Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18233/2019

THE IMMIGRATION ACTS

Heard at : Field House
On : 23 November 2021

Decision & Reasons Promulgated
On: 02 December 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

HASAN MOHAMMAD MEHEDI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Gill QC, instructed by Haque & Hausmann Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 22 October 2019 refusing his human rights application for indefinite leave to remain on the basis of his family and private life in the UK and ten years' continuous lawful residence.

2. The appellant is a citizen of Bangladesh, born on 25 December 1990. He arrived in the UK on 12 September 2009 with leave to enter as a Tier 4 student valid until 31 December 2012. He was granted various periods of further leave as a Tier 4 student until 9 May 2015 followed by a period of leave as a Tier 2 General Migrant until 13 June 2018

which was subsequently curtailed to expire on 3 May 2016. The appellant then applied in time for further leave to remain outside the immigration rules and subsequently varied that application to one for leave as a Tier 1 Entrepreneur Migrant. That application was refused on 27 March 2019 and then refused again on 8 May 2019 following an administrative review. In a further administrative review the refusal decision was maintained, on 18 June 2019.

3. On 27 June 2019 the appellant applied for indefinite leave to remain outside the immigration rules, but included in the covering letter a claim that he was eligible for indefinite leave to remain within the rules on the basis of his long residence in the UK, with reference to paragraph 276B of the immigration rules.

4. The appellant's application was refused by the respondent on 22 October 2019. The respondent noted that the appellant's leave had been extended by section 3C of the Immigration Act 1971 and that that leave had expired on 18 June 2019. The respondent considered, therefore, that the appellant did not meet the requirements of paragraph 276B of the immigration rules on the basis of 10 years' continuous lawful residence in the UK as he had accrued only 9 years and 9 months continuous lawful residence, from 12 September 2009 to 18 June 2019. Although he had made a claim within 14 days of the expiry of his leave, paragraph 39E did not assist him as he had submitted his new application when he did not hold lawful leave. The respondent then went on to consider the appellant's application for settlement outside the immigration rules but concluded that his private life ties were not so significantly compelling as to warrant remaining in the UK on such a basis. The respondent noted that the appellant's wife was also a Bangladeshi national and considered that they could therefore both return to Bangladesh together and continue their family life there. The appellant's application was therefore also refused under paragraph 322(1) on the basis that variation of leave was being sought for a purpose not covered by the immigration rules. The respondent considered further that the requirements in Appendix FM could not be met, that there were no very significant obstacles to the appellant's integration in Bangladesh for the purposes of paragraph 276ADE(1)(vi) and that there were no exceptional circumstances rendering refusal a breach of Article 8 on the basis that it would result in unjustifiably harsh consequences to the appellant.

5. The appellant appealed against the respondent's decision and his appeal was heard in the First-tier Tribunal on 31 January 2020 by Judge Bowler. Before the judge it was accepted that the appellant could not argue that he was automatically entitled to indefinite leave to remain, in light of the Court of Appeal judgment in Ahmed, R (on the application of) v The Secretary of State for the Home Department [2019] EWCA Civ 1070. However it was argued that discretion should have been exercised in the appellant's favour, given his length of lawful residence in the UK and that it should be accepted that there would be very significant obstacles to his integration in Bangladesh in particular considering that his wife was expecting their first child. The appellant also relied upon the respondent's Guidance in relation to long residence. Judge Bowler, applying the case of Masum Ahmed, found that the period of overstaying could not be converted into lawful leave and that the period of 18 June 2019 to 27 June 2019 was not a period of lawful residence. She found, further, that the respondent's guidance could not avail the appellant and that the

appellant could not succeed under paragraph 267B. The judge considered further that the appellant could not meet the requirements of Appendix FM and that he could not demonstrate very significant obstacles to integration in Bangladesh for the purposes of paragraph 276ADE. The appellant's medical condition of hepatitis B was considered, but it was concluded that he could access relevant treatment in Bangladesh. The judge found that there were no exceptional circumstances rendering removal unjustifiably harsh and that the respondent's decision was proportionate. The judge accordingly dismissed the appeal on the basis that the respondent's decision did not breach the appellant's Article 8 human rights.

6. The appellant sought permission to appeal to the Upper Tribunal on three main grounds: firstly, that he could succeed under the Rules and that Masum Ahmed was wrongly decided; secondly, that Masum Ahmed did not preclude an applicant from succeeding under the respondent's long residence guidance (version 15.0) published on 3 April 2017 and that the appellant's case had not been assessed under the guidance; and thirdly, that the judge had adopted a confused approach to the test under Article 8, wrongly applying a test of 'unduly harsh' rather than considering a reasonableness test, that she had failed to apply Article 8 jurisprudence in the context of near-misses, that she had failed to lower the weight to be given to the public interest appropriately, that she had erred by considering she was required to give reduced weight to the appellant's family and private life and that she was wrong to conclude that the appellant's removal was not disproportionate.

7. Permission to appeal was refused by the First-tier Tribunal. In a renewed application to the Upper Tribunal the appellant relied upon the fact that it had since been accepted by the respondent that Masum Ahmed was wrongly decided in part and also the fact that a decision was pending in the Court of Appeal in the cases of Hoque and others and in the Upper Tribunal in the case of Waseem involving three linked judicial review applications, all raising similar issues.

8. Permission to appeal was then granted by the Upper Tribunal in a decision dated 10 September 2020, with particular reference to the fact that the expected judgment in Hoque and others would be relevant to the appellant's appeal.

9. That decision was, for some reason, not sent out to the parties until 27 July 2021. In a rule 24 response dated 13 August 2021, the respondent opposed the appellant's appeal, submitting that the appellant fell within the category of applicants described by the Court of Appeal in Hoque & Ors v The Secretary of State for the Home Department (Rev 1) [2020] EWCA Civ 1357 as 'open-ended' overstayers and therefore could not rely upon the disregard in paragraph 39E of the immigration rules to cure the fact that he was an overstayer. The respondent submitted further that the decision was not undermined by the relevant Home Office guidance and that the First-tier Tribunal Judge had correctly assessed the appellant's Article 8 claim which was bound to fail in any event.

10. The appellant's appeal was subsequently adjourned for various reasons and, in response to directions from the Upper Tribunal, the appellant served amended grounds of appeal dated 4 October 2021 and the respondent served a further rule 24 response dated

13 October 2021 relying upon the decision of the Presidential panel in R (on the application of Waseem & Others) v Secretary of State for the Home Department (long residence policy - interpretation) [2021] UKUT 146.

11. The matter then came before me.

Hearing and submissions

12. Mr Gill accepted that, in light of the judgment in Hoque, there was nothing further he could say in regard to ground one, which challenged the decision under the immigration rules. He observed that, whilst the Supreme Court had refused permission to appeal, that was not on the basis of there being no arguable errors in the judgment, but on the basis that the Secretary of State had advised that the immigration rules were to be amended.

13. As for ground two, the challenge relating to the Home Office long residence guidance, Mr Gill referred to the fact that in Masum Ahmed the applicant did not argue the guidance as a separate issue, whereas the applicants in Hoque did. The Court of Appeal did not go on to determine the case on that basis in Hoque, whereas in Masum Ahmed the Court accepted that a person might succeed under the guidance. Mr Gill submitted that First-tier Tribunal Judge Bowler had not dealt with the guidance because she wrongly believed that the decision in Masum Ahmed covered both the rules and the guidance. He submitted that that failure to consider the guidance was a material error, despite the judgment in Waseem, because Waseem was wrongly decided. Waseem effectively said that the guidance was the same as the immigration rules. It failed to recognise that the purpose of the guidance was to explain how discretion should be exercised and that it adopted a more open-ended approach to discretion. He submitted that a policy had to be flexible otherwise it was unlawful and the Tribunal was therefore wrong in Waseem as it did not appreciate the purpose and general thrust of the guidance.

14. Mr Gill submitted that the general thrust of the policy was that, provided applicants behaved lawfully, periods of overstaying were not to be held against them for the purpose of deciding entitlement to remain on the basis of long residence. The policy was not requiring applicants to have leave to remain for the relevant period, but only to have acted lawfully for ten years. That was apparent from the fact that the period could include temporary admission and that an application could be made 28 days late. Mr Gill referred me to the different versions of the guidance over the past years which showed that the aim of the policy was broad. He submitted that the Tribunal in Waseem did not appear to appreciate that as it simply linked the guidance to the same approach as the rules. As further evidence that the Tribunal in Waseem got it wrong, Mr Gill referred to the non-exhaustive list of examples given in the current guidance, version 15, of where discretion could be exercised in an applicant's favour. He referred in particular to example four at page 17 of the guidance which he submitted was wrongly interpreted by the Tribunal in Waseem at [224] and [225] and which showed that a person could be an overstayer at the time they submitted a long residence application.

15. As for the third ground, Mr Gill submitted that the First-tier Tribunal Judge had erred in law in relation to Article 8. He submitted that the Court of Appeal in Hoque was

very critical of the lack of clarity of the rules and that where the rules and policy were unclear, reduced weight must be given to the public interest. It was therefore difficult for the Secretary of State to state that there was a strong public interest in removing the appellant. He submitted, with regard to the Article 8 assessment, that Article 8 was clearly engaged, but that the decision was not in accordance with the law owing to the failure to exercise discretion properly. Even putting that aside, there was a failure, when assessing proportionality, to identify any strong public interest in removing someone from the UK who had been here for more than ten years. He submitted that the public interest was in fact very weak, given the general thrust of the policy in the case of people residing and behaving properly in the UK for ten years. When considered along with the additional factors of family members, children, health issues and Covid, the Secretary of State was not able to discharge the burden of showing that the decision was proportionate.

16. Mr Gill went on to identify five different bases upon which the judge had erred in her Article 8 assessment, in addition to the errors identified above. Firstly, she had applied an 'unduly harsh' test, which was not the correct test under GEN.3.2. She had therefore misapplied the rules in GEN.3.2. Secondly, the judge had failed to apply the Article 8 jurisprudence in the context of a near miss. Thirdly, she had failed to reduce the public weight on the basis of the shortfall of two to three months in the appellant's ten years continuous lawful residence, his lawful behaviour and the lack of clarity in the rules and failed to recognise that the public interest in removing the applicant was almost negligible. Fourthly, the judge was wrong to consider that she was 'required' to give little weight to the appellant's private life, when section 117B of the Nationality, Immigration and Asylum Act 2002 only said that 'due regard' should be given to that and that little weight 'should' be given. The correct approach was to consider all the circumstances. Fifthly, the judge had failed to take account of relevant factors such as the small shortfall in the appellant's ten years lawful residence, his strong attachment to the UK and the strong roots he had put down, his strong family life and the fact that the Secretary of State had facilitated the entry of his wife, his reasonable expectation of being granted settlement after ten years, the practical reality of removal when the appellant's wife was pregnant and the impact of coronavirus. With regard to the latter, Mr Gill submitted that the respondent must have known, in early 2020, that coronavirus was on its way. The likely effect of the pandemic should have been drawn to the attention of the First-tier Tribunal and the respondent had therefore failed in its duty in that regard. Mr Gill referred to a recent statement from the appellant about the impact of coronavirus in Bangladesh and submitted that that was relevant to the error of law.

17. Mr Gill submitted that the decision of First-tier Tribunal Judge Bowler should be set aside and re-made by allowing the appeal on Article 8 grounds, taking into consideration the difficulties in Bangladesh because of the virus and the government advice not to travel there at the current time.

18. Ms Everett then made her submissions. She relied on the rule 24 response of 13 October 2021. With regard to the second ground, she asked me to follow the decision in Waseem and briefly addressed the example number four in the guidance, as referred to by Mr Gill. As for the third ground, she submitted that whilst the judge had wrongly cited an 'unduly harsh' test, there was nothing to suggest that she had applied the wrong test. As

for the submission regarding the duty of disclosure in regard to Covid, Ms Everett submitted that it was difficult to see what the respondent could have done as it was not known at that time how Bangladesh would be affected, and the judge could not have unduly speculated.

Discussion

19. Mr Gill properly accepted that he was unable to pursue the first ground, namely a challenge to the decision under paragraph 276B of the immigration rules, given the judgment in Hoque which made it plain that the appellant, as an open-ended overstayer, could not succeed.

20. As for the second ground, there is nothing in Mr Gill's submissions which could possibly lead me to depart from the decision in Waseem. I appreciate the fact that the decision is not binding on me. However, it is powerfully persuasive, particularly being a judgment of a presidential panel, and I am wholly unpersuaded by Mr Gill's attempt to undermine the decision. The point made by Mr Gill, in seeking to persuade me to depart from the findings in Waseem, was that the decision failed to appreciate and understand the purpose of the long residence guidance and aligned the guidance with the immigration rules rather than acknowledging the flexibility of approach that it advocated. I make two main responses to that point. Firstly, the panel in Waseem clearly had a full and proper understanding of the purpose and effect of the guidance and was under no misconception as to its scope as compared with the limitations of the immigration rules. Secondly, I do not agree with Mr Gill's interpretation of the 'thrust' of the policy.

21. With regard to the first response, I refer to [230] to [238], where the panel in Waseem summarised its conclusions following an assessment of the various policies over the years and considered the thrust of those policies, concluding at [230] that:

> "In summary, an analysis of the various versions of the long residence policy and its earlier incarnation of the long residence concession supports the respondent's contention that the core attribute of the 10 year route has always been the requirement to have 10 years' continuous lawful residence. Paragraph 39E and predecessor provisions are a separate issue, relating to the effect on continuity of residence of out of time applications. To conflate that limited concession, so that residence 'of any other legality' is treated the same as continuous lawful residence, would undermine the very basis of the 10 year route. The timeliness of repeated applications, categorised as a commitment to attempt to comply with the Rules and as demonstrating ties to the UK, ignores the enduring purpose of the 10 year route, which is to recognise those who have acquired 10 years' continuous *lawful* residence."

22. The panel gave full consideration to the discretion afforded by the policy and to the exceptions which the policy permitted, noting at [231] the effect and the purpose of those exceptions. [235] to [238] of Waseem record the panel's consideration of the submissions made in regard to the limitations of the discretion, similar to the points made by Mr Gill before me, and provide a detailed response, whereby the panel observed in particular at [237]:

> "… Whilst we note and accept Mr Jafferji's submission that there has been an expansion beyond that 10 year residence period, at its core, it remains the cornerstone. Were that cornerstone to be removed and replaced with discretionary assessments of individual circumstances, unrelated to the specific exemptions that have been outlined and published by the respondent over many years, it that would, in our view, inevitably result in a form of a 'sliding scale,' rather than a distinction between long residence on the 10 year route and other applications such as the 20 year route or applications for leave to remain outside the Rules on the basis of right to respect for a person's private or family life. Such a 'sliding scale' would undermine the very purpose of the 10 year route, the recognition of a specified period of lawful residence."

23. At [240] the panel considered the question of residual discretion and concluded:

> "…we agree that while there is some residual discretion, the application of it to disregard the core attribute of continuous lawful residence, would, by analogy to the points-based system, make the long residence policy unworkable, and would result in the 'sliding scale' of circumstances to which we have already referred. In the case of Kalsi, the applicant had referred (at [57]) to a residual discretion to do what was fair and what 'justice required,' in the context of R (Mehta) [1975] 2 All ER 1087, and 'special circumstances'. The applicants' circumstances are that they are overstayers who applied under the 10 year route substantially earlier than 10 years; and upon their applications being rejected, simply made swift further paid applications. We agree with Mr Harland's submission that to the extent there remains a residual discretion, there are no such 'special circumstances' in the applicants' cases."

24. Accordingly, I disagree entirely with Mr Gill's suggestion that the panel in Waseem failed to distinguish between the rules and the policy and failed to consider the discretion and flexibility afforded by the policy. I disagree with his suggestion that the panel did not understand the thrust of the policy.

25. That then leads me to the second point, namely Mr Gill's interpretation of the thrust of the policy which he submitted was that, provided applicants behaved lawfully, periods of overstaying were not to be held against them for the purpose of deciding entitlement to remain on the basis of long residence. However, as the panel found in Waseem, the purpose of the policy was not to benefit overstayers who had applied under the ten year route, but it was, and had always been throughout its earlier versions, at the core of the policy that there was a requirement to have ten years' continuous lawful residence. The policy was never intended to benefit 'open-ended' overstayers.

26. In so far as Mr Gill relied upon an example given within the policy, example 4 at page 17 of the long residence guidance, also referred to by McCombe LJ at [92] of Hoque, as showing that open-ended overstayers were able to benefit from the policy, I find his understanding of that example to be misconceived. Whilst it was his submission before me that the panel in Waseem mischaracterised the example by reciting it in a way which read words into it that were not there – and he gave that as a further reason to conclude that the decision in Waseem was wrong – it is in fact his own interpretation that is wrong. The example falls within a section entitled "examples of gaps in lawful residence" which is plainly concerned with gaps within book-ended periods of residence and there can be no

doubt that the interpretation relied upon by the panel in Waseem at [224] and [225] was the correct one.

27. Indeed Mr Gills' categorisation of the appellant's immigration history as being one which the policy intended to benefit is undermined by the observations made by the Court of Appeal in Hoque, by Underhill LJ at [50]:

> "The case of open-ended overstaying is … an essentially different situation from one where the application has in fact been granted. It is also one that is capable of being abused, since an applicant could in principle make a wholly unfounded application as he or she approached the end of the ten-year period and count on the time taken to determine it (perhaps prolonged by a variation) in order to get to the point where an application under paragraph 276B could be made. The facts of the present cases illustrate how that could be done, though of course I express no view about the merits of the particular applications on which the Appellants rely… There is a plain difference between the situations where an applicant has attained ten years' residence with leave and one where they have attained it without leave, albeit with a pending application, and it is in my view reasonable for the Secretary of State to treat the two situations as distinct."

and by Dingemans LJ at [103]:

> "The appellants' approach would mean that any applicant who had ever had leave to enter the UK could make serial unsuccessful applications for further leave to remain, so long as the applications were made promptly after notification of the last unsuccessful application, until they had accumulated 10 years residence, and then make a successful application for leave to remain pursuant to paragraph 276B. The chronologies in the individual appeals show that after leave to remain had expired or been curtailed a further application had been made, and it is the time taken by these repeated applications which the appellants say counts to the 10 year period. However difficult it is to interpret the provisions in paragraph 276B (and the way in which the exceptions have been added on to paragraph 276B(v) have made the Court's task unnecessarily difficult) this seems to me to be a construction which defies reason because it would sanction the making of numerous repeated applications until 10 years had passed."

28. As Underhill LJ made clear that he expressed no view about the merits of the particular applications on which the appellants relied, so too I cannot express any view on the merits of the various applications made by the appellant before me. However, it is undeniably the case that he has not had any proper basis of stay in the UK other than through section 3C leave since May 2016. His stay in the UK for the past five years has been extended through the making of successive unsuccessful applications since the curtailment of his Tier 2 leave at that time and the panel in Waseem properly found that the policy was not intended to assist a person in such circumstances.

29. Whereas Mr Gill submitted that Judge Bowler had failed to make a lawful assessment of the appellant's argument under the guidance, it is clear that that is not the case. The judge gave detailed consideration to the submissions made by Mr Gill about the discretion afforded under the guidance and the findings that she made, albeit with

reliance upon the Court of Appeal's judgment in Musam Ahmed, were nevertheless entirely consistent with the decision in Waseem. The judge properly found that the appellant could not benefit from any discretion under the guidance and accordingly I do not find the second ground to be made out.

30. I turn next to the third ground, namely the judge's assessment of Article 8 and again find no merit in this ground. It was Mr Gill's submission that reduced weight ought to have been given to the public interest in removing the appellant owing to the lack of clarity in the rules and the guidance. Having regard to my views expressed above, and also noting the findings of the panel in Waseem at [246] in regard to a similar argument, I reject that submission. Whilst the Court of Appeal in Hoque criticised the drafting of paragraph 276B, the effect of the rule is clear, as is the ambit of the guidance. For the same reason I reject Mr Gill's submission that the respondent's decision to refuse the appellant's human rights claim was not in accordance with the law.

31. As for the more specifically case-related challenges to the judge's finding, I find no merit in the assertion that the judge adopted an incorrect approach when considering exceptional circumstances under GEN.3.2. I agree with Ms Everett that, whilst the judge incorrectly referred to "unduly harsh" consequences in [57], [58] and [59] of her decision, there was nothing in her decision to suggest that she applied the wrong test or that she was considering any question other than whether there were exceptional circumstances which would render the refusal of leave a breach of Article 8 owing to unjustifiably harsh consequences for the appellant or his family. Indeed it is clear from [43] that the judge correctly directed herself on that test and, further, that she applied the guidance in the relevant caselaw. As for the second point made in the third ground, I do not accept that the judge failed to appreciate the relevance of a 'near-miss' in assessing proportionality, when it is clear from her findings at [57] that she did. Her approach at [57] was entirely consistent with the jurisprudence cited by Mr Gill at [37] and [38] of his grounds. The third point in ground three is essentially a reiteration of the point already addressed above and, as already stated, I find no merit in Mr Gill's assertion that the public interest should be reduced by a lack of clarity in the rules or the guidance. Neither do I consider that the appellant's history of making unsuccessful applications to extend his leave since 2016, albeit in time, is a reason for the public interest to be reduced and I certainly find no proper basis for Mr Gill's assertion that the public interest in removing the appellant is negligible. Indeed I refer back to the comments of Underhill LJ and Dingemans LJ in Hoque, as quoted at [27] above.

32. Likewise I find no merit whatsoever in the criticisms in the fourth part of ground three of the judge's consideration of the public interest factors in section 117B of the NIAA 2002 at [51] to [54] of her decision. There was nothing inconsistent with section 117B(4) and (5) in the judge's consideration at [54] that she was required to give little weight to the appellant's private life and neither was she in error in reducing the weight to be given to the appellant's family life for the reasons given at [51] to [53].

33. As for the fifth part of the third ground, the various subsections therein are simply repetitions of points previously made in the grounds. The judge had full regard to the appellant's circumstances in and ties to the UK, as well as those of his wife and child in the

UK, and gave cogent reasons for according the wight that she did to those matters. She gave full consideration to the length of the appellant's residence in the UK and the basis of his residence here and she considered the circumstances to which the family would be returning in Bangladesh, applying the appropriate weight to the public interest. As for the assertions made in the grounds and the submissions made before me by Mr Gill in relation to the coronavirus and the impact of that on the appellant and his family if removed to Bangladesh, that was not a matter before the judge and there cannot be an error in law in failing to consider it. For the same reason I do not consider that the statement now produced in the appellant's name (which is more akin to submissions) is of any relevance in considering whether the judge erred in law in her decision. I reject Mr Gill's submission as to the Secretary of State's duty to inform the Tribunal about the impending pandemic, when the full extent of its impact was not known at that time and could not have been foreseen. As Ms Everett submitted, any consideration of how that would affect the appellant and his family in Bangladesh, and how that would impact upon the appellant's wife during her pregnancy, would have been pure speculation. I find no merit in Mr Gill's assertion that that could have affected the judge's proportionality assessment. The proportionality assessment was made on a full and detailed consideration of the relevant information and evidence available at the time and the judge's conclusion in that regard was entirely open to her on the evidence before her.

34. For all of these reasons I find the appellant's grounds to be without any merit. Contrary to Mr Gill's assertion, the appellant's Article 8 claim was not a strong one and the judge's decision was one that she was perfectly entitled to reach. I do not find any errors of law in her decision and I uphold the decision.

DECISION

35. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed: *S Kebede* Dated: 25 November 2021
Upper Tribunal Judge Kebede