Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11741/2019 (V)**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 November 2020	**On 11 December 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MD TOWHIDUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Symes instructed by Morgan Hill Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

1. This is an appeal by the appellant against the decision of Judge of the First-tier Tribunal Bunting ("the judge") promulgated on 2 January 2020.

2. The appellant's immigration history is highly relevant to this appeal. It was summarised by the judge in paragraphs 2–10 of the decision. The accuracy of the judge's summary has not been questioned/challenged by either party. I set it out in full:

> "2. The appellant arrived in the United Kingdom on a Tier 4 visa (following a previous unsuccessful appeal against a previous refusal) on 4 September 2009. This leave was valid until 31 December 2012.
>
> 3. On 5 January 2013 he applied for further leave to remain as a Tier 4 General Student. This was granted on 5 March 2013 and was valid until 9 October 2014.
>
> 4. The appellant applied for further leave in the same category on 8 October 2014. This was refused, with a right of appeal, on 17 February 2015.
>
> 5. An appeal was duly lodged on 3 March 2015. The First-tier Tribunal dismissed his appeal on 18 April 2016. Permission to appeal was refused on 22 September 2016 and, by the Upper Tribunal, on 18 October 2016, when he became appeal rights exhausted.
>
> 6. The appellant applied for leave to remain outside the Immigration Rules on 16 November 2016. This was refused on 2 September 2017 with no right of appeal.
>
> 7. There was a further application for leave to remain on the basis of his private life on 28 July 2017 (the appellant describes this as a variation of the 16 November 2016 application). This was refused on 5 June 2018 with a right of appeal (that was not exercised).
>
> 8. On 08 April 2018 there was a further application for leave to remain that was voided.
>
> 9. The appellant made this application on 29 May 2018. This was refused on 19 June 2019 with a right of appeal.
>
> 10. An appeal was lodged on 1 July 2019".

3. Before the First-tier Tribunal, the appellant argued that he had accrued ten years of continuous lawful residence in the UK and therefore satisfied the requirements of paragraph 276B of the Immigration Rules. He maintained that the "gap" in his lawful residence between 18 October 2016 (when his application for permission to appeal was refused by the Upper Tribunal) and his application for further leave on 16 November 2016 could be "cured", if not by reference to paragraph 276B(v) of the Immigration Rules then by the application of the Home Office policy – long residence, version 16.0, published on 28 October 2019 ("the long residence policy").

4. He also argued that there were very significant obstacles to his integration into Bangladesh, such that he met the conditions of paragraph 276ADE(1)(vi) of the Immigration Rules; and that his removal from the UK would be disproportionate under Article 8 ECHR.

5. Applying the Court of Appeal judgment in *R (Ahmed) v SSHD* [2019] EWCA Civ 1070, the judge found that the appellant did not meet the requirements of paragraph 276B.

6. The judge also found that because the appellant could not succeed under the Rules, the long residence policy could not assist him. At paragraph 56 the judge stated

> "The appellant prays in aid the terms of the long residence v16.0. I consider that I am bound by the decision of the Court of Appeal and the Upper Tribunal and must follow those decisions, regardless of the terms of the policy."

7. The judge also found that there would not be very significant obstacles to the appellant's integration in Bangladesh and that his removal would not be disproportionate. Amongst other things, the judge found that the appellant's private life was formed at a time when his immigration status was precarious and therefore attached little weight to it.

Grounds of Appeal and Submissions

8. The grounds of appeal argue that the judge fell into error by failing to give sufficient reasons for rejecting the appellant's argument that he was able to benefit from the long residence policy.

9. The grounds refer to an example given in the long residence policy of when it might be appropriate to grant an application when there has been a gap in lawful residence. The example states as follows:

> Example 2:
>
> An applicant has three gaps in their lawful residence due to submitting three separate applications out of time. These were 9, a 17 and 24 days out of time.

Question	Would you grant the application in this case?
Answer	Grant the application as the Rules allow for a period of overstaying of 28 days or less when that period ends before 24 November 2016.

10. The grounds submit that the appellant's argument before the First-tier Tribunal was that his immigration history was "on all fours" with the above example.

11. The grounds also contend that the judge failed to properly consider that the appellant was entitled to have his application and appeal decided in line with the long residence policy.

12. Permission was granted by Upper Tribunal Judge Rintoul.

13. After permission to appeal was granted, the Court of Appeal judgment in *Hoque v SSHD* [2020] EWCA Civ 1357 was promulgated. This judgment was referred to in the

appellant's skeleton argument and by both parties in oral submissions before me at the hearing.

14. In *Hoque*, the Court of Appeal considered how paragraph 276B should be interpreted and understood. The court drew a distinction between two kinds of overstaying: overstaying between two periods of leave (referred to as "book ended overstaying"); and current overstaying (referred to as "open ended overstaying"). The Court found that, whilst "book ended overstaying" of a sufficiently short duration should be disregarded when determining if there has been continuous lawful residence, "open ended overstaying" should not.

15. It was common ground that I am bound by the decision in *Hoque*.

16. Mr Symes, in his skeleton argument and oral submissions, argued that although the appellant cannot meet the conditions of Rule 276B as interpreted in *Hoque*, he was entitled to rely on the long residence policy, which is more generous to him. Mr Symes argued that the appellant had in fact relied on the terms of the long residence policy, as set out in his witness statement. He referred to Example 2 of the policy, which is reproduced above.

17. Mr Symes relied on the Court of Appeal decision *Nadarajah* [2005] EWCA Civ 136 to support his contention as to the weight that should be given to the long residence policy. In that judgment, Laws LJ stated at 68:

> "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public".

18. Mr Symes also argued that the judge should have taken into consideration, in the assessment of proportionality under Article 8, that the Immigration Rules on lawful continuous residence are ambiguous and unclear, as highlighted by Underhill LJ in *Hoque*, and is apparent from the fact that so many different Court of Appeal judges have reached a different view on what paragraph 276B means.

Analysis

19. It is plain, and was not in dispute, that the appellant does not meet the conditions of paragraph 276B of the Immigration Rules. This is because, as Mr Symes acknowledged, I am obliged to follow the Court of Appeal judgment in *Hoque*, where it was found that, in assessing whether a person has had at least ten years' continuous lawful residence in the UK, a period of overstaying cannot be disregarded unless it was between periods of lawful leave (i.e. book ended overstaying). In the appellant's case, his leave ended on 18 October 2016 and there has been no subsequent period of leave.

20. I now turn to consider the long residence policy.

21. I agree with Mr Symes that it was erroneous for the judge to treat the long residence policy as irrelevant. If a policy exists which is more generous to an appellant than the Rules, that is relevant to the proportionality assessment under Article 8 ECHR. See *SF and others (Guidance, post-2014 Act) Albania* [2017] UKUT 00120(IAC).

22. However, I agree with Mr Kotas that applying the long residence policy to the appellant's circumstances does not lead to the conclusion that he accrued 10 years' continuous lawful leave. The section of the long residence policy that Mr Symes relies on starts at page 16, under the heading "Breaks in lawful residence". Under this heading is the sub-heading "Gaps in lawful residence". Under this, it is stated that an application may be granted where the applicant "has short gaps in lawful residence". On the following page, within the same section, there is a subheading "Examples of gaps in lawful residence". It is under this heading that the example cited by the appellant in his witness statement and in his grounds of appeal is given.

23. I have underlined words "breaks" and "gaps" in the above paragraph to highlight what is plain from reading this section of the long residence policy, which is that it is concerned with gaps/breaks in lawful residence (that is, a gap/break in otherwise continuous lawful residence), not with a situation where a person's lawful residence has ended and no subsequent leave has been granted. The example relied upon by the appellant, which is in this section of the long residence policy, is plainly only concerned with such gaps in residence. The appellant was therefore mistaken to argue that this example was "on all fours" with his circumstances. Mr Symes argued that this part of the long residence policy is ambiguous and unclear. However, in my view it is not. The repeated use of the term "gaps" leaves the reader in no doubt that the issue addressed by the policy is where there is a gap between two periods of lawful residence.

24. I am fortified in my view by noting that Underhill LJ in paragraph 38 of *Hoque* interpreted (an earlier version of) the long residence policy in the same way. He stated:

> "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. 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 when 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 law residence.

Those bullets are clearly intended to reflect element (C) in subparagraph (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" which refers to the requirement of continuous lawful residence. Clearly the Home Office itself thought that element (C) qualified subparagraph (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".

25. My conclusion, therefore, is as follows:

(a) The judge fell into error by treating the long residence policy as irrelevant. This is because if the long residence policy was more generous to the appellant than the Immigration Rules that would be relevant to the question of whether there was a public interest in his removal under article 8 ECHR.

(b) However, this error was not material because the section of the long residence policy relied upon by the appellant is not more generous to him than the Immigration Rules, as it is only concerned with applicants who have a gap/break in lawful residence, not those, like the appellant, whose lawful leave ended and were not subsequently granted further leave.

Notice of Decision

The appeal is dismissed. The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed

Daniel Sheridan

Upper Tribunal Judge Sheridan Dated: 3 December 2020