



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004034
First Tier No: HU/59698/2022
LH/02105/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 8th March 2024**

Before

**UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE WELSH**

Between

**Dr Alamy Mohamed Gomaa Mohamed Kassem
(no anonymity order made)**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms A Jones, Counsel instructed by Good Advice UK
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 5 January 2024

DECISION AND REASONS

1. The Appellant Dr Kassem is a national of Egypt born on the 6th November 1994. She seeks indefinite leave to remain pursuant to paragraph 276B of the Immigration Rules on the grounds that she has accrued a continuous period of lawful residence in the United Kingdom of ten years or more.
2. Dr Kassem's application for indefinite leave to remain in the UK was refused by the Respondent on the 25th November 2022 on the grounds that there had been gaps in her residence totalling 891 days, far in excess of the permitted total of 18 months. It was accepted that Dr Kassem had always held valid leave since she first arrived as a student in September 2012. It was also accepted that there were good reasons for some of her absences such that the Respondent was prepared to exercise discretion in her favour and overlook those. There were however still 548 days of intermittent absences from the country which defeated her claim under paragraph 276B. The application for ILR was therefore refused. The

Respondent noted that Dr Kassem held valid leave to remain until the 14th April 2024, and said this:

“You are not required to leave the UK at this time, therefore Article 8 would not be breached as a result of this decision. It’s open for you to apply for further leave to remain in the UK in an appropriate capacity should you wish to remain here beyond the date of your current leave”.

3. The letter concluded as follows:

NEXT STEPS
ROA

Right of appeal You have 14 calendar days* from the date this letter was sent to appeal the decision to refuse your application. Information on how to appeal, the appeal process and the fees payable are all available online at: <https://www.gov.uk/immigration-asylum-tribunal/overview>

*If you received this notice by post, you are counted as receiving it two working days after it was posted. If you want to seek legal advice you must do so now.

4. Dr Kassem, not unreasonably, deduced from this that she had a right of appeal, which she duly filed with the First-tier Tribunal.
5. The First-tier Tribunal accepted her appeal and duly processed it. On the 3rd July 2023 the matter came before Judge Manyarara sitting at Taylor House. As is clear from the face of the decision, by that time Counsel who appeared for the Appellant, Ms A. Jones, and the Tribunal itself, had apprehended that the Appellant may not in fact have a right of appeal at all. Discussion was had at the hearing about the impact of the decision in R (M Aleem Mujahid) v First-tier Tribunal (IAC) [2021] EWCA Civ 449. In that judgment the Court of Appeal had upheld the decision of the President Mr Justice Lane in R (on the application of Mujahid) [2020] UKUT 85 (IAC) that there is no right of appeal before the Tribunal in these circumstances. Where an individual holds valid leave to remain at the time of the appeal, there is no requirement that he or she leave the United Kingdom. It cannot therefore be said that any human right has been breached by the decision, and so the decision to refuse ILR does not constitute a ‘human rights decision’ such that a right of appeal exists under s82 of the Nationality, Immigration and Asylum Act 2002. This was of course the first observation made by the Respondent in the refusal letter, and the author of that letter was quite wrong to have concluded the correspondence by indicating to Dr Kassem that she had a right of appeal. The First-tier Tribunal should not have processed it.
6. Having directed itself to the decisions in Mujahid the First-tier Tribunal was evidently unsure about their applicability here, since it discussed their effect at some length before saying this:

“24. The appellant was granted a right of appeal. In case I am wrong, and for completeness, I have considered the arguments presented on behalf of the appellant in respect of art. 8”.

7. The Tribunal then goes on to make substantive findings on the reasons for refusal and Dr Kassem's case.
8. We are quite satisfied that there was no right of appeal in this matter, for the reasons set out in Mujahid. It follows that all of the findings made by the First-tier Tribunal are a nullity and the decision, to the extent that there is a 'decision' at all, is set aside in its entirety. Dr Kassem's application to appeal should not have been accepted by the First-tier Tribunal, there was no need for Judge Manyarara to have taken the time that she so evidently did in writing the decision, and permission should certainly not have been granted to this Tribunal. The Deputy Judge who granted permission to the Upper Tribunal was, it seems, under the impression that a lack of jurisdiction can be remedied by an appeal being accepted and processed. It cannot. Appeals to the Upper Tribunal are governed by statute. Section 82 (1) of the 2002 Act sets out the circumstances where a right of appeal exists:

82 Right of appeal to the Tribunal

(1)A person ("P") may appeal to the Tribunal where—

- (a) the Secretary of State has decided to refuse a protection claim made by P,
- (b) the Secretary of State has decided to refuse a human rights claim made by P, or
- (c) the Secretary of State has decided to revoke P's protection status.

9. None of those things apply here.
10. The appeal before us is therefore dismissed for want of jurisdiction. We would add this. It remains open to Dr Kassem to seek to judicially review the Respondent's decision of the 25th November 2022, albeit that she would need to seek an extension of time in order to do so. Ms Jones points out on Dr Kassem's behalf that she was wrongly led to believe that she had a statutory right of appeal, and as such should not be penalised for seeking to exhaust the alternative remedy which she was told she had. In particular Ms Jones asked us to record that when she attended the hearing before Judge Manyarara, she was specifically asked to address the Tribunal on the substantive merits of the case because, it would seem, Judge Manyarara was not wholly convinced of her own conclusions about the effect of Mujahid. Counsel considered it her duty to assist the court and duly did as she was asked. All of that has contributed to the delay in any judicial review claim being brought. That will no doubt be a matter taken into account by any judge considering an application to admit a late application, should such a claim be filed.
11. The decision of the First-tier Tribunal is set aside. The appeal is dismissed for want of jurisdiction. There is no order for anonymity.

Upper Tribunal Judge Bruce

Appeal Number: UI-2023-004720

Immigration and Asylum Chamber
7th January 2024