IAC-AH-KRL/CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/16488/2019**
HU/20398/2019

THE IMMIGRATION ACTS

Heard at Field House Via Microsoft Teams	**Decision & Reasons Promulgated**
On the 17 February 2022	**On the 29 March 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SREE RAMA CHANDRA MOULI NETHI (FIRST APPELLANT)
ROHINI KOLLA (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Z Jafferji, instructed by Law Valley Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed to the First-tier Tribunal against the decision of the respondent on 20 May 2019 refusing his application for indefinite leave to remain on the basis of long residence. The application was refused on 29 September 2019.

2. The judge set out in detail the appellant's immigration history. He entered the United Kingdom as a Tier 4 Student on 13 June 2009 with leave until 31 March 2011. He made further in time applications in subsequent years, during which time the appellant's wife, the second appellant, entered the United Kingdom on 8 February 2014 as his dependent spouse.

3. On 29 March 2018, shortly before the expiry of his most recent grant of leave which was until 1 April 2018, the appellant made an application for further leave as a Tier 1 (Entrepreneur). The second appellant was a dependant on this application. The applications were refused on 11 July 2018. The judge noted that the key ground of refusal was based on the fact that the first appellant had failed to provide Real Time Full Payment Submissions establishing that he had complied with the pay as you earn reporting requirements of the HMRC. As a consequence he was not awarded any points in the attributes category of paragraph 50(a) of Appendix A of the Immigration Rules. He exercised his right to an administrative review but the decision was maintained, on 12 August 2018.

4. On 23 August 2018 the appellants made an application for leave to remain under Article 8 of the European Convention on Human Rights. They varied this application on 5 April 2019, the first appellant seeking leave to remain as a Tier 1 (Entrepreneur) Migrant with the second appellant as his dependant. On 20 May 2019 the appellants again sought to vary the application and this time made the application which is the subject of this appeal for indefinite leave to remain on the basis that the first appellant had accrued ten years of continual lawful residence.

5. The judge heard oral evidence from the appellants. It is relevant to note that they have a child who was born in the United Kingdom on 4 December 2014.

6. The judge noted that the first appellant's parents have made significant contributions to supporting the appellants in the United Kingdom. They have sold property in India and have moved in with the first appellant's sister and had made contributions in excess of £50,000 to support the appellants during their stay in the United Kingdom.

7. The judge accepted that the appellants and their child had established a family and private life in the United Kingdom. The child had not accrued seven years' continual residence. The appellants had entered the United Kingdom lawfully and had made in time applications to extend their leave until 12 August 2018 when the administrative review application was refused.

8. The judge went on to make findings in relation to their circumstances if they were returned to India after all these years. They continued to have cultural, linguistic and family ties to India. He accepted that having been away from the United Kingdom for several years would cause some level of hardship but given that they had both lived in India up to adulthood and

had spent the majority of their lives there any such hardships could be overcome and they certainly did not amount to "insurmountable obstacles". They continued to have a family support structure that they could rely on for some assistance, be it temporarily. Even if their respective families were only able to provide them with limited assistance there was nothing preventing them from finding employment and re-establishing themselves in India. The qualifications and experience which they had accrued in the United Kingdom would only serve to benefit them in the job market.

9. Taking into account the best interests of the child the judge accepted that he had lived in the United Kingdom since birth and would have established some form of private life, especially since he had started reception and school. However there would be no interference in his family life as he would return to India with his parents. He was young enough to adapt to life in India and his parents could assist him in this. Taking into account his best interests under section 55 of the Borders, Immigration and Citizenship Act 2009, his best interests clearly lay with him being with his parents.

10. The judge then went on to consider the legal issues appertaining in the case. In light of the decision in Hoque and Others [2020] EWCA Civ 1357, the application could not succeed under paragraph 276B(i)(a). With regard to the distinction identified at paragraph 9 in Hoque between "open ended" and "bookended" overstaying, it was accepted on behalf of the appellants that the appellants' period of overstaying was not bookended but was open ended. By the time his lawful leave expired on 12 August 2012 the appellant had only acquired approximately nine years of continuous lawful leave and had since been accumulating open ended overstaying and as Hoque made clear he could not rely upon this type of overstaying under paragraph 276B(i)(a).

11. The judge then considered the further argument made on behalf of the appellant that the respondent had applied the incorrect part of the long residence policy in considering the application before her. The section relating to "out of time" applications was split into two parts: "applications made before 24 November 2016" and "applications made on or after 24 November 2016".

12. The judge agreed with the argument put forward on behalf of the appellant by Mr Jafferji, who also appeared below, that in making reference to and considering the policy referring to applications made before 24 November 2016 the respondent had erred, since the application had been made on 23 October 2018. The relevant part of the policy applicable to the appellant read as follows:

> "Applications made on or after 24 November 2016
>
> Where an out of time application is submitted on or after 24 November 2016, you must consider whether to exercise discretion in line with paragraph 39E of the Immigration Rules. This must be authorised by a senior caseworker at senior executive officer (SEO) grade". 13. Mr Jafferji

argued that the way the policy was drafted was more generous than the Immigration Rules and it was clear that an applicant must not be disadvantaged by the respondent's failure to apply properly a policy if the wording of that policy produced a more generous outcome for the appellant.

14. The judge said that he might have been persuaded to agree with this argument, which was based on what was said in Adeyodin [2010] EWCA Civ 773. However he did not accept that the policy was more generous than the Immigration Rules as now interpreted in Hoque. He said that the policy made it clear that in out of time long residence applications submitted after 24 November 2016 the caseworker was to consider whether discretion had to be exercised in reference to paragraph 39E. He went on to say that the policy was asking the caseworker to apply the Immigration Rules and was not creating a different or more generous policy, Rule or concession outside the Rules. Hoque had recently cleared up the ambiguities and uncertainties in the interpretation of the interplay between paragraph 276B and paragraph 39E, and Hoque did not conclude in favour of the appellants as at the date of decision the first appellant's period of overstaying was not bookended.

15. The judge went on to say that the relevant part of the policy simply asked the decision maker to ensure that the decision was in line with paragraph 39E and was a reminder to the decision maker that he/she must ensure that all of the relevant parts of the Immigration Rules had been considered. It did not create some separate policy concession. The appeal therefore could not succeed on that basis.

16. The judge then went on to consider Article 8 outside the Rules. He began by taking into account all the findings of fact he had set out earlier in his decision. He found that the public interest factor was engaged in the maintenance of effective immigration controls in the public interest and the appellants' applications did not succeed under the Rules and they had no further leave in the United Kingdom. It was in the public interest that a person seeking to remain in the United Kingdom could speak English. This public interest factor was neutral. Likewise as the neutral factor was the fact that there was no evidence that the appellants were reliant upon public funds. The public interest also required that little weight be attached to any private life established during the period where the appellants' leave had been precarious.

17. The judge went on to state that he had much empathy for the appellants. The first appellant had been an impressive witness and there was much to admire from both of them as to the manner in which they had sought to establish their lives in the United Kingdom and contribute to the economy of the country. Were it not for the fact that Hoque had interpreted paragraphs 39E and 276B in a manner that was not favourable to them, these appeals might well have succeeded. However empathy had to be put to one side and, adopting the Razgar approach, the judge concluded that the appellants' removal from the United Kingdom would be

proportionate in all the circumstances and his finding that the public interest in removal outweighed the facts upon which the appellants relied.

18. The appellants sought and were granted permission to appeal to the Upper Tribunal on the basis first that the judge had erred in his reading of the application of the policy guidance, and secondly that he had erred in his assessment of Article 8 outside the Rules.

19. In his submissions Mr Jafferji relied on and developed these points. He also relied on points that had been set out in the skeleton argument before the First-tier judge which he put before us.

20. Mr Jafferji argued that if it were the case, as the judge had considered, that the relevant part of the policy relied upon by the appellants simply reflected the provisions of the Immigration Rules, the policy would have made reference to paragraph 276B(v) of the Rules, as paragraph 39E had no freestanding application to long residence applications. The relevant part of the policy made no reference to paragraph 276B(v), and was thus clearly not concerned with telling caseworkers how to apply paragraph 276B and there was no question of any freestanding application of paragraph 39E to a long residence application. The policy clearly envisaged it being an exercise of discretion to be authorised by a senior caseworker and this could not be an application of the Rule as there was no discretion there. The judge had failed to take this into account. Reference to discretion necessarily involved departing from the Rules, otherwise there was no need for discretion.

21. Also, the caseworker who decided the applications clearly proceeded on the basis that this part of the policy related to the exercise of discretion where the requirements of paragraph 276B could not be satisfied. The judge's reasoning therefore ran directly counter to the Secretary of State's own reasoning in these appeals with respect to the application of the policy. The judge had failed to address this issue. It was also argued that a reference to the exercise of discretion at the end of the guidance in the policy with regard to pre-24 November 2016 applications must be read into the part concerned with post-24 November 2016 applications. Discretion was necessary as it did not cover an application which did not meet the ten years' requirement. It had to apply to both elements of the guidance. It was clearly a matter of an exercise of discretion outside the Rules and the judge had erred in thinking that it was just an application of the Rules. It was clear from paragraph 54 that if he had agreed with Mr Jafferji's argument the appeal might well have succeeded. So if the Tribunal accepted that that part of the policy was an extension of the Rule and was a discretion that was not in the Rule, it was clearly a material error of law. The decision of the Upper Tribunal in Waseem [2021] UKUT 0142 (IAC), relied on by the Secretary of State in her Rule 24 response, did not consider this section of the policy guidance and was also a judicial review claim. It found the policy was capable of being applied in an Article 8 compliant way but did not consider this aspect of the policy guidance and said it did not apply in the way which it was argued on behalf of the

appellant that it did. The caseworker had considered the exercise of discretion outside paragraph 276B. None of the recent Court of Appeal decisions considered the policy guidance in any detail but were concerned with the proper interpretation of the Immigration Rule. There was therefore no authority on the application of this aspect of the policy guidance.

22. As regards the challenge to the judge's findings on Article 8 outside the Rules, the judge had erred in considering that pursuant to section 117B of the 2002 Act he was "required" to place little weight on the private life established by the appellants in the United Kingdom. It was clear from what was said by the Supreme Court in Rhuppiah [2018] UKSC 58 that there was flexibility in the application of section 117B.

23. The judge had failed to approach the proportionality assessment on the basis that the Secretary of State had to establish that interference was proportionate. The only reference to the burden of proof was at paragraph 31 where the judge stated the burden was on the appellants to establish that they came within the Immigration Rules. There was no reference to the proper approach when considering Article 8 outside the Rules and in particular with regard to the requirement that in assessing proportionality the burden was on the Secretary of State to show that an interference is proportionate.

24. The judge had also failed to give any proper consideration to the weight to be placed on the public interest side of the scales and the particular circumstances of the case. The appellants had attached weight to a number of factors, including the fact that there was no uniform policy with respect to the way that overstaying was treated by the Secretary of State and to her overall immigration policy, that the policy pursued by paragraphs 39E 245AAA and 407 was directly at odds with the way that open ended overstaying was treated under paragraph 276B, there was no justification provided by the Secretary of State for the difference in treatment between bookended and open ended overstaying under paragraph 276B, that in Hoque, Dingemans LJ had doubted whether the Secretary of State had even given any thought to the distinction between open ended and bookended overstaying, and that elsewhere in that decision Underhill LJ recorded the history of the Secretary of State changing position with respect to her own long residence Rules showing that she did not have a proper understanding of her immigration policy and that the Secretary of State's policy guidance contained numerous provisions for the exercise of discretion where the requirements of paragraph 276B were not satisfied.

25. It was argued that all these factors reduced the weight to be placed on the public interest side of the scales, in particular that they showed that there was no coherent, firm and fair immigration policy imperative being pursued in this particular case. The judge had entirely failed to consider these matters and assess what weight was appropriate on the public interest side of the scales.

26. The appellants had specifically stated that they had been disadvantaged by placing reliance on their understanding of the operation of paragraph 276B and varying their pending Tier 1 (Entrepreneur) application to an application based on long residence. Their evidence was that the Tier 1 application would have succeeded and thus their overstaying would have become bookended. However they had relied upon their understanding of the operation of paragraph 276B to their detriment to vary the pending application for a long residence application. It was relevant that the Court of Appeal in Hoque had unanimously criticised the complexity and lack of clarity at paragraph 276B to the assessment of what the fair balance in this case was and that the judge had not considered this. The fact that the appellants would have succeeded in their pending application for Tier 1 leave was highly material to the proportionality assessment.

27. The judge had also failed to give proper consideration to the numerous factors weighing in favour of the appellants and failed to follow the balance sheet approach advocated in Hesham Ali [2016] UKSC 60.

28. Further, it was argued, the assessment of the best interests of the child was flawed. Although no doubt his best interests lay with him being with his parents, the judge had failed to assess whether those best interests lay with the child being with his parents in the UK or in India. Nor had there been any consideration of the child's future prospects, a key aspect of the Secretary of State's section 55 duty to promote the child's welfare and a key aspect of the best interests assessment. The judge had failed to take into account the interference with the child's private life if he were to be required to leave the United Kingdom and the fact that there would be interference with his family life because his family circumstances would deteriorate if the family was required to return to India. As a consequence the assessment of proportionality was fundamentally flawed.

29. By way of reply Ms Isherwood relied upon the points made in the Rule 24 response and developed those points further. In essence in the response it was argued first that contrary to what was contended on behalf of the appellants, there was an element of discretion in paragraph 39E, in particular in sub-section (1). The argument as to the inconsistency between the Secretary of State's policy and the Rules had been considered and rejected in Waseem, and there were quotations from relevant paragraphs of that decision. As regards Article 8 the grounds amounted to disagreement only. The judge's decision was to be read as a whole. Ms Isherwood also relied on what had been said in Ali [2021] EWCA Civ 1357. The judge had considered the relevant issues properly in the context of the correct case law and came to conclusions which were clearly open to him.

30. By way of reply Mr Jafferji argued that the element of discretion in paragraph 39E was only in sub-section (1) of that Rule. This was akin to the 28 days' previous policy. It was not argued that paragraph 39E contained a discretion to be exercised in the appellants' favour as it applied clearly to the appellants, but that the long residence policy contained a discretion, and therefore, if a person were within paragraph

39E discretion should be applied. The judge had accepted that the case came within paragraph 39E but erred as he thought that the caseworker was being told to apply paragraph 276B(v) and that was not so as there was no reference to that in the policy and it would not need the exercise of discretion which was only needed if the decision maker was going outside the parameters of paragraph 276B. It was argued on behalf of the appellant that there was a discretion but it had not been properly applied.

31. As regards Waseem, the circumstances there were different. It was different factually, it was a judicial review case and this element of the policy had not been considered. The guidance contained exceptions and enlargements to paragraph 276B. The Tribunal in Waseem had looked at various elements of the policy guidance but not this particular element.

32. The judge had erred as contended both with regard to the decision in respect of the policy and with regard to Article 8 outside the Rules.

33. We reserved our decision.

Discussion

34. It is clear that the overarching guidance to be drawn from Hoque is the distinction between open ended and bookended overstaying. It is common ground in this case that the appellants' overstaying is open ended in the sense that he had some nine years of lawful leave and thereafter has remained in the United Kingdom without leave and it is that period that took him to the ten years and thereafter residence in the United Kingdom. We set out below the terms of paragraph 276B and paragraph 39E of the Immigration Rules.

276B. 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) 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, taking into account his:

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. 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.

39E. 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, abandoned or lapsing; or

(3) the period of overstaying was between 24 January and 31 August 2020; or

(4) where the applicant has, or had, permission on the Hong Kong BN(O) route, and the period of overstaying was between 1 July 2020 and 31 January 2021.

35. It is clear from paragraph 276B(i) that an applicant for indefinite leave to remain in the United Kingdom on grounds of long residence has to have had at least ten years' continuous lawful residence in the United Kingdom. That requirement was not met in this case. It is also clear from Hoque that as can be seen, for example from paragraph 102 in Hoque in the judgment

of Lord Justice Dingemans, 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" does not qualify the requirements 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. Sub-paragraph 276B(v) is an independent requirement with its own internal first exception to that requirement.

36. None of this is contentious but it is we think helpful to set it out at the start of our judgment. The argument made on behalf of the appellant with regard to the policy is not only, as the judge rightly accepted, that the decision maker considered the wrong policy, but that the policy that should have been considered is more generous than the requirements of the Rules and therefore the judge erred in not coming to that conclusion. The policy in respect of applications made before 24 November 2016 also involves the exercise of discretion, in the context of whether any evidence of exceptional circumstances preventing the applicant from applying within the first 28 days of overstaying has been provided.

37. One can see from the decision letter that having set out the terms of the guidance in respect of applications made before 24 November 2016, it is said that in considering the application it was considered whether the exercise of discretion was appropriate as the appellant could not demonstrate ten years' continuous lawful residence. He had failed to provide any exceptional reasons in support of his out of time application. With this in mind it was considered that it was not appropriate to exercise discretion in his case. The relevant provision, as we have set out above, which should have been considered by the decision maker says as follows:

> "Where an out of time application is submitted on or after 24 November 2016, you must consider whether to exercise discretion in line with paragraph 39E of the Immigration Rules. This must be authorised by a senior caseworker at senior executive officer (SEO) grade".

38. As it seems to us, what the decision maker did in this case was to act consistently with the flawed understanding of which part of the guidance to apply. It is clear that there is a discretion to be exercised in respect of applications made before 24 November 2016 and the consideration of discretion that was made in the decision letter is consistent with that guidance.

39. We do not agree with Mr Jafferji that the words relating to exercise of discretion at the end of the guidance concerned with the first part of out of time applications can be read across to the second part. Each is separately set out. And if one then turns to the guidance for applications made on or after 24 November 2016, in stating that the decision maker must consider whether to exercise discretion in line with paragraph 39E, this again appears to us to be entirely consistent with the wording of

paragraph 39E. The first part of that paragraph clearly involves the exercise of discretion in the section where the Secretary of State is required to consider whether there was a good reason why the application could not be made in time. It is common ground that that is not this case, but the guidance of course has to allow for cases to which both sub-paragraph (1) and sub-paragraph (2) of paragraph 39E may apply. Accordingly the fact that discretion is to be considered in the guidance in respect of applications made on or after 24 November 2016 is in our view entirely uncontroversial. As a consequence we consider that the judge did not err in his analysis of the argument that the policy was more generous than the Immigration Rules. As the judge pointed out, the caseworker is simply being asked to apply the Immigration Rules and there is no creation of a different or more generous policy, Rule or concession outside the Rules. What the policy does in effect is to remind the caseworker that the case might be one where the application of paragraph 39E may enable the disregarding of any current period of overstaying. It is clear that paragraph 276B(v) enables a person who in the past has completed ten years' leave but currently has no lawful leave, nevertheless to succeed in an application for indefinite leave to remain in the circumstances contemplated in paragraph 39E. It is clear that a discretion is to be exercised in sub-paragraph (1) of paragraph 39E and as a consequence we consider that the judge was entirely correct to conclude that, as he put it in paragraph 54, even considering the correct part of the policy would not have led the respondent to arrive at a decision which was favourable to the first appellant and would not lead to a set of circumstances where the relevant part of the policy was more generous than the Rules. The policy is simply consistent with a proper consideration of the factual situation of any particular case entirely consistently with the Rules. It does not go beyond the Rules and the judge was entirely correct so to find.

40. Accordingly the appeal in respect of the judge's findings concerning the policy is dismissed.

41. Ground 2 has to be seen at least in part in the context of the judge's findings at paragraph 43 concerning the circumstances of the appellants and their child. It also has to be seen in the light of his clear finding as to the history of the case set out at paragraph 41. He began his consideration of Article 8 outside the Rules by taking into account all the findings of fact that he had made above which must be taken also to include his findings in respect of the policy.

42. We do not consider that he was required to make a finding as to the likelihood of success or lack of it of the Tier 1 (Entrepreneur) application that the appellant varied in the indefinite leave to remain application that became the subject of the appeal. In the end it was a decision for the appellant and, if he was legally advised at the time, his advisers, to make that change. The fact that the law is complex and difficult, as observed by all three members of the Court of Appeal in Hoque, did not oblige the judge to attach more weight than he did to this element or any other element of the appellants' immigration history. At the end of the day, as

he noted, the appellants' applications did not succeed under the Rules and they had no further leave to remain in the United Kingdom. He understandably expressed sympathy for their situation in light of their circumstances but correctly concluded that he must put to one side any empathy he had for the appellants. He gave appropriate and proper consideration to the relevant evidence in respect of the Article 8 evaluation. We see no materiality to the point made in respect of the argument that the judge said that he was required to place little weight on any private life established during the time when the appellants' leave was precarious. The fact there is an element of flexibility as described in Rhuppiah does not in our view materially flaw his decision in this regard. He was not obliged to carry out a balance sheet approach, helpful though that can be. The relevant factors were given proper consideration, summarised relatively briefly as they were at paragraphs 56 to 61 but nevertheless building, as noted above, upon the detailed findings he had made previously in his decision.

43. Likewise we do not consider he erred with regard to the best interests of the child. The analysis in that regard at paragraph 43(v) is entirely adequate. A finding was made in the context of the family circumstances if they were returned to India which is the conclusion that the judge arrived at as a consequence of his evaluation of the appeal in respect of the policy, and that real world scenario was a proper context in which to consider the best interests of the child.

44. Though he did not refer specifically to the burden being on the Secretary of State to establish proportionality, there is nothing in his decision which is inconsistent with a proper approach being taken to the evaluation of this point. Again we see no error of law in that regard.

45. Bringing these matters together, we consider that the judge's consideration of Article 8 outside the Rules has not been shown to be flawed in any respect. The appeal in this regard is also dismissed.

46. These appeals are dismissed.

No anonymity direction is made.

Signed Date 16 March 2022
Upper Tribunal Judge Allen