Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01680/2020 (V)

THE IMMIGRATION ACTS

Heard via Microsoft Teams from Field House	**Decision & Reasons Promulgated**
On 3rd August 2021	**On 16th September 2021**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SOHAIL RAYF KHAN
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms G Brown, of Counsel, instructed by Farani Taylor Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Pakistan born on 10th January 1985. He arrived in the UK on 16th July 2007 with leave to enter as a student. On 26th December 2019 he made a human rights claim. This application was refused in a decision dated 15th January 2020. His appeal against

the decision was allowed on human rights grounds by First-tier Tribunal Judge MR Oliver in a determination promulgated on the 25th November 2020. Permission to appeal was granted to the Secretary of State and I found for the reasons set out in my error of law decision at Annex A to this decision that the First-tier Tribunal had erred in law. I set aside the decision of the First-tier Tribunal but retained all findings bar the finding that the claimant had been lawfully present in the UK for a continuous period of ten years and so was entitled to settlement under paragraph 276B of the Immigration Rules. This I replaced with a finding that the claimant was continuously lawfully present for nine years and eight months from July 2007 to March 2017 only.

2. The matter comes before me now to remake the appeal. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules this hearing took place via Microsoft Teams, a format to which neither party raised objection. There were no significant issues of connectivity or audibility during the hearing. Ms Brown did not call evidence for the remaking hearing so it proceeded on the basis of submissions only.

Submissions – Remaking

3. In her skeleton argument and oral submissions Ms Brown argued, in summary, as follows. Ms Brown accepted that the claimant had not been lawfully present for 10 years in the UK so could not succeed in an appeal by reference to the Immigration Rules at paragraph 276B, but argued on a wider consideration under Article 8 ECHR that he was entitled to succeed for the following reasons.

4. She argued that applying the decision of the Upper Tribunal in R (on the application of Waseem & Others) v SSHD (long residence policy – interpretation) [2021] UKUT 0146 there was a residual discretion of the respondent under s.3 of the Immigration Act 1971 to do what was fair and just in the context of special circumstances, and that such circumstances exist in this case. She argued that the special circumstances are as follows. The application made by the claimant on 29th March 2017 was made within 14 days of the expiry of his leave so was in this sense in time as the amount of overstaying was not such that it would have prohibited a future grant of leave under the Immigration Rules; this application was never determined by the Secretary of State and was put on hold as a result of an ETS questionable marker for two and a half years; if the application had not been put on hold it would have been granted as the GCID notes indicate that he would otherwise have been found to qualify under paragraph 276B of the Immigration Rules by having ten years lawful residence; the 2017 application was only not determined due to the making of the December 2019 application (the refusal of which led to this appeal) which the claimant only made due to frustrations relating to the delay in decision-making; the Secretary of State should not be allowed to rely

upon her own error in relation to the ETS questionable marker hold decision or her own delays to deny the claimant a positive outcome; the claimant has been in the UK for 14 years and his wife has been here for 15 years and they have mixed faith/nationality relationship which might lead to some obstacles (if not very significant ones) or discrimination (if not harm) if they were forced to relocate; the claimant and his wife have a child born in February 2018 whose best interests must be considered and it should be considered that any difficulties her parents may have could negative impact on her if they were forced to leave the UK.

5. Mr Tufan, for the Secretary of State, relied upon the reasons for refusal letter dated 15th January 2020, the retained findings of the First-tier Tribunal and argued in oral submissions, in short summary, as follows.

6. It is not accepted that the claimant can qualify to remain on family life grounds by reference to the Immigration Rules because his wife is not a British citizen or settled in the UK, and because his child has not been present for seven years. It is not accepted that he qualifies to remain by reference to the private life Immigration Rules at paragraph 276ADE(1)(vi) as it is not accepted he can show very significant obstacles to integration in Pakistan, his country of nationality, as he lived most of his life in Pakistan, he has a degree and has worked in the UK. It is argued that there are no exceptional circumstances, which would result in unjustifiably harsh consequences for the claimant or his family, if they were not allowed to remain in the UK and which would thus make it correct to allow the appeal when considered more broadly with reference to Article 8 ECHR.

7. Mr Tufan argued that the 2017 application was properly superseded by the 2019 one. The claimant did not have ten years lawful residence as all accept. The GCID notes were not enough to constitute a claim to remain based on this being a special circumstance necessitating the use of the respondent's discretion to grant leave under s.3 of the Immigration Act 1971 to make a fair and just outcome. The GCID notes were not a decision but were just part of a decision-making process which was never enacted. There was no evidence, given the retained findings, that it would be harsh in any way for the claimant and his family to relocate to Pakistan or Mauritius and so his removal was a proportionate interference with his Article 8 ECHR rights.

Conclusions- Error of Law

8. The findings of the First-tier Tribunal that are retained are as follows. The claimant has a genuine and enduring relationship with his wife and child but does not qualify to remain on this basis under Appendix FM of the Immigration Rules as neither have any leave to remain. His wife is a Mauritian overstayer, and their child, who is also without leave to remain, was born on 9th February 2018 so has not been present in the UK for seven years. It was not accepted that the appellant and his wife

would face any harm from their families if they were to settle together in Pakistan or Mauritius, or would have very significant obstacles to integration in either country, or that his wife would have any problems due to her being born a Hindu and now being an atheist if they were to settle in Pakistan.

9. It was not argued before me that the claimant could succeed in this appeal by reference to any provision of the private life Immigration Rules. I find that he would not have very significant obstacles to integration in Pakistan, and cannot succeed by reference to paragraph 276ADE(1)(vi) of the Immigration Rules. It is of course a finding made at the error of law hearing that he had only been lawfully in the UK for nine years and eight months, and that his 2017 application was made after his s.3C leave had expired and so he was a open ended overstayer as defined by Hoque, and so could not succeed in any appeal by reference to paragraph 276B of the Immigration Rules. This was explicitly the starting point for Ms Brown.

10. At the hearing neither representative was able to explain the law relating to subsequent valid applications, and on what basis therefore the December 2019 application had cancelled out the March 2017 one, although both Mr Tufan and Ms Brown accepted that this was the normal Home Office practice. The law relating to this issue is in fact found in the Immigration Rules. Under paragraph 34BB(1) of the Immigration Rules it is stated that an applicant may only have one outstanding application for leave to remain at a time, and at paragraph 34BB(2) that an application submitted in circumstances where a previous application for leave to remain has not been decided will be treated as a variation of the previous application. This accords with what the claimant's legal representatives say in their cover letter (A1 of the respondents' bundle) and also with what the claimant says in his statement (page 3 of the 48 page bundle) about the matter: both say that the 2017 application was varied by the 2019 one. So whilst there seems to have been some confusion by a caseworker at the Home Office (in their letter of 15th January 2020 at page 6 of the 48 page bundle corrected in their letter of 24th January 2020 at page 12 of the 48 page bundle) I find that the application was varied and therefore expired on the making of the valid application in December 2019. I find that this fact was known to the claimant who was legally represented by solicitors at the time he made his December 2019 application, and was therefore what he and his legal representatives intended.

11. The question that remains is whether what is said in the GCID notes by a caseworker for the Secretary of State about the 2017 application being grantable on the basis of ten years lawful residence (which can only have been on the basis of an error of understanding or the exercise of residual discretion by the Secretary of State as the claimant was not in a position to acquire the necessary further lawful residence time to have ten years lawful residence as a result of his 2017 application on the basis of the law as clarified in Hoque as he was an

open ended overstayer) in September 2018 (see pages 55 -56 of the 94 page bundle) is a factor which notwithstanding the abandonment of that application by the claimant in favour of one made in December 2019 weighs in his favour. I find the submission to be essentially that it appears unfair, particularly perhaps to a lay person, that if a decision had been made at that point in time in September 2018 that he would have been granted indefinite leave to remain, and there was no good reason why a decision was not made at that time as the claimant's file had been put in a hold related to an "ETS questionable marker" for an ETS interview but this was never pursued by the Secretary of State. I find therefore that the submission is in essence that to avoid the operation of the immigration system appearing arbitrary some weight at least ought to be given in favour of granting the claimant that or at least some permission to remain now. I find that this is a factor that can be given some weight and that it goes to somewhat reduce the weight to be given to the public interest in maintaining immigration control and removing the claimant as a person who cannot fulfil the requirements of the Immigration Rules.

12. What must be decided now is whether the interference with the claimant's private life which removal represents is sufficient to outweigh that somewhat reduced public interest in the maintenance of immigration control. I remind myself that only little weight can be given to the claimant's private life ties with the UK as they have all been formed whilst he has been precariously and unlawfully present, applying s.117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002. That his ability to speak English and financial self-sufficiency (as born out by his bank statements and job offer) are neutral matters. I remind myself that there are no significant obstacles to relocation and no risk of harm for the claimant and his wife if they decide to live in Mauritius or Pakistan, as these are retained findings from the First-tier Tribunal. The best interests of their three year old child are a primary consideration, but I have no evidence which would lead me to conclude that her best interests go beyond being in the same country and in the care of her parents. Ultimately, weighing all of the evidence, although the public interest in maintaining immigration control is reduced by the history of this matter as revealed in the GCID notes, I do not find that the interference with the claimant's Article 8 ECHR rights that removal represents is disproportionate.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal allowing the appeal on human rights grounds.

3. I remake the appeal dismissing it on human rights grounds.

Signed: Fiona Lindsley Date: 4th August 2021
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision:

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Pakistan born on 10th January 1985. He arrived in the UK on 16th July 2007 with leave to enter as a student. On 26th December 2019 he applied for settlement under the long residence provisions at paragraph 276B of the Immigration Rules. This application was refused in a decision dated 15th January 2020. His appeal against the decision was allowed on human rights grounds by First-tier Tribunal Judge MR Oliver in a determination promulgated on the 25th November 2020.

2. Permission to appeal was granted by Judge of the First-tier Tribunal JM Holmes on 14th December 2020 on the basis that it was arguable that the First-tier judge had erred in law in calculating whether the claimant had ten years continuous lawful residence, as it was arguable the judge misunderstood the caseworker notes and failed to apply the law as found by the Court of Appeal in Hoque & Others v SSHD [2020] EWCA Civ 1357. It is arguable that the claimant had a period of overstaying of more than 28 days in the period 2012 to 2015, and that there was a period of overstaying of more than 28 days after the refusal of permission to appeal in relation to the first application for indefinite leave to remain on 16th March 2017 and thus the application which led to this refusal.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules this hearing took place via Skype for Business, a format to which neither party raised objection. There were no significant issues of connectivity or audibility during the hearing.

Submissions – Error of Law

4. Mr Tufan, for the Secretary of State, argued in the grounds of appeal and in oral submissions that the First-tier Tribunal had erred in law in finding that the claimant had accrued ten years continuous lawful presence in the UK. Although subject access notes do record that the claimant had acquired ten years lawful residence that was not a concession and ultimately the claimant was refused as after anxious scrutiny it was concluded that this was not the case. There is a lack of reasoning by the First-tier Tribunal as to how the claimant was continuously lawfully present in the period 2012 to 2015. The claimant succeeded in a limited way in his appeal on 28th July 2012 and as a

result was granted 60 days to find a further student sponsor, but he failed to do this within that period of time and only made a further application in 2015, which in turn was ultimately unsuccessful. Further the claimant became appeal rights exhausted on 16th March 2017 when he was refused permission to appeal to the Upper Tribunal and had another period of 4 months overstaying from this time up until the ten year anniversary of his entry on 16th July 2017.

5. Ms Jones submitted for the claimant that there was sufficient reasoning in the decision of the First-tier Tribunal that during the period July 2012 to March 2017 the claimant was continuously lawful but she accepted that in accordance with the decision of the Court of Appeal in Hoque & Others the claimant was not lawfully present between 16th March 2017 and 16th July 2017 and thus the First-tier Tribunal erred in law in that decision. She noted that the appellants in Hoque & Others had applied for permission to appeal to the Supreme Court against the decision of the Court of Appeal, and asked that it be made clear that she did not concede that the decision of the Court of Appeal was legally correct, although she understood that the Upper Tribunal was bound by that decision.

6. I indicated that I found that the First-tier Tribunal had erred in law as it was agreed by the parties that there was an error in failing to apply Hoque & Others to the period March 2017 and July 2017, and thus in failing to follow the decision of the Court of Appeal and in finding that the claimant was lawfully present in this time, and as a result erroneously finding that the claimant had ten years lawful presence in the UK. I therefore indicated that I would set aside the decision of the First-tier Tribunal allowing the appeal on this basis.

7. I asked if the parties agreed that we could remake the appeal forthwith as there was no factual remaking to undertake. However Ms Jones said that she wanted to adjourn this hearing as she believed that it was relevant that the Secretary of State had delayed in decision making as she had investigated whether the claimant had committed deception by cheating in a TOEIC test, and although it was agreed no allegation of TOEIC cheating was ever put to the claimant she contended that this had some relevance to the remaking of the human rights appeal, and she wished to draft a skeleton argument setting out her reasoning on this point. As the hearing had been listed for an error of law hearing only I agreed to the request although I could not understand the submission.

Conclusions- Error of Law

8. It is clear that the claimant had leave to remain as a student from 16th July 2007 until 31st March 2009.

9. The First-tier Tribunal found that the claimant made an application in time as he submitted his new application within 28 days of the expiry

of his student leave on 31st March 2009, as this was done on 15th April 2009, and because although the application was refused his appeal was allowed his lawful continuous leave to remain continued until 17th August 2011. The claimant made a new application on 14th August 2011, in time, which thus extended his leave again until the refusal of 21st March 2012. This leave was extended under s.3C as the claimant successfully appealed again and was ultimately granted 60 days to find an alternative sponsor.

10. The First-tier Tribunal found that the crucial period to consider was whether the claimant had leave to remain from July 2012 to August 2015. The immigration history of the claimant is very confusing in this time, however I find that the First-tier Tribunal has provided sufficient reasoning and not made an irrational decision that the claimant was continuously lawfully present in the period 16th July 2007 to 16 March 2017. The immigration history in the decision under challenge seems to indicate that when the student application made in time in August 2011 was refused with a right of appeal which was properly exercised an "application was open for reconsideration", and the subject access notes set out at paragraph 22 of the decision indicate that this reconsideration continued until August 2015, and so I find that it was open to the First-tier Tribunal to conclude, as is done at paragraph 25 of the decision, that the refusal of 17th June 2015 which was followed by a series of in time appeals culminating in the claimant becoming appeal rights exhausted on 16th March 2017, was to be seen as a period of continuous lawful residence.

11. With respect to the period 16th March 2017 to 16th July 2017 (the final crucial period of 4 months up until the ten year anniversary of the claimant's entry on 16th July 2017) I find that the First-tier Tribunal has erred in law however in finding that the claimant continued to be lawfully resident. The GCID notes conclude three times that the claimant qualifies on the basis of 10 years lawful residence, see the notes of 6th September 2018, 20th September 2018 and 28th August 2019. It was entirely permissible for the First-tier Tribunal to give weight to this evidence. However the First-tier Tribunal was obliged to apply the decision of the Court of Appeal in Hoque & Others, which the First-tier Tribunal was clearly aware of and provided the parties an opportunity to make post-hearing submissions upon, as it was determined within days of the hearing as is set out at paragraphs 16 and 17 of the decision, although ultimately neither assisted the First-tier Tribunal by doing so.

12. I find that there was a failure by the First-tier Tribunal to reason why it concluded that the period after 16th March 2017 was lawful when the next application was made on 29th March 2017, and thus unequivocally when the claimant was an overstayer, his s.3C leave having expired on 16th March 2017, and given that the judgement in Hoque & Others found that the period of ten years lawful residence required at paragraph 276B(a) could not be acquired simply by

making a further application following a previous unsuccessful one after the expiry of all s.3C leave by virtue of this new application being made within the grace period of 14 days (provided for by paragraph 39E of the Immigration Rules). The facts of the appellants in Hoque & Others, i.e. that of open ended rather than bookended overstayers, as set out at paragraph 20 of the judgement, are materially entirely the same as for this claimant. The judgement of the Court of Appeal is clear that the fact of a current unsuccessful application being made within 14 days of the previous expiry of s.3C leave does not enable the claimant to extend his lawful residence so as to acquire ten years lawful residence and thus qualify under the Immigration Rules at paragraph 276B of the Immigration Rules.

13. I preserve all of the findings of the First-tier Tribunal bar the finding that the claimant had been lawfully present in the UK for a continuous period of ten years and so was entitled to settlement under paragraph 276B of the Immigration Rules. This is replaced with a finding that the claimant was continuously lawfully present for nine years and eight months from July 2007 to March 2017 only. There was no Rule 24 notice or cross-appeal challenging the legality of any of the other findings by the claimant so all other findings stand.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal allowing the appeal on human rights grounds.

3. I adjourn the remaking of the appeal.

Directions

1. The claimant will file with the Upper Tribunal and serve on the Secretary of State a skeleton argument 10 days prior to the remaking hearing.

Signed: Fiona Lindsley Date: 13th April 2021
Upper Tribunal Judge Lindsley