



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

In the matter of an application for Judicial Review

The King on the application of

SEERANGAN DHASARATHAN

Applicant

versus

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

ORDER

BEFORE Mrs Justice Thornton sitting as a Judge of the Upper Tribunal

HAVING considered all documents lodged and having heard Mr Malik KC and Ms Jegarajah of counsel, instructed by KT Solicitors, for the applicant and Ms Howarth of counsel, instructed by GLD, for the respondent at a hearing on 22nd February 2024 and having considered a draft agreed order and written submissions on permission to appeal.

IT IS ORDERED THAT:

- (1) The application for judicial review is refused for the reasons in the judgment handed down at 10.15 am on 16th April 2024.
- (2) The Applicant to pay the Respondent's reasonable costs.
- (3) Permission to appeal is refused. I do not consider the appeal to have a real prospect of success. Whilst the case has been designated as a lead case and there are other cases stayed behind this case, that is not, of itself, a compelling reason for the Court of Appeal to hear the matter. I might have considered the lead status of the case to amount to a compelling reason if its merits had been more finely balanced (albeit not reaching the standard of a 'real prospect of success') but I am not so persuaded.

Signed: **Mrs Justice Thornton**

The Hon. Mrs Justice Thornton

Dated: **16/04/24**

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): **16/04/2024**

Solicitors:

Ref No.

Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).



Case No: JR-2023-LON-001221

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

16/04/2024

Before:

THE HON. MRS JUSTICE THORNTON
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)

Between:

THE KING
on the application of
SEERANGAN DHASARATHAN

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Mr. Z Malik KC and Ms. S Jegarajah
(instructed by KT Solicitors),
for the Applicant

Ms. K Howarth
(instructed by the Government Legal Department),
for the Respondent

Hearing date: 22nd February 2024

J U D G M E N T

Mrs Justice Thornton:

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Introduction

1. The Applicant, Seerangan Dhasarathan, seeks judicial review of the Secretary of State's decision to refuse his application for leave to remain as a Tier 2 skilled worker. The basis for the decision was that the Applicant had overstayed his leave to remain in the UK pursuant to a student visa.
2. The Applicant contends that the Secretary of State erred in law in refusing leave. He had the benefit of a 'short term exceptional coronavirus assurance', the effect of which was that he would not be regarded as an overstayer between 16 - 30 November 2022 or suffer any detriment in applications made during this period. His application for leave to remain was made during the period of the assurance, on 29 November 2022.
3. In response, the Secretary of State maintains that the Applicant was an overstayer when he applied for the coronavirus assurance and the assurance did not change his existing immigration status in this respect. The assurance was expressly said not to be a grant of leave. Its effect was no more than reassurance that the Home Office would not take enforcement action during the period of the assurance.
4. Accordingly, the central issue raised by this claim is the nature of the legal protection afforded by the 'short term exceptional coronavirus assurance' granted by the Secretary of State to the Applicant in November 2022. The claim has been identified as a lead case in this regard, pursuant to Regulation 5(3)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008/2698.

Background

5. There was no material dispute about the background.

The Secretary of State's Covid-19 guidance

6. Covid-19 was an unprecedented event which led to the closure of borders across the world. It was necessary for the Home Office to respond to the closures to ensure that individuals in the UK with leave to remain which expired during the pandemic and who could not return to their home country, did not face uncertainty as to their immigration status because of circumstances outside their control.
7. In accordance with the origins of the pandemic, guidance published by the Home Office on 17 February 2020 was addressed primarily to approximately 63,055 Chinese nationals in the UK, as

well as to British nationals in China. The guidance acknowledged the uncertainty faced by individuals in light of travel restrictions which were out of their control. Chinese nationals in the UK whose visa expired between 24 January - 30 March 2020 were eligible for an automatic extension of their visa until 31 March 2020.

8. As the pandemic developed and spread, a second version of the guidance was published on 24 March 2020 to widen the provision. Visa nationals who could not return home due to the pandemic would be able to extend their visa until 31 May 2020, subject to regular review. Anyone in this situation was advised to contact the Home Office in order to be granted an extension of their leave.
9. Further versions of the guidance were published on 22 May 2020 and 9 June 2020. The version published on 9 June 2020 indicated that those whose leave expired between 24 January - 31 July 2020 would get a visa extension until 31 July 2020 if they could not leave the UK for Covid-19 related reasons. Visas already extended until 31 May 2020 would receive an automatic extension to 31 July 2020. Provision was also made for applicants to apply from within the UK to stay long term.
10. A fourth iteration of the policy was published on 24 August 2020 as travel restrictions started to lift globally. Individuals would no longer be able to extend their visas automatically and they were expected to take all reasonable steps to leave the UK, where possible to do so, or to apply to regularise their stay in the UK. A grace period was given until 31 August 2020 for individuals to make arrangements to leave the UK. The conditions of stay in the UK during this period were to be the same as the conditions of an individual's previous leave. If an individual intended to leave the UK but was not able to do so by 31 August 2020, they could request additional time to stay in the UK by applying for an 'exceptional assurance'. Where there were travel restrictions in place a person would be granted an exceptional assurance for ten weeks. If there were no restrictions, they would be given a short term period of exceptional assurance, referred to as a short term assurance, of two weeks duration to allow them to make further arrangements.
11. The version of the policy in force when the Applicant applied for leave to remain on 16 November 2022 provided, in relevant part, as follows:

“If you intend to leave the UK to return to a country or territory but have not been able to do so and you have a visa, leave or 'exceptional assurance' that expires before 31 October 2022 you may request

additional time to stay, known as 'exceptional assurance'.

Exceptional cases could include where you may be unable to return to a country or territory you are resident in, as that nation has closed their borders ...

Please submit your request for an exceptional assurance by emailingwith the following details: name.expiry date of visa

...

If you are granted "exceptional assurance" it will act as 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 Covid19 restrictions and not to facilitate travel other than to return home.

....

If you intend to stay in the UK

In order to remain in the UK you will need to apply for the relevant permission to stay...

You'll need to meet the requirements of the route you are applying for...

The terms of your current permission will remain the same until your application is decided...

...

You are also able to apply for permission to stay to remain in the UK if you have been issued with an 'exceptional assurance'. You must submit your application before the expiry of your 'exceptional assurance'.

If you have overstayed your leave

If your visa or leave expired between 24 January 2020 and 31 August 2022 there will be no future adverse immigration consequences if you didn't make an

application to regularise your stay during this period. However, if you have not applied to regularise your stay or submitted a request for an exceptional assurance you must make arrangements to leave the UK.”

12. These core elements of the policy for ‘exceptional assurance’ remained as above until the scheme closed on 30 November 2022.

The Applicant’s application for a Covid-19 assurance

13. The Applicant is a citizen of India. He was born on 4 June 1994. He entered the UK on 3 October 2020 with entry clearance as a Tier 4 (General) Student, which was valid from 24 September to 30 January 2022.
14. On 14 November 2022, the Applicant’s legal advisors wrote to the Coronavirus Assurance Team at UK Visas and Immigration to apply on his behalf for an ‘exceptional assurance’ for 14 days to regularise his stay so as to avoid being an overstayer in the UK. The letter explained that the Applicant was unable to travel back to India due to Covid-19. The Applicant had a prospective employer who could not employ him due to his immigration status. The Applicant wished to return to India in order to make a fresh application for leave to enter the UK, but any such application was likely to be refused if he was classed as an overstayer in the UK.
15. On 16 November 2022, the Coronavirus Assurance Team responded to the application, explaining that India had no reported travel restrictions or exceptions in place restricting the Applicant from leaving the UK. The letter went on to state that:

“The exceptional assurance policy is a short-term protection against any enforcement action for overstaying leave, visa, or previous exceptional assurance due to travel restrictions caused by the pandemic.

As the reasons for your request are not in line with the exceptional assurance policy, we have issued you a short-term assurance until 30 November 2022 to allow you time to schedule a flight to leave the UK or submit an application for leave if you intend to stay for reasons not covered by the exceptional assurance policy.

.....

You must now make plans to leave the UK or make a new application on or before the expiry of your current leave or exceptional assurance, as you may not be exempt from any immigration enforcement action. You may also be regarded as an overstayer which could be detrimental to any future applications you may wish to make. Your immigration record has been updated to reflect this and you will remain on the same terms and conditions as your previous grant of leave. If the conditions of your previous grant of leave allowed you to work, study or rent accommodation then you are able to continue on those conditions until the expiry of your assurance as detailed above. Please note that this is not an extension of your leave.

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 current leave or assurance expires. If you do not leave on or before this date, you may be classed as an overstayer.”

The application for leave to remain and refusal

16. On 29 November 2022, during the period of the assurance, the Applicant applied for leave to remain as a skilled worker. In answer to the question “Have you ever remained in the UK beyond the validity of your visa or permission to stay?” he ticked “No”. In answer to the question, “Do you have a current UK visa entry clearance or grant of leave?”, he replied “No”. In the section headed ‘UK immigration status’ he answered, “Yes” to the question, “Was there a reason beyond your control why you did not apply before your visa or leave to remain expired?”. In response to the question “Give details about the reason” it was said, “Please refer to covering letter (“Exceptional assurance”).
17. By a letter dated 19 December 2022, the Secretary of State refused the application for a visa. The reasons for the decision were as follows:

“You have overstayed and your application is out of time. Your previous leave to remain for Tier 4 General Student was valid up until 30/01/2022. Therefore, from 30/01/2022 you have overstayed. CV Assurance cannot be used to submit an in-time application during the period of assurance if the previous leave and conditions have expired. The CV Assurance was

permission to stay for temporary protection against immigration enforcement and for you to be able to travel back to your home country, but you chose not to return.”

18. The letter set out paragraph 39E of the Immigration Rules before stating that the Applicant had been refused under Part 9, paragraph 9.8.3 of the rules, following which it was said that “As you have been refused under Part 9 you do not meet the criteria set out in Paragraph SW2.1 and SW2.2 of the Immigration Rules Skilled Worker.”
19. The Applicant applied for administrative review. The decision to refuse was maintained by letter dated 6 April 2023. The following reasons were given:

“You claim that the decision to refuse your application was incorrect because it applied the Immigration Rules incorrectly and failed to apply the Secretary of State’s relevant published policy and guidance. However, the administrative review of your case has confirmed that the application was considered in accordance with the correct rules, policy, and guidance and correctly assessed against those rules, policy, and guidance. You applied for permission to stay as a Tier 2 Skilled Worker and the application was therefore assessed under Appendix Skilled Worker of the Immigration Rules. Under those rules, you were required to demonstrate that when applying for permission to stay you must not be in breach of immigration laws. As stated in the original refusal decision notification, you failed to satisfy this requirement. Therefore, I have maintained the original decision. In the original refusal notice it states you were refused on the grounds that you were noted as an overstayer and submitted your application out of time. The initial caseworker outlines your immigration history to support this decision. The refusal states your previous leave to remain for Tier 4 General Student was valid up until 30 January 2020. Therefore, from 30 January 2020 you have overstayed. They also highlight that CV Assurance cannot be used to submit an in-time application during the period of assurance if the previous leave and conditions have expired. As a result you were refused according to Paragraph 39E of the Immigration Rules.

.....

You are therefore refused under Part 9 paragraph 9.8.3 of the Immigration RulesWith your administrative review application you state that your Skilled Worker application was not in breach of the Immigration Rules at the point of application because you were granted CV Assurance from (16 November 2020) until (30 November 2020) and that because your application for leave to remain as a Skilled worker was submitted during this period you believe that you were entitled to the reinstated conditions of leave held in your student visa.

However, CV assurance is not a form of leave to remain. All it is, is an assurance the Home Office will not take action against those who overstay because they are unable to leave the UK for Covid-19 related reasons. Whether they can make an in-country application to remain in the UK therefore depends on the last leave they were granted, before applying for CV assurance. As your previous leave granted to you as a student expired you had no permission to stay (leave) before you were granted CV assurance. The CV assurance you were granted provided a 2 week short-term exceptional assurance allowing you to remain in the UK in order to arrange a flight to leave the UK or submit a valid application of leave as India has no reported travel restrictions or exceptions such as border closures or lack of quarantine facilities. Please be advised, your granted assurance did not grant you individual leave but acted as a short-term protection against any adverse action or consequences after your leave has expired. You are assumed to have the same conditions as your previous leave during the period of assurance. Your confirmation of exceptional assurance letter also states 'If the conditions of your previous grant of leave allowed you to work, study or rent accommodation then you are able to continue on those conditions until the expiry of your assurance as detailed above. Please note that this is not an extension of your leave' However, as your leave had expired, you have breached your previous conditions under Part 9 paragraph 9.8.3 of the Immigration Rules...In consideration to the above, I am satisfied the original caseworker refused your application under Paragraph 39E of Appendix Skilled Worker of the immigration rules."

Grounds of challenge

20. The Applicant applied for judicial review of the Secretary of State's decision. There was said to be only one rational meaning and interpretation of the Covid-19 guidance and the assurance, namely that when someone holds an assurance they will not, during the lifespan of that assurance, be considered an overstayer and will not suffer a detriment in any application made within the period of the assurance as a result. The Secretary of State had, thereby, expressly given an undertaking that the Applicant's overstaying would not be held against him. That undertaking not only created a legitimate expectation on the part of the Applicant but was express and unambiguous. The Secretary of State should either have waived the requirement that the Applicant not be an overstayer or, if that requirement could not be waived, granted him leave to remain outside the Immigration Rules.
21. Permission to apply for judicial review was refused on the papers but granted on oral renewal of the application. Pursuant to Regulation 5(3)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008/2698, the claim was identified as a lead case on the legal effects of the Secretary of State's exceptional assurance policy. Other cases raising similar issues are stayed behind this case.
22. Shortly before the hearing, the Applicant applied under Rule 32 of the Tribunal Procedure (Upper Tribunal) Rules 2008/2698 to reformulate the grounds of challenge as follows:

“(1) The Secretary of State's letter of 16 November 2022 and/or the policy, Exceptional Assurance Policy: Coronavirus (Covid 19), provided a clear and unambiguous promise or undertaking that the Applicant would not be regarded as an overstayer between 16 November 2022 and 30 November 2022. The Secretary of State erred in law in departing from that assurance and refusing the Applicant's application on the basis of overstaying.

(2) The Secretary of State erred in law in refusing the Applicant's application under Paragraphs SW2.1 and SW2.2 of Immigration Rules Appendix Skilled Worker. This is because (a) the Applicant has breached no conditions of his leave to remain, (b) the Applicant falls within the “unless” exception, (c) the Secretary of State has not appreciated and exercised his discretion under the Immigration Rules, (d) the Secretary of State is obliged to disregard current

overstaying and Applicant cannot be refused on the basis of previous overstaying, and, (e) the Secretary of State has not considered departing from the Immigration Rules in the exercise of his residual discretion.”

23. On behalf of the Applicant, the broad thrust of the challenge was said to remain the same in the reformulated grounds. The claim is said to be about the implications of the Applicant’s ‘short temporary period of permitted stay’, which was a phrase used in the Secretary of State’s detailed grounds of defence and in the witness statement by the civil servant in charge of the Covid-19 policy, both of which were filed after the grant of permission for judicial review. The claim is not about the Applicant’s previous overstaying. It was wrong in law to refuse leave to the Applicant on the basis of SW2.1 and SW2.2 of the Immigration Rules. In the case of the former the Applicant had not breached any conditions of leave to remain. As regards the latter, the Secretary of State had to impermissibly read into the provision reference to an applicant not having previously breached immigration law. In so far as additional and connected points were made, it would be appropriate for the Upper Tribunal to allow these points to be made at the substantive hearing. They are points of wider importance and the present case has been identified as the lead case on the subject with a number of other cases stayed behind it.
24. The Secretary of State objected to the reformulation of the grounds. The Applicant’s overstaying since the expiry of his student visa was central to the Secretary of State’s refusal of leave. Reformulated ground 1 had been deliberately phrased in a way that invited the Tribunal to disregard the Applicant’s previous overstaying and instead focus solely on the period of the exceptional assurance between 16 - 30 November 2022. Reformulated grounds 2 a) b) and c) were said to raise new points but, in any event, it was now conceded on behalf of the Secretary of State that SW2.1 of the rules could not constitute a ground for refusal and the correct legal basis for the refusal was SW2.2 The claim had been designated as a lead case, with other cases stayed behind it and the Secretary of State had been disadvantaged by the need to respond to a developing challenge.
25. Having heard the application to reformulate the grounds at the start of the hearing, the Tribunal informed the parties of the decision as follows:
 - a. the relevance of the Applicant’s previous overstaying depended upon the Tribunal’s construction of the relevant

guidance and assurance which is at the heart of the claim. Reformulated ground 1 could not therefore be circumscribed in the way sought on behalf of the Applicant.

- b. The Secretary of State had conceded that the Applicant could not be refused leave under SW2.1 of the Immigration Rules. These aspects of the claim were therefore academic and could not be pursued. The Administrative Court Guide on Judicial Review 2023 states that academic challenges should not generally be pursued (6.3.4.1). Whilst the guide recognises that lead cases may constitute an exception, it will usually be better for all parties if judicial review proceedings are not treated as “rolling” or “evolving” (Spahiu v Secretary of State for the Home Department [2018] EWCA Civ 2604 [§60-63] and R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605)). The Court of Appeal has emphasised that procedural rigour is important for justice to be done (Dolan at §117). It is important that there must be fairness to all concerned, not just to the parties, for whom the stakes are high. It is also necessary for the wider public interest in enabling important issues at stake in a claim to be considered by the Tribunal with appropriate care. In the present case, the material before the Tribunal was insufficient for proper consideration to be given to reformulated grounds 2 a) and b). The relevant arguments were first raised in a skeleton argument whereupon the Secretary of State had conceded that SW2.1 was not a correct legal basis upon which to refuse leave. An application to amend the grounds was only made shortly before the hearing when the Secretary of State objected to the content of the skeleton argument and the application could not be heard until the day of the hearing.
- c. Argument could proceed in relation to reformulated Ground 2c) (failure to exercise discretion outside the Immigration Rules) on the basis that Counsel for the Secretary of State confirmed in oral submissions that she had been able to respond to the reformulated grounds in her skeleton argument. Counsel reserved her position on whether the Secretary of State might be prejudiced by further development of the new arguments at the hearing. In the event, a request was made on behalf of the Secretary of State to provide written submissions in relation to a point raised on behalf of the Applicant in reply. The Tribunal acceded to the request and both sides provided short submissions in writing after the hearing.

Submissions

26. As refined and reformulated, the following arguments were advanced at the hearing.
27. On behalf of the Applicant it was said that the claim is not about his previous overstaying. The effect of the Covid-19 assurance given to the Applicant was to provide him with a short temporary period of permitted stay between 16 - 30 November 2022. There was a clear and unambiguous assurance that the Applicant would not be regarded as an overstayer during this period or suffer any detriment in applications made during the period. The letter to the Applicant explained that his immigration record had been updated and he would remain in the UK on the same terms and conditions as his previous leave. When granting the assurance, the Secretary of State was aware the Applicant was an overstayer because he had said so in his application letter. The assurances were said to be "crystal clear". It was wrong in law to refuse leave on the basis of SW2.2 of the Immigration Rules. SW2.2 can only be used to refuse an application on the basis of current overstaying namely overstaying at the date of the application. The Applicant's residence during the period in which he applied for leave to remain was by virtue of a permitted stay. The Secretary of State could only justify refusal by impermissibly reading into the provision reference to the Applicant having previously breached immigration law. Other parts of the Immigration Rules draw a distinction between current and previous breaches of immigration laws and there is a separate definition of 'previously breached immigration laws' in paragraph 6 of the rules. Alternatively, the Secretary of State was entitled to depart from the Immigration Rules and his complete failure to appreciate, consider, or exercise his residual discretion was unlawful.
28. On behalf of the Secretary of State it was submitted that the Applicant's previous overstaying is at the heart of the case. The Applicant had been an overstayer since his leave to remain expired on 30 January 2022 and neither the Covid-19 policy or the assurance changed his status as an overstayer. The guidance and assurance make clear the assurance was not a grant of leave. Its effect was that an individual would not be subject to immigration enforcement action and any period of overstaying during the period of the short term assurance would be disregarded when considering future applications. Although the Applicant could make an application for leave to remain during the period of the assurance, it would only be granted if he met the requirements of the route for which he was applying. He did not fall into the category of persons whose overstaying would be disregarded because it occurred between 24 January to 31 August 2020.

Analysis

The decision under challenge

29. The decision under challenge in these proceedings is the refusal of the Secretary of State to grant the Applicant leave to remain in the UK as a skilled worker pursuant to the Immigration Rules. By way of relevant background; a person, who is not a British citizen may be given leave to remain in the UK, pursuant to section 3(1) of the Immigration Act 1971. The Immigration Rules set out the practice which the Secretary of State and his officials will follow in this regard (section 3(2) of the 1971 Act). To be granted leave under the skilled worker route in the Rules, an applicant must meet validity, suitability, and eligibility requirements.
30. In the Applicant's case, leave was refused on the basis he failed the suitability requirements set out in SW2.1 and SW2.2. The Secretary of State now concedes that the correct legal basis for refusal is not SW 2.1 but SW2.2. SW2.2 provides, in material part, as follows:
- “SW2.2. If applying for permission to stay the applicant must not be:
- (a) in breach of immigration laws, except that where paragraph 39E applies, that period of overstaying will be disregarded; ...”
31. “Breach of immigration laws” is defined in paragraph 6 of the Rules to include a person who is an overstayer. “Overstayed” or “overstaying” is defined to mean a person who has stayed in the UK beyond the latest of the time limit attached to the last permission granted or the period that the permission was extended under section 3C or 3D of the Immigration Act 1971. Paragraph 39E of the Immigration Rules provides for overstaying to be disregarded in a limited number of scenarios, including where the period of overstaying was between 24 January and 31 August 2020 (paragraph 39E(3)).
32. It was common ground that the Applicant was an overstayer from 30 January 2022 to 16 November 2022, when the Secretary of State issued him with a short term assurance which was valid until 30 November 2022. The question at the core of the challenge, therefore, is whether the Applicant's status as an overstayer was changed by the grant of the Covid-19 assurance.

The Covid-19 guidance - status and principles of interpretation

33. There was no material dispute between the parties as to the legal status of the guidance issued by the Secretary of State in relation to the immigration implications of the Covid-19 pandemic and the accompanying closure of borders. The guidance amounts to a concessionary policy in which, exceptionally, leave to remain may be granted outside the Immigration Rules pursuant to the wide discretion granted to the Secretary of State by sections 3, 3A, 3B and 3C of the Immigration Act 1971 to control the grant and refusal of leave to remain (Munir v Home Secretary [2021] 1WLR 2192 at §44).
34. It was also common ground that the interpretation of the Immigration Rules, and, by extension, the Secretary of State's Covid-19 guidance, is a matter for the Tribunal (SC Mandalia v SSHD [2015] UKSC 59 at §31 (Lord Wilson)). Neither should be construed with the strictness appropriate for a statutory instrument. Instead, they should be construed by reference to the language used, construed against the relevant background. In other words, they should be construed 'sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy' (Mahad v Entry Clearance Officer [2010] 1 WLR 48 at §10).

Interpretation of the Covid-19 guidance

35. There were various iterations of the Covid-19 guidance which developed as borders closed and then re-opened during the pandemic. From a review of the various iterations, it is apparent that there were two distinct phases to the policy in this regard. The first phase ran from 24 January – 31 July 2020, with a grace period until 31 August 2020. During this phase of the policy, which coincided broadly speaking with a global closure of borders, the Home Office issued automatic extensions to visas.
36. The second phase of the policy ran from 1 September 2020 – 30 November 2022 and was first reflected in the fourth iteration of the policy published on 24 August 2020 at a time when travel restrictions were starting to lift globally. The Home Office no longer issued automatic extensions to visas but instead issued assurances to individuals, upon application.
37. The version of the policy in force when the Applicant applied for a Covid-19 assurance explains that a person who intends to leave the UK but who has not been able to do so and whose visa expires before 31 October 2022 may request additional time to stay. This "exceptional assurance" is expressly said not to be a grant of leave ("'Exceptional assurance' does not grant you leave"). It is said to be a "means to protect those who are unable to leave the UK due

to Covid restrictions” and is described as “short term protection against any adverse action or consequences after... leave has expired”. An individual with the benefit of an assurance is entitled to apply for permission to stay in the UK providing they do so before expiry of the assurance.

38. During the period of an exceptional assurance an individual’s immigration status continues on the same visa conditions as previously (“If conditions allowed you to work, study or rent accommodation you may continue to do so during your period of ‘exceptional assurance’”).
39. The only assurance given in the relevant version of the guidance in relation to overstaying relates to overstaying between 24 January – 31 August 2020, where it is said that there “will be no future adverse immigration consequences” for overstaying during this period (“If your visa or leave expired between 24 January 2020 and 31 August 2020 there will be no future adverse immigration consequences if you didn’t make an application to regularise your stay during this period.”) No such comfort is given in relation to overstaying after this period. Instead, the guidance provides that in order to remain in the UK an individual will need to apply for the relevant permission to stay and ‘to meet the requirements of the route you are applying for’.
40. The distinction in approach to overstaying between the two phases of the Covid-19 policy is reflected in paragraph 39E of the Immigration Rules, which sets out exceptions for overstayers. It was amended on 22 October 2020 to include a period of overstaying between 24 January 2020 and 31 August 2020. No such exception is made for overstaying after 31 August 2020.

The assurance letter to the Applicant

41. The assurance letter sent to the Applicant explained that he was not considered eligible for an exceptional assurance under the Covid-19 policy because India had not reported travel restrictions in place. Instead, he was issued with ‘a short-term assurance until 30 November 2022 to allow you time to schedule a flight to leave the UK or submit an application for leave if you intend to stay for reasons not covered by the exceptional assurance policy’. He should do so before the expiry of his current leave or exceptional assurance as he might not be exempt from any immigration enforcement action and might also be regarded as an overstayer which could be detrimental to any future applications he might wish to make. His immigration record would be updated to reflect the assurance and he would remain on the same terms and conditions as his previous grant of leave. The letter said expressly;

“Please note that this is not an extension of your leave” before stating “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 current leave or assurance expires. If you do not leave on or before this date, you may be classed as an overstayer.”

42. The letter must be construed in the context of the Covid-19 guidance (Mahad v Entry Clearance Officer [2010] 1 WLR 48 at §10. The effect of the letter was, in the language of the guidance, to offer the Applicant ‘short term protection’ whilst he made arrangements to leave the country or submitted an application for leave. That is as far as the protection went. It did not purport to alter his previous immigration status. Like the guidance, the letter expressly made the point that the assurance did not amount to a grant of leave and he was told that his leave would remain on the same terms and conditions as previously. Although not repeated in the letter, the guidance had made clear that in order to remain within the UK, beyond the term of an assurance, an individual would need to apply for the relevant permission to stay and meet the requirements of the route being applied for.
43. It is not enough for the Applicant to say that the effect of the assurance letter was that he would not be treated as an overstayer during the period of the assurance. At the hearing, it was common ground that this was indeed the effect of the letter. For the Applicant to succeed in his claim, he must establish that the assurance letter amounted to a clear and unambiguous undertaking that his previous overstaying would be disregarded (Re Finucane [2019] All ER 191, per Lord Kerr, at §§62 and 64). In this regard Mr Malik conceded, pragmatically, that the decision letter did not expressly state that any previous overstaying by the Applicant would be disregarded in future applications. This may be said to be unsurprising. Any such provision would amount, in effect, to a general amnesty on previous overstayers provided they applied for leave during the period of their Covid-19 assurance. One would expect such a material departure from the implications of overstaying as a ground of refusal to be spelt out explicitly, as was done in paragraph 39E of the Immigration Rules. Overstaying between 24 January - 31 August 2020, at the height of the pandemic and border closures, would be disregarded. The leave of an individual whose leave would otherwise have expired during that period was automatically extended. Beyond 31 August 2020, neither the Covid-19 policy or the Immigration Rules provided any automatic extension of leave, or for overstaying to be disregarded.
44. It follows that the Tribunal accepts the submission on behalf of the Secretary of State that the most that the Applicant and his legal

representatives could expect as a result of having read the letter, in conjunction with the Covid-19 policy was that (a) his request had not in fact been in line with the 'exceptional assurance policy' because he did not meet the requirements (in that there were no travel restrictions to India) and so he was being provided with a 'short-term assurance', that (b) enforcement action would not be taken against him as a result of overstaying during the two-week period of the short-term assurance and that (c) should he make an immigration application during that period, the two-week period of his assurance would not be counted as a period of overstaying.

45. In oral submissions Mr Malik placed emphasis on the reference in the letter to the Applicant making an application for leave to remain in the UK. However, as is apparent from the guidance and the letter, a Covid-19 assurance permitted an application for leave to be made during the period of the assurance but it did not go so far as guaranteeing the outcome of the application. That is apparent from the statement in the guidance that an applicant would need to meet the requirements of the route applied for.
46. In his reply, Mr Malik raised a comparison between the Covid-19 assurance and section 3C of the Immigration Act 1971 which had not previously been raised in the pleadings and the purpose of which is to prevent a person becoming an overstayer during the period of making an application for leave and a decision on the application, any appeal or administrative review. At the request of Ms Howarth, the Tribunal permitted the parties to file short written submissions on the point after the hearing. In her written submissions Ms Howarth submitted that section 3C is not applicable to the Applicant because his previous leave expired on 30 January 2022 and no valid application for leave was made before that leave expired. The written submissions of Mr Malik and Ms Jegarajah submitted that, on a simple reading of the assurance letter and the Covid-19 policy, the policy was plainly intended for overstayers and potential overstayers, particularly given the concession on behalf of the Secretary of State that he knew the Applicant was already an overstayer when issuing the assurance. For the reasons explained above, the Tribunal does not accept this interpretation of the policy/letter. The purpose of the Covid-19 policy was to create, in effect, a holding position so as to allow an individual who had been affected by the border restrictions arising from Covid-19 time in which to either arrange a flight to leave the UK, or to submit a valid application for leave to remain. If the latter, the individual still had to meet the requirements of the Immigration Rules to be granted leave in any subsequent application.

Lawful refusal of leave to remain

47. It follows from the analysis above that the Secretary of State's decision to refuse the Applicant's application for leave on the basis he was in breach of immigration laws as an overstayer (SW2.2) was lawful. The Applicant became an overstayer from 30 January 2022. He submitted an application for leave to remain on 29 November 2022, eleven months after the expiry of his leave. Neither the Covid-19 policy nor the assurance letter cured his previous immigration status in this regard. He could not therefore satisfy the suitability requirements for a Tier 2 Skilled Worker and he did not come within paragraph 39E of the Immigration Rules, which sets out the circumstances in which a period of overstaying will be disregarded.

Exercise of discretion by the Secretary of State outside the Immigration Rules

48. Mr Malik's alternative submission was that the Secretary of State's failure to exercise his residual discretion to grant leave outside the Immigration Rules was irrational. It was common ground in this regard that the Secretary of State has a wide discretion to control the grant and refusal of leave to remain outside the Immigration Rules (See above §33 and Munir at §44).

49. Mr Malik drew the Tribunal's attention to the observations of the Court of Appeal in R (Behary) v Secretary of State for the Home Department [2016] 4 WLR 136 at §39 that the Home Office is under an obligation to consider a grant of leave outside the Immigration Rules when expressly asked to do so. The Court considered that outside such cases there may exist at least in theory, cases where the facts are so striking that it would be irrational in a public law sense not to consider the grant of leave outside the rules.

50. Contrary to the submission advanced by Mr Malik, the Applicant did not invite the Secretary of State to consider his application outside the Immigration Rules in either the cover letter accompanying the application for leave on 29 November 2022 or in the request for administrative review. Mr Malik sought to suggest that the reference in the application form to the Covid-19 assurance letter constituted such a request, but that letter was an application for an assurance. A request for consideration of leave to remain outside the rules was made for the first time in pre-action correspondence.

51. Nor can the facts of the present case be said to be so striking that it would be irrational for the Secretary of State not to have considered granting leave outside the Immigration Rules, in the absence of a specific request to do so. Mr Malik emphasised that the

only reason for refusal was the Applicant's previous overstaying during a global pandemic. However, Ms Howarth explained to the Tribunal that there are many people in the Applicant's position. As made clear by the Court of Appeal in Behary, the threshold for the Tribunal to find a public law error in this regard is high.

Conclusion and decision

52. For the reasons given above: the Secretary of State's decision to refuse leave under the Immigration Rules (Appendix Skilled Worker) was lawful and the Secretary of State did not err in law in failing to consider the grant of leave outside the Immigration Rules.
53. The claim for judicial review fails.