Neutral Citation Number: [2020] EWCA Civ 1357

Case Nos: C2/2019/0292
C2/2019/0646
C2/2019/2522
C4/2020/0287
C4/2020/0777

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM:
(in *Hoque*, *Kabir* and *Mubarak*)
THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Rintoul
Upper Tribunal Judge Craig
Upper Tribunal Judge Gill
(in *Arif*)
THE HIGH COURT OF JUSTICE (QUEEN'S BENCH DIVISION)
Elisabeth Laing J and Saini J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2020

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE McCOMBE
and
LORD JUSTICE DINGEMANS

- -

Between :

ZIAOUL HOQUE	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
MOHAMMED ABDUL MUBARAK	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

SOBEL KABIR **Appellant**
- and -
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

MUHAMMAD ARIF **Appellant**
- and -
UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER) **Respondent**
- and -
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Interested Party**

- -
- -

Mr Manjit Gill QC and **Mr Edward Nicholson** (instructed by **City Heights Solicitors**) for the **Appellant** in ***Hoque***
Mr Michael Biggs (instructed by **Capital Solicitors LLP**) for the **Appellant** in ***Kabir***
Ms Stephanie Harrison QC, **Mr Zainul Jafferji** and **Mr Arif Rehman** (instructed by **Lawfare Solicitors**) for the **Appellant** in ***Arif***
Mr Zane Malik (instructed by **Syed Shaheen & Partners**) for the **Appellant** in ***Mubarak***
Ms Lisa Giovannetti QC and **Mr Ben Keith** (instructed by **the Treasury Solicitor**) for the **Respondent in *Hoque*, *Kabir*** and ***Mubarak*** and **the Interested Party in *Arif***

Hearing dates: 28th & 29th July 2020
- -

Approved Judgment

(revised version 23 October 2020)

Lord Justice Underhill:

INTRODUCTION

1. There are before us five applications for permission to appeal (though two of them are in the same case), which have been directed to be heard together on an *inter partes* basis, with the appeal to follow if permission is granted. For convenience I will refer to them all as appeals and to the applicants as Appellants. The appeals were directed to be heard together because the factual situation which gives rise to them has generated a large number of claims in the tribunals and several applications for permission to appeal to this Court. The precise nature of the orders appealed against in each case and the procedural routes by which they come before the Court vary. The details appear in the judgment of Dingemans LJ, and I need not recapitulate them here.

2. Three of the Appellants – Messrs Hoque, Kabir and Mubarak – are nationals of Bangladesh. The fourth, Mr Arif, is a national of Pakistan. They all came to this country over ten years ago with leave to enter as students and have had further grants of leave to remain since then. They claim to be entitled to indefinite leave to remain ("ILR") on the basis of long residence. The Secretary of State does not accept that they are so entitled, essentially because at the time of their applications their leave to remain had expired and they were overstayers.

3. In three of the appeals – *Hoque*, *Kabir* and *Arif* – the primary issue is whether, as they claim, the Appellants are entitled to ILR under the long residence provisions of the Immigration Rules. That turns on the correct interpretation of paragraph 276B of the Rules. That is an issue of law the outcome of which will necessarily be determinative of the rights of all applicants for ILR in the same circumstances. By way of alternative they contend that the refusal of ILR is in breach of their rights under article 8 of the European Convention on Human Rights. In the fourth appeal – *Mubarak* – the Appellant relies only on article 8. The article 8 issues are case-specific and do not in themselves raise any issue of principle.

4. Mr Hoque has been represented before us by Mr Manjit Gill QC, leading Mr Edward Nicholson; Mr Kabir by Mr Michael Biggs; Mr Mubarak by Mr Zane Malik; and Mr Arif by Ms Stephanie Harrison QC, leading Mr Zainul Jafferji and Mr Arif Rehman. The Secretary of State has been represented by Ms Lisa Giovannetti QC, leading Mr Ben Keith. The quality of both the written and the oral submissions was high. I should also pay tribute to the care with which the core bundles and the bundle of authorities were prepared.

THE PARAGRAPH 276B ISSUE

PRELIMINARY

5. I should by way of preliminary summarise the circumstances in which an application for ILR on the basis of long residence will typically be made. The applicant will have come to this country with limited leave to enter, typically as a student, and will have then been granted successive further limited periods of leave to remain, usually either

for further study or as a tier 1 or tier 2 migrant under the points-based system. They will have been resident in the UK for at least ten years (though, as will appear, the application is sometimes made in anticipation of the actual anniversary).

6. In the most straightforward case leave for those further or extended periods will have been granted before the expiry of the previous period of leave. But very commonly that will not be the case, because even if the application is made some time before the end of the period the current leave may expire before the Home Office makes a decision (or before the expiry of the applicable review and appeal processes if the application is refused). That situation is addressed by section 3C of the Immigration Act 1971, which provides (in summary) that in such a case leave will be automatically extended until 14 days after the decision is made (or any right of review or appeal has been exhausted). It is important to appreciate that section 3C only operates where the application for further leave is made before the expiry of the current period ("in time"). If it is made after the expiry of the current period, the application may in due course be granted, but during the intervening period the applicant will have no leave and will be an overstayer.

THE RELEVANT RULES

7. Paragraphs 276A-276D of the Immigration Rules are headed "Long Residence". Paragraph 276A contains certain definitions applicable to those paragraphs (and also to paragraphs 276ADE and 399A). Paragraphs 276B-276D constitute the primary operative provision. Paragraph 276B is headed "Requirements for indefinite leave to remain on the ground of long residence in the United Kingdom". Paragraph 276C provides that ILR may be granted if the Secretary of State is satisfied that "each of [those requirements] is met"; and paragraph 276D provides if she is not so satisfied leave is to be refused.

8. Paragraph 276B provides (so far as material for our purposes):

> "The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i) (a)[1] he has had at least 10 years continuous lawful residence in the United Kingdom.
>
> (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, … and
>
> (iii) the applicant does not fall for refusal under the general grounds for refusal.

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1 There was once a sub-sub-paragraph (b), but when it was removed (in October 2012) the (a) was confusingly left in place.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom … .

(v) [A] the applicant must not be in the UK in breach of immigration laws, [B] except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. [C] Any previous period of overstaying between periods of leave will also be disregarded where –

(a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or

(b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied."

I have inserted the letters [A]-[C] before each of the elements in sub-paragraph (v) so as to make subsequent reference to them easier.

9. To anticipate, these appeals primarily focus on the effect of sub-paragraph (v) of paragraph 276B. I will have to analyse it more fully later, but at this stage it is important to note that it consists of the primary "requirement" ([A]), followed by provision for two circumstances in which periods of overstaying may be "disregarded" ([B] and [C]), the first of which relates to "*current* … overstaying" and the second to "*previous* … overstaying *between periods of leave*". Those two kinds of overstaying were referred to in the argument before us as, respectively, "open-ended" and "book-ended" overstaying. I should also explain that the distinction under element [C] based on the date of the previous/further application reflects the fact that as from 24 November 2016 the previous general policy under the Rules of disregarding periods of overstaying of under 28 days was abandoned and a regime providing for different kind of disregard ("the paragraph 39E regime") was introduced.

10. Some of the terms used in paragraph 276B are defined either in paragraph 276A or in paragraph 6, which contains definitions applicable to the Rules generally[2]. For present purposes I should set out three definitions.

11. First, the two elements in the phrase in sub-paragraph (i) "continuous lawful residence" are defined in paragraph 276A as follows (so far as relevant):

[2] I have to say that paragraph 6 contains over a hundred definitions but they are not in alphabetical order, which makes it very laborious to find out whether a term used in the Rules is a defined term, even if it occurs to the user to look. The two definitions which I set out below, "in breach of immigration laws" and "overstaying", come respectively between "working illegally" and "adequate"/"adequately" and between "a period of imprisonment" and "intention to live permanently with the other". If there is any rhyme or reason in this it escapes me.

> "(a) 'continuous residence' means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that … [I need not set out the provisos].
>
> (b) 'lawful residence' means residence which is continuous residence pursuant to:
>
> (i) existing leave to enter or remain; or
>
> (ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or
>
> (iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain."

In these appeals only head (i) of the definition of "lawful residence" is material, but I have included (ii) and (iii) for completeness. It is common ground before us that the phrase "existing leave to enter or remain" in (b) (i) includes leave extended by section 3C of the 1971 Act; and that seems plainly correct.

12. Second, the phrase "in breach of immigration laws" in sub-paragraph (v) is defined in paragraph 6 as meaning "without valid leave where such leave is required, or in breach of the conditions of leave".

13. Third, the word "overstaying" which appears in sub-paragraph (v) is defined in paragraph 6 as meaning that

> "the applicant has stayed in the UK beyond the latest of:
>
> (i) the time limit attached to the last period of leave granted, or
>
> (ii) beyond the period that his leave was extended under sections 3C or 3D of the Immigration Act 1971".

(Something has gone wrong with the English but the sense is clear.)

14. Paragraph 39E of the Immigration Rules, which is incorporated by reference in both the disregards under paragraph 276B (v), is headed "Exceptions for overstayers". As already mentioned, the regime for which it provides replaced an earlier regime under which (broadly) any period of overstaying of up to 28 days was overlooked.[3] It reads:

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[3] There is a brief explanation of the thinking behind these changes in the Explanatory Memorandum to Statement of Changes HC 667: see paragraphs 7.45-48.

"This paragraph applies where:

(1) the application was made within 14 days of the applicant's leave expiring and the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in-time; or

(2) the application was made:

(a) following the refusal of a previous application for leave which was made in-time; and

(b) within 14 days of:

(i) the refusal of the previous application for leave; or

(ii) the expiry of any leave extended by section 3C of the Immigration Act 1971; or

(iii) the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable); or

(iv) any administrative review or appeal being concluded, withdrawn or abandoned or lapsing."

15. What paragraph 39E therefore does is to define circumstances in which the fact that an applicant for further leave to remain is an overstayer may be disregarded. It does not itself provide for the disregard: that will be done in the operative provision which incorporates it by reference – in our case, paragraph 276B. The two circumstances which attract the disregard are of different characters, but in both the application for further leave needs to have been made within 14 days of the expiry of the previous leave or (to over-simplify) the refusal of a previous in-time application. The effect for our purposes is that, when read with sub-paragraph 276B (v), where either condition is satisfied the periods of overstaying identified in element [B] or element [C], as the case may be, are disregarded: I will have to come back later to what exactly that means.

THE FACTS

16. The full immigration histories of the Appellants are set out in the judgment of Dingemans LJ. At the cost of some repetition, I ought to set out here those aspects which are relevant for the purpose of the issue under paragraph 276B. I should explain by way of preliminary that where an applicant for leave to remain on one basis is pending it is open to him or her to make a further application on a different basis, which is treated as a variation of the original application: see *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78. As will appear, all three Appellants took advantage of this right.

17. *Hoque*

(1) Mr Hoque came to the UK on 7 February 2008 with leave to enter as a student until 21 May 2010. He enjoyed further grants of leave, initially as a student and then as a tier 1 migrant, until 18 March 2016.

(2) Before the expiry of that leave he made an application for further leave, which was refused. He applied for a review but it was unsuccessful. While the application and the outcome of the review were pending he enjoyed 3C leave, but he became an overstayer on 22 June 2016.

(3) He made an application for (limited) leave to remain "outside the Rules" on 20 July 2016, i.e. within 28 days of that date (that is the relevant period because the application pre-dated 24 November). While that application was pending, on 13 October 2017 he made an application for ILR, also outside the Rules: as noted, that had effect to vary his original application.

(4) While that varied application was pending, on 12 January 2018 he made a further application for ILR, this time on human rights grounds and on the basis of long residence under the Rules: that too constituted a variation of the original application. Although that was just over a month short of the ten-year anniversary of his arrival in the UK, that was not in practice a problem since we were told that applications are assessed as at the date of decision, not the date of application, and it was not likely that the Home Office would make a decision before the anniversary; and there is also a practice, published in the relevant Guidance, of granting premature applications, if they are otherwise well-founded, if they fall for consideration less than 28 days before the relevant anniversary.

(5) The application of 20 July 2016, as varied, was refused by letter dated 18 May 2018 on the basis that he could not satisfy the requirement under paragraph 276B (i) (a).

Mr Hoque had thus at the date of the Secretary of State's decision been an overstayer for almost two years.

18. *Kabir*

(1) Mr Kabir came to the UK on 2 September 2008 with leave to enter as a student until 31 December 2009. He enjoyed further grants of leave as a student until 19 September 2015.

(2) Before the expiry of that leave he made an application for further leave, which was refused. He appealed unsuccessfully against the refusal to the FTT. While the application and the outcome of the appeal were pending he enjoyed 3C leave, but he became an overstayer on 12 September 2017.

(3) On 25 September 2017, i.e. within 14 days of that date, he made an application for (limited) leave to remain on the basis of ten years' continuous lawful

residence. I find that a little puzzling, but it is not necessary for our purposes to get to the bottom of it.

(4) While that application was pending, on 9 January 2018 he made an application for ILR, also outside the Rules, on the basis of ten years' continuous lawful residence. That was no less than eight months prior to the ten-year anniversary of his arrival, but presumably he banked on a long delay in considering the application.

(5) The application of 25 September 2017, as varied, was refused by letter dated 18 May 2018. The refusal was on two bases – (a) that he could not satisfy the requirement under paragraph 276B (i) (a); and (b) that he owed £1,963 to an NHS Trust in respect of medical treatment, which is one of the general grounds for refusal incorporated by paragraph 276B (iii) – see paragraph 322 (12).

Mr Kabir had thus at the date of the Secretary of State's decision been an overstayer for over eighteen months.

19. *Arif*

(1) Mr Arif came to the UK on 4 April 2008 with leave to enter as a student. He enjoyed further grants of leave, initially as a student and then as a tier 1 migrant.

(2) Before the expiry of his most recent leave he made an application for further leave, which was refused. He applied for a review but it was unsuccessful. While the application and the outcome of the review were pending he enjoyed 3C leave, but he became an overstayer on 31 March 2017.

(3) On 10 April 2017, i.e. within 14 days of that date, he made a further application for (limited) leave to remain as a tier 1 migrant.

(4) On 8 March 2018 he varied that application by applying (just under a month prior to the ten-year anniversary) for ILR on the basis of long residence.

(5) The application of 10 April 2017, as varied, was refused by letter dated 18 May 2018 on the basis that he could not satisfy the requirement under paragraph 276B (i) (a).

Mr Arif had thus at the date of the Secretary of State's decision been an overstayer for over a year.

THE ISSUE

20. The essential elements in the situations of these three Appellants which give rise to the issue before us are as follows:

(1) their last period of limited leave expired before they had accumulated ten years' continuous lawful residence;

(2) they did not make any further application prior to the expiry of that leave, so as to attract the operation of section 3C of the 1971 Act, and accordingly became overstayers at that point;

(3) they made a further application for leave within 14 days (in the case of Mr Arif and Mr Kabir) or 28 days (in the case of Mr Hoque) of the expiry of the earlier leave, which was in due course varied so as to become an application for ILR;

(4) that varied application was pending at the tenth anniversary of their arriving in the UK but was subsequently refused.

These are all therefore cases of open-ended overstaying.

21. In each case the Secretary of State refused the Appellant ILR on the basis that it followed from those facts that as from the expiry of the last period of limited leave their residence had not been lawful and that they accordingly could not satisfy the requirements of paragraph 276B (i) (a).

22. It is the Appellants' case that the period of overstaying since the expiry of their last leave to remain falls to be "disregarded" pursuant to element [B] in sub-paragraph (v) because the period between the expiry of their previous leave and the date of decision constituted "current" overstaying. They say that the effect of the disregard is that the period in question falls to be treated as continuous lawful residence, with the result that the requirement in paragraph 276B (i) (a) is satisfied.

23. The Secretary of State's response to that case is that the various sub-paragraphs of paragraph 276B constitute self-contained requirements and accordingly that the disregard in sub-paragraph (v) on which the Appellants rely cannot have any effect on the requirements of sub-paragraph (i).

JUNED AHMED AND *MASUM AHMED*

24. Before I turn to address that issue I need to refer to two recent decisions in which the effect of paragraph 276B (v) has been considered – first, the decision of the Upper Tribunal (Sweeney J) in *R (Juned Ahmed) v Secretary of State for the Home Department* [2019] UKUT 10 (IAC) and, second, the decision of this Court (Floyd and Haddon-Cave LJJ) to refuse permission to appeal in *R (Masum Ahmed) v Secretary of State for the Home Department* [2019] EWCA Civ 1070. I take them in turn.

25. In *Juned Ahmed* the facts were materially identical to those of the present appeals as summarised at para. 21 above. As here, the Secretary of State (represented, as it happens, by Mr Malik) relied on paragraph 276B (i) (a) and the claimant (represented, as it happens, by Mr Biggs) relied on paragraph 276B (v). Their arguments are fully summarised by Sweeney J at paras. 45-51 of his judgment, but they largely correspond to the arguments before this Court and I need not reproduce them here. Sweeney J dismissed the claim. At para. 75 he said:

> "The parties are rightly agreed that paragraph 276B of the Immigration Rules sets out five separate requirements. For the reasons advanced by Mr Malik (summarised above) I conclude that:
>
> (1) Given the definition of 'lawful residence' in paragraph 276A(b), it is hopeless to argue that the Applicant could meet the first requirement under paragraph 276B(i)(a).
>
> (2) It is obvious from the structure of paragraph 276B, read in conjunction with Paragraph 276D, that paragraph 276B(v) is a freestanding requirement additional to sub-paragraph (1)(a) and consistent with the general amendment of the Immigration Rules to the effect that applications for leave to remain by persons who have overstayed for more than 28 days will be refused on that Ground.
>
> (3) There is no arguable merit in Mr Biggs' contention that the Applicant was to be treated, for the purposes of paragraph 276B, as if he had leave to remain and thus to be in 'lawful residence'; nor in the contention that the Respondent's construction would lead to starkly unfair results to applicants. Rather, it is readily foreseeable that if applicants were to be so treated, it would create fertile ground for the abuse of the system."

26. In *Masum Ahmed* the facts were different from those of the present appeals in as much as the claimant had leave to remain at the date of his application but there were two periods during the relevant ten years during which he was an overstayer because his previous leave had expired and, although he was in due course granted a further period of leave, he had not applied in time and so did not enjoy "3C leave": in short, it was a case of book-ended overstaying. The Secretary of State argued that those periods of overstaying meant that the period of his lawful residence was not "unbroken", as required by paragraph 276A (a). The claimant argued that the two gaps attracted the operation of paragraph 39E and fell to be disregarded under paragraph 276B (v). The Upper Tribunal rejected that argument.

27. The claimant's application to this Court for permission to appeal was heard orally on an *inter partes* basis. As I have said, the Court refused permission. It gave a full judgment which it permitted to be reported because there were a number of other pending appeals raising the same point. Its reasoning appears at paras. 14-17. Para. 14 defines the issue as being

> "… whether it is arguable that paragraph 276B(v) operates so as to cure short 'gaps' between periods of LTR so as to entitle persons such as the Applicant in the present case to claim '10 years continuous lawful residence' under paragraph 276B(i)(a)."

The Court goes on at para. 15 to hold that sub-paragraph (v) does not have that effect. It gives its reasons in eight sub-paragraphs, which I need not quote in full. Its essential point, made under sub-paras. (1) and (2), is that each of the five sub-paragraphs of paragraph 276B provides for a distinct, free-standing, requirement and there is no cross-reference between them. Under sub-para. (3) it explains the effect of sub-paragraph (v) on that basis: I will return to this later. Sub-para. (4) reads:

> "The critical point is that the disregarding of current or previous short periods of overstaying for the purposes of sub-paragraph (v) does not convert such periods into periods of lawful LTR; still less are such periods to be 'disregarded' when it comes to considering whether an applicant has fulfilled the separate requirement of establishing '10 years continuous lawful residence' under sub-paragraph (i)(a)."

The points made under sub-paras. (5)-(8) are essentially secondary and I will not summarise them here. The Court concludes, at para. 16:

> "It will be apparent, therefore, that we agree with the decision and reasoning of Sweeney J in *Juned Ahmed* (*supra*). As Sweeney J correctly held, paragraph 276B(v) involves a freestanding and additional requirement over and above the requirements of paragraph 276B(i)(a)."

28. Neither decision is binding on us, *Juned Ahmed* because it is a decision of the Upper Tribunal and *Masum Ahmed* because it is a decision to refuse permission to appeal (see, e.g., *Arthur J S Hall v Simon* [1999] 3 WLR 873, per Lord Bingham CJ at p. 902H).

ANALYSIS AND DECISION

29. My starting-point is that I agree with both Sweeney J in *Juned Ahmed* and this Court in *Masum Ahmed* that it is quite clear from the structure and language of paragraph 276B that the requirements identified at sub-paragraphs (i)-(v) are intended to be free-standing and self-contained. Normally it would follow that any disregard provided for in a particular sub-paragraph would only relate to that requirement, and thus that the Appellants cannot invoke the disregards in sub-paragraph (v) to remedy their inability to satisfy the requirements of sub-paragraph (i) (a).

30. However it is not as straightforward as that. The effect of sub-paragraph (v) is in fact seriously problematic, and I will need to consider each of the elements in turn.

31. Element [A] states the actual requirement which sub-paragraph (v) imposes, namely that the applicant must not "be in the United Kingdom in breach of immigration laws". Mr Gill submitted that that to a great extent overlapped with the requirement in sub-paragraph (i) (a) that the applicant should have had ten years' continuous lawful residence: if they were in the UK in breach of immigration laws their residence could not be lawful. If that were correct, it would make it less difficult to argue for

some cross-effect between the two sub-paragraphs of the kind required by the Appellants' case. However, I do not think that it is correct. I accept Ms Giovannetti's submission (in which in fact she was supported by Mr Biggs) that the two sub-paragraphs have entirely distinct roles, focused on different points in time. Sub-paragraph (v) is expressed in the present tense – "must not *be* in the UK …". It is therefore addressed to the applicant's status at the moment of decision: that is so simply as a matter of language, but it is also consistent with the first disregard (element [B]) being concerned with "any *current* period of overstaying". Sub-paragraph (i) (a), by contrast, requires that the applicant "has had" ten years' continuous lawful residence. That formulation does not necessarily require that the lawful residence is continuing at the date of decision. No doubt typically that would be the case, but it would also be satisfied in a case where an applicant has accrued the relevant period in the past but has become an overstayer since then. In my view the purpose of the requirement in sub-paragraph (v) is evidently to ensure that overstayers are not entitled to ILR in those circumstances (subject to the effect of the disregard).

32. I should mention one other point. In course of the hearing Dingemans LJ pointed out that a further distinction between sub-paragraphs (i) (a) and (v) is that the phrase "in breach of immigration laws" in the latter is wider than the requirement of "lawful" residence in the former (as defined in paragraph 276A (a)), in that it covers not only cases where the person has no leave but also cases where they have it but are in breach of conditions: a breach of conditions does not automatically terminate leave, though it will be a ground on which it can be curtailed. The result is that an applicant with ten years' continuous lawful residence whose leave remains current at the date of decision will still be refused ILR if (say) they have leave as a student and are found to be working in excess of the permitted number of hours. I understood Ms Giovannetti to accept that this was correct. That is, however, entirely consistent with the purpose of sub-paragraph (v) being to address the applicant's position at the date of the decision. There is nothing surprising in the Secretary of State wishing to ensure compliance with immigration laws at the date of decision but not reserving a right to rely on past breaches (maybe up to ten years previously) which did not attract curtailment at the time.

33. Element [B] is, expressly, an exception to that requirement – "except that". Subject to the arguments which I consider below, its effect is that where the applicant has had ten years' continuous lawful residence in the past but it has expired, so that he or she is "currently" (i.e. at the date of decision) overstaying, that breach of the immigration laws will be disregarded in deciding whether the requirement in sub-paragraph (v) is satisfied, provided that one of the two "paragraph 39E circumstances" applies. Such a situation might readily occur. The applicant's current limited leave (or, perhaps, an extension of it under section 3C) might expire after the ten-year anniversary and without them having made a further application on the basis of their ten years' residence: they would thus become overstayers. The effect of paragraph 39E would be that if they made that application within the 14-day grace period, or could show that the omission was the result of circumstances beyond their control, the overstaying would be disregarded with the result that the requirement in sub-paragraph (v) was treated as satisfied.

34. So far so good, but the difficulty is with element [C]. The problem is that the disregard for which it provides applies to "previous periods of overstaying between periods of leave"; but overstaying of that character has no possible application in the context of the requirement which sub-paragraph (v) imposes. That requirement is, as we have seen, concerned only with the applicant's immigration status at the date of decision, to which previous book-ended periods of overstaying could never be relevant. There is a frank disconnect between the disregard and the requirement to which it appears to be applied. That is in fact reflected in the way that element [C] is verbally linked to the rest of the paragraph. Unlike element [B], which is explicitly framed as an exception to the primary requirement and part of the same sentence, it takes the form of a self-contained sentence to the effect that the relevant periods of overstaying "will also be disregarded". In short, element [C] does not belong in sub-paragraph (v). The only context in which previous periods of overstaying between periods of leave – and thus also a provision that they be disregarded – would matter is the requirement of ten years' continuous lawful residence, which would of course otherwise be broken by a period of overstaying between periods of leave. If element [C] is to have any effect it belongs in sub-paragraph (i) (a).

35. It follows that we are faced with a choice between, on the one hand, giving element [C] no effect and, on the other, treating its placing within paragraph 276B as a drafting error and applying it as if it qualified sub-paragraph (i) (a). In my view we should choose the latter. It is unfortunately not uncommon for tribunals and courts to have to grapple with provisions of the Immigration Rules which are confusingly drafted, but it is our job to try to ascertain what the drafter intended to achieve and give effect to it so far as possible. In this case it is clear from its terms what the intended effect of element [C] is, but it has been put in the wrong place. Treating it as if it appeared in sub-paragraph (i) (a) does violence to the drafting structure, but I do not believe that that is a sufficient reason not to give effect to it.

36. That conclusion is reinforced by a consideration of the drafting history of paragraph 276B (v). This can be sufficiently summarised for our purposes as follows:

(1) Sub-paragraph (v) was first introduced by Statement of Changes HC 196 with effect from 1 October 2012. Previously paragraph 276B had only contained sub-paragraphs (i)-(iv). The new sub-paragraph read:

> "the applicant must not be in the UK in breach of immigration laws, except that any period of overstaying for a period of 28 days or less will be disregarded".

It will be seen that the primary requirement is the same as now, but there is only one disregard. It refers to the "28 day regime" rather than the paragraph 39E regime, but it is in principle doing the same kind of job as element [B] in the current version. Also like element [B], it is necessarily concerned only with overstaying at the date of decision.

(2) Sub-paragraph (v) was amended by Statement of Changes HC 1039 with effect from 6 April 2013, so as to read (new part italicised):

> "the applicant must not be in the UK in breach of immigration laws, except that any period of overstaying for a period of 28 days or less will be disregarded*, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period*."

The added words, like element [C] in the current version, are necessarily directed to past ("book-ended") overstaying. Also like element [C], they are not expressed as an exception to the primary requirement but are introduced by the words "as will". If I am right in my conclusion that reference to past overstaying does not belong in sub-paragraph (v), this is where the error first appeared. There is unfortunately no substantive gloss on this change in the Explanatory Memorandum.

(3) The current version of the sub-paragraph was introduced by Statement of Changes HC 667 with effect from 24 November 2016. The change was part of a wider change to the Rules generally whereby the previous policy of overlooking periods of overstaying of less 28 days was abandoned, and the regime based on paragraph 39E introduced. The change is explained in some detail at paras. 7.45-49 of the Explanatory Memorandum. Para. 7.49 reads:

> "Changes have also been made to the requirements for applicants for indefinite leave to remain to have completed a period of continuous lawful residence in the UK. These ensure that the Secretary of State will disregard any period of overstaying between periods of leave which, at the time the further application was made, fell to be disregarded under the previous 28 day period or the exceptions identified above. This is for reasons of fairness."

37. Two points from that history tend to confirm what I would conclude from the language of sub-paragraph (v) alone:

(1) The fact that element [C] and its predecessor were introduced by amendment makes the case for drafting error more plausible: the endless process of changing particular provisions of the Rules is a fertile source of error.

(2) More importantly, para. 7.49 of the Explanatory Memorandum relating to the 2016 changes shows that the drafter regarded the changes made to sub-paragraph (v) (which are clearly what is being referred to in the second sentence) as affecting the requirement for applicants for ILR "to have completed a period of continuous lawful residence in the UK". That means that, however anomalous the placing, the intention was that it should apply to the requirement under sub-paragraph (i) (a).

38. There is some further support for my conclusion in the Home Office's Guidance on "Long Residence". We were shown version 15, which was issued on 3 April 2017.

This contains a section headed "Breaks in lawful residence": I cannot give a page or paragraph reference because, unhelpfully, neither the pages nor the paragraphs are numbered[4]. The first chunk of text reads:

> "Gaps in lawful residence
>
> You may grant the application if an applicant:
>
> - has short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days where those gaps end before 24 November 2016
> - has short gaps in lawful residence on or after 24 November 2016 but leave was granted in accordance with paragraph 39E of the Immigration Rules
> - meets all the other requirements for lawful residence".

Those bullets are clearly intended to reflect element [C] in sub-paragraph (v) (as also does the text which follows, which addresses how to calculate the period of overstaying), though it may be questionable how accurately it does so; and some examples of how that works in practice are given on the following pages. This passage is significant for our purposes because it appears under the heading "Breaks in lawful residence"[5], which refers to the requirement of continuous lawful residence. Clearly the Home Office itself thought that element [C] qualified sub-paragraph (i) (a). Ms Giovannetti told us that the terms of the Guidance (as one would expect) reflect the approach which the Home Office takes in practice.

39. I should acknowledge in connection with the previous paragraph that there may be a question whether it is legitimate to refer to the Guidance as an aid to construction. At paras. 10-11 of his judgment in *Mahad (Ethiopia) v Entry Clearance Officer* [2009] UKSC 16, [2010] 1 WLR 48, Lord Brown disapproved the use of IDIs (the predecessor to Guidance documents) for this purpose; and para. 23 of the judgment of Dyson LJ in *MD (Jamaica) v Secretary of State for the Home Department* [2010] EWCA Civ 213 is to the same effect. At para. 15 (7) of its judgment in *Masood Ahmed* the Court referred to Lord Brown's observations in the context of this very issue. However at para. 42 of his judgment in *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568 Jackson LJ noted a qualification to that approach in cases where a rule is ambiguous and the Secretary of State has in her published guidance adopted the interpretation more favourable to applicants. The intended scope of element [C] is certainly ambiguous, given the mismatch between its terms and its placing within the paragraph, and the interpretation that I believe to be

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4 To be fair, version 16, published on 28 October 2019, does have page numbers, though the paragraphs are still unnumbered.

5 In fact, confusingly, there is an intermediate heading "Time spent outside the UK". That is clearly a mistake since the text that follows is concerned with overstaying.

correct is more favourable to applicants. In any event, however, the terms of the Guidance are not essential to my conclusion.

40. If I am right up to this point, it must follow that *Masum Ahmed*, which was concerned with past overstaying, was wrongly decided. I have already acknowledged that normally it would be sufficient to proceed on the basis that a disregard under sub-paragraph (v) could not have effect to qualify the requirement under the wholly distinct sub-paragraph (i) (a). But in my view that argument must yield to the considerations developed above, which centre on the fact that if element [C] were treated as qualifying sub-paragraph (v) it would have no purpose or effect. I obviously differ from the Court with considerable reluctance, but I note that it was not referred to the drafting history (including the Explanatory Memorandum accompanying HC 667); and, as will appear, the Secretary of State's position before it was fundamentally different from her position before us.

41. I have already noted that at para. 15 (3) of its judgment the Court in *Masum Ahmed* did address the question of what the effect of the second disregard in sub-paragraph (v) was if its conclusion was correct. It said:

> "… [T]here is no difficulty in giving sub-paragraph (v) a self-contained meaning. It makes use of the provisions of paragraph 39E of the Rules. Paragraph 39E is the 'exceptions for overstayers provision' which, in effect, grants a 14-day period of 'grace' in respect of the lodging of LTR applications in certain circumstances. Under sub-paragraph (v), where paragraph 39E applies, any *current* period of overstaying as well as any *previous* period of overstaying after the advent of the amendment to the rules on 24th November 2016 will be 'disregarded'. In addition, periods of overstaying of less than 28 days before that date are also disregarded. The reference to previous periods means that, in requiring that the applicant should not 'be in the United Kingdom in breach of immigration laws', the sub-paragraph is not looking simply at the applicant's status at the date of the application, but also looks back in time to his previous immigration status. [Counsel for the claimant] confirmed that the sub-paragraph referred to all previous periods of overstaying. This is, of course, subject to the SSHD's residual discretion."

What I take the Court to be saying in that passage is that the reference to previous periods of overstaying does have a role to play in sub-paragraph (v) because the requirement itself – element [A] – relates not only to the applicant's current position but to his or her "previous immigration status", i.e. to whether they had leave to remain over the entirety of the claimed period of continuous lawful residence. With respect, I am unable to agree with that, even though it appears to have been conceded by counsel for the claimant. As I have already said, the requirement is framed in the present tense – "must not *be* in the UK in breach of immigration laws" – and the first disregard refers to "current overstaying". I do not think that it is possible to read it as

meaning "must not at any time in the ten-year period relied on *have been* in the UK in breach of immigration laws".

42. Although I have felt it necessary to explain my reasoning in full since I am differing from another division of this Court, in fact it was common ground before us that element [C] in sub-paragraph (v) must be treated as qualifying the requirement in sub-paragraph (i) (a). In her original skeleton argument, settled by different counsel, the Secretary of State sought to uphold the reasoning in *Masum Ahmed*. But, in a helpful supplementary skeleton argument submitted shortly before the hearing, Ms Giovannetti and Mr Keith conceded that there was force in the point that "the first and second part of paragraph 276B (v) are addressing different matters" and that it followed that "some of the reasoning in *Masum Ahmed* is erroneous". That was a fair concession and correctly made.

43. However, as Ms Giovannetti pointed out, that conclusion does not directly assist the Appellants because, unlike in *Masum Ahmed*, their cases do not involve a "previous period of overstaying between periods of leave", and element [C] of sub-paragraph (v) is accordingly of no assistance to them. Rather, they are current overstayers, and their cases, like *Juned Ahmed*, involve open-ended rather than book-ended overstaying. Cases of current overstaying are addressed by element [B]. Ms Giovannetti's concession did not extend to the effect of element [B]. She submitted that it was clear that <u>that</u> element was intended only to qualify the requirement in sub-paragraph (v) itself, which is concerned with the requirement not to be in breach of UK immigration laws at the date of decision, and not the requirement in sub-paragraph (i) (a), which was concerned with the requirement to have accumulated ten years' continuous lawful residence. She accepted that it was clumsy that different parts of sub-paragraph (v) should qualify different requirements; but she said that that was the only possible conclusion both from the language and from the drafting history.

44. I accept that submission. For the particular reasons which I have given, it is necessary to do violence to the structure of the drafting in order to give effect to element [C]. However, those reasons do not apply to element [B]. Specifically:

(1) It is expressed in terms as an exception to the requirement imposed in element [A], whereas element [C] and its predecessor use a different formulation – "as will" or "will also be".

(2) More substantively, the subject of the disregard in element [C] (past, book-ended, periods of overstaying) bears no relation to the primary requirement, whereas the subject-matter of the disregard in element [B] (current overstaying) clearly does.

(3) Element [B], albeit initially referring to the 28-day grace period rather than to paragraph 39E, has been part of sub-paragraph (v) from the beginning and is accordingly integral to it, whereas element [C] and its predecessor were introduced into the sub-paragraph by amendment.

(4) When sub-paragraph (v) was first introduced there could be no possible warrant for saying that the disregard applied to any other requirement. It would be remarkable if its effect were changed because of the subsequent introduction of an additional disregard in 2013 or 2016.

There is thus no basis for treating the disregard in element [B] as applying to anything save sub-paragraph (v).

45. It follows that I would regard *Juned Ahmed* as correctly decided, although Sweeney J's reasoning is too broadly expressed to the extent that it is treated as applying to both disregards. Where, if I may respectfully say so, the Court went wrong in *Masum Ahmed* was that it treated the situations covered by the two cases – that is, open-ended and book-ended overstaying – as if they were the same. I quite agree that that is the natural starting-point, but on the arguments before us I do not think it can be the end of the analysis.

46. I turn to address the Appellants' counter-arguments.

47. Mr Gill and Ms Harrison both submitted that once it was accepted that one of the disregards in sub-paragraph (v) qualified the requirement in sub-paragraph (i) (a) it made no sense not to make the same finding as regards the other. That might at first sight seem an attractive submission, but it loses its force in the face of the distinctions between the two elements which I have enumerated above. Element [C] is anomalous, but that is not a reason for making element [B] anomalous as well.

48. Mr Gill and Ms Harrison also submitted that it did not make sense for the Rules to take a stricter approach to open-ended overstaying than to book-ended overstaying. In both cases the basic situation is the same: the applicant failed to make an application in time and is accordingly an overstayer, but he or she made a subsequent application within 14 (or, previously, 28) days. If the Secretary of State's policy was to allow a short period of grace where the applicant was subsequently granted leave, why should it be any different where the application remains outstanding? The provisions in question should be construed purposively on the basis that the Secretary of Sate must have intended to provide consistently for equivalent situations.

49. As to that, I start by saying that, while I accept that the Rules should be construed purposively (and have in fact adopted a highly purposive approach in my construction of element [C]), that does not justify giving them a meaning which they simply do not bear. For the reasons given, I see no room for ambiguity about the intended effect of the first disregard in paragraph 276B (v): on no possible reading can it be construed as qualifying the definition of continuous lawful residence.

50. However, that is not a complete answer. Mr Biggs submitted that the unavailability of a "paragraph 39E disregard" for the purpose of satisfying the requirement of continuous lawful residence was irrational and/or a disproportionate interference with an applicant's article 8 rights. He pointed out that there were some circumstances in which an applicant would be positively unable to make a further application until after the previous (in-time) application had been determined. If a period of grace is required in the case of book-ended gaps it is also necessarily required in the case of

open-ended overstaying. If he is right about that it might be necessary to give a strained construction to the rule. I should therefore also say that I do not regard it as unreasonable or disproportionate for the Secretary of State to treat book-ended and open-ended overstaying differently. In the case of a book-ended gap the applicant has been granted further leave, and has attained ten years' residence, since the period of overstaying; and the only reason why the overstaying occurred was that they did not make in-time the *ex hypothesi* well-founded application which in due course led to the grant of leave. It is in those circumstances unsurprising that the Secretary of State should think it right to allow the period between the expiry of the previous leave and the grant of the further leave to count as continuous lawful residence – assuming of course that the applicant can satisfy the requirements of paragraph 39E. The case of open-ended overstaying is necessarily different because, *ex hypothesi*, there will have been no grant of leave on the original application: it will have remained, in effect as a place-marker, until the point where it is varied by the making of an application based on ten years' continuous lawful residence. That 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. The Appellants argued that if the Secretary of State was concerned about that the remedy was in her own hands: she could, for example, alter the practice of permitting variation, or simply determine applications more promptly. But even if that were a complete answer to the risk of abuse (which I am not persuaded that it is) it is not the fundamental point. 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.

51. I should for completeness mention that Ms Giovannetti placed some reliance on the decision of this Court in *MD (Jamaica),* to which I have already had occasion to refer. That case was concerned with the rules relating to long residence as they stood in 2009. At that point both paragraph 276B (i) (a) and the definitions of "lawful residence" and "continuous residence" in paragraph 276A were in the same form as they are now; but, as we have already seen, paragraph 276B (v) had not been introduced. The only provision for a grace period of any kind was in an IDI which gave case-workers a discretion to overlook "a single short gap in lawful residence through making one single previous application out of time by a few days". The principal issue in the appeal was whether it was right in principle to seek to construe the definition of continuous lawful residence so as to conform with the IDI: as already noted, it was held that it was not. But the Court also had to address a submission from counsel for the appellant (as it happens, Mr Gill) that "the definition of what constitutes lawful residence in rule 276A (a) is not exhaustive". At para. 25 of his judgment Dyson LJ roundly rejected that argument. In one sense that supports Ms Giovannetti's submission, but I agree with Mr Gill that it is in truth neutral. Dyson LJ was, if I may say so, obviously right if one considers only the terms of the definition

itself; but the whole argument before us is based on paragraph 276B (v) acting as a qualification to it. I do not therefore think *MD (Jamaica)* advances the argument either way.

52. In conclusion, therefore, I would hold that the requirement of continuous lawful residence in paragraph 276B (1) (a) is not qualified by the paragraph 39E disregard in element B of paragraph 276B (v).

THE OTHER ISSUES

53. In his judgment Dingemans LJ considers the article 8 issues raised in *Hoque*, *Kabir* and *Mubarak*. I need not set out the facts, which appear in his judgment, but I will identify in summary form why I agree with his conclusion that their appeals on this ground should be dismissed.

54. As regards *Hoque* and *Kabir*, the essential points are:

(1) The Upper Tribunal in addressing the relevant question under paragraph 353 of the Rules or section 94 of the Nationality, Immigration and Asylum Act 2002 was obliged to have regard to the public interest in effective immigration controls: section 117A (2) (a) of the 2002 Act, read with section 117B (1). Weight therefore had to be given to the fact that none of the Appellants was able to satisfy the requirements for the grant of ILR prescribed by the Immigration Rules.

(2) To the extent that the factor that goes in the opposite balance is the interference with the Appellant's private life that would be caused by a refusal of ILR, section 117B (5) prescribes that little weight is to be given to private life established at a time when the applicant's immigration status is "precarious" – which, as decided in *Rhuppiah*, means at a time when they do not enjoy ILR. Although that does not mean that applications for leave to remain outside the Rules based on interference with private life can never succeed, it is not likely that they will do so more than occasionally: see per Lord Wilson in *Rhuppiah* at para. 49.

(3) Neither Mr Hoque nor Mr Kabir relied in their applications on any features of their private life which might, exceptionally, have required the grant of ILR in their cases. In the absence of material of that kind, the fact that their applications might in some sense have been "near misses", because – at least in Mr Hoque's case – his earlier application for limited leave had been refused only because of technical non-compliance, cannot help: see *Secretary of State for the Home Department v SS (Congo)* [2015] EWCA Civ 387, [2016] 1 All ER 706, at paras. 54-56.

(4) There is also in Mr Kabir's case the additional feature that his application was refused on a separate ground based on his outstanding debt to the National Health Service.

55. Mr Mubarak is nearer the line, because he came so close to the necessary ten years' residence and because the curtailment of his earlier leave was not his fault. I agree with McCombe LJ that that makes his something of a hard case. But in truth it does no more than to render him a rather nearer near-miss than Mr Hoque. The fact remains that he did not qualify for ILR under the Rules, and UTJ Gill was in my view right to hold that the Secretary of State's decision that the matters on which he relied under article 8 did not create a real prospect of success in the FTT was not irrational. Mr Malik argued that that was not the right question in a challenge to a decision under paragraph 353, but there is binding authority of this Court to the contrary: see *R (MN (Tanzania)) v Secretary of State for the Home Department* [2011] EWCA Civ 193, [2011] 1 WLR 3200.

56. Dingemans LJ also considers the complex procedural history in *Arif*. I likewise agree with his conclusions in that case.

DISPOSAL

57. It will be apparent from the foregoing, and from my Lords' judgments, that the cases of *Hoque*, *Kabir* and (potentially) *Arif* raised a serious point of law about the meaning of paragraph 276B, and I would accordingly grant Mr Hoque and Mr Kabir permission to appeal. However, for the reasons given I would find against them on that point. Accordingly, since Dingemans LJ has reached the same conclusion, and I have agreed with him on the remaining issues, their appeals must be dismissed, notwithstanding McCombe LJ's contrary conclusion about paragraph 276B. In *Arif* the substantive issue would only be open to the Appellant if he were entitled to permission to appeal out of time against the decision of Elisabeth Laing J or to permission to appeal against the refusal of Saini J to reconsider her decision. For the reasons given by Dingemans LJ, I would not grant either.

58. The case for granting permission to appeal in *Mubarak* is less clear-cut, but on balance I would do so. However, for the reasons already given the appeal must be dismissed.

POSTSCRIPT

59. This Court has very frequently in recent years had to deal with appeals arising out of difficulties in understanding the Immigration Rules. This is partly a result of their labyrinthine structure and idiosyncratic drafting conventions but sometimes it is a simple matter of the confused language and/or structure of particular provisions. This case is a particularly egregious example. The difficulty of deciding what the effect of paragraph 276B (v) is intended to be is illustrated by the facts not only that this Court itself is not unanimous but that all three members have taken a different view from that reached by a different constitution in *Masum Ahmed*. Likewise, the Secretary of State initially sought to uphold *Masum Ahmed* – contrary, it would seem to her own Guidance – but, as we have seen, shortly before the hearing executed a *volte face*. (This illustrates a different vice, also far from unique, that the Home Office seems to have no reliable mechanism for reaching a considered and consistent position on what its own Rules mean.) Of course mistakes will occasionally occur in any complex piece of legislation, or quasi-legislation; but I have to say that problems of this kind

occur too often. The result of poor drafting is confusion and uncertainty both for those who are subject to the Rules and those who have to apply them, and consequently also a proliferation of appeals. The Secretary of State has already taken a valuable first step towards improving matters by asking the Law Commission to report on the simplification of the Immigration Rules, and I hope that action will be taken on those recommendations. But the problem goes further than matters of structure and presentation, and I would hope that thought is also being given to how to improve the general quality of the drafting of the Rules.

Lord Justice McCombe:

60. Having carefully considered the rival arguments, for which I express my gratitude to counsel, as to the proper construction of para. 276B of the Immigration Rules ("the Rules") (in the form applicable to the appeals in the present case), I find myself in agreement with the arguments of Mr Manjit Gill QC on the point, as presented on behalf of the Appellant, Mr Hoque. Refinements and nuances to those arguments came from other counsel on behalf of the Appellants, but I find it convenient to adopt largely the points made by Mr Gill from which, as it seemed to me, other submissions (very helpful though they were) did not greatly differ. I regret, therefore, that I am unable to agree with my Lords, the Vice-President and Dingemans LJ on the point.

61. I am grateful to the Vice-President for his exposition of the facts of the cases and for his quotations of the material parts of the Rules.

62. The part of the Rules with which we are concerned is directed to who should qualify for indefinite leave to remain in the United Kingdom ("ILR") by virtue of long residence. It begins with definitions in para. 276A. Para. 276B(i)(a) (there is no (b)) then tells the reader that the basic qualification requirement for achieving ILR is 10 years continuous lawful residence in the UK. Para. 276A defines "continuous residence" and "lawful residence". In the basic case, of the type mentioned by Underhill LJ in his paragraph 8, the application of these provisions will cause no problem. Paras. 276C and 276D provide that leave may be granted or will be refused respectively, depending upon whether or not each of the requirements in para. 276B are or are not met. I agree that each of sub-para. (i) to (v) of that para., therefore, are largely separate requirements. Nonetheless, I see no reason why the tenor of those requirements should not be drawn from that paragraph as a whole and the concepts that it is seeking to define and/or qualify. It would be odd to isolate completely one part of a single paragraph from another. Normally, one construes a document, and *a fortiori* one clause in a document, with regard to its contents as a whole, rather than by its individual parts in isolation. Indeed, the Secretary of State's presently favoured construction requires para. 276B(i) to be read with part (but not the whole) of para. 276B(v).

63. The five requirements set out in para. 276B (in summary) are: (i) 10 years continuous lawful residence; (ii) no public interest reasons rendering it undesirable to grant ILR; (iii) the case does not fall for refusal under "the general grounds for refusal"; (iv) sufficient knowledge, on the applicant's part, of the English language and of life in the UK; (v) the applicant is not "in breach of the immigration laws" (i.e. without

valid leave where required or in breach of conditions of leave – see para. 6 of the Rules). The fifth requirement specifies, in addition, two "disregards". It is with those two "disregards" that this case is concerned.

64. The first sentence of para. 276B(v) (dealing with "any current period of overstaying") says expressly that "breach of immigration laws" by reason of "any current period of overstaying" will be "disregarded" where para. 39E applies, i.e. in a case where the new application is made within the specified short time after expiry of previous leave. In other words, for those purposes the applicant is not treated as being in the UK "without leave". This must be so because the relevant part of the definition of "breach of the immigration laws", in para. 6, is that it means "without valid leave where such leave is required …". It seems to me clear that for the purpose of that paragraph he is to be treated, in those circumstances, as *having* existing leave within the meaning of para. 276A(b)(i). If so, it should mean that his residence continues to be "lawful" for the purposes of para. 276B(i)(a) [sic]. Given the approach that one is required to adopt in seeking to understand the Rules, in my judgment, the ordinary reader of para. 276B would be in difficulty in distinguishing the idea of "lawful residence" in 276B(i) from not being "in the UK in breach of immigration laws" in 276B(v) by being resident here.

65. Strangely and very belatedly (for the first time in the supplementary skeleton argument of 22 July 2020), the Secretary of State now accepts that the *second* sentence of para. 276B(v) (dealing with "[a]ny *previous* overstaying between periods of leave" and saying that this will "*also* be disregarded") "is intended to apply when calculating 10 years continuous lawful residence for the purpose of paragraph 276B(i)" (para. 19 of the skeleton argument). This consequence is not accepted, however, as being the result of the *first* sentence, dealing with current overstaying, notwithstanding the use of the characteristically linking words "will *also* be disregarded" in the second sentence.

66. There was no glimmer of such a refinement in the Secretary of State's argument at any earlier stage of these proceedings, nor was there such in the arguments in the *Masum Ahmed* case. It seems to me that the conjunction of "will be disregarded" and "will also be disregarded" in the two sentences of sub-para. (v) naturally fall to be read as being directed to the same matters. The idea that the two phrases have different applications and effects is an odd one.

67. In paragraph 18 of the new skeleton argument, the Secretary of State now "recognises that there is force to the point made in the skeleton argument on behalf of Mr Arif … to the effect that "the first and second part of paragraph 276B(v) are addressing different matters". However, that "recognition" is not (as argued for Mr Arif) that the two sentences are simply treating the "different matters" of current and past periods of overstaying in the same way for the purposes of para. 276B as a whole. Rather it is said to lead to the different argument that the two sentences, while using identical words, are directed to different aspects of paragraph 276B and that the first sentence (in contrast to the second) does not affect the calculation of "continuous lawful residence" for the purpose of sub-para. (i).

68. In my judgment, no ordinary reader of para. 276B would read it in such a tortuous fashion. The two "disregards" would naturally be treated as going to the same matters in the case of current and previous periods of overstaying respectively. It is indicative that the construction of this paragraph now advanced by the Secretary of State is indeed so tortuous that it had not been presented to anyone in this long litigation until six days before the hearing of these present appeals. Indeed, it is recognised that the argument is inconsistent in part with the Secretary of State's own argument before this court in *Masum Ahmed*. Further, I do not believe that such a reading of the paragraph even occurred to the court as being a possible, let alone the natural one, prior to sight of the Secretary of State's new skeleton argument received during the morning of the first day of the hearing.

69. We know that,

> "The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, 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."
>
> (per Lord Brown of Eaton-under-Heywood in *Mahad v ECO* [2009] UKSC 16 at [10])

Clearly, until 22 July 2020 the Secretary of State did not regard the interpretation now advanced as being "the natural and ordinary meaning" of the Home Department's own policy. Until about 10.43 on the first morning of the present hearing (28 July 2020), when the new skeleton argument actually reached us, the court did not know that this new reading of para. 276B(v) was even being advanced even as a possible construction of that provision, let alone as being the "natural and ordinary" one. In my view, that is not surprising. There is no hint of such a meaning in any of the underlying materials before the deployment of the new argument.

70. Indeed, as Underhill LJ recognises in paragraph 35, the Secretary of State's argument now requires us to treat the last sentence of para. 276B as having been "put in the wrong place" and as properly belonging to 276B(i) rather than to 276B(v) where one actually finds it.

71. In my judgment, the natural and ordinary meaning of the relevant paragraphs is far more readily that put forward by Mr Gill (and other appellants), which I have sought to summarise above. It is also supported by the history of the Rules, the changes made to them from time to time and by the Explanatory Memoranda of those changes to which we were taken in some detail by Mr Gill. I believe that is not contradicted by the so-called Explanatory Memorandum which introduced para. 276B(v) in its present form. I do not propose to dwell extensively upon these historical materials but will try to point out those features which seem to me to be the most significant.

72. The first version of para. 276B to which we were taken was in force until 1 October 2012 and had no sub-para. (v). The paragraph stopped with (iv), containing (then as now) the requirement of knowledge of English language and of UK life.

73. It was a Rule in this form that came before this court in *MD (Jamaica) v SSHD* [2010] EWCA Civ 213. At the relevant time (2008), alongside the Rule, there was an Immigration Directorate Instruction ("IDI") to case workers which allowed ILR to be granted, without inquiry, on the basis that certain breaches of conditions might be considered "lawful". One of these was: "A short delay in submitting an application provided that the application is subsequently granted". These concessions were entitled "The Long Residence Concession" or "LRC". That LRC gave vent to the argument in *MD* that para. 276B should be construed consistently with the LRC. The court held that such an argument was inconsistent with the law as stated by Lord Brown in *Mahad*, namely that the Rules cannot be construed by reference to directions/guidance to caseworkers.

74. As Dyson LJ (as he then was) said in *MD* at [25], the definition of lawful residence in para. 276A(b) (in that form) was exhaustive and meant continuous residence pursuant to the three categories of case there specified. As he had said at [24], a different result would have required "some express provision or …necessary implication". Since then, however, sub-para. (v) has been added to para. 276B and, while I would not perhaps go so far as Mr Gill in saying that this makes the decision in *MD* "irrelevant", it certainly makes our task of construing para. 276B a very different one.

75. In 2012, the Rules changed. Sub-para. 276B(v) was added (with effect from 1 October 2012) in this form:

> "(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded."

No distinction is drawn there between a current and a previous period of overstaying. The "Purpose of the Instrument" was explained in the Explanatory Memorandum (of 13 June 2012) as including provision:

> "To introduce a consistent approach to dealing with applications for leave to remain from migrants whose previous period of leave has expired, by enabling migrants whose previous period of leave has expired to qualify for leave to remain where the application is made within 28 days of the expiry of their previous leave."

76. It is difficult to see how this provision could have treated those with a current period of overstaying as being in breach of immigration laws, provided they applied within the 28-day period allowed. In my judgment, for the purposes of para. 276B, if one is not present in breach of immigration laws, because the period since expiry of leave is disregarded (and, therefore, to be treated as present with leave – para. 6) it is odd to say that nonetheless one is not present lawfully in the UK for the purpose of calculating the 10-year period under para. 276B(i)(a).

77. Mr Gill argued, in my view persuasively, that under these new rules, there might be many cases in which it was not possible to submit an "in time" application for further leave to remain. Typically, this would arise where an applicant was seeking administrative review of refusal of further leave. The application for review had the

effect of extending leave until the decision on review, but no new application for leave could be made until that process was over without the review application being treated as withdrawn. By the time the review was completed the previous leave would have expired and, if unsuccessful, it would be impossible (without sub-para. (v)) to re-apply in time. Where the new sub-paragraph applied the applicant would not be treated as being in breach of immigration laws and would not be obliged to leave the country. As Mr. Gill submitted, it is hard to see why the applicant's residence in the UK, continuing just as before, should not be regarded as "lawful" for the purpose of sub-para. 276B(i)(a). Any normal reading of the provision seems to me to require para. 276B(i)(a) to be qualified accordingly. As Mr Gill said, other breaches of immigration laws may still take the applicant outside the protection of sub-para. (v), but that only reinforces the point that that sub-paragraph would seem to qualify the rigour of sub-para. 276B(i)(a).

78. The next change that we were shown was that taking effect on 6 April 2013. The new para. 276B(v) was changed to read as follows:

> "(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period."

We were shown nothing in the Statement of Changes (dated 14 March 2013) directed to this amendment, save for a statement in para. 90 of the intended change itself.

79. Presumably, consistently with the new argument, it would be contended for the Secretary of State that the single sentence, adding the clause beginning with the words "as will…" had different meanings for the first part (being the original sub-para. (v)) and for the second part as then added. Thus, this second part of the sentence would also have had to be treated as being "in the wrong place" and should have been added to sub-para. (i) also. Can that really be so? I think not. I have not previously come across any such provision which required one to transpose part of a single sentence in a sub-paragraph into a different part, four sub-paragraphs higher up the document, in order to find the natural and ordinary meaning of the provision as a whole.

80. The final version of para. 276B to which we were directed, and which applies to the present appellants, was introduced as from 24 November 2016.They were set out and explained in a Statement of Changes of 3 November 2016. The same version of the Rules introduced para. 39E. This new provision (para. 39E) was incorporated by reference into both halves of the new para. 276B(v) and, in effect, curtailed the period of disregard, for both current and past overstaying, to cases where the fresh application was made within 14 days of the expiry of previous leave or such leave as extended pending an appeal or administrative review.

81. The change effected by the introduction of para. 39E was addressed in paras. 7.45 to 7.49 of the Explanatory Statement which related not only to applications for further leave by those claiming ILR on the ground of long residence. The most material

paragraphs of the statement for the purposes of para. 276B of the Rules are paras. 7.48 and 7.49. These read as follows:

> "7.48 For those whose previous application was in-time but decided before their leave expired, or was made out of time but permitted by virtue of the provision outlined in paragraph 7.56[6], the 28-day period will be reduced to within 14 days of:
>
> - The refusal of the previous application for leave.
> - The expiry of the time-limit for making an in-time application for administrative review or appeal (if applicable).
> - Any administrative review or appeal being concluded, withdrawn or abandoned or lapsing
>
> This is to ensure that individuals to whom these circumstances apply also have 14 days to make a further application.
>
> 7.49. Changes have also been made to the requirements for applicants for indefinite leave to remain to have completed a period of continuous lawful residence in the UK. These ensure that the Secretary of State will disregard any period of overstaying between periods of leave which, at the time of the further application was made, fell to be disregarded under the previous 28 day period or the exceptions identified above. This is for reasons of fairness."

82. While we do not know to what the missing para. 7.56 would have referred, it seems that the addition of the second sentence of sub-para. 276B(v) may be being explained as providing a "disregard" of previous periods of overstaying between grants of leave which, as is common ground in this case, would qualify sub-para. 276B(i)(a). However, it seems to me that current periods of overstaying might well have been within para. 7.48 and thus included in the phrase in para. 7.49 "or the exceptions identified above". While the drafting of the explanation is singularly opaque, it does not seem to me that it is suggesting that the new sentence added to sub-para. (v) is indicating that the change would import a different effect into the sub-para. from that of the old rule (quoted above) or that the two sentences of the new rule had materially different effects one from the other. The statement can only be described as unclear and confusing. It was for this reason that I called the document the "so-called" Explanatory Memorandum earlier in this judgment.

83. In my judgment, this final Statement of Changes and its Explanatory Memorandum, leading to the current version of the Rules, therefore, do not greatly assist the current debate.

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[6] There appears to be no "paragraph 7.56". The passages reproduced for us have the parts quoted above on pages 14 and 15 of 16. The last paragraph of the statement appears to be paragraph 7.50 on page 15 of the document.

84. In my judgment, Miss Harrison QC and Mr Jafferji for Mr Arif were correct in their submission, in paragraph 45(vi) of their skeleton argument, that the new version of para. 276B(v) not only added the new version of the second part of the provision but also changed the wording of the first part dealing with current overstaying. The new version provided that the entire period of current overstaying (as opposed to the 28-day period only in the previous version) would be disregarded in a case where para. 39E applied. This brought both parts of the provision into line in cases where para. 39E applied. It would be most strange that the two parts of the provision, changed at the same time, should be intended to apply the "disregards" to different aspects of the paragraph as a whole. One would have expected some signal of such an intention in para. 276B itself (or at least in the Explanatory Memorandum). There is none.

85. Finally, Mr Gill referred us to the parallel rules governing ILR under the "points based system". There the Rules provide (in para. 245 AAA (a)) a definition of

> "References to "continuous period" "lawfully in the UK" [as meaning] … residence in the UK for an unbroken period with valid leave and a period shall be considered unbroken where: …
>
> (iii) The applicant has any current period of overstaying disregarded where paragraph 39E of these Rules applies; and
>
> (iv) the applicant has any previous period of overstaying between periods of leave disregarded where: the further application was made before 24 November 2016 and within 28 days of expiry of leave; or the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied."

86. In *Masum Ahmed* at 15(6) the court referred to these provisions as being a contrast to para. 276B where "…the Rules expressly [provide] that 'continuous periods' of lawful residence in the UK shall be considered 'unbroken', notwithstanding periods of overstaying, where paragraph 39E applies". The court's quotation of para. 245AAA(a) includes sub-para. (iv), but not (iii). This is perhaps understandable as that case concerned periods of previous overstaying between periods of leave. However, to me, this provision does not show a contrast with para. 276B at all. It is a similarity. It makes similar provision for "disregards" of both types of overstaying ("current" and "previous", without distinguishing between the two). I see no difference in para. 276B.

87. In my view, all these provisions are designed to ensure that applications for new leave to remain, made on expiry of an old period of leave, should be made promptly and within the period of grace provided for in para. 39E. Once an application is made promptly, the baton then passes to the Secretary of State to deal with the applications. If they are dealt with promptly, no problem arises. The real problem is where, as in some of these cases, there are long time lags between application and decision and a new application is then made which is treated as a variation of the first application. The remedy for that inconvenience is not to twist the wording of the existing rules but to amend them.

88. Miss Giovannetti QC, for the Secretary of State, in a customarily attractive argument, contended that the two sentences of para. 276B(v) have two separate effects, as is succinctly stated in paragraph 19 of her skeleton argument (quoted above). She says that the first part of (v) is only intended to benefit a person whose application is made after having clocked up already the necessary 10-year period for the purposes of sub-para. (i). It then allows for the "disregard" of any short period of overstaying after expiry of an old leave, to avoid the applicant being in breach of immigration laws, provided that the application is made within the 28-day (now 14 day) period of grace. It should not allow an applicant with less than 10 years lawful residence to clock up the 10-year period while waiting for the new application to be dealt with and the Rules were not intended so to provide.

89. One sees the force of that submission, or at least the convenience of it for the Secretary of State, in cases where there are long delays in the department in dealing with applications, which can then be varied by yet further applications. However, the remedy is in the Secretary of State's own hands. If an application is made for further leave to remain after expiry of a former period of leave and before 10 years residence is achieved, it would have to be on other grounds. Such an application was made, for example, by Mr Hoque, who asked again for further leave as a Tier 1 (Entrepreneur) Migrant on 20 July 2016, within the 28-day period then prevailing. (An earlier application had been rejected because of a technical failure to provide evidence to satisfy the requirements of the points-based system.) With the July 2016 application still extant, which had not been dealt with in the meantime by the Secretary of State, he applied on 13 October 2017 for ILR outside the Rules which took effect as a variation of the July 2016 application. Then while the application, as so varied, was still extant, he reached the period of 10 years residence and submitted (on 12 January 2018) a third application for ILR under the long residence provisions; that again took effect as a variation of the first application of July 2016. The July 2016 application, by then varied twice, was refused by the Secretary of State on 18 May 2018.

90. If Mr Hoque's application had been dealt with timeously, there would have been no question of him having achieved the necessary 10-year residence period. As it was, nothing at all happened in the 15-month period between 20 July 2016 and the submission of his new application on 13 October 2017, except Mr Hoque's residence continued as before. As Mr Gill submitted, the possibility of making further applications during the pendency of a first application, with the consequences as in Mr Hoque's case, does not seem to be a good reason for giving a distorted meaning to para. 276B(v).

91. Finally, I would add a few words about the Secretary of State's Guidance issued to caseworkers for the purposes of helping them to decide applications for ILR submitted on the basis of long residence. No counsel took us to the detail of this material, which is included in the bundles before us for the appeal. Rightly, they did not focus on this in their arguments on construction of the Rules because, as Lord Brown made clear in *Mahad*, the Secretary of State's intention in formulating the Rules is not to be discovered from these. However, there is a qualification to this, noted by Jackson LJ (with whom Longmore LJ and Vos LJ (as he then was)) agreed in *Pokhriyal v SSHD* [2013] EWCA Civ 1568. Jackson LJ said:

> "42 If there is ambiguity in Immigration Rules and the Secretary of State publicly declares that he/she will adopt the more lenient interpretation, then tribunals and courts may hold the Secretary of State to that assurance. This is exemplified by the Court of Appeal's decision in *Adeyodin v Secretary of State for the Home Department* [2010] EWCA Civ 773 … At paragraph 70 Rix LJ said that in a situation of genuine ambiguity, it was legitimate to derive assistance from the executive's formally published guidance, including IDIs
>
> 43. I would respectfully agree with paragraph 70 of Rix LJ's judgment in *Adeyodin*. I would, however, add this comment. I do not think it is possible for the Secretary of State to rely upon extraneous material in order to persuade a court or tribunal to construe the rules more harshly or to resolve an ambiguity in the Government's favour. The Secretary of State holds all the cards. The Secretary of State drafts the rules; the Secretary of State issues the IDIs and guidance statements; the Secretary of State authorises the public statements made by his/her officials. The Secretary of State cannot toughen up the rules otherwise than by making formal amendments and laying them before Parliament. That follows from the Supreme Court's reasoning in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33 …"

92. Mr Gill's primary submission to us on the guidance was that he did not need it for the purpose of his case, and I agree with him; he does not. However, in reply, he submitted that if we were to regard the rule in question as ambiguous, then the guidance may assist: see *Pokhriyal* above. Once that is done one can see from at least one of the examples given (Example 4 on p. 16 of the version published for Home Office staff on 3 April 2017) that it treats a current period of overstaying as "lawful residence" for the purpose of para. 276B. I agree.

93. At the very best, in my judgment, the Secretary of State's new argument before this court serves only to show that the rule may be ambiguous. (In my view, ambiguity only comes in if one tries to distort the language of the rule in the manner now suggested.) If it is ambiguous, this guidance does not help in supporting the construction now advanced. However, for the reasons given by Mr Gill (and others for the Appellants) we do not need to go there. There is also a telling absence from the Guidance to caseworkers that they should apply para. 276B in the manner now suggested by the Secretary of State. At best, this poorly drafted provision is not easy to construe and if it had been intended that two "disregards" appearing in the *very same* sub-sub- paragraph were to have different effects for different parts of the paragraph as a whole one might have expected that to be spelled out clearly for the guidance of Home Office staff in their work. However, the omission is not surprising, given that that construction of the rule was only advanced for the first time on 22 July 2020.

94. For these reasons, I would have granted permission to appeal in each of these cases, in view of the difficult questions that the cases posed on construction of the rules, and I

would have allowed the appeals. That, for me, would have been the right course even in the cases of Mr Mubarak (who did not argue the construction points taken by the other applicants) and of Mr Arif (whose late applications presented significant procedural hurdles for him). However, in each case they were joined to argue these applications and the facts of their cases are not so dissimilar from those of Mr Hoque and Mr Kabir. Each would have been entitled to the benefit of the construction advanced by Mr. Gill. In my judgment, if that construction argument had succeeded, I would have considered it to be in the interests of justice that they should have had the benefit of that success.

95. I respectfully agree, however, with the conclusion reached by Dingemans LJ in respect of the Article 8 arguments in each case. The result in Mr Mubarak's case seems to me to be particularly harsh, but the room for success in Article 8 cases such as his has become very slender indeed. Given the majority view, on the construction of the Rules, those appeals for which I would still give permission, and which I would have allowed, now fall to be dismissed.

96. I entirely agree with what is said by Underhill LJ in his postscript in paragraph 59. The problem, as he says, goes further than structure and presentation. After many years of trying to understand and construe infelicitous drafting in various parts of these Rules and in simply trying to see how they are supposed to work in practice, I think that there may be no solution other than to discard the present Rules and to start again. It may take a considerable time to achieve, but the result should enable officials, migrants (and their advisers) and the Tribunals and courts to understand what is going on and should reduce the volume of litigation. That result, it seems to me, would be well worth it.

Lord Justice Dingemans:

THE CONSTRUCTION OF PARAGRAPH 276B

97. I agree with the judgment of Underhill LJ and in particular with his construction of paragraph 276B(v) of the Immigration Rules. However, as McCombe LJ does not agree with this construction, and because the construction differs in part from the construction of paragraph 276B given in *R (Masum Ahmed) v Secretary of State for the Home Department*, I should explain briefly my reasons for agreeing with Underhill LJ.

98. It is common ground that the function of this court is to interpret the Immigration Rules not with all the strictness applicable to the construction of a statute, but sensibly according to the natural and ordinary meaning of the words used.

99. As it is necessary to show "10 years continuous lawful residence" for the purposes of obtaining ILR under paragraph 276B(i) of the Immigration Rules, in my judgment the starting point is the definition of "lawful residence". This is set out in paragraph 276A(b). The definition of "lawful residence" in paragraph 276A(b) is that it "means residence which is continuous residence pursuant to: (i) existing leave to enter or remain; or (ii) temporary admission within section 11 … or immigration bail … where leave to enter or remain is subsequently granted; or (iii) an exemption from

immigration control …”. It is common ground that none of these appellants satisfied these requirements for a 10 year period.

100. Paragraph 276B sets out a series of requirements in sub-paragraphs (i), (ii), (iii), (iv) and (v), as appears from paragraph 8 of Underhill LJ’s judgment. Paragraph 276D provides that ILR is to be refused unless the Secretary of State is satisfied that “each of the requirements in paragraph 276B is met”. It was not apparent to me that the construction contended for on behalf of the appellants (save for Mr Mubarak who did not take this point) gave any weight to this requirement to satisfy each of the separate requirements in paragraph 276B(i), (ii), (iii), (iv) and (v).

101. Paragraph 276B(v) requires that the applicant must not be in the UK in breach of immigration laws. A breach of immigration law includes not only presence in the UK without leave to remain, but also, for example, working in breach of conditions of entry. Paragraph 276B(v) contains exceptions to this requirement. The first exception (termed [B] for the purposes of analysing paragraph 276B(v) as appears from paragraph 8 above) is “except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded”. The second exception (termed [C] for the purposes of analysing paragraph 276B(v)) is “any previous period of overstaying between periods of leave will also be disregarded …” in two specific instances.

102. I cannot accept the arguments of the appellants, or that part of the judgment of McCombe LJ, which treat the exception set out in the first part of paragraph 276B(v) “except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded” as qualifying the requirement set out in paragraph 276B(i). This exception is self-contained within sub-paragraph 276B(v) and does not appear either by punctuation or formatting as an exception or proviso to the whole of paragraph 276B. In my judgment sub-paragraph 276B(v) is an independent requirement, with its own internal first exception to that requirement, which first exception says nothing about sub-paragraph 276B(i). Further even if the “current period of overstaying” is “disregarded” for the purposes of paragraph 276B(i) there is nothing which converts that period of overstaying into “lawful residence” as defined in paragraph 276A(b).

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. So far this construction of sub-paragraph 276B(v) is consistent with

the approach taken in *R (Masum Ahmed) v Secretary of State for the Home Department* and *R (Juned Ahmed) v Secretary of State for the Home Department*.

104. My provisional view after hearing argument was, consistent with my approach to the first exception in paragraph 276B(v) (termed [B] in paragraph 8 of the judgment of Underhill LJ), to restrict the second exception of paragraph 276B(v) "any further period of overstaying between periods of leave will also be disregarded where …" (termed [C] in paragraph 8 of the judgment of Underhill LJ) as applying only to the requirement in paragraph 276B(v), and accept the approach taken in *R (Masum Ahmed)* and *R (Juned Ahmed)* for the same reasons for taking that approach to the first exception to paragraph 276B(v) (termed [B] in paragraph 8 of the judgment of Underhill LJ). However I am persuaded that Underhill LJ's construction that this second exception of paragraph 276B(v) applies to paragraph 276B(i), should be accepted for three reasons. First this is because Underhill LJ's construction: accords with the explanatory memorandum to HC667; reflects the Secretary of State's practice when dealing with applications (so we are told on behalf of the Secretary of State); and is more beneficial to applicants for indefinite leave to remain than my provisional view. In the case of ambiguity in the rules it is permissible to adopt an interpretation more generous to applicants on the basis of the Secretary of State's statements about her practice, compare *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568 at paragraph 39. Secondly Underhill LJ's analysis provides a meaning for the second exception which, as is pointed out by Underhill LJ at paragraph 35 of the judgment, would otherwise be lacking. Thirdly there is a need to have some agreement on the proper construction of sub-paragraphs 276B(i) and (v), and my agreement with Underhill LJ's construction gives a majority in favour of his interpretation of paragraph 276B.

105. I conclude this part of my judgment on the construction of paragraph 276B by agreeing with what Underhill LJ has said about the drafting of the Immigration Rules. The way in which sub-paragraph 276B(v) came to be in its present format appears from the judgments of Underhill and McCombe LJJ. It is not apparent that any thought was given to the interrelationship of the parts of sub-paragraph 276B(v) [A], [B] and [C] (as defined in paragraph 8 of the judgment of Underhill LJ) with themselves or sub-paragraph 276B(i). This leads to understandable confusion on the part of parties and their legal advisers. In this respect McCombe LJ has pointed to the differing submissions made on behalf of the Secretary of State about the proper construction of the second exception to paragraph 276B(v) advanced in *R (Masum Ahmed) v Secretary of State for the Home Department* and in this case. Poorly drafted rules lead to avoidable litigation.

THE OTHER ISSUES

106. The interpretation of paragraph 276B of the Immigration Rules given by Underhill LJ, with which I agree, means that the submissions made on behalf of Mr Arif, Mr Hoque and Mr Kabir on the main point on the appeal do not succeed. However these appellants, and Mr Mubarak, have raised issues about whether the refusal of leave to remain was compatible with their human rights protected by article 8 of the ECHR.

In addition Mr Arif requires an extension of time to seek permission to appeal against the judgment of both Saini J and Elisabeth Laing J.

107. If the Secretary of State refuses to grant leave to remain ("LTR") where a human rights claim has been made, the rejected applicant may appeal in the UK to the FTT unless the Secretary of State has certified the claim as being "clearly unfounded" pursuant to section 94 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Further, where a human rights claim has already been made and rejected, the Secretary of State may refuse to treat the new human rights claim as amounting to a fresh claim under paragraph 353 of the Immigration Rules. Again, this means that there is no right to an appeal to the FTT in the UK.

108. In the case of Mr Hoque the claim was certified under section 94 of the 2002 Act. In the cases of Mr Mubarak and Mr Kabir the Secretary of State did not treat further submissions as a fresh claim under paragraph 353 of the Immigration Rules after an earlier claim had been rejected.

109. Mr Arif is in a different position. His claim was not certified under section 94 of the 2002 Act and so he appealed to the FTT. After the FTT dismissed his appeal and he was refused permission to appeal to the UT, Mr Arif commenced a claim for judicial review of that refusal of permission to appeal in the Administrative Court. The claim was dismissed by Elisabeth Laing J and an application to set aside that dismissal was refused by Saini J. Mr Arif seeks permission to appeal against those decisions and requires an extension of time in which to do so. I am very grateful to McCombe LJ for his assistance in producing the part of the judgment which relates to Mr Arif.

PRINCIPLES RELATING TO SECTION 94 AND PARAGRAPH 353

110. Section 94 of the 2002 Act provides that the Secretary of State may certify a human rights claim as "clearly unfounded".

111. Paragraph 353 of the Immigration Rules provides that when a human rights claim has been refused or withdrawn and any appeal against the decision is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. Submissions amount to a fresh claim if they are significantly different from the previous claim. A claim will be significantly different if the submissions: (1) had not already been considered; and (2) taken together with the previous material, create a realistic prospect of success.

112. In *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6; [2009] 1 WLR 348 the House of Lords considered the effect of further submissions after certification under section 94 of the 2002 Act. When considering whether further submissions made after a claim had been certified under section 94, the Secretary of State should "treat a claim as having a realistic prospect of success unless it is clearly unfounded". The House of Lords confirmed that if any reasonable doubt existed as to whether the claim might succeed "then it is clearly not unfounded", and it had to be treated as a fresh claim so that paragraph 353 could not be applied. If a Court, asking itself the same question as the Secretary of State, considered that the claim has a

realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational.

113. The 2002 Act, as amended, now sets out relevant factors for a Court to consider when assessing article 8 ECHR claims. Section 117A(2)(a) of the 2002 Act requires the judicial decision maker to "have regard to the considerations listed in section 117B ... in considering the public interest question". The "public interest question" is, in turn, defined in section 117A(3) of the 2002 Act as being "the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)".

114. Section 117B of the 2002 Act, so far as relevant set outs the following "public interest considerations applicable in all cases":

> "(1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English - (a) are less of a burden on taxpayers, and (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons - (a) are not a burden on taxpayers, and (b) are better able to integrate into society.
>
> (4) Little weight should be given to -
>
> (a) a private life, ... that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious ...".

115. Consideration of the effect of a person's immigration status being precarious was given in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536 at paragraph 49 and in *CL v Secretary of State for the Home Department* [2019] EWCA Civ 1925; [2020] 1 WLR 858 at paragraphs 58 to 65. These statutory provisions are supplemented by provisions made in the Immigration Rules for specific factual situations such as "family life with a partner", "victims of domestic abuse" and "adult dependent relatives".

116. It is therefore necessary to return to the factual background for each appellant.

MR HOQUE

117. Mr Hoque was born on 1 June 1984, so he is now aged 36 years. He arrived in the UK on 7 February 2008, when he was aged 23 years, with leave to enter ("LTE") as a student, valid until 21 May 2010. He was granted further LTR as a Tier 4 Student, a Tier 1 (Post Study Work) Migrant and as a Tier 1 (Entrepreneur) Migrant, until 18 March 2016.

118. On 15 March 2016 Mr Hoque made a further in time application for LTR as a Tier 1 (Entrepreneur) Migrant based on a business providing IT services established by Mr Hoque and a business partner. On 10 May 2016 the Secretary of State refused the application. Mr Hoque complained that the refusal was technical because although bank statements did not show the £50,000 investment, required by the Tier 1 Entrepreneur migrant rules, an investment schedule did show the investment and it was supported by an accountant's letter. Further although employee start dates had not been provided in the form required by the rules, that information was contained in a separate table along with payslips.

119. Mr Hoque requested an administrative review, which was refused by letter dated 21 June 2016. Mr Hoque's LTR terminated on 23 June 2016, the deemed date of delivery of the letter dated 21 June 2016 (some 8 years and 4 months after arriving in the UK).

120. On 20 July 2016, which was within 28 days of the last decision, Mr Hoque made a further submission with all the relevant information. This application had not been determined over a year later and as at 13 October 2017 Mr Hoque varied the application by making an application for ILR outside the rules. This varied application had not been determined by 12 January 2018, and Mr Hoque made a further variation to the outstanding application so that it was for ILR on long residence grounds. It was the application of 20 July 2016, as varied on 13 October 2017 and 12 January 2018, which was refused by the Secretary of State on 18 May 2018 when the Secretary of State refused to grant Mr Hoque leave to remain and certified the claim as clearly unfounded pursuant to section 94 of the 2002 Act. The effect of the certification was that Mr Hoque had no right of appeal to the FTT.

121. Mr Hoque sought judicial review of the Secretary of State's decision contending that he should have been granted indefinite leave to remain ("ILR") under paragraph 276B of the Immigration Rules and that the Secretary of State was wrong to certify his article 8 ECHR claim as clearly unfounded. On 15 November 2018 permission to apply for judicial review was refused by UT Judge Macleman. On 1 February 2019 UT Judge Rintoul refused a renewed application for permission to apply for judicial review.

122. Mr Hoque submits that the Secretary of State acted unlawfully in certifying his claim. Mr Hoque relies on the fact that he had leave to remain for a period of 8 years 4 and a half months, he acted lawfully and made applications within the rules, he has built up a business in the UK making a contribution to the economy, he has now spent 12 years in the UK, he is a technical overstayer and he was caught out by the complexity

of the Immigration Rules. He asserted that he had integrated socially, culturally and economically in the UK.

123. In my judgment the Secretary of State was entitled to certify Mr Hoque's claim. Mr Hoque had not satisfied the provisions of the Tier 1 (Entrepreneur) Migrant route and made a further application after 8 years and 4 months in the UK, which he varied. He lived in Bangladesh for 23 years and has family over there. He did not refer to any relevant relationships or family members living in the UK. There was no material to show that the public interest in the maintenance of effective immigration controls was outweighed by Mr Hoque's family and private life protected under article 8 of the ECHR. Any such claim was "clearly unfounded" because it was bound to fail before a FTT Judge. UT Judge Rintoul was therefore right to refuse Mr Hoque permission to apply for judicial review.

MR KABIR

124. Mr Kabir arrived in the UK on 2 September 2008 with LTE as a student from 29 August 2008 until 31 December 2009. Mr Kabir's LTR was extended as a Tier 4 General Student until 19 September 2015.

125. On 23 March 2015 Mr Kabir applied for LTR on the basis of his private life. On 13 July 2015 the application was refused with an in country right of appeal because it appears that Mr Kabir had medical issues on which he had relied. Mr Kabir appealed but on 11 January 2017 the appeal was dismissed by the FTT. Further applications for permission to appeal against the dismissal of the appeal were refused and on 12 September 2017 Mr Kabir became appeal rights exhausted and he did not have LTR. This was 9 years and 15 days after he had entered the UK.

126. On 25 September 2017 Mr Kabir applied for further LTR on the basis of 10 years lawful continuous residence, even though at that time he had only 9 years and 23 days' residence. On 9 January 2018 Mr Kabir varied his application so that he sought ILR on the basis of the 10 years' continuous lawful residence. On 8 October 2018 the Secretary of State refused the application and decided that there was no fresh claim pursuant to paragraph 353 of the Immigration Rules.

127. It appears that there was an outstanding invoice for £1,963 for NHS treatment at Homerton University Hospital NHS Foundation Trust for Mr Kabir. The Secretary of State relied on this non-payment as a ground on which LTR should normally be refused pursuant to paragraph 322(12) of the Immigration Rules although it was said on behalf of Mr Kabir that there had been no response to an email about the charge and that he was paying the charge by instalments.

128. On 12 November 2018 a letter before claim was sent and the Secretary of State maintained the decision by letter dated 12 November 2018, which was served on 27 November 2018.

129. Mr Kabir applied for judicial review of the Secretary of State's decision. On 30 January 2019 UT Judge Pitt refused permission to apply for judicial review on the papers. Mr Kabir renewed his application and at a hearing on 15 March 2019 UT

Judge Craig refused the renewed application for permission to apply. UT Judge Craig noted that after the first article 8 claim had been rejected the second claim was made essentially on the same grounds as his previous application. UT Judge Craig noted even if the paragraph 276B interpretation urged on behalf of Mr Kabir was correct the Secretary of State was entitled to refuse leave because he owed monies to the NHS.

130. Mr Kabir submits that the Secretary of State acted unlawfully in refusing to treat his further claim, as varied, as a fresh claim. The new claim followed on from the rejection of Mr Kabir's claim before the FTT. Very little detail was provided about Mr Kabir's life in the UK apart from the chronology of events. There was no material to show that the public interest in the maintenance of effective immigration controls was outweighed by Mr Kabir's family and private life protected under article 8 of the ECHR. The Secretary of State was entitled to refuse to treat Mr Kabir's claim as a fresh claim because it was "clearly unfounded" because it was bound to fail before a FTT Judge. UT Judge Craig was therefore right to refuse Mr Kabir permission to apply for judicial review.

MR MUBARAK

131. Mr Mubarak was born on 6 September 1985 (and is now aged 35 years) and is a citizen of Bangladesh. His wife was born on 3 November 1994 (and is now aged 25 years) and his daughter was born on 16 January 2016 (and is now aged 4 years). They are also citizens of Bangladesh.

132. Mr Mubarak arrived in the UK on 14 July 2008 with LTE as a student until 21 October 2010. By an application made on 27 October 2010 he was granted further LTR as a student until 24 October 2011. He obtained a Master of Science with Distinction from the University of Greenwich on 23 June 2011. By an application made on 21 October 2011 he was granted LTR as a Tier 1 (Post Study Work) Migrant until 1 December 2013. On an application made on 29 November 2013 he was granted further LTR as a Tier 2 (General) Migrant until 29 December 2016. This was for a job as a sales account manager with Utility Choice Limited. However he got a better opportunity with "Save My Quid Ltd" who offered a higher salary package and enhanced benefits and he moved to them. By an application made on 11 December 2015 he was granted further LTR as a Tier 2 (General) Migrant until 31 January 2019. However on 29 October 2017 Mr Mubarak's LTR as a Tier 2 (General) Migrant was curtailed to expire on 29 October 2017 because of issues concerning the sponsorship licence of his employer. Mr Mubarak said that this was his employer's fault. Mr Mubarak noted that if his leave had not been curtailed because of those problems he would have been entitled to ILR after completing five years residence under Tier 2 (General).

133. On 27 October 2017 (some 9 years and 3 months after arriving in the UK) Mr Mubarak made an application for LTR relying on article 8 of the ECHR. The Secretary of State refused the claim on 22 May 2018 and certified it pursuant to section 94 of the 2002 Act.

134. On 2 June 2018 Mr Mubarak applied for ILR outside the rules, and varied the application on 17 July 2018 for ILR pursuant to paragraph 276B of the Immigration

Rules. On 4 March 2019 the Secretary of State refused the application and decided that there was no fresh claim pursuant to paragraph 353 of the Immigration Rules.

135. On 22 March 2019 a pre-action protocol letter was sent on behalf of Mr Mubarak, and the Secretary of State agreed to reconsider on 3 April 2019. On 14 May 2019 the Secretary of State issued a further decision, refusing the application and again deciding that there was no fresh claim under paragraph 353 of the Immigration Rules.

136. A claim for judicial review was issued on 31 May 2019 and permission to apply for judicial review was refused by UT Judge Eshun on the papers on 8 July 2019. Mr Mubarak renewed his application and on 18 September 2019 Upper Tribunal Judge Gill refused permission to apply for judicial review and refused permission to appeal to the Court of Appeal. UT Judge Gill gave detailed reasons for the decision, noting complaints that the Secretary of State had not given anxious scrutiny, had not considered the approach of a FTT Judge to the application, and come to a conclusion that was irrational. UT Judge Gill referred to the decision letter which had specifically referred to the fact that Mr Mubarak had only just failed to satisfy the 10 year requirement, and had taken specific account of the witness statements showing Mr Mubarak and his wife's business, friends and their daughter's circumstances.

137. It is submitted on behalf of Mr Mubarak that the Secretary of State acted unlawfully in failing to treat Mr Mubarak's claim on 14 May 2019 as a fresh claim. In addition it was submitted that there was a misdirection when UT Judge Gill held "I simply cannot say that the conclusion that the respondent reached, that further representations taken together with the previously considered material did not create a realistic prospect of success, was arguably irrational". It was said that this was an error because the Judge should have considered whether the claim might succeed, and not whether the decision was rational.

138. I do not accept that UT Judge Gill applied the wrong test when refusing permission to apply for judicial review. This was because the question is whether the Secretary of State acted unlawfully by acting irrationally. It will be irrational to determine that there was no prospect of success before the FTT Judge if there was such a prospect of success. UT Judge Gill was responding to the argument made in the UT on behalf of Mr Mubarak, and applying the proper test. The real question is whether UT Judge Gill was right to assess that there was no prospect of success before a FTT Judge.

139. It was submitted on behalf of Mr Mubarak that a FTT Judge might have accepted the article 8 claim. Reliance was placed on the fact that Mr Mubarak had lived lawfully in the UK from 14 July 2008 until 23 May 2018, and had made his application promptly. He was nearly at the 10 years lawful residence mark. He spoke English and was financially independent. He, his wife and daughter, had cousins and friends in the UK and he had made an economic contribution to the UK by paying his taxes. Reliance was placed on witness statements from Mr Mubarak and his wife. These set out the background and also details of their daughter's life in the UK, the use of leisure centres and playgrounds in the UK and the lack of comparable facilities in Bangladesh, and plans for pre-school.

140. It was also submitted that being a near miss case is not wholly irrelevant to the balancing exercise required under article 8 of the ECHR if an applicant can show that there are individual interests at stake covered by article 8 of the ECHR which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTR outside the rules. This is because the detrimental impact on the public interest will be somewhat less than in a case where the gap between the applicant's position and the rules is greater, see *Secretary of State for the Home Department v SS (Congo)* [2015] EWCA Civ 387; [2016] 1 All ER 706. Although Mr Mubarak's immigration status had been precarious (for the purposes of section 117B of the 2002 Act) and a private life established in such circumstances should be given little weight, that gave a Tribunal flexibility and did not mean that no weight should be given, see *Rhuppiah v Secretary of State for the Home Department*.

141. In my judgment the Secretary of State acted lawfully in refusing to treat Mr Mubarak's submissions as a fresh claim. A claim made on 27 October 2017 under article 8 of the ECHR had been made, refused and certified on 23 May 2018, and Mr Mubarak had then simply made a further application, which was later varied, on 17 July 2018. It is right to record that Mr Mubarak's leave was curtailed because of the sponsorship issues with his company, rather than any personal failing on his part but he did not qualify for ILR by that method. The Secretary of State was entitled to refuse to treat Mr Mubarak's claim as a fresh claim because it was "clearly unfounded" and this was because it was bound to fail before a FTT Judge. This was because the public interest in the maintenance of effective immigration controls, as set out in section 117B(1) of the 2002 Act, outweighed Mr Mubarak's right to respect for his private and family life under article 8 of the ECHR which included the interaction with cousins and friends in the UK and even taking full account of Mr Mubarak's young daughter's best interests and her use of swimming pools and playgrounds in the UK. UT Judge Gill was therefore right to refuse Mr Mubarak permission to apply for judicial review.

MR ARIF

142. I should record my thanks to McCombe LJ who prepared the main part of this judgment relating to Mr Arif. Mr Arif is a national of Pakistan, born on 16 November 1983. He arrived in the UK on 4 April 2008 with LTE as a student. He was granted further LTR to remain as a student and subsequently, from 2013, as a Tier 1 (Entrepreneur). On 20 May 2016 he applied for an extension of that leave which was refused. He applied for Administrative Review which, on 31 March 2017, affirmed the refusal decision.

143. Within 14 days Mr Arif made a further application for leave to remain as a Tier 1 (Entrepreneur) on 10 April 2017. Almost a year later, with that application still pending and undecided, on 8 March 2018, he applied for ILR on the basis of 10 years continuous lawful residence under paragraph 276B of the Rules. That application was refused on 20 August 2018, in a decision which also considered his private life rights under Article 8 of the ECHR. The decision on the latter point was that the refusal of further leave would not result in a disproportionate interference with those rights.

144. Mr Arif's claim was not certified and so he appealed to the FTT. An appeal from the decision of 20 August 2018 was rejected by the FTT on 26 March 2019, finding that Mr Arif did not satisfy the requirement of 10 years continuous lawful residence for the purposes of paragraph 276B and that the decision on the Article 8 grounds had also been correct. An application for permission to appeal to the UT was refused by both the FTT and by the UT itself on 3 July 2019.

THE APPLICATION FOR JUDICIAL REVIEW BY MR ARIF

145. Mr Arif then brought an application for judicial review seeking to quash the decision of the UT to refuse him permission to appeal pursuant to *R(Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663. The application for judicial review of the UT decision was issued on 24 July 2019. However, only brief grounds for review were submitted at that stage as it was said that leading counsel had been instructed on the matter "and grounds will be drafted in next 14 days" (see the end of section 10 of the Claim Form). On 23 August 2019 Mr Arif's solicitors sent the "existing version" of the draft further grounds and asked (without formal application) for an extension of time until 9 September 2019 to file finalised grounds with the benefit of leading counsel's input. They asked that the papers should not be put before a judge in the meantime. On 12 September 2019, the Administrative Court office wrote an email to Mr Arif's solicitors asking for an update. The solicitors responded on 13 September asking for a further extension to 16 September; this was acknowledged on that day. A finalised version of draft amended grounds was sent to the court on 16 September and was acknowledged.

146. Shortly thereafter, the solicitors received an order of Elisabeth Laing J, signed and dated by the judge on 13 September 2019, refusing permission to apply for judicial review, for reasons dealing extensively and (with respect) cogently with the grounds of appeal that had been lodged with the Claim Form. She also referred to the more extensive grounds of appeal presented on the application for permission to appeal to the Upper Tribunal; these included a submission that the decision of Sweeney J in *R (Juned Ahmed)* was wrong. The judge also noted that the original grounds before her did not address the "second appeals" test, applicable to any application to the High Court for permission to apply for judicial review of a decision of the UT refusing permission to appeal. Clearly, however, the judge did not have before her the draft amended grounds for review as finalised with leading counsel and lodged on 16 September nor the previous "existing version" of the draft amended grounds sent to the court on 23 August. It appears that the order (although finalised by the judge on 13 September 2019, a Friday) was sent to the solicitors on the Monday, 16 September.

147. Nearly a month later, on 14 October 2019, the solicitors requested the court to review the matter, reciting the facts set out above and asking for the case to be sent back to the judge with a request to review her decision. On 15 October 2019, a Court Progression officer replied saying that if it were sought to have the grounds reconsidered it would be necessary to lodge an application notice and to pay a £255 fee. It was also said, however, that it was not for court staff to advise on any particular course of action.

148. On 2 December 2019, the solicitors issued an application for an order "To reopen the case and request for an extension of time". The grounds of the application made reference to *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council, Practice Note* [2018] EWCA Civ 860; [2018] 1 WLR 5161, dealing with the principles governing applications to which CPR 52.30 applies. CPR 52.30 provides for the Court of Appeal or the High Court to exercise their jurisdiction to reopen "a final determination of any appeal" only where:

> "(1) …(a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative or effective remedy.
>
> (2) In paragraph … (1), … 'appeal' includes an application for permission to appeal …".

149. An affidavit from a Mr Nadeem Ali, a friend of Mr Arif, was also lodged testifying to Mr Arif having been ill and to his having moved to Mr Ali's home for about two weeks from the middle of October until 2 November 2019 and at a time when, it was said, his solicitors had been trying to contact him about this matter. Mr Arif's own affidavit (of 22 November 2019) stated that he learned about the court's email of 15 October 2019 on or around 13 November 2019 and that after that he had been awaiting funds to make the application.

THE APPLICATION TO SET ASIDE ELISABETH LAING J'S JUDGMENT

150. While no reference was made in the application to reopen to the precise jurisdiction being invoked, it is clear that the High Court does have an inherent jurisdiction to reconsider a matter already decided on judicial review and that the appropriate test is the same as that applied to the reopening of an appeal under CPR 52.30: see *R (Harkins) v Secretary of State for the Home Department* [2014] EWHC 3609 (Admin) (Aikens LJ and Globe J), considering the then CPR 52.17. (This decision was followed by Cutts J in *Gregory v Thames Magistrates Court* [2019] EWHC 2125 (Admin).)

151. In *Harkins*, the court said,

> "Under CPR r. 52.17(4) permission is needed to make an application to reopen a final determination of an appeal, even in a case where permission was not needed for the original appeal. Effectively, therefore, to reopen an appeal (as opposed to a refusal to grant permission to appeal), there are three stages in the CPR r 52.17 process. First, permission to make the application to reopen the appeal has to be granted. Secondly, if it is, then the application to reopen the appeal has to be made and granted. Only if the application is granted will the Court of Appeal go on to the third stage of reopening the merits of the appeal and considering whether the original decision was correct in the light of the changed circumstances."

152. In the *Goring-on-Thames Parish Council* case at paragraph 29 the Master of the Rolls, McCombe and Lindblom LJJ accepted counsel's concession that,

> "… The court's jurisdiction under CPR r 52.30 is, as we have said, a tightly constrained jurisdiction. It is rightly described in the authorities as 'exceptional'. It is 'exceptional' in the sense that it will be engaged only where some obvious and egregious error has occurred in the underlying proceedings and that error has vitiated – or corrupted – the very process itself. It follows that the CPR r 52.30 jurisdiction will never be engaged simply because it might plausibly or even cogently be suggested that the decision of the court in the underlying proceedings, whether it be a decision on a substantive appeal or a decision on an application for permission to appeal, was wrong. The question of whether the decision in the underlying proceedings was wrong is only secondary to the proper question of whether the process has itself been vitiated. But even if that prior question is answered 'Yes', the decision will only be reopened if the court is satisfied that there is a powerful probability that it was wrong."

153. Dealing with permission applications, at paragraph 31 in *Goring*, the judgment continues:

> "In the context of an application for permission to appeal whose consideration is said to have been critically undermined or corrupted, the first question will be whether the judge whose decision is the subject of the application to reopen has sufficiently confronted and dealt with the grounds of appeal. Secondly, if the conclusion is reached that the process has been critically undermined it will still be necessary for the court to consider whether, had that been so, that it is highly likely, in the sense of there being a powerful probability, that the decision on the application for permission to appeal would have been different and that permission to appeal would have been granted."

154. By order made on 4 February 2020, Saini J refused the application to reopen the judicial review proceedings. In his reasons, the judge rejected the submission that the integrity of the proceedings had been critically undermined and found that the reasons for delay in submitting final grounds for judicial review were "far from convincing". He said that, in any event, he agreed with the decision of Elisabeth Laing J refusing the original application for permission to apply and found that the "second appeal" test (*Cart*) was not met. By Appellant's Notice of 13 February 2020, Mr Arif applied for permission to appeal from Saini J's order. In short, the grounds of appeal advanced contend that Saini J erred in his application of the principles which I have endeavoured to summarise above.

155. The application by Mr Arif for permission to appeal from Saini J's order was adjourned by the order of 5 May 2020, to an oral hearing with appeal to follow if

permission was granted, and to be linked to the other three applications for permission to appeal by Mr Hoque, Mr Mubarak and Mr Kabir.

156. By Appellant's Notice of 10 June 2020, Mr Arif also applied for permission, out of time, to appeal from the original order of Elisabeth Laing J on the basis of procedural irregularity in the judge's failure to consider the new draft amended grounds of appeal lodged at the court office on 23 August 2019, and the related correspondence requesting extension of time, and the arguments that the decision of the Upper Tribunal to grant permission to appeal had been flawed. That application was adjourned to these hearings by further order of 12 June 2020.

THE APPEAL FROM THE ORDER OF SAINI J

157. In my judgment, the application for permission to appeal from the order of Saini J should be refused. The application to reopen the judicial review proceedings was hopelessly late in the circumstances of this case. It must have been immediately apparent as early as 17 September 2019 that Elisabeth Laing J's order had been founded solely upon the grounds for review originally that had been lodged with the Claim Form as required by the Rules and the relevant Practice Direction. Further, no application had ever been made to amend those grounds. The prospect of further grounds being settled by leading counsel did not constitute such an application to amend, nor did the lodging of "the existing version of the grounds" on 23 August 2019, even with a request that the papers should not go before a judge until 9 September, achieve that end. The original papers did go before Elisabeth Laing J and she dealt with them comprehensively on Friday, 13 September, before the finalised draft amended grounds were despatched to the court on the following Monday. It cannot, therefore, be said that the judge did not confront and deal with the formal grounds of review. She did precisely that. The process had not been critically undermined.

158. While it seems that new material lodged by the solicitors was not put before Elisabeth Laing J by the court office, as might have been expected, there was no entitlement for that to happen, absent formal application for permission to rely upon amended grounds of claim. By the time that the judge dealt with the papers, even the delay asked for (on 23 August), before the papers went before a judge, had expired. No request had been made for the informal "existing version" of 23 August to be placed before the judge. No assurance had been given after 23 August that the papers would not be considered. Such matters are not without significance when it is sought to reopen proceedings that have already been final for a lengthy period when application to reopen is made.

159. In any event, Elisabeth Laing J had before her the underlying complaint about the UT's decision to refuse permission to appeal, both in the grounds submitted to the UT itself and in the original grounds submitted with the Claim Form. She was well aware of the issues in the case, even on the grounds before her, and she made a comprehensive decision upon them. Given the overall delays by Mr Arif in presenting his draft amended claim to the High Court, the delay thereafter in making an application to reopen the case, and the law as it was understood to be, there were no

conceivable grounds upon which Saini J could have reopened the original proceedings.

160. The delay between despatch of Elisabeth Laing J's order on 16 September 2019 and the issue of the application to reopen on 2 December 2019 was sufficient ground alone for refusing to exercise the exceptional jurisdiction to reopen judicial review proceedings. The proceedings were themselves subject to a time limit of 16 days from the sending of the notice of the UT's decision for the lodging of the Claim Form and supporting documents and the permission to apply for review was subject to a requirement that the case should give rise to an important point of principle or practice or that there is some other compelling ground to permit the claim to be brought: CPR 54.7A(3) and (7). The evidence seeking to explain the delay after receipt of Elisabeth Laing J's order was inadequate for the purpose. One only has to consider again the judgment in the *Goring* case to understand that the principle of finality renders impossible a reopening of judicial review proceedings in circumstances such as those in Mr Arif's case.

THE APPEAL FROM THE ORDER OF ELISABETH LAING J

161. I turn to the application for permission to appeal out of time from the order of Elisabeth Laing J dated 16 September 2019. This application was made on 10 June 2020 because an issue was raised about whether the Court of Appeal had jurisdiction to hear an appeal from the order of Saini J dated 4 February 2020, who had refused to set aside the order of Elisabeth Laing J. In fact it became common ground that the Court did have jurisdiction to grant permission to appeal from the order of Saini J.

162. An extension of time is required because an application for permission to appeal should have been made within 7 days of service of the order refusing permission to apply, see CPR 52(2) and (4). Elisabeth Laing J's order was served by letter dated 16 September 2019.

163. It is necessary to consider: (1) the seriousness and significance of the failure to comply with the rule; (2) why the failure to comply occurred; and (3) evaluate all the circumstances of the case, see *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 WLR 3926.

164. The failure to seek permission to appeal within 7 days of 16 September 2019 was very serious. Even if the failed application to reopen the proceedings is treated as the notional date of applying for permission to appeal, the application was not made until 2 December 2019, a delay of over two months, and the actual delay until permission to appeal was sought was over seven months. There was no good explanation for the delay until 2 December 2019, and no good explanation for the failure to seek permission to appeal from the order of Elisabeth Laing J during this time.

165. As to all the circumstances of the case it is right to record that the issue of the proper construction of paragraph 276B of the Immigration Rules raises important issues, but it is before the Court in the other appeals. There was nothing to suggest that the article 8 ECHR claims made on behalf of Mr Arif had not been properly and fairly addressed by the FTT. It is also right that the delays have not made the Secretary of

State's task in responding to the appeal more difficult. In my judgment, however, there is nothing in the circumstances which justifies the grant of such a very long extension of time, particularly in circumstances where there was no good reason for the delays which occurred.

166. For the reasons given above I would refuse permission to appeal to Mr Arif.

CONCLUSION

167. I agree with the disposal of the applications for permission to appeal and the appeals as set out by Underhill LJ in paragraphs 57 and 58 of the judgment.