



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/17364/2016  
IA/25830/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 5<sup>th</sup> July 2018

Decision & Reasons Promulgated  
On 17<sup>th</sup> July 2018

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAINI**

**Between**

**MISS MARINE NEMSADZE  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss J Norman, Counsel; instructed by Sterling Lawyers Ltd

For the Respondent: Mr C Howells, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a citizen of Georgia, born on 10<sup>th</sup> September 1985 appeals against two decisions of the Respondent refusing firstly an application for leave to remain as a Tier 4 (General) Student dated 10<sup>th</sup> February 2014 and an application for indefinite leave to remain on the basis of having completed ten years of lawful residence dated 8<sup>th</sup> July 2016. These two appeals have previously been linked by the First-tier Tribunal and both appeals are the subject of this decision before the Upper Tribunal.

## **Immigration and Appeal History**

2. The Appellant arrived in the United Kingdom on 6<sup>th</sup> February 2005 with entry clearance as a student and held lawful leave as a student continuously until her last application which was made on 20<sup>th</sup> October 2013 which is the subject of the first refusal dated 10<sup>th</sup> February 2014. Following that refusal the Appellant through her previous legal representatives sought reconsideration of that Tier 4 decision, however on 3<sup>rd</sup> September 2014 the reconsideration was rejected. On 29<sup>th</sup> October 2014 the Appellant applied for further leave to remain on the basis of her family and private life which was refused on 7<sup>th</sup> January 2015 without a right of appeal. Subsequently, on 17<sup>th</sup> July 2015 with the benefit of different legal representation the Appellant lodged a late appeal with the First-tier Tribunal challenging the Respondent's decision of 10<sup>th</sup> February 2014. That appeal was received by the First-tier Tribunal on 14<sup>th</sup> July 2015. Thereafter, on 28<sup>th</sup> July 2015 the Appellant applied for further leave on the basis of her family and private life which was voided on 25<sup>th</sup> September 2015. A few days before that event, by way of a 'Notice of Late Appeal decision' dated 22<sup>nd</sup> September 2015 the Appellant was notified of a decision by First-tier Tribunal Judge Borsada wherein the judge found that time for bringing the appeal be extended given the circumstances of the Appellant's case and the reasons for the delay in bringing her appeal and was satisfied that there was sufficient reason to allow the appeal to proceed, specifically considering the strength of the grounds, the consequences of the decision and the length of the delay. Consequently, the time for appealing was extended by Judge Borsada in a decision dated 10<sup>th</sup> September 2015. Thereafter, on 19<sup>th</sup> November 2015 the Appellant applied for settlement on the basis of ten years' continuous lawful residence which was refused by way of the decision dated 8<sup>th</sup> July 2016 which is the second decision that is subject to this appeal. Both appeals previously came before the First-tier Tribunal and were heard on 6<sup>th</sup> February 2017 and were the subject of a Decision and Reasons promulgated on 27<sup>th</sup> February 2017. That decision was challenged by the Appellant and was set aside by me by way of a decision promulgated on 17<sup>th</sup> January 2018 due to material error of law. Thus, the appeal now comes before me and stands to be decided *de novo*.

## **Issues under Appeal**

3. The first decision subject to this appeal is that dated 10<sup>th</sup> February 2014 which I will henceforth refer to as "the Tier 4 decision". In this decision the sole basis given as a reason for refusal is that the Appellant was required to show she had maintenance or living costs of £2,000 (having paid her course fees for her Tier 4 study), but failed to show that that amount of funds was available to her for a 28-day period and was therefore unable to meet the maintenance requirements for a grant of leave as a Tier 4 (General) student. That decision was appealed against on the basis that the decision is not in accordance with the Immigration Rules, that the Respondent should have exercised definitely a discretion conferred by those Rules, that the decision was not in accordance with the law, and on the basis that the decision contravened the Appellant's Article 8 private life.

4. The second decision that is subject to this appeal is that of 8<sup>th</sup> July 2016 and the sole issue raised in objection to the Appellant's grant of settlement is that she has not accrued ten years' continuous lawful leave by the date of the decision owing to the fact that her Section 3C leave came to an end when her Tier 4 student application was refused on 10<sup>th</sup> February 2014 and she failed to submit an appeal by the deadline of 26<sup>th</sup> February 2014 which, in the Secretary of State's view, rendered her appeal rights exhausted and her Section 3C leave terminated. The decision refusing indefinite leave to remain mentions that the Appellant sought to challenge the Tier 4 decision by way of reconsideration instead of lodging an appeal however is silent as to the appeal being lodged out of time on 17<sup>th</sup> July 2015 and makes no mention also of the extension of time being given by Judge Borsada by way of his decision promulgated on 22<sup>nd</sup> September 2015.

### **The Hearing**

5. The Appellant's solicitors have continued to rely upon the First-tier Tribunal bundle which contained seven tabbed sections of documentation and extensively covered all of the relevant material for both appeals before me. The Appellant's Counsel had also provided a skeleton argument. The Respondent had provided a bundle dated 3<sup>rd</sup> February 2017 which appeared to be in response to the refusal of indefinite leave to remain and simply contained the long residence application form and the covering letter for that application. I queried with Mr Howells whether there was a bundle for the Tier 4 appeal, however was informed that no bundle had been produced for the purposes of that linked appeal.
6. I heard evidence from the Appellant and her partner and a witness (Mr Shanidze) who all gave evidence in English. A full note of their evidence is set out in my Record of Proceedings which I shall not rehearse herein.

### **Findings of Fact and Reasons**

7. The standard of proof to be applied is the civil standard and that of the balance of probabilities. I have considered all the evidence in the appeal, including the Appellant and Respondent's bundles and the authorities which I have been referred to by both representatives as well as Miss Norman's skeleton argument. I heard submissions from both parties which I will set out in full in my Record of Proceedings and are not rehearsed herein.
8. I find that the Appellant, her partner and the witness gave credible and plausible evidence overall and that their evidence was corroborative of one another and I accept their oral evidence as given. It is fair to say that the only issues of controversy in this appeal are legal ones and do not concern any of the factual background to this appeal. Consequently, I will not rehearse the factual background beyond that which I have as it is not relevant to the determination of the Tier 4 appeal nor does it go to the question of the continuity of leave in respect of the appeal against the refusal of indefinite leave to remain.

9. In respect of the Tier 4 refusal, Mr Howells submitted that the refusal was one which was made on the basis that the Appellant had failed to provide evidence that she was in possession of £2,000 to demonstrate she met the maintenance requirements and would therefore not be in jeopardy of becoming a burden upon the public purse and claiming benefits. Mr Howells submitted that in respect of the evidence that was supplied after the application had been made and on appeal - which may be summarised as being confirmation that the Appellant's father's company in Georgia would be willing to lend money to the Appellant - Mr Howells submitted that the evidential flexibility policy did not cover such documentation and there was no requirement on the Secretary of State to contact the Appellant for further financial information and consequently paragraph 245AA(d) was inapplicable in this scenario. However, Mr Howells accepted that the new evidence was admissible in relation to the human rights limb of the appeal challenging the Tier 4 refusal and was equally admissible in respect of the human rights appeal against the refusal of indefinite leave to remain. He did not however accept that the evidence was admissible in the appeal against the Tier 4 refusal in respect of the limb challenging the application of the Immigration Rules in the refusal by the Secretary of State.
10. In respect of that decision Miss Norman for the Appellant argued that the evidence submitted with the application, which included the Appellant's father's company bank statement and evidence of the Appellant's illness justified two bases upon which the Secretary of State should have contacted the Appellant before refusing the application. Miss Norman submitted that this evidence engaged the evidential flexibility rule under paragraph 245AA(d) in that the evidence of holding funds from 22<sup>nd</sup> September 2013 to 5<sup>th</sup> October 2013 was "missing evidence". The company bank accounts did not meet the particular requirements of the rules of specified evidence as the company bank accounts held by the Appellant's father were not 'personal' accounts and did not contain her father's name. However she submitted that given that the information that the father was the sole shareholder of the company, had access to those funds and his name were discernible from other documents, paragraph 245AA(d)(iii) applies. This paragraph states in summary that if an applicant has submitted a specified document which does not contain all of the specified information, but the missing information is verifiable from other documents submitted with the application the application may be granted exceptionally.
11. In respect of those submissions, in my view this was not a scenario where evidential flexibility applied, even on the basis of missing evidence or in respect of information being verifiable from other documents as there was no specified document submitted which did not contain certain missing information or failed to contain necessary information. This was a case where the father's company bank statement was not a specified document because it was not a personal statement, and therefore the flexibility rule would not apply on its terms.
12. Turning to the Secretary of State's failure to consider the father as being a potential Sponsor for the Appellant and her failure to consider the Appellant's medical evidence which she submitted with her application for Tier 4 leave and which indicated that the Appellant had been admitted into hospital in Tbilisi (having suffered from acute food

poisoning which was so serious that she required half-a-litre of blood transfusion as well as administration of other detoxification therapy), in my view these are matters which the Secretary of State should have considered *before* refusing the Appellant's application for Tier 4 student leave on the basis that she did not have £2,000 of funds to show she met the maintenance requirements. These facts and documents are not mentioned anywhere on the face of the Respondent's decision which is a glaring omission. I note that the Secretary of State would have known that the corporate account held by the Appellant's father's business contained a balance of 264,786 GEL which equates to £90,387.10 and the evidence of this balance which dwarfed the financial requirement of £2,000 was provided to the Secretary of State. Thus, whilst in my view the decision is in accordance with the Immigration Rules, for the obvious reason that the Appellant did not submit the specified evidence of £2,000 in maintenance being available to her through her own personal funds or through personal funds from her father, I find that the decision is not in accordance with the law because the Appellant submitted evidence which showed that she suffered from a serious health condition shortly before her application was made and that her father was in possession of more than sufficient funds to meet the £2,000 requirement which could not have been ignored and which led to an inadequacy of reasons in the impugned decision (see *South Bucks District Council & Anor v Porter* [2004] UKHL 33 at [36], for recitation of this trite ratio).

13. Furthermore, pursuant to Lord Mustil's judgment in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 560 as famously stated by His Lordship:

"Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations ... either before the decision is taken ... or after it is taken, with a view to procuring its modification".

14. That ratio also still firmly applies to all decision-making and given that a limb of appeal challenging the Tier 4 refusal is that the decision is not in accordance with the law, the above ratios are apt for application to this ground of appeal. As summarised by Lord Neuberger in *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39 at paragraph 179 of His Lordship's judgment:

"... the rule is that, before a statutory power is exercised, any person who foreseeable would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute".

Therefore, as confirmed by Lord Mustil in *Doody*, and as also confirmed by Lord Sumption at paragraphs 29 to 30 of *Bank Mellat* the common law imposes a duty on the Executive to give notice to a person of its intention and to give that person an opportunity to be heard before any power is exercised against them. In my view if the Secretary of State was unwilling to exercise her statutory discretion which she always holds (pursuant to section 4(1) of the Immigration Act 1971) and was minded to disregard the Appellant's evidence of her serious health condition and the Appellant's father's circa £90,000 + in available funds) the Respondent should have given notice to the Appellant of that intention and should have given the Appellant an opportunity to be heard before exercising the power to refuse leave as a Tier 4 student. I find this is particularly so given that the Appellant has not had any opportunity to procure modification of that decision by virtue of the fact that post-application evidence is inadmissible in the context of a points-based appeal pursuant to Section 85A of the Nationality, Immigration and Asylum Act 2002. As such, having failed to give notice of the intention to refuse notwithstanding the evidence put forward by the Appellant with her application, I find that the decision is not in accordance with the law in respect of the Tier 4 refusal.

15. In any event, even if I did not so find, in my view the Tier 4 decision is one which is equally disproportionate against the Appellant's private life given that the public interest that might be quantified from her failure to meet the Rules is simply that of not having submitted the specified evidence of having £2,000 in her own bank account or that of her father's bank account, whereas the evidence demonstrated the funds were in the father's company bank account. In that respect, and in my view, I find that it was highly unlikely that the Appellant would have ever been in danger of needing to rely upon public funds to support herself whilst here or have been in jeopardy of claiming public benefits in any form.
16. It is clear in my mind that the Appellant's private life was engaged having resided in the United Kingdom since 2005 as a student until the date of that decision on 10<sup>th</sup> February 2014 and given her extensive residence her private life is engaged in respect of that decision at that time and of course until date, and in respect of the public interest under Article 8 ECHR it may be quantified as the Appellant having failed to submit the specified evidence, but I note Mr Howells did not submit that the Appellant was unable to meet the maintenance requirements on the new evidence that had been put forward by her from her father. Thus the public interest in respect of the Appellant's failure to meet the Immigration Rules would only be nominal and in respect of the discrete and nuanced weight that must be given to the public interest in removing her by virtue of the extent of her failure to meet the Immigration Rules, I am mindful of the approach approved by the Senior President of Tribunals in *TZ (Pakistan) and PG (India) v Secretary of State for the Home Department* [2018] EWCA Civ 1109 at [30] of that judgment (in harmony with Lord Carnwath's decision in *Patel v Secretary of State for the Home Department* [2013] UKSC 72), wherein Sir Ernest Ryder confirmed as follows:

“Although in general terms it is not incumbent on a tribunal to express a concluded view about something that is either not in issue or not determinative within the Rules (unless the hearing is a one stop appeal within the meaning of

the Nationality, Immigration and Asylum Act 2002, as amended, when as a matter of law all material issues will be before the tribunal and will necessitate a decision), as explained below where article 8(1) is engaged and the consideration of article 8 outside of the Rules must follow, the tribunal should consider the insurmountable obstacles test within the Rules before considering the exceptional circumstances test outside the Rules”.

17. In this appeal insurmountable obstacles is not at stake, however the Appellant’s exceptional circumstances are, and in my view, the fact of the nominal public interest in failing to provide the specified evidence to the Secretary of State at the time of the application, alongside the public interest as defined by Section 117B of the Nationality, Immigration and Asylum Act 2002 towards the Appellant’s removal balanced against the Appellant’s evidence of her illness and her father’s available funds, leads to a conclusion that the decision to remove the Appellant in respect of this discrete failure under the Rules and the public interest in a statutory form is a disproportionate one. Thus, I find that the Appellant’s appeal against the Tier 4 decision succeeds first on the basis that the decision is not in accordance with the law, and secondly on the entirely independent basis that the decision is disproportionate against the Appellant’s private life.
18. Turning to the Appellant’s appeal against the refusal of indefinite leave to remain, as summarised above the sole issue in respect of this second appeal is whether the Appellant had accrued ten years’ lawful residence starting from her entry to the United Kingdom on 6<sup>th</sup> February 2005 till date. As also summarised above the Secretary of State’s view is that the leave was broken when the Appellant failed to appeal against her decision of 10<sup>th</sup> February 2014, although no consideration is given by her in her refusal letter to the decision of Judge Borsada or the Tier 4 appeal at all. Miss Norman in her skeleton argument and in her submissions submitted that the Appellant had held continuous lawful residence in the United Kingdom because her Section 3C leave continued to run pursuant to Section 3C(2)(b) and (c) of the Immigration Act 1971. In respect of Judge Borsada’s decision, as I have already noted the judge extended time for the bringing of the appeal and in my view that fact, although not considered by the Secretary of State has wide ramifications for the Appellant’s Section 3C leave. Section 3C in its relevant part reads as follows:

**“3C Continuation of leave pending variation decision**

- (1) 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,
  - (b) the application for variation is made before the leave expires, and
  - (c) the leave expires without the application for variation having been decided.

- (2) The leave is extended by virtue of this section during any period when—
  - (a) the application for variation is neither decided nor withdrawn,
  - (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the Appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), ...
  - (c) an appeal under that section against that decision, brought while the Appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act), or
  - (d) an administrative review of the decision on the application for variation—
    - (i) could be sought, or
    - (ii) is pending.”

19. As can be seen from the above excerpt, under Section 3C(2) leave can be extended during any period when an appeal under Section 82 could be brought against a decision on an application for variation (ignoring any possibility of an appeal out of time with permission) *or* when an appeal under Section 82 against a decision is pending. To my mind I do not accept Miss Norman’s submission that Section 3C(2)(b) could apply to this scenario as sub-Section (2)(b) is very clear in stating that it relates to the period during which an appeal could be brought, *ignoring any possibility of an appeal out of time with permission* which if extended would not extend leave under this subsection on its terms. However, I do accept Miss Norman’s submission that sub-Section (2)(c) is applicable to this scenario as an appeal under Section 82 has been brought against the Tier 4 decision of 10<sup>th</sup> February 2014, albeit the appeal was brought late on 14<sup>th</sup> July 2015. Judge Borsada nonetheless was prepared to allow time to be extended and in my view there is only one way one can interpret whether the appeal is pending or not and that is of course that an appeal is pending at the date of the hearing before me. Consequently, by virtue of the successful extension of time given by Judge Borsada (which is distinct from the mere “possibility” of an appeal out of time with permission as stated in section 3C(2)(b)), the Appellant’s leave was retrospectively extended and the appeal was pending by virtue of the extension of time by Judge Borsada. Thus in my view, on that interpretation there was no break in the Appellant’s continuous residency by virtue of her filing a late appeal.
20. In any event, if I am wrong to proceed on that basis, having found that the Tier 4 decision of 10<sup>th</sup> February 2014 is not in accordance with the law, that decision no longer holds any legal basis, and in that respect the Appellant’s status in respect of that Tier 4 application could only be described as pending a (lawful) outcome and therefore, given that the decision is not in accordance with the law and is, in other words,



unlawful, the situation as it presently stands by virtue of my decision is that a lawful decision upon the Appellant's Tier 4 application is awaited from the Secretary of State and consequently the Appellant's Section 3C leave will have prevailed from the date of her application of 20<sup>th</sup> October 2013 till date. Thus, in that respect the Appellant's Section 3C leave has continued during the relevant time when it is said to have broken and on this further basis the Appellant has held continuous lawful residence for the requisite ten year period under paragraph 276B of the Immigration Rules.

21. In any event, even if I am wrong in respect of all of my above findings, I go on to consider this matter outside of the Rules.
22. In respect of the Appellant's private and family life, in my view both are clearly engaged. Firstly, the Appellant's private life is engaged on the basis of having held lawful leave here, at least until 26<sup>th</sup> February 2014 on Mr Howells' submission and on my findings possibly longer. Nonetheless, it is plain from the length of her residence that her private life is engaged. In respect of the Appellant's family life she is in a partnership with Mr Shota Maskharashvili, a Georgian national who presently holds a residence card and apparently will be in a position to apply for permanent residency in nine months time, but in any event has a valid residence card as the former family member of an EEA national which is valid until 10<sup>th</sup> April 2023 according to the document in the Appellant's bundle. Thus the Appellant's family life is engaged by virtue of her relationship since August 2016 till date with her unmarried partner, and she also shares a child with that partner whom was born to the couple on 22<sup>nd</sup> May 2017. In respect of their status, all three are Georgian nationals. It is the Secretary of State's position that the Appellant and her unmarried partner and child can relocate to Georgia as a family unit, and in respect of the public interest it may be quantified in the form of the break in the Appellant's leave from having not appealed the decision in time. Thus if I am wrong in my interpretation of the Appellant holding lawful leave the public interest against her would appear to be in a somewhat severe form and sits uncomfortably against Judge Borsada's decision to extend time, notwithstanding the Appellant's previous request for reconsideration of the Tier 4 decision and belatedly applying to appeal against that decision, which was sufficient to justify the appeal time being extended in any event. Nonetheless, the Appellant on the Respondent's interpretation has not held lawful leave for the past four years and five months and pursuant to Section 117B of the 2002 Act, the public interest does stand against her in a statutory form and notwithstanding that the Appellant can speak English and is financially independent, these will not form the basis for any grant of leave to remain or settlement, albeit they should also not fall against her. However, in respect of the Appellant's private life her precarious status from the outset of her residency in the United Kingdom will stand against her in a significant form, and albeit she is not married to a settled partner, Mr Howells submits that the Appellant's family life should be given little weight also.
23. Taking those factors into account in respect of the Secretary of State's side of the balance, I counter-balance those going in favour of the Appellant, namely that she has an innocuous presence in the United Kingdom and enjoys both a private and family life here. Her private life has subsisted for a significant period of time, some thirteen

years, having lived here since the age of 19 years, and she is in a partnership with her unmarried partner whom I understand from their evidence plan to marry once her immigration status is resolved, and both of whom share a child and are not a threat to immigration control *per se*. Given the Appellant's contributions to the United Kingdom's economy as a student over the course of several years and her *bona fide* attempts to regularise her status since February 2014, I do not view her overstaying as being malicious or with any intent but to resolve her status.

24. Notwithstanding the above factors going in favour of the Secretary of State and pursuant to the Senior President of Tribunals' decision in *TZ and PG* (citation *supra*) and following the balance sheet approach approved at [35] of that judgment (which in turn approves Lord Thomas's recommendation in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 at [82] to [84] of that judgment), when those factors are collectively balanced against the public interest in her removal in the form of her not having held lawful leave since the refusal of her Tier 4 application, in my view, the weight to be given to the Appellant's private and family life collectively outweighs the public interest in her removal and the decision to remove her is thus disproportionate.

#### **Notice of Decision**

25. The appeal against the Tier 4 decision is allowed as the decision is not in accordance with the law.
26. The appeal against the Tier 4 decision is allowed on the basis that the decision is disproportionate against the Appellant's Article 8 rights.
27. The appeal against the refusal of indefinite leave to remain is allowed on the basis that the decision is disproportionate, either on the basis of the Appellant's satisfaction of the continuous residence requirement and the impact that will have upon the proportionality of removal, or on the separate basis of her private and family life assessment excluding that factor, as set out above.

#### **Anonymity**

I was not asked to make an anonymity direction and neither do I see any reason to do so.

#### **TO THE RESPONDENT** **FEE AWARD**

I do not make a fee award as my decision is based upon the evidence and arguments before me which were not presented to the Secretary of State at the relevant time.

Signed

Date 15 July 2018

Deputy Upper Tribunal Judge Saini