is no obvious power to grant something called Exceptional Assurance.

42. The main reason that we adjourned the hearing for a mention on 9 November is that Judge Chapman's researches had discovered a recommendation by the House of Commons, Home Affairs Committee, third report of 2019-2021, published on 15 June 2020. It was that

> "The Home Office must clarify the legal basis for the offers of visa extensions. Relying on the Home Secretary's discretion is not sufficient legal assurance for people whose lives in the UK depend on evidential clarity. We recommend that the department introduce a statutory instrument clarifying the legal basis for both the extension of leave for all individuals who are unable to leave the country before the expiry of their current visa, and for the automatic extensions of leave offered to NHS staff."

43. We wanted to be quite sure that, with the benefit of this prompt, the parties did not want to argue that that a legal basis for Exceptional Assurance had been created. They made their enquiries and assured us that they were not aware of any such provision.

44. It may be that the appellant is right when she argues that the legal basis for Exceptional Assurance is a little vague although the judge is certainly right to note that the Secretary of State has considerable inherent powers to permit people to enter or remain in the United Kingdom. However, we cannot agree that Exceptional Assurance *must* have been leave otherwise it would have been unlawful. The Secretary of State was dealing with an international crisis. As time moves on it is very easy to forget that, as recently as 2021, when Exceptional Assurance was last granted in this case, there were significant restrictions in parts of the world on people's ability to travel because of the fear of transmission of coronavirus. This appellant, no doubt like many others, could not return to her country of nationality. Understandably the Secretary of State felt obliged to do something for people who, through no fault of their own, were in danger of becoming overstayers and he created something called Exceptional Assurance which was clearly intended to protect them and which, equally clearly, was not intended to be leave. We can make no sense of the policy documents and explanations given by the Secretary of State in a way that supports any other interpretation. We are doubtful that the policy was unlawful. It is more likely that it was within his inherent powers to create such an arrangement but that is not something that we have to determine. If the policy was unlawful and the respondent acted beyond his powers then the applicant might be in a still more

difficult position but Exceptional Assurance does not become leave because the legal basis for it is vague. If the Secretary of State had intended to grant leave, he would have granted leave but he clearly and emphatically had no such intention.

45. We agree with Mr Terrell that, for the reasons explained in **Anwar v SSHD** [2017] EWCA Civ 2134 leave has to be granted by written notice and there is no such notice here because it was not the respondent's intention to create leave and he did not.

46. With respect to Ms Revell, we find the contention that Exceptional Assurance is leave is fundamentally wrong. It was by its very nature expressly intended not to be leave. The First-tier Tribunal clearly found that Exceptional Assurance is not leave and we agree.

47. Turning to ground 2 we find that the appellant is right to insist that the First-tier Tribunal Judge erred by not deciding clearly if she had a legitimate expectation that her Exceptional Assurance would be treated as leave. It was raised in the grounds and was not decided.

48. We have reminded ourselves of the terms of the grant of Exceptional Assurance set out in paragraph 30 above and we find it convenient to repeat them here. The grant said:

> "During this time, you will not be regarded as an overstayer or suffer any detriment in any future applications. However, you must make plans to leave the UK prior to the date that your assurance expires. If you do not leave on or before this date, you will be classed as an overstayer."

49. There are two promises made there. One is that the person will not be regarded as an overstayer and the second is that the person will not suffer detriment in any future applications.

50. We find it to be beyond argument that the appellant has been regarded as an overstayer. The Reasons for Refusal Letter could hardly be clearer. Having referred to it being a specific requirement of paragraph 276B that a person has ten years' continuous unlawful residence the letter continues:

> "With this in mind, as the result of the fact that you cannot demonstrate that you have accrued ten years' continuous unlawful residence you cannot meet the requirements of paragraph 276B(i)(a) and as you have not had leave to remain since 30 January 2021, you are deemed to be an overstayer and as such, you fail to meet the requirements of paragraph 276B(v) as well and therefore cannot qualify for a grant of indefinite leave to remain on the basis of ten years' continuous lawful residence."

51. However, the promise not to regard the appellant as an overstayer was qualified with the words "during this time", that is the time that she has Exceptional Assurance and she was not treated as an overstayer during that time. There was no attempt to remove her or to prevent her enjoying the benefits that went with her last grant of leave. Although the phrase is probably clear at first reading, it is followed by the sentence: "However, you must make plans to leave the UK prior to the date that your assurance expires. If you do not leave on or before this date, you will be classed as an overstayer." Any legitimate expectation not to be treated as an overstayer when she had Exceptional Assurance has been honoured and there is no legitimate expectation of more.

52. The second promise, that the appellant would not suffer any detriment in any future application may not be quite so straight forward.

53. The appellant says that she has suffered a detriment in a future application. She applied for leave on 4 December 2021 and, far from not suffering any detriment, she was told that she had not accrued ten years' lawful residence and was an overstayer. However, on consideration it is quite clear to us that the appellant has not suffered any detriment in a future application by reason of having Exceptional Assurance. Her application depended on her having leave and she did not have leave. Her application was not in any way disadvantaged by reason of her having Exceptional Assurance. It was, in a sense, disadvantaged by reason of her not having leave but she had never asked to renew her leave and was given Exceptional Assurance which was emphatically not leave.

54. Ms Revell has reminded us that the test for legitimate expectation it is that it is based on a "clear, unambiguous and devoid of relevant qualification" as formulated in **R v Commissioners of Inland Revenue ex parte MFK Underwriting Agencies Ltd and Others** [1990] 1 WLR 1545.

55. The appellant set out her expectations in her witness statement. Without giving any explanation for choosing that particular form of relief but beyond claiming to have been "advised", she says:

> "11. I was advised that Confirmation of Exceptional Assurance continues to grant me all the rights that my Student visa gave me and that it continued to make me lawful in the UK. I was still allowed to study and work part time as per conditions of my previous leave to remain as a student. I was also advised that I will not be treated as an overstayer. I was also promised that holding of Exceptional Assurance will not have detrimental effect on any of my future applications for leave to remain in the UK.
>
> 12. I therefore made an application for indefinite leave to remain upon completion of 10 years on(sic) long residence in the UK. My application for ILR on the basis of 10 years long residence was refused alleging that I made an application as an overstayer when the Exceptional Assurance clearly stated that I will not be treated as an overstayer. The decision to refuse my application is complete contradiction to the terms on which I was granted Exceptional Assurance."

56. We note in the statement she goes on to complain that she was also treated as someone who had made a late application but this really adds nothing. The application was late because her leave had lapsed. It is a variation of the same point. Nevertheless the appellant says that she made her application in the belief that it would be treated as made by somebody whose leave had not lapsed.

57. We accept what the appellant says about her understanding but not that this was a legitimate expectation. The respondent has honoured her promise but the appellant misunderstood it.

58. The judge did fail to decide if the appellant had a legitimate expectation. We have no hesitation in saying that on the material advanced the appellant did not have a legitimate expectation. There is no material error. If the judge had decided the point she would have decided it against the appellant and would have used it as a further reason to dismiss the appeal.

59. The third ground is different. It has been conceded by the Secretary of State that the judge did not look at the article 8 balancing exercise from the appellant's

perspective. The appellant was never cross-examined. The judge had to accept what the appellant said and we will do the same. We accept that the appellant made her application for indefinite leave to remain in the belief that she would be treated as a person who had not overstayed but who had leave at all material times. She was mistaken but that is what she thought.

60. This does impact the Article 8 balancing exercise. There are many reasons why overstaying is an adverse factor in such a test. Immigration policy is formulated at least broadly on the basis that people obey the Rules. If that were not right there would be absolutely no point at all in having the Rules. The public interest in removal is high in the case of a person who has deliberately disregarded the rules but the appellant is clearly not such a person. She has never lost touch with the authorities and she has always asked to extend her stay before her existing capacity has lapsed. She is not and should not be regarded as an "overstayer". She remained in the United Kingdom after her leave expired because she had no practical alternative and the Secretary of State recognised her plight by creating a special capacity for the appellant and others in like circumstances. Her presence in the United Kingdom after her leave expired was permitted expressly and so her not having leave is not a negative factor but this does not make it a strong positive factor. The appellant was not on a route to settlement. There is no evidence that she ever asked for leave to remain or would have qualified for it if that is what she sought. She may have been granted further Tier 4 leave to finish her doctorate but she did not seek it and it is unhelpful to speculate how such an application might have been answered. Her Exceptional Assurance must have been granted on the basis that she was not seeking settlement but seeking a temporary extension of stay because she could not leave the United Kingdom. This perhaps underlines why we have been disadvantaged by not seeing what the application for Exceptional Assurance actually says but we dealt with that above.

61. Similarly her financial independence and ability to speak English are in her favour but are not strong points.

62. The appellant wanted her Exceptional Assurance to be treated as having leave to remain but it was not and she should not have thought that it was. It was unequivocally status to protect her from being treated as an overstayer when she could not return to her country of nationality.

63. We are, nevertheless, satisfied that the public interest in enforcing immigration control is at its strongest when the person is knowingly abusing the system. The public and those who abuse the system must realise that disregard for the rules is not rewarded. This appellant is not in the category of a deliberate rule breaker and this, we find, does diminish the public interest in her removal. She had the mistaken belief that she would be treated as someone who had leave. That this could influence the article 8 balancing exercise was recognised in **Birch** However we do not find this particularly helpful to her. She has expressed no strong reason for remaining in the United Kingdom. Her case is based entirely at the private life end of the private and family life continuum. It was expressly accepted before the First-tier Tribunal that there were no insurmountable obstacles in the way of her return to Iran, at least for the purposes of this application. It follows that she is a person who can be returned but who would prefer to remain.

64. We note all the points made in favour and acknowledged by the First-tier Tribunal Judge. There is no misbehaviour deliberately on the part of the appellant. There is a mistaken belief that she would be treated as someone with

leave and she is not an overstayer and must not be treated as if she were. As set out above, she is not somebody who has hidden from the authorities and who then raised an array of reasons not to be removed when she was caught. But she does not have a strong case. She cannot acquire a right just by reason of making a mistake about her status. We find there are no good reasons why she should be allowed to remain because of a mistake arising from correspondence that constantly warned her of the need to be planning to leave.

65. We have reminded ourselves that public policy expressed in the rules illuminates the article 8 balancing exercise and that people who have lived in the United Kingdom for 10 year with leave generally are entitled to leave to remain but that expression of policy requires the applicant to have leave which the appellant did not.

66. We have found nothing in the appellant's personal circumstances that establishes a right for her to remain.

67. We find that although the First-tier Tribunal erred, and we have remade the decision, we come to the same conclusion. The interference in the appellant's private and family life is proportionate. This is an appeal that should be dismissed and we dismiss it.

68. In summary therefore, we find that Exceptional Assurance is not leave and the grant of Exceptional Assurance is unlikely to give rise to a legitimate expectation that a person will be treated as if they have leave. The fact that a person mistakenly believes that they would be treated as a person with leave is relevant to the Article 8 consideration but how important it is depends entirely on the facts of the case. Any case based on Article 8 and Exceptional Assurance will have to be subject to express findings on its own terms. The motivations of the party are relevant but we doubt that there will be many cases where Exceptional Assurance and a mistaken understanding of its nature should lead to a person establishing a right to remain.

69. Following the hearing Ms Revill sought to adduce further submissions in light of a newly published statement of changes, through which reference to "exceptional assurance" is incorporated into the Immigration Rules by virtue of statement of changes HC 590 on 14 March 2024 inserting paragraph 39E. This provides at [5] that a person who has overstayed their leave to enter or remain will not be treated as an overstayer if the period of overstaying is (a) between 1 September 2020 and 28 February 2023 and (b) is covered by an exceptional assurance. "Exceptional assurance" is defined at paragraph 39F as "a written notice given to a person by the Home Office stating that they would not be considered an overstayer for the period specified in the notice." Reference is also made to APP CR15 of HC 590 which amends CR4.1(d) of Appendix Continuous Residence so that continuity of residence will not be broken during a period without leave where " the applicant was granted permission following a successful application where paragraph 39E of these rules applied." This provision takes effect on 11 April 2024 with no transitional provisions.

70. Ms Revill submits that it is questionable whether the amendments in HC 590 accurately reflect either the legal status of exceptional assurance or the scope of the promise made to those granted it and that the Appellant continues to content that a grant of exceptional assurance constituted a grant of leave or alternatively that she had a legitimate expectation that her future applications would be treated as though it had been [9]. Ms Revill further submits that the new paragraphs 39E(5) and 39F support the Appellant's legitimate expectation

argument and that the Respondent has recognised that the grant of exceptional assurance during the pandemic should affect the way the recipient's immigration status at the time it is subsequently viewed and that the Respondent has now acknowledged that an exceptional assurance was not merely a guarantee against removal but an assurance regarding the effect of the alleged overstaying.

71. Ms Revill further acknowledges at [12] that the Appellant would not satisfy the new long residence rules if they applied to her since time with exceptional assurance is regarded thereunder as overstaying and not lawful residence, albeit does not break continuity.

72. We invited Mr Terrell to make submissions in response, which he did on 29 July 2024. Mr Terrell noted that paragraph 39E(e) would appear to align directly with the Respondent's policy at the time, set out at AB 87. Mr Terrell's primary submission is that the changes to the Immigration Rules do not in any real substance support the Appellant's legitimate expectation argument. He submits that it is not sufficient for the Appellant to persuade the Tribunal that she had a legitimate expectation not to be treated as an overstayer but rather that there was a clear and unambiguous promise that the SSHD would treat the period of exceptional assurance as lawful residence for the purpose of a prospective application for ILR and there is nothing in the SSHD's policy or letters that come close to such a promise. Mr Terrell submits that the change to the Immigration Rules does not touch upon that and is largely irrelevant.

73. Mr Terrell acknowledges that were the Appellant to have made her application after the change she could now likely benefit from paragraph 276(v) of the Rules given the change to 39E but she must also have 10 years continuous lawful residence as per 276B(i)(a) of the Rules which is a separate requirement that the Appellant does not meet irrespective of the change to 39E. Therefore, the public interest in removal is not reduced by the Appellant's ability to partially meet some of the requirements and not meet some of the others. He further submits that it is not necessary for the Tribunal to decide whether the change that has been made to the Rules is implicitly in recognition of a legitimate expectation and it does not follow that the change to the rules was made to satisfy a legally enforceable legitimate expectation.

74. We have concluded that Mr Terrell's submissions are to be preferred on this issue. We agree that it was not the intention of the SSHD when making provision for the concept of exceptional assurance to provide recipients with a legitimate expectation either that this constituted leave to remain or that further leave to remain would necessarily follow. There is no clear and ambiguous promise. This is also clear from the terms of the letters granting the Appellant exceptional assurance.

75. It follows that the appeal is dismissed.

Notice of Decision

76. In summary we find the First-tier Tribunal erred. We set aside its decision but we substitute a decision that, for further reasons, dismisses the appeal against the Secretary of State's decision.

Jonathan Perkins
Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 October 2024