**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Number: HU/06222/2020
HU/03797/2020

**THE IMMIGRATION ACTS**

| **Heard at Manchester CJC (via Microsoft teams)** | **Decision & Reasons Promulgated** |
|---|---|
| **On 14 September 2021** | **On 14 October 2021** |

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**
**FAISAL HUSSAIN**
**RABBIA FAISAL**
**(**Anonymity direction not made)

Appellants

**and**

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

Respondent's

**Representation:**

For the Appellant: Mr Parkin instructed by Rayan Adams Solicitors
For the Respondent: Ms Isherwood a Senior Home Office Presenting Officer.

**DECISION AND REASONS**

1. The appellants appeal with permission a decision of First-tier Tribunal Judge Lodato ('the Judge') which dismissed their appeals against the respondent's decisions of 27 February 2020 and 23 June 2020 to refuse their applications for leave to remain in the United Kingdom on the basis of their private life, long residence, the best interests

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of their children, and what are said to be very significant obstacles to their integration into Pakistan.

**Background**

2. The first appellant was born on 15 February 1980, and his wife, the second appellant, on 22 October 1983.
3. Having had the benefit of considering the documentary and oral evidence the Judge sets out findings of fact from [37] of the decision under challenge.
4. The Judge correctly adopts a structured approach to assessing the merits of the appeals as per the Razgar guidelines - see R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27 at [17]. The Judge does not dispute that due to the length of time the appellants have been in the United Kingdom, the ties that have been developed by them and their eldest child, and the consequences of the decision, that Article 8 ECHR is engaged.
5. In relation to the third of the Razgar questions the Judge writes:

> 42. The primary argument advanced on behalf of the first appellant, and adopted by his wife, the second appellant, was that the respondent was bound by policy to exercise discretion in favour of granting the most recent application for leave to remain. This was the almost exclusive focus of both skeleton arguments and much of the oral arguments advanced during the hearing. It was conceded in Mr Hussein's skeleton argument that he did not satisfy the requirements of paragraphs 276B of the Immigration Rules as he had not accumulated 10 years continuous lawful residence in the UK before taking into account the period of time which followed the most recent application for leave, which was not an application to vary extending leave. It was argued that the policy document, Long Residence, allow for no other decision than to grant discretionary leave. Upon my reading of the section of this policy relied upon, it simply does not bear the weight that has been placed upon it. On the contrary, the detailed analysis of this complex set of provisions in *Hoque* suggests quite the opposite purposive interpretation. At paragraph 50 of the judgement, the underlying policy considerations were identified which informed the court's interpretation that paragraph 276B(v) could not be regarded as qualifying the primary 10-year period of 276B(i)(a). The danger identified was that, after a lawful period of leave had drawn to a close, an unmeritorious application for leave could artificially allow the clock to continue ticking until the 10-year point was reached. This will permit the deployment of procedural gamesmanship to ensure that the 10-year point could be reached irrespective of the underlying substance of the application which was under consideration when 10 years residency was reached.
>
> 43. I find it to be impossible to reconcile the appellant's arguments about the purpose lying behind the respondent's policy with the findings in *Hoque*. To follow the appellant's suggested approach would unpick the clear interpretation of the Court of Appeal which post-dated the policy relied upon. The effect would be to introduce a qualifier to the first requirement of paragraph 276B by strained and unwarranted interpretation of policy. This analysis is consistent with s. 117B(4) of the 2002 Act that little weight should be afforded to a private life established at a time when the person is in the UK unlawfully or precariously. The appellants cannot succeed by reference to paragraph 276B, nor on the policy of Long Residence.

6. The grounds of appeal assert certain of the Judge's findings at [42 – 43] are inconsistent with the authority of the Court of Appeal in Hoque [2020] EWCA Civ 1357.

7. Permission to appeal was granted by another judge of the First-tier Tribunal on 12 May 2021 on the basis that judge was satisfied there was an arguable error of law in that the Judge may have misapplied the decision in Hoque.

8. The Secretary of State has filed a Rule 24 response dated 18 June 2021 in the following terms:

**Re: Secretary of State's response to the grounds of appeal under Rule 24. Mr Faisal Hussain Faisal Pakistan 15 February 1980 & Rabbia Faisal Pakistan 22 October 1983**

1) The respondent to this appeal is the Secretary of State for the Home Department. Documents relating to this appeal should be sent to the Secretary of State for the Home Department, at the above address.

2) The respondent opposes the appellant's appeal.

3) You are invited to note that Appellants accept they cannot succeed under the terms of the extant Immigration Rule applied (e.g. he does not have ten years continuous lawful residence for the purposes of 276B of the Rules). Equally, you are invited to note that the Appellants do not challenge the FtTJ's wider adverse findings on either their family or private lives under Article 8 of the ECHR.

4) Accordingly, the scope of the ground as far as can be discerned, appears to be a challenge to the FtTJ's findings at [42]-[43] relating to third question in Razgar, namely whether the Respondent's decision was in accordance with the law (e.g. failing to take into account the policy guidance '*Long Residence v.16*', which was the relevant policy in existence between 28th October 2019 and 10 May 2021) and argue that some form of Discretionary Leave be afforded to the Appellants.

5) The Respondent can only go so far in her response given: -

   a) The absence in her possession of the Appellant's skeleton argument, noting she was not represented before the FtT(IAC) in Bradford; and

   b) The grounds as pleaded primarily take issue with the Respondent's decisions of 27th February 2020 and 23rd June 2020 rather than particularise why the FtTJ has materially erred in law other than to say the FtTJ didn't apply binding authority in the form of Hoque & Ors v Secretary of State for the Home Department [2020] EWCA Civ 1357.

6) It is submitted the grounds are misconceived.

7) It appears to be common ground that the Appellant had remained lawfully in the United Kingdom from entry on 9th September until 13th November 2018 when the Appellant's administrative review of the decision 2nd October 2018 was completed (e.g. approx. nine years and two months). Since then the Appellant's have remained 'open-ended' overtstayers to use the terminology from Hoque (Supra).

8) It is submitted that the grounds are selective in their quoting of Hoque (Supra) and do not distinguish between open-ended and book-ended overstaying, with the passage relied upon at §35 applying only to the latter not the former, you are invited to consider §103 of the concurring judgement of Dingemans LJ, which the FtTJ alludes to at [42].

9) Furthermore, it is submitted that the Appellant's grounds have largely been disposed of in R (on the application of Waseem & Others) v Secretary of State for the Home Department (long residence policy – interpretation) [2021] UKUT 0142 (IAC) in respect of the ambit of the policy: -

> *"230. In summary, an analysis of the various versions of the long residence policy and its earlier incarnation of the long residence concession* ***supports the respondent's contention that the core attribute of the 10 year route has always been the requirement to have 10 years' continuous lawful residence. Paragraph 39E and predecessor provisions are a separate issue, relating to the effect on continuity of residence of out of time applications. To conflate that limited concession, so that residence 'of any other legality' is treated the same as continuous lawful residence, would undermine the very basis of the 10 year route****. The timeliness of repeated applications, categorised as a commitment to attempt to comply with the Rules and as demonstrating ties to the UK, ignores the enduring purpose of the 10 year route, which is to recognise those who have acquired 10 years' continuous lawful residence.*
>
> *231. While we accept that the understanding of the Rules has changed and that the scope of the policy has changed over time, as the long residence concession was incorporated within the Rules, there has consistently been consideration of, and guidance relating to, breaks in continuous lawful residence; temporary admission; those exercising treaty rights in the UK under the EEA Regulations; early applications; and the effect of absences from the UK. Not only has there been a consistent theme to these exceptions, so as to enable people to manage their affairs accordingly, but the guidance also explains and provides rationales for those exceptions. Far from the policy guidance failing to provide any foreseeable or accessible outcome in respect of 'open-ended' overstayers, the examples make clear that a person could, provided they were able to obtain leave to re-enter, leave the UK, in order to manage their affairs, for specified periods, while maintaining continuity of lawful residence.* ***In contrast, it is not possible to discern from the policy documents that the respondent intended 'open-ended' overstaying to become equivalent to continuous lawful residence and that proposition is inconsistent with the guidance relating to the prohibition of the grant of limited leave to remain in order to 'make up' any missing period of lawful residence****.*

And in respect of the Respondent's residual concession at :-

> *"240. We further consider, nevertheless, whether the policy permitted and the respondent had failed to consider and apply, residual discretion, which undoubtedly exists under section 3 of the 1971 Act.* ***In that regard, we return to the authority of Kalsi [2021] EWCA Civ 184.*** *We consider whether that was a case which ought to be distinguished on the basis that it related to the points-based system, rather than, as Mr Jafferji contended, a policy which had wider scope for the exercise of discretion as exemplified by the long residence policy.* ***We note that the Court of Appeal's discussion of the existence of a residual discretion was relatively limited and the issue was answered, in their view, at [70] by reference to the authority of R (Junied) v SSHD [2019] EWCA Civ 2293. We are conscious that in the context of a points-based system, the question of exercise of discretion will be necessarily fact specific, but we agree that while there is some residual discretion, the application of it to disregard the core attribute of continuous lawful residence, would, by analogy to the points-based system, make the long residence policy unworkable, and would result in the 'sliding scale' of circumstances to which we have already referred****. In the case of Kalsi, the applicant had referred (at [57]) to a residual discretion to do what was fair and what 'justice required,' in the context of R (Mehta) [1975] 2 All ER 1087, and 'special circumstances'. The applicants' circumstances are that they are overstayers who applied under the 10 year route substantially earlier than 10 years; and upon their applications being rejected, simply made swift further paid applications. We agree with Mr Harland's submission that to the extent there remains a residual discretion, there are no such 'special circumstances' in the applicants' cases."* [my emphasis]

10 In these circumstances it is submitted it is difficult to see why the FtTJ can be criticised firstly for the Respondent not exercising her discretion, notwithstanding that the Respondent noted the subsequent applications within 14 days (pp4 of 9 of the RFRL) of the Appellant's leave expiring nor secondly for his consideration at [42]-[43] which also considered the policy guidance and the judgement in Hoque (*Supra*).

11 In summary, the respondent will submit *inter alia* that the judge of the First-tier Tribunal directed himself appropriately.

12 The respondent requests an oral hearing.

## Error of law

9. There have been a number of relevant decisions concerning paragraph 276B of the Immigration rules, including Hoque and others v Secretary of State for the Home Department [2020] EWCA Civ 1357 (22 October 2020) in which the Court of Appeal was tasked with interpreting paragraph 276B which establishes the requirements to be met by an applicant seeking Indefinite Leave to Remain ("ILR") on the ground of long residence in the United Kingdom. A majority of the Court concluded that sub-paragraph 276B(i)(a), which requires an applicant to have had "at least 10 years continuous lawful residence", was to be read in conjunction with sub-paragraph 276B(v) which provides for a 'disregard' in respect of "any previous period of overstaying between periods of leave" and which found that "open-ended" overstaying cannot be disregarded for the purpose of paragraph 276B(i).

10. The fact unlawful residence between periods of "book-ended" leave can count towards continuous lawful residence was further confirmed in Muneeb Asif (Paragraph 276B – disregard – previous overstaying) [2021] UKUT 00096 (IAC) (10 March 2021) the headnote of which reads:

*On the proper construction of paragraph 276B any period of overstaying between periods of leave that has been disregarded in accordance with sub-paragraph (v)(a) or (b) is treated as lawful residence for the purpose of sub-paragraph (i)*

11. The respective party's immigration histories are set out in the refusal notices in the following terms:

In relation to the first appellant:

- You entered the UK on 9 September 2009 with Entry Clearance as a student, valid from 22 July 2009 until 31 July 2011.
- You applied in time for Leave to Remain as a Tier 4 General Student on 29 July 2011 with leave being granted until 30 March 2012.
- You applied in time for Leave to Remain as a Tier 1 Post Study on 26 March 2012 with leave being granted until 8 August 2014.
- You applied it in time for Leave to Remain as a Tier 1 Entrepreneur on 29 June 2014 with leave being granted until 24 July 2017.
- You applied in time for Leave to Remain as a Tier 1 Entrepreneur on 24 July 2017 with leave being refused with the right to an Admin Review on 2 October 2018. You submitted an in-time Admin Review on 16 October 2018. The refusal decision was maintained in the Admin Review was completed on 13 November 2018.
- You applied out of time for Leave to Remain Outside the Rules on 23 November 2018 with this application being voided on 24 April 2019 due to a variation of applications.
- You applied out of time for Leave to Remain as a Tier 1 Entrepreneur on 23 April 2019 with leave being refused with the right to an Admin Review on 18 June 2019. You submitted an in-time Admin Review on 28 June 2019. The refusal decision was maintained and the Admin Review was completed on 26 July 2019. The outcome was later reconsidered on 12 November 2019 and on 13 December you were refused leave with the right to an Admin Review.

- You applied out of time for Leave to Remain on the 10-year Family/Private life route on 2 August 2019 with this application being voided on 29 October 2019 due to a variation of applications.
- You applied out of time for Indefinite Leave to Remain on the basis of 10-year Long Residence on 2 August 2019, as your Tier 1 application was being reconsidered.
- You applied out of time for Indefinite Leave to Remain on the basis of 10 years Long Residence on 20 December 2019.

In relation to the second appellant:

- The second appellant entered the UK on 3 May 2015 on a Tier 1 Entrepreneur Partner visa valid from 18 March 2015 to 24 July 2017.
- 24 July 2017 the second appellant was linked to her partner's application for Leave to Remain under Tier 1 Entrepreneur with their dependent child, which was refused. With Admin Review on 2 October 2018. Admin Review was received on 16 October 2018 and completed with decision maintained on 13 November 2018.
- On 23 November 2018 the second appellant was linked to her partner's application for Indefinite Leave to Remain Outside the Rules Compassionate Grounds with their dependent child, which was void as inappropriate application on 24 April 2019.
- On 23 April 2019 the second appellant was linked to her partner's application for Leave to Remain under Tier 1 Entrepreneur with their dependent child, which was refused on 18 June 2019 with Admin Review. Admin Review was received on 28 June 2019, which was completed in decision maintained on 26 July 2019. The application was set to be reconsidered on 12 November 2019, which was refused with Admin Review on 13 December 2019.
- On 2 August 2019 the second appellant was linked to her partner's application for Family and Private Life, which was void as an inappropriate application on 22 November 2019.
- On 20 December 2019 the second appellant applied for Leave to Remain under Family and Private Life.

12. In relation to any challenge to the Secretary of State's policies, in R (on the application of Waseem & Others) v Secretary of State for the Home Department (long residence policy – interpretation) [2021] UKUT 00146 (IAC) it has been found that the various versions of the Secretary of State's long residence policy from 2000 to 2017, as properly interpreted, are consistent with the distinction between 'open-ended' and 'book-ended' overstayers, as described in paragraph [9] of the Court of Appeal's decision of Hoque & Ors v SSHD [2020] EWCA Civ 1357. This interpretation is consistent with a rationality review and is capable of resulting in a 'fair balance' between competing interests.
13. It was correctly accepted by Mr Parkin that the decision in Waseem disposed of the appellant's challenge based upon the Judges treatment of the Secretary of State's policies. He maintains however that it was possible for the appellants to succeed on the basis of a further issue raised in the grounds and his argument that Waseem could be distinguished, based as it was upon consideration of Version 15 of the Long Residence Guidance whereas in this appeal the applicable guidance is Version 16.
14. The Long Residence Guidance has changed over time. Version 13 is believed to be dated 8 May 2015, Version 14, 25 November 2016, Version 15, 3 April 2017 and archived on 19 October 2017, Version 16 on 28 October 2019 and Version 17 dated 25 May 2021.

15. Mr Parkin was unable to produce copies of the version of the policy he was seeking to rely upon to substantiate his claim that there was a material difference between Version 15 and Version 16 as a result of the earlier versions having been archived, which he stated access he could not access.
16. There is in the grounds of appeal at [21] the following:

> 21. On page 16, the Respondent explicitly instructs her caseworkers that they may exercise discretion in certain circumstances:
>
> *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*

17. The underlying position throughout the Rules is that an applicant must not be in the UK in breach of immigration laws if they wish to succeed with an application. An exception to this is paragraph 39E which allows a specified period of overstaying to be disregarded when making a new application. In applications such as that based on 10 years residence in the UK an applicant will be required to show lawful and continuous residence in the UK but for the grace period given by paragraph 39E.
18. It is not disputed that the last period of leave enjoyed by the appellants expired on 13 November 2018. The next application was made within 10 days of the leave expiring but it was accepted by Mr Parkin that the appellants were not able to continue to benefit from section 3C leave, which is the basis of the acceptance they could not succeed under the Immigration Rules. This position is correct for although paragraph 39E provides an exception for overstayers, allowing a specified period of overstaying it does not extend an applicant's section 3C leave even if the period of overstaying was disregarded by the Home Office.
19. It is not disputed that the appellants made an application within 10 days of their leave expiring on 13 November 2018, but it was not established before the Judge that the appellants had been granted leave in accordance with paragraph 39E on that or any subsequent application. The guidance does not suggest that all an applicant has to do is make an application pursuant to paragraph 39E as the wording specifically requires the application made on that basis to have led to a grant of leave. The difficulty for the appellants in this appeal is that they have not been granted any form of leave to remain in the United Kingdom since 13 November 2018. This is not a 'book-ended' appeal in which a later period of lawful leave was granted enabling the Judge to disregard the period of overstaying between 13 November 2018 and any subsequent grant of leave to remain in the United Kingdom in accordance with the cases set out above, but an 'open-ended' appeal in which such overstaying cannot be disregarded.
20. The appellants have failed to establish any legal error material to the Judge's decision to dismiss the appeal on human rights grounds sufficient to warrant

the Upper Tribunal interfering any further in this matter. The appeal is dismissed.

**Decision**

**21. There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

22. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 16 September 2021