



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/17618/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 27 April 2022**

**Decision & Reasons
Promulgated
On 12 May 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

**KIRIELLA RANASINGHE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. N Paramjorthy, Counsel, instructed by Norma & Co Solicitors

For the Respondent: Ms A Everett, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals against a decision of the respondent not to grant her further leave to remain in the United Kingdom on human rights (article 8) grounds. The respondent's decision is dated 30 September 2019.
2. The appellant's appeal was initially allowed by Judge of the First-tier Tribunal Buttar by a decision sent to the parties on 28 May 2021. The respondent was subsequently granted permission to appeal. I allowed the

appeal by a decision dated 7 January 2022 to the extent that the decision of the First-tier Tribunal was set aside with no findings of fact preserved and the resumed hearing was to be heard by this Tribunal.

Background

3. The appellant is a national of Sri Lanka and is presently aged 32. She entered the United Kingdom on 24 August 2010 with entry clearance as a Tier 4 Student. She was subsequently granted extensions of leave to remain in this country until 30 October 2018.
4. She made an in-time application for further leave to remain on 29 October 2018. The respondent refused the application under paragraph 322(1) of the Immigration Rules ('the Rules') by a decision dated 30 September 2019 observing, *inter alia*:

'You requested leave to remain in the UK to allow you to gain a CAS which would enable you to continue with your studies in the UK. This is not a purpose covered by the Immigration Rules and your application on these grounds is therefore refused under para. 322(1).'

5. The respondent proceeded to consider the appellant's article 8 rights outside of the Rules, noting the appellant's assertion that she had been unable to commence her postgraduate study on the date intended as she had been absent from this country for a short period following the death of her grandmother. The respondent concluded, *inter alia*:

'It would also undermine the purposes of the immigration system relating to Students should you be granted leave to remain outside of the Immigration Rules purely because you cannot meet the requirements of the student Rules. Exercising discretion in your favour in this respect would be to treat you in a more favourable manner when compared to other persons who are either in a similar position and have been refused leave to remain or who can meet the requirements for leave under the Immigration Rules relating to Tier 4 Students.'

Decision

6. Ms. Everett noted that on 24 August 2020, having enjoyed 'section 3C leave', the appellant was lawfully present in this country for ten years. She candidly, and appropriately, accepted that the respondent had difficulties in advancing the public interest requirement in respect of the proportionality assessment consequent to the observations made by the Upper Tribunal in *OA and Others (human rights; 'new matter'; s.120) Nigeria* [2019] UKUT 00065 (IAC).
7. In *OA and Others*, the Upper Tribunal was concerned with the issue of new matters and addressed the situation where an appellant had been lawfully present in this country for ten years whilst their appeal was ongoing and the impact such lawful residence could potentially have upon the

proportionality assessment in a human rights (article 8) appeal. The headnote to the decision details, *inter alia*:

- '(1) In a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, a finding that a person (P) satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that (provided Article 8 of the ECHR is engaged), the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the Secretary of State in the proportionality balance, so far as that factor relates to the particular immigration rule that the judge has found to be satisfied.
- (2) The fact that P completes ten years' continuous lawful residence during the course of P's human rights appeal will generally constitute a 'new matter' within the meaning of section 85 of the 2002 Act. The completion of ten years' residence will normally have a material bearing on the sole ground of appeal that can be advanced in a human rights appeal; namely, whether the decision of the Secretary of State to refuse P's human rights claim is unlawful under section 6 of the Human Rights Act 1998. This is because paragraph 276B of the Immigration Rules provides that a person with such a period of residence is entitled to indefinite leave to remain in the United Kingdom, so long as the other requirements of that paragraph are met.
- (3) Where the judge concludes that the ten years' requirement is satisfied and there is nothing to indicate an application for indefinite leave to remain by P would be likely to be rejected by the Secretary of State, the judge should allow P's human rights appeal, unless the judge is satisfied there is a discrete public interest factor which would still make P's removal proportionate. Absent such factors, it would be disproportionate to remove P or require P to leave the United Kingdom before P is reasonably able to make an application for indefinite leave to remain.
- (4) Leaving aside whether P has any other Article 8 argument to deploy (besides paragraph 276B) and in the absence of any policy to give successful human rights appellants a particular period of limited leave, all the Secretary of State is required to do in such a case is grant P a period of leave sufficient to enable P to make the application for indefinite leave to remain. If P subsequently fails to make such an application, P will continue to be subject to such limited leave as the Secretary of State has granted in consequence of the allowing of the human rights appeal.'

8. Ms Everett accepted that no evidence had been provided to this Tribunal by the respondent seeking to establish that there is a discrete public interest factor which makes the appellant's removal proportionate. In the circumstances, she acknowledged that the appellant's appeal should properly be allowed. Unsurprisingly, Mr. Paramjorthy agreed with Miss Everett.

9. I am satisfied that the appellant has resided lawfully in this country, through formal grants of leave to enter or remain and additionally under section 3C of the Immigration Act 1971. She has been lawfully in this country for almost twelve years. I am satisfied that on the documents placed before me she would be successful in securing indefinite leave to remain under paragraph 276B of the Rules. Undertaking the proportionality assessment, I conclude in favour of the appellant because, as Ms Everett accepts, there is presently no public interest in her removal as she satisfies, on its face, paragraph 276B of the Immigration Rules. Accordingly, I allow the appeal.
10. I observe, as confirmed by the Upper Tribunal in OA, that I am only required to consider the human rights (article 8) appeal before me and not the issue of settlement as no application has been made by the appellant for indefinite leave to remain. The appellant's success in this appeal does not, by itself, entitle her to settlement in the absence of the requisite paid application.

Notice of Decision

11. The decision by the First-tier Tribunal to allow the appellant's appeal, dated 28 May 2021, was set aside by a decision of this Tribunal dated 7 January 2022.
12. The decision is remade. The appellant's appeal is allowed on human rights (article 8) grounds.

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

Date: 29 April 2022

TO THE RESPONDENT **FEE AWARD**

No fee paid and therefore no fee award is made.

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

Date: 29 April 2022