IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001754
On appeal from: HU/56886/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 4th of July 2024

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROBERTA MOREIRA MARTINS
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Kevin Ojo, a Senior Home Office Presenting Officer
For the Respondent: Ms Emma Daykin of Counsel, instructed by ABK Solicitors

Heard at Field House on 27 June 2024

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 18 September 2022 to refuse her indefinite leave to remain as a person having completed 6 years discretionary leave in the UK. The claimant is a citizen of Brazil.

2. **Mode of hearing.** The hearing today took place face to face.

3. For the reasons set out in this decision, I have come to the conclusion that the decision of the First-tier Tribunal contains a material error of law and

must be set aside and remade in the First-tier Tribunal, limited to consideration of Article 8 ECHR outside the Rules.

Background

4. The claimant was born in Brazil in 1984 and lived there until the age of 12, arriving in the UK in 2005 with her mother, stepfather and 2-year old half-sister. There is also now a half-brother, born in the UK.

5. The main basis of the claimant's case is that she is entitled to indefinite leave to remain because she completed 6 years in the UK on discretionary leave before 2012.

6. Her discretionary leave periods were from 25 September 2006, when she was 21 years old, to 16 August 2013, when she was 28 years old, a period of 7 years. Transitional arrangements exist for young people following the expiry of discretionary leave, but the claimant took no steps to regularise her position.

7. The claimant then remained in the UK without leave for a time. She was the subject of domestic abuse by her late mother and eventually reported her mother to social services and was fostered, but returned home briefly. After leaving school her mother expected her to work with her, without pay.

8. In 2015, when she was 19, the claimant's mother arranged for her to return to live in Brazil. In Brazil, she worked as a nursing assistant. Her grandparents there have died, and she is not in contact with her maternal aunts and uncles in Brazil.

9. The claimant's mother stayed in the UK with her stepfather and half-siblings.

10. The claimant remained in Brazil until 20 July 2019, returning on a 6-month visit visa, specifically to visit her dying mother here and to seek reconciliation. She would have had to satisfy the Entry Clearance Officer of her intention to return to Brazil at the end of that visit. Instead, the claimant overstayed her visit visa and made no attempt to regularise her position when her visit visa expired on 20 January 2020. On 1 May 2021, the claimant's mother died.

11. On 27 March 2022, over two years after her visit visa had expired, the claimant applied for indefinite leave to remain outside the Rules. On 18 September 2022, the respondent refused indefinite leave to remain.

12. The claimant relies on a Forensic Mental Health Assessment Report dated 4 April 2023 by Kevin M O'Doherty who accepted that she was domestically abused by her mother to such an extent that even at the age of 19, in 2015, she had no choice but to go to Brazil when her mother arranged for her to do so.

13. The claimant now relies on her family life with her partner, her stepfather and her half-brother in the UK, arguing that to remove her would be a disproportionate breach of her private and family life rights under Article 8 ECHR.

Discretionary Leave Policy (27 May 2021)

14. The discretionary leave policy informing the Secretary of State's decision was version 8.0 dated 27 May 2021. Under the heading *Considering further DL applications* on page 24, the policy provides for out of time applications to be considered:

> "Out of time applications must still be considered on the basis of all the evidence put forward and the fact that the application was late should not, on its own, be used as a reason to refuse further leave where the individual otherwise qualifies under the policy. Those who apply out of time will be unable to accrue continuous leave towards settlement. "

15. On page 25, the policy deals with settlement applications, which now require 10 years' continuous discretionary leave but for those whose leave was granted before 9 July 2012, the relevant period is 6 years' discretionary leave:

> "A person will normally become eligible to apply for settlement after completing a continuous period of [six years'] limited leave. The application will be considered in light of the circumstances prevailing at that time. *All settlement applications must be made on the appropriate form no more than 28 days before existing leave expires*." [*Emphasis added*]

16. At page 28 of 29, the policy sets out transitional arrangements for persons who, like this claimant, were granted discretionary leave before 9 July 2012:

> "Those granted DL before 9 July 2012 may apply to extend that leave when their period of DL expires. *All such applications, including settlement applications under the transitional arrangements*, must be made on the appropriate application form *no more than 28 days before their existing leave expires*. Caseworkers must apply the following guidance:
>
> **Applicants granted DL before 9 July 2012**
>
> Those granted leave under the DL policy in force before 9 July 2012 will normally continue to be dealt with under that policy through to settlement *if they continue to qualify for further leave on the same basis as their original DL was granted* (normally they will be eligible to apply for settlement after accruing 6 years' continuous DL (or where appropriate a combination of DL and LOTR, see section 8 above)), unless at the date of decision they fall within the restricted leave policy.
>
> Caseworkers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same, the individual does not fall within the restricted leave policy and the criminality thresholds do not apply, a further

> period of 3 years' DL should normally be granted. Caseworkers must consider whether there are any circumstances that may warrant departure from the standard period of leave. …
>
> If there have been significant changes that mean the applicant no longer qualifies for leave under the DL policy or the applicant falls for refusal on the basis of criminality (see criminality and exclusion section above), the further leave application should be refused."
>
> [*Emphasis added*]

First-tier Tribunal decision

17. The First-tier Judge found at [18]-[19] that the claimant, and her stepfather, were under the influence of her late mother to such an extent that she was in no position to make an application for indefinite leave to remain before she left the UK to go to Brazil, when she was 19 years old. She was 'held almost in close custody conditions' and her mother refused to give her stepfather her passport to apply for settlement with the rest of the family, instead arranging for the claimant to go and live in Brazil, away from her family members. Although there is no express credibility finding, it seems that the Judge accepted this part of the account as true.

18. The First-tier Judge at [20]-[22] applied the 2021 discretionary leave policy as follows:

> "20. I note from the transitional arrangements that were in place subject to any criminal convictions, of which the appellant has none, that 6 years DL would lead to settlement. I find that the appellant having returned to the UK and having been reunited with her family and having to some extent come to terms with the abuse that her mother had inflicted on her had applied for ILR on the correct paid form as required under the transitional arrangements.
>
> 21. I find that there is nothing in the transitional arrangements giving an end date as to when an application for ILR need be made although there is a date before which an application cannot be made which is 28 days before the expiry of the ILR.
>
> 22. I find that the appellant under the transitional arrangements where there is no end date given to make such an application was entitled to make the application and for that application to be dealt with under the transitional arrangements. The appellant had completed 6 years DL and is thus entitled to ILR. I find that in these exceptional circumstances where the appellant was not allowed to make her ILR application at the time of her DL leave and that she was forced to go to Brazil that the appellant is entitled to ILR under the Rules."

19. That is the core passage under challenge in this appeal.

Permission to appeal

20. Permission to appeal to the Upper Tribunal was granted to the Secretary of State by First-tier Judge Lester in the following rather brief terms:

> "1. The grounds state that the judge erred in that they: (1) Making a material misdirection of law – application of the transitional arrangements for discretionary leave.
> 2. The [Secretary of State] did not attend the hearing. In their absence it appears the judge misdirected themselves on the relevant law. The grounds of appeal disclose an arguable error of law. Permission is granted."

Rule 24 Reply

21. The claimant filed a Rule 24 Reply, arguing that holding an Immigration Judge to account for misapplying published policy guidance intended for caseworkers would amount to treating it as though it were a statute and would be an error of law by the Upper Tribunal.

22. The claimant argued that she was 'circumstantially incapacitated' to make an application for indefinite leave to remain before the expiry of her discretionary leave in August 2013 and that she was 'possibly uncontrollably [prevented]' from so doing. She contended that the First-tier Judge had thoroughly considered all circumstances in the round and made a well-reasoned factual judicial finding.

23. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

24. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal. I note from the First-tier Tribunal decision that both parties were represented before the First-tier Tribunal: the permission grant is erroneous in that respect.

25. For the Secretary of State, Mr Ojo argued that the Judge had missed the point in the transitional arrangements. They existed to allow persons with 6 years' accrued discretionary leave to apply, before it expired, to move into indefinite leave to remain. The present application was made long beyond the date of the discretionary leave expiring and the claimant was an overstayer, both before and after leaving the UK to go to Brazil.

26. The Judge had fallen into error at [17]-[21] of the decision. Mr Ojo accepted that there had been a change of circumstances but not that they were so exceptional as to entitle the claimant to be granted indefinite leave to remain now.

27. For the claimant, Ms Daykin relied on her skeleton argument dated 31 May 2024. She argued that the First-tier Judge did not err in interpreting the transitional arrangements as extending beyond the end of the discretionary leave and that there was no date on which the claimant could not apply thereunder. She relied on dicta in the judgment of Lord Justice Dingemans (with whom Mr Justice Johnson agreed) in *R ota CX1 and others v Secretary of State for Defence* [2024] EWHC 94 (Admin) at [55]-[56]. She asked me to uphold the First-tier Judge's decision.

Legal framework

28. Useful guidance on interpreting policies has been given by Dingemans LJ in *CX1* at [55] as follows:

> **"**56. It is common ground that if there is a dispute about the interpretation of a policy such as ARAP, this is an objective question for the Court whose task is to decide what a reasonable person's understanding of the policy would be. This requires looking at the words used in the policy, taking the policy as a whole and in the light of its context and purpose, see *Mahad v Entry Clearance Officer* [2009] UKSC 16; [2010] 1 WLR 48 at paragraph 10; *R(O) v Secretary of State for the Home Department* [2016] UKSC 19; [2016] 1 WLR 1717 at paragraph 28; and *R(KA) v Secretary of State for the Home Department* [2022] EWHC 2473 (Admin); [2023] 1 WLR 896 at paragraph 151."

29. The Secretary of State relies on the reasoning in the Opinion of Lord Boyd of Duncansby in *Sajad Karimi v Secretary of State for the Home Department* [2019] CSOH 74. The delay in *Karimi* was from expiry of leave on 19 April 2015 to an application (the petitioner's third such application) on 23 March 2016. The petitioner in *Karimi* had not left the jurisdiction in the meantime.

30. The Court of Session (Outer House) is equivalent to the High Court of England and Wales. Mr Ojo accepted at the hearing that the *Karimi* decision does not bind the Upper Tribunal in non-Scottish cases, although it may be persuasive. In *Karimi,* the petitioner argued that no application for extension of discretionary leave to remain could be made until after the discretionary leave had expired, as the First-tier Judge also held in this appeal. Lord Boyd rejected that interpretation:

> "[8] … The focus is on the word "extend". The application to be made is for the extension of the existing DLR once it has expired. Any other interpretation could not sit with the next sentence which starts "All such applications". …
>
> [9] …It is for the tribunal and court to interpret the policy and the fact that a case-worker may have misinterpreted the policy in one case does not bind the Secretary of State, far less the courts, in the proper application of the policy in another case.
>
> [10] The question for me is whether it was arguable that the FTT had misinterpreted the policy. In my opinion it did not; the policy is clear beyond peradventure. The application to be made is one to extend the existing DLR beyond the date of its expiry. That is what is meant by the first sentence. Any ambiguity is swept away by the words "All such applications" i.e. an application to extend DLR. They are to be made no more than 28 days before the expiry of their existing leave.
>
> [11] Such an interpretation is also consistent with wider considerations of immigration law. Once DLR has expired the person holding DLR becomes an overstayer and liable to prosecution. Section 3C of the Immigration Act 1971

> provides for continuation of leave pending a variation decision but only where the application for leave is made before the leave expires."

31. In *R (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982 (27 July 2005), Lord Justice Brooke, with whom Lord Justice Chadwick and Lord Justice Maurice Kay agreed, gave guidance on points of law at [90]:

> "90. It may now be convenient to draw together the main threads of this long judgment in this way. During the period before its demise when the IAT's powers were restricted to appeals on points of law: …
>
> 2. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.
>
> 3. A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision. …"

32. More recently, in *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [2]-[5] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed, held that an appellate court may interfere with the First-tier Tribunal's findings of fact and credibility only where they are 'plainly wrong' or 'rationally insupportable', which is a high standard.

Conclusions

33. In this appeal, I find that the Judge's interpretation of the policy is both plainly wrong and rationally insupportable. Out of time applications are to be considered: the claimant's application was considered. There is no difficulty there. However, the Judge's interpretation is in conflict with the terms of the discretionary leave policy: on page 25 and page 28 as cited above, the policy states clearly that such applications must be made 'no more than 28 days before existing leave expires'. That cannot rationally be read as meaning 'any time after the 28 day period', or 'any time at all, once existing leave expires'.

34. The First-tier Judge's interpretation of the policy is unsustainable and must be set aside. I have considered whether I can remake the decision on the evidence before me.

35. I do not consider that I can. A full consideration of Article 8 ECHR outside the Rules, over and above the discretionary leave question, is required. The appeal will be remitted to the First-tier Tribunal, for rehearing afresh limited to Article 8 ECHR outside the Rules.

Notice of Decision

36. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.
I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal.

Judith Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 2 July 2024