Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18855/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 4 November 2021	**On the 25 November 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MUMTAZ ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr P Saini, Counsel, instructed by BRIT Solicitors
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the appellant's appeal against the respondent's refusal of his human rights claim, following my previous error of law decision, promulgated on 7 May 2021, by which I found that the First-tier Tribunal had erred in law and that its decision should be set aside. The error of law decision is appended to this re-making decision and the two should be read together.

2. The essence of my error of law decision is that the First-tier Tribunal had failed to consider a specific aspect of the appellant's case relating to what was described as "historical injustice" perpetrated against him by the respondent in respect of an application for leave to remain in 2018. More of that later.

3. The appellant is a citizen of Pakistan, born in April 1981. He arrived in United Kingdom on 23 September 2009 as a student. He was granted several extensions of that leave over the course of time. On 28 July 2018 he made an in-time application for further leave, this time as a Tier 2 Migrant. On 3 September 2018 the application was refused by the respondent on the ground that the Certificate of Sponsorship ("CoS") did not confirm that the sponsor would be providing maintenance for the appellant: the "yes" box on the application form had not been ticked and the "no" box had been. The respondent was not satisfied as to the mandatory maintenance requirements under Appendix C to the Immigration Rules ("the Rules"). No other grounds for refusal were stated.

4. The appellant applied for Administrative Review ("AR"). With that application was provided a letter from the sponsor confirming that they had made an error by failing to tick the appropriate box in the application form and confirming that they would indeed be maintaining the appellant. By a decision dated 4 October 2018, the original refusal was maintained. At this point the appellant's leave to remain in the United Kingdom ceased. He has not been granted any further leave to remain since and is therefore in the category of persons described as "open-ended" overstayers by the Court of Appeal in Hoque [2020] EWCA Civ 1357; [2021] Imm AR 188.

5. Following the negative AR decision, the appellant made another Tier 2 application on 10 October 2018. This was varied on 12 June 2019 to an application seeking indefinite leave to remain on the basis of 10 years' continuous lawful residence in the United Kingdom, pursuant to paragraph 276B of the Rules. The varied application was deemed by the respondent to constitute a human rights claim and the refusal relating thereto gave rise to a right of appeal.

6. The appeal was heard by the First-tier Tribunal 6 March 2020 and dismissed by a decision promulgated on 10 March 2020. I need say nothing more about that decision, save that it is clear that the first of the appellant's principal arguments described below was squarely put to the judge.

The appellant's case

7. The appellant's case now is, and only can be, founded on Article 8. He puts forward two core contentions, both of which are predicated on the basis that none of the relevant Rules can be satisfied.

8. Firstly, the manner in which the respondent dealt with the Tier 2 application made on 28 July 2018 was procedurally unfair and constituted an historical injustice (as opposed to an historic injustice: see Patel (historic injustice; NIAA Part 5A) [2020]

UKUT 351(IAC). This, it is said, constitutes a very significant, if not a decisive, factor in the Article 8 proportionality balancing exercise. As stated in Mr Saini's skeleton argument, the result of the historical injustice is that "only nominal, or no, weight should be given to the public interest…"

9. Secondly, it is asserted that the difficulties surrounding the interpretation of paragraph 276B, particularly sub-paragraph (v) have been such that those individuals (the appellant being one) adversely affected by what is described as the "understandable confusion and uncertainty" should be treated "less stringently" than those who might have applied for settlement after the handing down of the judgment in Hoque. This "reasonable misapprehension" argument should result in "only nominal, or no, weight been given to the public interest…" Even if this argument were put to one side, it is asserted that the "unrelenting and scathing criticisms" made by the Court of Appeal in Hoque were such that this represents an "exceptional circumstance" and that the appellant's private life should be afforded greater weight as a consequence.

10. As regards the judgment in Hoque, Mr Saini quite properly accepts that it is binding on me and he has not at this stage sought to argue that it is wrong in law.

The respondent's case

11. Leaving aside specific credibility issues taken against the appellant, which I will address below, the respondent answers the two contentions described above, as follows. As regards the first, the respondent complied with the Rules and the 2018 Tier 2 application was refused because of an error by the sponsor. The appropriate process was followed and there is no wider common law duty of procedural fairness in the circumstances of this case. Any unfairness to the applicant was substantive, not procedural. The respondent relies on Patel, *supra*, Pathan [2020] UKSC 41;[2020] WLR 4506, and Talpada [2018] EWCA Civ 841.

12. On the Hoque issue, it is said that whatever the litigation may have said about the drafting of the Rules, the fact that there had been disagreement did not mean that the public interest should be reduced.

13. Overall, it is said that the appellant does not have a particularly strong private life in the United Kingdom and that there are no other factors which are compelling or exceptional.

The evidence

14. In re-making the decision in this appeal I have had regard to the following documentary evidence:

    (a) the respondent's original appeal bundle;

(b) The appellant's appeal bundle, indexed and paginated 1-49;

(c) The appellant's supplementary witness statement, dated 27 May 2021;

(d) The Tier 2 Guidance for Sponsors, published in July 2018.

15. The appellant attended the resumed hearing and gave oral evidence. In summary, he adopted his to witness statements and provided further information about the 2018 Tier 2 application, the actions which followed from its refusal, and how the respondent's claimed unfair treatment of him had affected his life. He told me that he has suffered from depression, that he maintains contact with his parents in Pakistan, that he worked as a university lecturer in that country prior to coming to the United Kingdom, but that, at 40 years old, he believed he was now too old to get a job there.

Submissions

16. Mr Saini relied on his detailed skeleton argument and supplemented this with oral submissions. Ms Isherwood made oral submissions as well. I have summarised the essence of these at paragraphs 7-13, above, and do not intend to set them out in any further detail here.

Findings and conclusions

Findings of fact

17. The basic factual background outlined earlier in this decision is uncontroversial. However, there are certain issues which fall to be resolved.

18. Ms Isherwood submitted that the appellant had not been entirely truthful in his evidence, specifically in relation to whether he had ever seen the CoS himself, or whether he had simply inserted the reference number into the application form.

19. Having regard to the evidence as a whole, I find that the appellant has in fact provided a truthful account on this particular point. It is right that in oral evidence he said that "they gave me the Certificate of Service and I sent it in." Yet he foreshadowed that answer by saying that he could not remember precisely what had happened. He then went on to say that it might in fact only has been the reference number that he inserted into the application form.

20. The appellant has an excellent immigration history. There has never been any suggestion that he has lied or otherwise engaged in any misconduct. I do not see any material discrepancy between his oral evidence and that set out in his witness statements. Whilst he could have been clearer in his oral evidence, witnesses are entitled to say that they are unsure about something: indeed, it is best that they do so,

if this is true, rather than providing a firm answer just for the sake of appearances. In addition, I have had regard to the Tier 2 Guidance to Sponsors in place in July 2018 when the Tier 2 application was made. Under the heading "Certificate of sponsorship", it is confirmed that once a CoS is assigned, a reference number is generated and this is provided to the applicant. That reference number is then inserted into the application form. The following paragraph confirms that the applicant may ask for information which was part of the CoS process and that a copy of the certificate can be provided. It is possible that the appellant could have asked his employer for a CoS, which would have contained all the relevant information and would presumably have disclosed the error in respect of maintenance. However, taking matters in the round, it is more likely than not that he simply followed the usual procedure of receiving only the reference number.

21. Therefore, I find that the appellant was not aware of the employers error at the time he made the Tier 2 application.

22. Moving on to other matters. I accept that following the AR decision, the appellant's then legal representatives gave him advice that he could make a new application for leave to remain. I accept that he was not advised as to the possibility of making an application for judicial review. I note that the Tier 2 refusal decision itself states that an unsuccessful applicant could submit a new application or leave United Kingdom. The advice which the appellant states he was given was not inconsistent with a range of responses to an adverse AR decision.

23. I am willing to accept that the appellant has had some mental health difficulties as a result of his predicament. However, in the absence of any medical evidence, I do not accept that these have been significant, nor that there is any ongoing significant problem.

24. I find that the appellant has family in Pakistan with whom he maintains a good relationship. On his own evidence, he had a good employment record whilst in that country, working as university lecturer at Khaipour University. In the absence of any supporting evidence, I do not accept that the appellant would be precluded from obtaining reasonable employment in Pakistan now by virtue of his age.

25. As regards the appellant's life in the United Kingdom, I am prepared to accept that he has established friendships over the course of time. I can appreciate his wish to have stability in his life and to pursue a chosen career path. The evidence does not show, however, that there are particularly significant ties in this country.

Conclusions

26. The appellant clearly has a private life in the United Kingdom, established over the course of some 12 years. He does not enjoy a family life in this country.

27. It is common ground that the respondent's refusal of the human rights claim constituted an interference with the private life, that the decision was in accordance with the law, and that it pursued a legitimate aim.

28. We arrive at the proportionality exercise. I take into account the mandatory considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002, as amended, and all other matters which I deem to be relevant.

29. Before turning to the two main issues put forward by the appellant, I can deal with certain matters fairly briefly.

30. The maintenance of effective immigration control is in the public interest: whether that is to a greater or lesser extent depends on the facts of the case.

31. In the present case, it is accepted that the appellant cannot satisfy any of the relevant Rules, those being paragraphs 276B and 276ADE(1)(vi). As to the former, the appellant only accrued 9 years and 2 weeks continuous lawful residence in the United Kingdom before his leave to remain ceased on 4 October 2018. As to the latter, the has been no suggestion that the appellant would face very significant obstacles to a re-integration into Pakistani society. In light of what is said below, I place considerable weight on the failure to meet any of the Rules.

32. It is the case that the appellant's status in the United Kingdom has always been either precarious (from his entry on 23 September 2009 until 4 October 2018) or unlawful (from 5 October 2018 to date). Ordinarily, his private life would attract "little weight". In the event, that is the conclusion I have reached, but the reasons for this are set out later in the decision.

33. The appellant obviously speaks excellent English and he is financially independent in the sense that he is not reliant on public funds (there has been no suggestion from the respondent that, for example, he owes an NHS debt). These are neutral factors in the overall proportionality exercise.

34. The first central issue is the historical injustice argument. It is important firstly to set out the essential facts. The appellant obtained the CoS reference number from his sponsor and inserted this into the appropriate section of the application form. I have found that he was unaware at this time that there was an error in the certificate, namely that the "yes" box confirming maintenance had not been ticked. The error was on the part of the sponsor, not the respondent. That error related to a mandatory requirement of the Rules for Tier 2 applicants and, on the face of it, the application fell to be refused.

35. At the time of the refusal decision, paragraph 245AA of the Rules was in place. This provided as follows:

> "245AA. Documents not submitted with applications

(a) Subject to sub-paragraph (b) and where otherwise indicated, where Part 6A or any appendices referred to in Part 6A state that specified documents must be provided, the decision maker (that is the Entry Clearance Officer, Immigration Officer or the Secretary of State) will only consider documents received by the Home Office before the date on which the application is considered.

(b) If the applicant has submitted the specified documents and:

(i) some of the documents within a sequence have been omitted (for example, if one page from a bank statement is missing) and the documents marking the beginning and end of that sequence have been provided; or

(ii) a document is in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(iii) a document is a copy and not an original document; or

(iv) a document does not contain all of the specified information; the decision maker may contact the applicant or his representative in writing, and request the correct documents. Such a request will only be made once, and the requested documents must be received at the address specified in the request within 10 working days of the date of the request.

(c) Documents will not be requested under sub-paragraph (b) where:

(i) a specified document has not been submitted (for example an English language certificate is missing); or

(ii) where the decision maker does not think that submission of the missing or correct documents will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted a specified document:

(i) in the wrong format; or

(ii) which is a copy and not an original document; or

(iii) which does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application; or

(2) the website of the organisation which issued the document; or

(3) the website of the appropriate regulatory body;

the decision maker may request the correct document under sub-paragraph (b), or may grant the application despite the error or omission, if satisfied that the specified documents are genuine and the applicant meets all the other requirements of the Rules."

36. Mr Saini realistically accepted that this provision could not have assisted the appellant at the time: it was not a case concerning missing documents and suchlike, but rather a failure to confirm the provision of maintenance. Thus, the Rule in place in order to avoid certain instances of potential procedural unfairness to applicants did not require the respondent to contact the appellant prior to the decision being made on his application.

37. Given the mandatory nature of the maintenance requirement in relation to Tier 2 applications, it is undoubtedly the case that the respondent was entitled to refuse the application in the first instance. In fairness to Mr Saini, his argument focused primarily on the next stage of the process, namely the AR.

38. The AR provisions of the Rules were lawful. There was never any challenge to their *vires* by the appellant or, as far as I am aware, anyone else. Appendix AR.2.4 provided as follows:

"AR2.4 The Reviewer will not consider any evidence that was not before the

original decision maker except where:

(a) evidence that was not before the original decision maker is submitted to demonstrate that a case working error as defined in paragraph AR2.11 (a), (b) or (c) has been made; or

(b) the evidence is submitted to demonstrate that the refusal of an application under paragraph 322(2) of these Rules was a case working

error and the applicant has not previously been served with a decision

to:

(i) refuse an application for entry clearance, leave to enter or leave

to remain;

(ii) revoke entry clearance, leave to enter or leave to remain;

(iii) cancel leave to enter or leave to remain;

(iv) curtail leave to enter or leave to remain; or

> (v) remove a person from the UK, with the effect of invalidating leave to enter or leave to remain,
>
> which relied on the same findings of facts."

39. The terms of this provision precluded the respondent from considering the sponsor's letter which accompanied the application for AR. It is clear that the respondent acted in accordance with the Rules. Again, Mr Saini appeared to accept as much.

40. Mr Saini's submission is, and can only be, that the respondent owed a wider duty of common law fairness to the appellant, notwithstanding the limited ambit of the Rules, and that this duty was breached by her failure to take account of the sponsor's letter. This, it is said, constitutes the "historical injustice".

41. There are attractive elements to this aspect of the appellant's case. After all, the only reason that the Tier 2 application was refused was because the sponsor had ticked the wrong box in the CoS. Further, the appellant had been unaware of this error when the application was submitted to the respondent. The outcome might appear to an observer to have been "unfair".

42. The question is, however, whether there was in truth a "historical injustice" such that it could have a significant impact on the overall proportionality assessment.

43. There are, in my judgment, substantial obstacles in the appellant's path.

44. Firstly, there was no challenge to the AR decision at the time. I accept that the appellant followed legal advice and that the absence of a challenge by way of judicial review is not fatal to the existence of a relevant historical injustice based on procedural unfairness. However, a certain degree of caution should be exercised when considering the impact of historical decisions in appeals against subsequent decisions made by the respondent. It was, after all, open to the appellant to have challenged the AR decision in the same basis that he puts forward in this appeal.

45. Secondly, the 2018 decision-making process did not involve delay or arbitrariness or a failure to apply the relevant Rules, which themselves encapsulated a procedural fairness element.

46. Thirdly, and importantly, the error was made by the employer, not the respondent. Although the precise nature of the employer's conduct in the present case is clearly different from that in Patel, the source of the difficulty is nonetheless a relevant consideration because it illustrates the distinction between situations in which the respondent has acted, or failed to act, in a way which had the effect of causing an application to fail and those in which it is the act or omission of a third party which has had that effect.

47. This factual basis goes to distinguish the present case from those in which the higher courts have found procedural unfairness to exist in respect of the respondent's decision-making. In Pathan, the respondent had, unbeknown to the individual

concerned, revoked his sponsor's licence some time before his application for leave to remain was determined. The respondent failed to notify Mr Pathan of this highly significant development prior to his application being refused. Although the Justices differed in some of their views as regards what should have happened as result of the procedural unfairness, all save for Lord Briggs agreed that there had been such unfairness: see paragraphs 6, 136, 187, and 218.

48. For the purposes of the present appeal, it is crucial to appreciate that the conclusions on procedural unfairness are grounded in the factual circumstances of the scenario in which Mr Pathan found himself: by her act of revocation of the sponsor's licence, the respondent had, without him knowing at the time, created an insuperable barrier to the success of his application. The requirements of procedural fairness depend on the context of the decision in question and, in the view of the majority, this demanded that the respondent took action prior to deciding the application in the form of notifying Mr Pathan of the revocation.

49. Pathan stands in contrast to the facts of the present case and a number of other authorities in which the refusal of an application was not a result of the respondent's actions: see for example Talpada and EK (Ivory Coast) [2014] EWCA Civ 1517.

50. Fourthly, the appellant's case does not involve allegations of wrongdoing (including deception) relied on by the respondent to refuse an application: c.f. Balajigari [2019] EWCA Civ 673; [2019] Imm AR 1152 and Karagul [2019] EWHC 3208 (Admin). Whereas these scenarios point strongly towards an obligation to contact the individual in advance of a decision, the appellant's case does not.

51. Fifthly, on Mr Saini's case, a common law duty of procedural fairness would, by logical extension, rest with the respondent in respect of *any* application under the Points Based System and would extend to an obligation to contact an applicant in advance of an outcome decision where *any* deficiency in the application was apparent. This would encompass not simply missing documents in a series or evidence in an incorrect format, but also erroneous assertions in an application form, as occurred in the appellant's case. I cannot see how a principled distinction could be drawn between any type of deficiency within the application.

52. In all the circumstances, I conclude that there is no overarching common law duty of procedural fairness applicable to the pre-decision stage in the circumstances of the present case.

53. Sixthly, as regards the AR stage of the decision-making process, I re-emphasise that the AR Rules themselves have never been challenged, nor can they be in these proceedings. Mr Saini's contention that, notwithstanding this, the overarching duty of common law procedural fairness applies to the post-decision review process cannot be right by virtue of the considerations set out above.

54. Seventhly, a number of pronouncements from the higher courts make it clear that the Points Based System was designed to be hard-edged and liable to produce harsh results in certain cases. I conclude that this is what occurred in the appellant's case

when his Tier 2 application was refused and that refusal was then maintained following AR. The reality is that the outcome could be seen as an example of substantive unfairness.

55. Having regard to the above, I conclude that the decision(s) from 2018 do not constitute a significant factor in the proportionality exercise. Whilst expressing some sympathy for the appellant, I attach little weight to this particular aspect of his immigration history, whether that is in the context of the strength of the appellant's private life or in respect of any potential reduction of the public interest.

56. I now turn to address the argument based on paragraph 276B and the Hoque judgment. For the reasons set out below I conclude that this aspect of the appellant's case does not provide him with either a decisive or indeed even a significant factor in the proportionality exercise, whether that is in the context of the strength of the appellant's private life or any potential reduction in the public interest.

57. Firstly, the appellant never had a legitimate expectation that he would have been entitled to settlement under paragraph 276B.

58. Secondly, the difficulties and disagreements surrounding the interpretation of paragraph 276B do not of themselves lead to the conclusion that the respondent was operating a dysfunctional or arbitrary system of immigration control. Poor drafting there may have been, but that is not entirely uncommon and in any event litigation through the courts is part and parcel of the legal system and often results in categories of individuals being disappointed and feeling, in their view, hard done by.

59. I accept that the criticisms of paragraph 276B by the Court of Appeal in Hoque were significant, even severe. This does not, however, justify the interpretive difficulties surrounding that provision from being elevated to a decisive or even a significant factor in the appellant's favour. The fact is that the appellant became an overstayer in October 2018 and whilst he might at one stage have harboured a reasonable hope (not, in my judgment, an expectation) of falling within paragraph 276B, the final word on the matter, as expressed by the Court of Appeal, went the other way.

60. Mr Saini has relied on a passage from the judgment of Lord Reed in Agyarko [2017] UKSC 11; [2017] Imm AR 764, where he stated at paragraph 53:

> "53. Finally, in relation to this matter, the reference in the instruction to "full knowledge that their stay here is unlawful or precarious" is also consistent with the case law of the European court, which refers to the persons concerned being aware that the persistence of family life in the host state would be precarious from the outset (as in *Jeunesse*, para 108). One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate."

61. In my view, this observation does not assist the appellant to any material extent. He had always been in the United Kingdom on a precarious basis and was well-aware of that. Lord Reed was, in my view, directing his attention to people who might believe

that their existing status was settled, perhaps believing that they were British or had indefinite leave to remain. I cannot see that he was suggesting that an individual here precariously who had applied, or hoped to apply, for settlement should be treated "less stringently" than others simply because the Rules were open to different interpretations until a final resolution was provided by the higher courts.

62. At its highest, any reasonably held (but ultimately mistaken) belief that the appellant might have been able to bring himself within paragraph 276B would in my judgment carry only very limited weight in the proportionality exercise.

63. On any view, the contentious issue of paragraph 276B of the Rules could not constitute an exceptional circumstance in the appellant's case.

64. Turning to the appellant's private life in the United Kingdom, I have found that it does not encompass any particularly strong ties. I take full account of the length of time he has been here and the fact that much of his residence has been lawful. He has studied and achieved much. There is little doubt that he would be anything other than a benefit to the economy of United Kingdom. I have no doubt that he would be distressed by the prospect of having to return to Pakistan and re-establish himself there. I am willing to accept that the re-integration exercise would probably not be entirely straightforward for him.

65. Against the factors just described, the appellant clearly has good family ties in Pakistan and would be able to receive support on return. I have not accepted that he would be precluded from the job market. His education and experience both in United Kingdom and previously in Pakistan would clearly stand him in good stead. Whilst I have accepted that he has had some mental health difficulties as result of his ongoing immigration issues, these have not been, and are not, significant and would not constitute a significant obstacle on return. In summary, there are no features of this case which constitute a proper basis to either increase the weight attributable to the private life any meaningful distance beyond the "little weight" envisaged by section 117B(4) and (5) of the 2002 Act, or to significantly decrease the weight of the public interest.

66. Bringing all of the above together, I conclude that the factors resting in the respondent's side of the scales outweigh those favouring the appellant. I conclude that the respondent's refusal of the appellant's human rights claim was and remains proportionate. That refusal is not unlawful under section 6 of the Human Rights Act 1998. It follows that the appellant's appeal must be dismissed

Anonymity

67. No direction has been made during the course of these proceedings and it is not appropriate to make one at this stage.

Notice of Decision

68. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. That decision has been set aside.

69. I re-make the decision by dismissing the appeal on Article 8 ECHR grounds.

Signed: *H Norton-Taylor* Date: 22 November 2021

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed: *H Norton-Taylor* Date: 22 November 2021

Upper Tribunal Judge Norton-Taylor

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18855/2019 (V)

THE IMMIGRATION ACTS

Heard remotely from Field House
On 16 April 2021

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MUMTAZ ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr P Saini, Counsel, instructed by BRIT Solicitors
For the respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of First-tier Tribunal Judge Louveaux ("the judge"), promulgated on 10 March 2020. By that decision, the judge dismissed the appellant's appeal against the respondent's decision, dated 2 November 2019, refusing his human rights claim.

2. The appellant, a citizen of Pakistan born in April 1981, arrived in United Kingdom on 23 September 2009 as a student. He had leave to remain until 4 October 2018. On this date, an Administrative Review of a refusal of Tier 2 Migrant application made on 28 July 2018 was concluded against him. Following this, on 10 October 2018 the appellant made another application as a Tier 2 Migrant. This application was then varied on 12 June 2019 to one seeking indefinite leave to remain on the basis of 10 years' continuous lawful residence in this country. It was this varied application which was the subject of the respondent's decision under appeal to the First-tier Tribunal.

The decision of the First-tier Tribunal

3. On appeal, the appellant's case was put forward in the following way. First, it was submitted that the appellant had accrued the requisite 10 years' continuous lawful residence in the United Kingdom such as to satisfy paragraph 276B of the Immigration Rules ("the Rules"). Second, it was said that the respondent had acted with procedural unfairness when refusing the 2018 Tier 2 application and again when upholding that refusal on Administrative Review. This conduct constituted a "historic injustice" and went to reduce the public interest in maintaining effective immigration control.

4. In dealing with the first issue, at [17] the judge relied on the two relevant authorities (as they then were) of Masum Ahmed [2019] EWCA Civ 1070 ("Masum Ahmed") and Juned Ahmed (para 276B – ten years lawful residence) [2019] UKUT 00010 (IAC) ("Juned Ahmed"). The judge applied the ratios in each case and found that the appellant's leave to remain (extended as it was by section 3C of the Immigration Act 1971) came to an end on 4 October 2018 at the conclusion of the Administrative Review process. At that point in time the appellant had only accrued 9 years and 11 months' continuous lawful residence.

5. As to the second issue, the judge concluded that any concerns over, or challenge to, the respondent's decisions on the 2018 Tier 2 application should and could have been pursued by way of judicial review at the time. It was not the role of the First-tier Tribunal to review a decision made some years previously and which would have been susceptible to judicial review. Therefore, whilst the judge had been presented with evidence relating to the 2018 application and its refusal, and notwithstanding what he apparently saw as the merit in the appellant's argument that the application had been wrongly refused, the judge declined to engage substantively with the matter when undertaking the proportionality exercise in the appeal before him.

6. Although it does not appear as though paragraph 276ADE(1)(vi) featured strongly (or indeed at all) in the appellant's case, the judge nonetheless dealt with it at [18] to [22] and concluded that there were no very significant obstacles to the appellant's integration into Pakistani society. That conclusion has not been challenged.

7. Bringing all of the above together and having regard to section 117B of the Nationality, Immigration and Asylum Act 2002, as amended, the judge ultimately concluded that the respondent's decision was proportionate and therefore lawful under section 6 of the Human Rights Act 1998.

The grounds of appeal and grant of permission

8. Three grounds of appeal were put forward. Ground 1 asserted that the then current authorities referred to above were wrongly decided. The second ground asserted at

some length that the judge erred by failing to engage with the appellant's case and that, if he had, the evidence showed that a "historic injustice" had been done to the appellant. Finally, it was said that because the respondent was responsible for the appellant's break in lawful residence in 2018, the judge should have found that he ought to be given 30 months' further leave to remain "in lieu" of what he would have been granted but for the erroneous decision in 2018.

9. Permission to appeal was granted by First-tier Tribunal Judge Beach on 30 April 2020.

10. The error of law hearing was originally listed for 19 August 2020. That hearing was adjourned on the basis that the Court of Appeal were due to hear a number of linked appeals on the vexed question of how paragraph 276B of the Rules should be construed. On 22 October 2020, the Court of Appeal handed down judgment in the cases of Hoque and Others [2020] EWCA Civ 1357; [2020] 4 WLR 154 ("Hoque"). This judgment concluded, by a majority, that Masum Ahmed had been wrongly decided and that Juned Ahmed was correct. The effect of this was that individuals would fall into one of two categories: "book-ended" overstayers and "open-ended" overstayers. Those in the former could benefit from the "disregard" provision contained in sub-paragraph (v) of paragraph 276B, whilst those in the latter could not.

The hearing

11. Mr Saini provided a skeleton argument and relied on it, together with the grounds of appeal. He submitted that Hoque was wrongly decided, although he acknowledged its binding effect on the Upper Tribunal. He informed me that an application for permission to appeal to the Supreme Court is pending there.

12. In light of Patel (historic injustice; NIAA Part 5A) [2020] UKUT 351(IAC), Mr Saini reframed his "historic injustice" argument to that of a "historical injustice". All relevant evidence relating to the respondent's conduct in 2018 had been placed before the judge and it was wrong of him to have "dodged" the issue. That the appellant had not pursued judicial review proceedings then was not fatal to the argument on appeal. The respondent had still acted unfairly, both in refusing the Tier 2 application and then preventing the admission of further evidence on Administrative Review. Mr Saini submitted that the judge could and should have decided the substance of the Tier 2 application for himself as the issue was a factor relevant to proportionality. On the evidence, it was submitted that the Tier 2 application would have been "certain" to have succeeded. On the issue of procedural fairness, I was referred to the authorities of Doody [1993] UKHL 8; [1993] 3 WLR, Pathan [2020] UKSC 41; [2020] 1 WLR 4506, and Bank Mellat v HM Treasury (No.2) [2013] UKSC 39; [2013] 3 WLR 179.

13. Mr Saini went on to submit that given the proximity of the appellant's lawful residence to the 10 years threshold, it was a factor in his favour when it came to proportionality.

14. Ms Everett submitted that I was bound by Hoque. In respect of the "historical injustice" point, she saw the force in Mr Saini's submission that the judge should have at least engaged with the matter in his decision, although she certainly did not go so far as to say that the 2018 issue would have been a decisive factor in the case. She made the point that the initial mistake in the 2018 application had been that of the sponsor, not the respondent.

15. At the end of the hearing I reserved my decision.

Conclusions on error of law

16. The Hoque issue can be dealt with briefly. I am bound by the majority judgment of the Court of Appeal and I apply its conclusions in this case. The appellant has been an "open-ended" overstayer since 4 October 2018. He could not benefit from sub-paragraph (v) of paragraph 276B of the Rules and was not and is not able to satisfy the requisite 10 years' continuous lawful residence criterion.

17. It follows that whilst one of the decisions applied by the judge (Masum Ahmed) has been overturned, this makes no difference to the correctness of the outcome on the paragraph 276B issue. The appellant's first ground of challenge fails (in fairness to Mr Saini, his skeleton argument does set out a relatively detailed argument as to why he says Hoque is wrong. I intend him no disservice by not setting out those written submissions here: see paragraphs 7 to 18 of the skeleton argument).

18. I am, however, persuaded that the judge erred in law by failing to grapple with the substance of the appellant's argument that the 2018 Tier 2 application was dealt with in such a way by the respondent as to either lend additional weight to his private life claim, or to reduce the weight attributable to the public interest.

19. The concept of "historical injustice" by definition requires a tribunal to look back in time. This will very often involve looking at a decision made by the respondent (or potentially another tribunal) which had not been challenged (or not successfully so), but which is said to have some bearing on the proportionality of a subsequent adverse decision. I see some force in the argument that appeals against one decision should not be used as a vehicle to mount a backdoor challenge to earlier decisions and there might be the danger of engaging in impermissible speculation. However, in the present case, I am satisfied that the appellant put before the judge all relevant evidence relating to the 2018 application and decision-making process. The "historical injustice" argument was legitimately open to the appellant, as confirmed by Patel. How far it might have taken the appellant's Article 8 claim is another question, but in my judgment a substantive consideration of this aspect of the appellant's case *might* (not would) have made a difference to the outcome if it had been undertaken.

20. Therefore, I conclude that the judge's failure to engage with this part of the case was a material error. Whilst in no way indicating that the appellant's Article 8 claim

would inevitably be successful if looked at again, it is appropriate to exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set the judge's decision aside.

Disposal

21. This case should clearly be retained in the Upper Tribunal. It may be that the appellant would wish to adduce further evidence, although it is somewhat unclear to me as to why this would be the case. In any event, the Tribunal would benefit from oral submissions.

22. My provisional view is that a resumed hearing could fairly be conducted on a remote basis.

Anonymity

23. The First-tier Tribunal did not make an anonymity direction and nor do I. There is no basis at all for such a direction in this particular case.

Notice of Decision

24. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

25. I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

26. This appeal shall be retained in the Upper Tribunal and set down for a resumed hearing in due course.

Directions to the parties

1. **No later than 21 days after** this decision is sent out, the appellant shall file and serve a consolidated bundle of all evidence relied on;

2. **At the same time**, the appellant shall confirm whether he agrees that the resumed hearing should be conducted on a remote basis, with accompanying reasons if this is not the case;

3. **No later than 7 days thereafter**, the respondent shall confirm whether she agrees that the resumed hearing should be conducted on a remote basis, with accompanying reasons if this is not the case;

4. **No later than 10 days before** the resumed hearing, the appellant shall file and serve a skeleton argument;

5. **No later than 5 days before** the resumed hearing, the respondent shall file and serve a skeleton argument;

6. With liberty to apply.

Signed: *H Norton-Taylor* Date: 20 April 2021

Upper Tribunal Judge Norton-Taylor