**IN THE UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)**

R (on the application of Waseem & Others) v Secretary of State for the Home Department (long residence policy – interpretation) [2021] UKUT 0146 (IAC)

Field House,
Breams Buildings
London, EC4A 1WR
and via Skype for Business

3rd June 2021

**Before:**

**THE HON. MR JUSTICE LANE, PRESIDENT**
**UPPER TRIBUNAL JUDGE KEITH**

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**Between:**

**THE QUEEN**
**on the application of**

**(1) ANSAR WASEEM**
**(2) GAYANI ARACHCHIGE (AND ONE OTHER)**

**Applicants**

**- and -**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**- - - - - - - - - - - - - - - - - - -**

Mr Z Jafferji and Mr A Rehman, instructed by Lawise Solicitors,
for the first applicant
Ms S Naik QC and Ms Ella Gunn, instructed by Jein Solicitors,
for the second applicant

Mr R Harland (instructed by the Government Legal Department) for the respondent

Hearing dates: 12th February and 30th March 2021

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**J U D G M E N T**

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*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; [2021] Imm AR 188. This interpretation is consistent with a rationality review and is capable of resulting in a 'fair balance' between competing interests.*

## *A. Introduction*

1. We conducted the hearings from open court at Field House, while the parties' representatives attended via Skype for Business. The Skype link was also open to members of the public to access. We monitored the quality of the communications between the parties and us and we were satisfied overall that the parties were able to participate effectively in the hearing.

2. The applicants' applications raised common issues relating to the respondent's application of her long residence policy; her exercise of discretion for those applying for indefinite leave to remain, where they do not meet the long residence requirements of the Immigration Rules; the issue of proportionality, in the context of article 8 of the European Convention on Human Rights ('ECHR'); and the respondent's consideration of the applicants' further submissions as fresh claims, for the purposes of paragraph 353 of the Immigration Rules.

3. As a consequence of the respondent's refusal to treat the applicants' further submissions as fresh claims, no statutory right of appeal arose and the challenges to the respondent's decisions came before us as applications for judicial review. At the core of the respondent's decisions was the common circumstance that the applicants were all 'open-ended' overstayers, as described by the Court of Appeal in the case of Hoque & Ors v SSHD [2020] EWCA Civ 1357; [2021] Imm AR 188 (see [9]).

4. The applicants accept that their ILR applications fell for refusal under the Immigration Rules, as now understood as a result of Hoque, but they contend that the respondent impermissibly failed to apply her own, wider policy in relation to long residence, which would otherwise result in them being granted some form of leave and so becoming 'book-ended' overstayers; failed to consider her residual discretion; and failed adequately to carry out a proportionality assessment for article 8 ECHR purposes. All parties accepted that it was for this Tribunal to determine the meaning of the respondent's long residence policy.

5. A synopsis of each of the applicants' circumstances is set out below.

## *B. The applicants*

### *JR/3246/2019*

6. AW is a citizen of Pakistan born on 5th May 1979. He arrived in the UK lawfully with permission to enter as a student on 19th April 2009, with leave to remain until 30th July 2012. Prior to expiry of that leave, he made an in-time application on 27th

January 2012 for leave to remain as a tier 1 post-study migrant and was granted further leave on 10th May 2012 until 12th May 2014. On that date, he submitted a further in-time application, for further leave to remain as a tier 1 entrepreneur and his leave was granted until 24th June 2017. That was the last date on which he had leave, other than as extended by section 3C of the Immigration Act 1971 (which broadly speaking extends the leave last granted until a decision is taken on the appeal for further leave; or until any appeal rights have been exhausted).

7. On 22nd June 2017, AW applied for ILR on the basis of long residence, (10 years' continuous lawful residence), despite having been in the UK for a little over eight years only. The respondent refused this application on 25th November 2017 and AW appealed that decision to the First-tier Tribunal. AW did not attend that First-tier Tribunal hearing and the First-tier Tribunal dismissed AW's appeal on 30th August 2018. AW sought permission to appeal to this Tribunal. Permission was refused by the First-tier Tribunal on 2nd November 2018 and by this Tribunal on 31st January 2019, when his appeal rights were exhausted.

8. On 4th February 2019 (so within 14 days of his appeal rights being exhausted, on which AW places significance), AW applied again for ILR on the basis of long residence. The crux of AW's case is that he says that by 21st March 2019, taking into account the ability to apply 28 days before a required residence period is met, he had lived in the UK for ten years, and the respondent only reached her decision after that date on 20th April 2019. The respondent characterises 10 years' residence in the UK as a "place marker", without legal significance, as AW had been an overstayer, without any existing leave, since 31st January 2019, and so a longer period of residence would be required for some form of leave based on long residence, namely 20 years.

9. The respondent refused to treat AW's application as a fresh claim in the decision dated 20th April 2019. Following pre-action correspondence, AW applied for judicial review on 14th June 2019.

***JR/1043/2019***

10. GA, the lead applicant in the second application, was born on 17th December 1974. Her husband, UM, who is dependent on her application, was born on 17th March 1964. Both are Sri Lankan nationals and entered the UK lawfully, pursuant to GA's student visa, on 20th September 2003. They obtained extensions of leave to remain and GA then applied on 29th October 2007 for a further extension, to undertake a PhD. That application was refused. GA appealed against that refusal to the Asylum and Immigration Tribunal. The AIT dismissed her appeal on 12th February 2008 and GA's appeal rights were exhausted on 6th March 2008. GA and UM remained in the UK as overstayers. UM then left on 20th April 2008 and GA left on 28th April 2008. GA then applied for a further student visa on 29th May 2008, which was granted and valid from 3rd July 2008.

11. GA re-entered the UK on 6th July 2008 and UM re-entered on 10th August 2008. They have remained in the UK ever since. GA then extended her leave to remain as a

student, which expired on 30th October 2015, and that was the last time on which GA had leave to remain, other than by reason of section 3C. Two days before the expiry of her last period of leave, on 28th October 2015, she made an-in time application for ILR based on 10 years' continuous lawful residence, referring to her residence from 20th September 2003 until 21st September 2013.

12. The respondent refused GA's application on 7th March 2016. GA then appealed that decision and her appeal was dismissed by the First-tier Tribunal on 5th April 2017. She sought permission to appeal that decision. The First-tier Tribunal refused permission on 3rd January 2018 and the Upper Tribunal refused permission on 9th May 2018, when GA's appeal rights were exhausted.

13. Within 14 days of the exhaustion of their appeal rights (on which, like AW, GA places importance), on 17th May 2018, GA and UM applied for further leave to remain based on their rights to respect for their private life, by reference to article 8. Before their applications were decided, they varied their applications, seeking ILR based on 10 years' continuous lawful residence, since GA's re-entry to the UK on 3rd July 2008. The respondent also regarded this purported anniversary as being without legal significance, as GA's and UM's leave had ended on 9th May 2018, even when extended by section 3C. The respondent refused to treat the applications as fresh claims, in decisions of 13th December 2018 and 18th January 2019.

### *C. Procedural history, grounds and defence*

14. Following pre-action correspondence, GA and UM applied for judicial review on 22nd February 2019. Permission was refused by Upper Tribunal Judge Kebede on the papers in a decision of 20th May 2019. AW applied for judicial review on 14th June 2019 and permission in respect of his application was refused on the papers by Upper Tribunal Judge Pickup on 18th July 2019.

15. Following further case management directions, which are not recited here, at an oral permission hearing on 12th March 2020, Upper Tribunal Judges Allen and Finch granted permission on the following grounds:

> "1. Permission is granted in respect of the arguable failure by the respondent to consider and apply the relevant sections of her policy on long residence to the facts of the case.
>
> 2. Permission is granted in respect of the arguable unlawfulness of the paragraph 353 decision.
>
> 3. Permission is granted in respect of the arguable lawfulness of the article 8 evaluation."

16. A ground asserting that the applicants met the requirements of the Immigration Rules was refused. Directions were given, on the grant of permission, to serve amended grounds. Upper Tribunal Judge Mandalia refused permission on 10th June 2020 in respect of an application to add a ground to JR/3246/2019. In further directions issued by Upper Tribunal Judge Gleeson on 15th September 2020, the applications were initially stayed pending the Court of Appeal's decision in R (Arif) v Upper Tribunal C4/2020/0287. Following these directions, AW and GA served separate amended grounds on 5th November 2020. Judge Gleeson issued additional

directions on 7th January 2021, delinking a third, previously linked application of R (Kabir) v SSHD (JR/3972/3019). The stay was later lifted and the remaining two linked applications came before us.

***AW's amended grounds***

17. The amended grounds focussed on the three permitted grounds, with a fourth, new challenge, to which the respondent objected.

18. The first ground was the challenge that the respondent had failed to consider and apply her own long residence policy, when assessing AW's application for ILR, in particular, the continuous lawful residence requirement. The respondent had erroneously limited her assessment of the application to paragraph 276B of the Rules and had failed to consider, either adequately, or at all, paragraph 39E; its conflict with, or different direction compared to paragraph 276B; and the respondent's wider policy guidance and greater flexibility in respect of overstaying and long residence which made allowance for periods of overstaying, if applications were made within specified short 'grace' periods. Developing that ground further, the long residence rule had always contained a strict requirement of continuous lawful residence, but after its introduction, there had been a parallel long residence concession, allowing the respondent to disregard certain gaps in lawful residence. The long residence concession had been imported into the Rules in 2003 in order to allow for a right of appeal.

19. While the respondent's earlier policy guidance contained only limited discretion to grant applications where there were gaps in lawful residence, the scope of the discretion grew over time. By April 2009, there was already some limited discretion, usually for single short gaps of lawful residence of not more than 10 calendar days. This reflected the purpose of the long residence concession, which was to recognise where someone had shown the 'necessary commitment to ensuring they have maintained lawful leave throughout their time in the UK'.

20. There was a difference between the respondent's overall immigration policy on overstaying; her specific policy guidance; and the specific, more limited provisions of the Rules.

21. In respect of the respondent's asserted failure to comply with her own policy guidance, AW relied upon the applicable version 15.0. The grounds set out where the policy allowed the respondent to grant leave where applicants did not satisfy the strict requirements of continuous lawful residence, including granting those with temporary admission; in relation to early applications; the ability to go beyond 'grace periods' provided in the Rules; and in particular, the respondent's discretion to depart from the requirement of ten years' continuous lawful residence where a statutory appeal was ultimately successful. In contrast, in refusing AW's application, the respondent did not exercise any discretion at all and merely referred to the lack of continuous lawful residence.

22. Passing over the second ground for a moment, in relation to the third ground, the respondent had failed to consider the quality of AW's private life established in the UK for the purposes of article 8. The respondent should have recognised that the requirements of paragraph 276B were far narrower, and could not encompass, an article 8 claim. AW raised a human rights claim in his ILR application. The fact that he could not satisfy the requirements of the Rules for ILR was not determinative of his article 8 claim. Instead, in the impugned decision, in a section dealing with the consideration of 'exceptional circumstances', the respondent had referred to the fact that even if his removal from the UK would not be a breach of his ECHR rights, she had gone on to consider exceptional circumstances. By jumping to a consideration of exceptional circumstances, the respondent had failed to consider that there might be a breach of AW's article 8 rights.

23. The respondent should not have relied merely upon narrow applicable provisions in the Rules as fully reflecting her own wider immigration policy, which in turn had an impact upon the weight which could be attached to the maintenance of effective immigration control in the article 8 proportionality assessment. There was no rational reason why a person who had overstayed within the time limits specified in paragraph 39E of the Rules should be treated less favourably than a person resident in the UK on temporary admission.

24. AW further argued (although the respondent characterised this as a new ground, and we agree that it is) that the respondent's policy, in focussing on paragraph 276B, lacked "accessibility and foreseeability" when read in the context of the respondent's wider immigration policy, as reflected in paragraph 39E. There was an ambiguity in the claimed purpose of the eligibility provisions of the Rules. They had been described as seriously problematic and ambiguous. Moreover, the policy was clearly more generous than the Immigration Rules, however they were interpreted. The rule of law required that the scope of any discretion be defined with a sufficient degree of specificity to avoid being used arbitrarily.

25. Both of these grounds fed into the second ground, which was the respondent's error in refusing to treat AW's renewed ILR application as having a realistic prospect of success, so as to meet the criteria of a fresh claim for the purposes of paragraph 353.

***GA's amended grounds***

26. GA's amended grounds substantially replicated AW's challenges. GA added, in terms of her personal circumstances, that her application of 9th June 2018 was not simply a repeat application, but related to a different time period from her earlier application for ILR. If weight were properly attached to her 10 years' residence (with longer periods of residence prior to that) up to June 2018, the respondent's rationale for treating the application as having no realistic prospect of success was unsustainable, even if GA did not meet the strict requirements of paragraph 276B. Central to the realistic prospect of success (as per the well-known authority of WM (DRC) v SSHD [2006] EWCA Civ 1495; [2007] Imm AR 337) was GA's article 8 claim, which was significantly different from the previous application for ILR because she

had been continuously resident for ten years, which brought her within the scope of the respondent's long residence policy.

27. The respondent had failed to consider properly her exercise of discretion under section 3 of the 1971 Act. GA had only overstayed by eight days and had completed nine years and 10 months' lawful residence by the date of her application; 10 years and six months' residence by the date of the impugned decision; and had lived in the UK for 16 years in total, with leave for over 14 years, except for a period of four months in 2008.

28. The respondent had instead limited her assessment to paragraph 276B, not considering paragraph 39E and the wider policy guidance in respect of overstaying. There was ambiguity in the claimed purpose of the Rules, as reflected in cases such as Hoque. Any ambiguity weakened the public interest in the maintenance of effective immigration controls. Regardless of any ambiguity in its purpose, the respondent clearly operated a policy that was more generous than the Rules and she had wide residual discretion, which she ought to have considered, at least in respect of granting limited leave, as opposed to no leave at all.

29. GA repeated AW's criticism that the respondent had also failed to consider adequately whether refusal of leave would breach her article 8 rights. The respondent had instead relied upon GA not meeting the requirement of paragraph 276B, without considering her wider policy and residual discretion when conducting (as she ought to have conducted) a proper 'balance sheet' assessment of proportionality. By way of example, the respondent's own policy guidance had urged decision-makers to consider an applicant's family life in the UK; their investment in business or property; and their positive contributions to UK society.

***Orders sought in the grounds***

30. The applicants sought orders quashing the decisions refusing to treat their applications as fresh claims; declarations that the respondent's long residence policy was insufficiently clear to be applied lawfully, including in a manner consistent with article 8; and mandatory orders requiring the respondent to reconsider her decisions to refuse to treat their applications as fresh claims.

***The respondent's amended grounds of defence***

31. Following the submission of Acknowledgements of Service; the partial grants of permission; and the orders for amended grounds, on 18th November 2020, the respondent served amended detailed grounds of defence.

32. The respondent first took issue with the new ground, namely the 'lack of accessibility' or 'foreseeability' in relation to the respondent's long residence policy. It was without permission or merit.

33. The broad thrust of the respondent's detailed grounds, which are lengthy and so we do no more than summarise here, was that the applicants' applications for ILR had

been correctly refused under paragraph 276B and the respondent's policy. The policy set out some situations and exceptions where case workers could exercise discretion beyond the Rules, but the applicants were unable to identify how any of those exceptions applied to them. Their applications had stood or fell to be refused based on their long residence, as the only basis of their further submissions was the weight they themselves applied to long residence. Given the narrowness of their applications, there was no reason to grant leave, nor any freestanding article 8 claim of any residual merit. The decisions to refuse to treat the applicants' applications as fresh claims under paragraph 353 were, in that context, unarguably lawful.

34. The respondent noted that Judge Gleeson had previously adjourned consideration of these applications so that the parties could await the conclusion of the Court of Appeal in Hoque. In any event, the Court of Appeal's decision provided further support to the respondent, not the applicants.

35. At the previous hearing before Judge Gleeson, there was discussion, in the context of directions, about what part of the Rules or the respondent's policy the applicants claimed to have the benefit of. This had remained unresolved and the applicants had never been able to identify which part of the wider policy they benefitted from, because again, in reality, they could not.

36. Turning to the applicants' individual chronologies, they had applied for ILR on the basis of lawful long residence and in neither case did the applicants have the required lawful long residence at the time of their applications. AW was approximately three months short of the 10 years' continuous lawful residence requirement when he became an overstayer on 31st January 2019. GA was two months short after she became an overstayer on 9th May 2018. Whilst the applicants asserted that their failure to reach the required period of continuous lawful residence could be overlooked by virtue of a discretion contained in the long residence policy, in fact they were unable to point to which part of the policy would benefit them.

37. In relation to a challenge under the Rules, permission had been refused on this ground and in any event was ruled out because of the Court of Appeal's decision in Hoque, which confirmed that paragraph 276B permitted 'book-ended' overstaying, that is, gaps of previous overstaying between periods of lawful leave, as counting towards long residence, but not 'open-ended' overstaying i.e. current overstaying which has not been closed off by a grant of leave.

38. The respondent pointed out that every visitor met the requirement of being in the UK lawfully, but this would not entitle every visitor to ILR. Lawful presence was distinct from a requirement of lawful residence for a specified period, which if met, allowed someone to 'bank' and apply for ILR at some stage in the future, even if they were currently unable to do so because of a current lack of lawful presence. The applicants fell into the first category. Their applications did not fail because they were in the UK unlawfully – they failed because they did not have the required period of continuous lawful residence.

39. In relation to the respondent's policy guidance, Lord Reed JSC had confirmed at [4] of Agyarko v SSHD [2017] UKSC 11; [2017] Imm AR 764 that the respondent has a discretionary power under the 1971 Act. However, he also recognised at [7] the increasing emphasis on certainty rather than discretion, and predictability rather than flexibility. It was good practice for the respondent to publish its policy and to stick to it; unless there were uniformly applied practices, decisions could be inconsistent and arbitrary. Since the guidance might set out how the respondent intended to exercise her residual discretion, it could be a source of policy more generous than the Rules and the respondent could state that she would adopt a more lenient interpretation of the Rules (see [42] to [43] of Pokhriyal v SSHD [2013] EWCA Civ 1568; [2014] Imm AR 711). However, there was no difference between paragraph 276B and the respondent's policy as applied to the applicants, as paragraph 276B was understood in Hoque.

40. The appropriate approach was for the Upper Tribunal to assess the meaning of the policy and to see the extent to which the applicants fell within it, as per [31] of Mandalia v SSHD [2015] UKSC 59; [2016] Imm AR 180.

41. While the respondent had provided guidance on long residence to case workers from time to time, the respondent's discretion was not, as the applicants contended, wide or so vague as to risk irrational application. In fact, the guidance to caseworkers circumscribed that discretion, with specific exceptions and examples. Historically, caseworkers had typically been able to exercise discretion where there were short gaps in lawful residence, as per the long residence concession. The relevant guidance for present purposes was the long residence guidance, version 15.0, published on 3rd April 2017, which dealt with 'breaks' in lawful residence and 'gaps'. The guidance was clear, in using such terminology, that such 'gaps' related short periods of overstaying between periods of grants of leave. None of the applicants had subsequent grants of leave and instead were simply people who had not accumulated 10 years' continuous lawful residence. The applicants were attempting to conflate their circumstances, by comparing themselves with those who had met the residence requirement, but were currently overstayers when they applied for ILR, and so satisfied paragraph 276B(i)(a), but contravened paragraph 276B(v), which the guidance dealt with.

42. The applicants' attempts to conflate their circumstances with those who benefitted from exceptions within the policy were not limited to paragraph 39E. They also sought to compare themselves to those who were within 28 days of completing the required qualifying period at the time of their application, namely those benefitting from the early application exception. None of the applicants fell within that exception, as none had made their applications within 28 days of completing the lawful residence requirement.

43. AW also sought to compare himself with those on temporary admission, as it then existed. The respondent was entitled to distinguish between overstayers and those on temporary admission, but in any event, they were not treated differently. A person with temporary admission still needed to meet the long residence

requirement. While periods spent in the UK with temporary admission could potentially count, they could only do so where there was a later grant of 'book-ended' leave on other grounds. If there were no such later grant, a person with temporary admission would still fail because of a lack of qualifying lawful residence.

44. Finally, the applicants tried to compare themselves with those who had spent time outside the UK, but where that absence did not break continuous residence, provided that they had leave on exiting and re-entering the UK and the gap was for a limited period. Once again, none of the applicants fell into this category (GA had been an overstayer when she left the UK in 2008 and had not applied for entry clearance within 28 days of the expiry of her leave).

45. The obvious rationale underlying the policy guidance was to differentiate between 'open-ended' and 'book-ended' overstayers. Were time spent in the UK pursuant to repeatedly unfounded applications, so long as each new application came 'hot on the heels' of the refusal of its predecessor, to count towards 10 years' continuous lawful residence, it would inevitably lead to abuses, as recognised by both Underhill and Dingemans LJJ at paragraphs [50] and [104] of Hoque. The applicants' reliance on different circumstances where exceptions were made did not assist them, as those exceptions reflected the circumscribed nature of the discretion. The Court of Appeal in Hoque observed their construction of paragraph 276B accorded with the respondent's guidance and practice (see paragraphs [38] and [104]), namely the same distinction was made in the policy, as in the Rules, between 'book-ended' and 'open-ended' overstayers.

46. In summary, the applicants' first ground of challenge was answered by the absence of any sections of the respondent's policy or guidance which allowed case workers a discretion to grant leave on the facts of the applicants' cases. None had set out with any specificity the section of the policy guidance that applied to them.

47. AW had applied on the basis of long residence, rather than outside the Rules. He did not purport to be making an early application. The application was made prior to 28 days before attaining 10 years' lawful residence and in that respect, the policy mandated refusal.

48. GA had applied on 17th May 2018 for limited further leave to remain, which she subsequently varied, but she had never explained how, even with the benefit of the early application exception, section 3C leave extended from 17th May 2018 to 9th June 2018 (the 10-year anniversary), after her appeal rights had been exhausted.

49. Their applications failed under the policy for the same reasons as they failed under the Rules, namely they were 'open-ended' overstayers who did not meet the 10 year period of continuous lawful residence.

50. Dealing with the second and third grounds together (article 8 and paragraph 353), the weakness of the article 8 claims reflected the fact that none of the applicants claimed to meet the Rules either in respect of Appendix FM for family life, or paragraph 276ADE in respect of private life. The applicants appeared to be pursuing

'near miss' long residence claims. While there might be some weight attached to a 'near miss' in relation to the Rules, it depended on the rule in question. The long residence provisions were not coterminous with article 8 rights. The fact that an applicant only nearly missed the '10-year' rule did not mean that their application would or should succeed under article 8. This was true of Mr Hoque and Mr Kabir in the Hoque case. Mr Mubarak fell only two months short and his claim was still bound to fail (paragraphs [140] to [141]).

51. In the applicants' cases, none had established family life in the UK; the existence of each in the UK was precarious; and a substantial period of their presence was only with section 3C leave. None pointed to the particular development of private life which would make their cases exceptional. All had had appeals rejected by First-tier Tribunals: AW, on 16th August 2018; GA, on 31st March 2017. Their renewed applications were made only a brief period of time afterwards. The only 'new' matter was a place marker, which had no legal significance, of 10 years' presence in the UK. Each application was no different to the previous claim which had recently been rejected by the First-tier Tribunal, and the further application was similarly bound to fail on an article 8 analysis and so had no realistic prospect of success.

52. In respect of any argument about lack of accessibility and foreseeability, first, no permission had been given for this ground. Second, the premise that the policy was unclear, as it applied to the applicants, was incorrect. The policy was very clear. That was supported by the Court's decision in Hoque that its understanding of the Rules was consistent with the application of the policy. There was, in the Court's view, no ambiguity when it came to overstayers like the applicants (see paragraph [43] of Hoque). 'Book-ended' overstayers could succeed under both the Rules and the policy, while the applicants, as 'open-ended' overstayers, failed under both.

53. Third, the applicants could not point to any ambiguity in the policy that assisted them and instead complained that they ought to come within exceptions, because their circumstances were of comparable merit. The applicants' circumstances were not comparable, because they were all currently overstayers, with no reason to remain in the UK.

54. Even if the premise were correct that the policy was not clear, there was no evidence that the policy could not be lawfully applied in respect of article 8 or that the decisions were otherwise unlawful because they were not 'foreseeable' or 'accessible'. The policy covered applications for ILR only and had to be read holistically with other paragraphs of the Rules and the respondent's policies. The respondent did not suggest that her residual discretion was unduly fettered by the terms of the Rules or policies and the applicants had not begun to show that the policy, as applied, was incapable of protecting their human rights. By analogy to the Supreme Court's decision of R (Bibi) v SSHD [2015] UKSC 68; [2016] Imm AR 270, in relation to whether a rule was unlawful, the applicants had not shown (nor could they show) that the policy could not be operated in a proportionate way or a way that was so inherently unjustified in all or nearly all cases. Whilst there remained a residual discretion outside the policy, as confirmed in the case of R (Ahmed) v SSHD

(paragraph 276B – ten years lawful residence) [2019] UKUT 00010 (IAC), the extent of the residual discretion should not be overstated nor should the respondent be criticised for not expressly having regard to it. None of the applicants had raised any reference to residual discretion in their applications, nor did they make a specific application on that basis. In reality, there was nothing exceptional about their cases, which placed sole reliance on the place marker of 10 years' residence, but not continuous lawful residence.

## *D. The hearing before us*

### *The applications to adduce new evidence*

55. On 11th February 2021, the day before the first day of the hearing, the applicants applied for permission to rely upon additional evidence. The additional evidence comprised witness statements of five solicitors representing third parties; emails between the AW's solicitors and the Government Legal Department from 1st to 11th February 2021, in which it was said that the applicants had sought further information from the respondent about decisions in relation to third party applicants; and a redacted decision of the respondent in a third party case. The gist of the evidence was that in at least a number of cases identified by the applicants (around 20), 'open-ended' overstayers had been granted leave to remain and this supported the applicants' construction of the policy. It was not argued that an unpublished policy was being applied.

56. In justifying the lateness of the application, Mr Jafferji pointed out that Judge Gleeson had given no specific direction as to any application for additional evidence (so no deadline had been broken) and the evidence had been collated only very recently with correspondence between the Government Legal Department and the applicants beginning on 1st February 2021. It was only around the end of January 2021 that the applicants' solicitors had become aware, through networks of third party solicitors, about some decisions having been granted in favour of 'open-ended' overstayers. As a consequence, the applicants had sought further information from the respondent. In response, the respondent had provided no witness statement and the GLD had stated on 4th February 2021 that it had no knowledge of any other practice to grant ILR to 'open-ended' overstayers, and if the applicants had evidence, they should provide it. The applicants had then begun a difficult process of obtaining evidence from third parties, a number of whom were nervous because of fear that any grant of leave would be retracted. There had been no breach of case management directions. There was a good reason for late disclosure. The respondent had been invited to give evidence and was under a duty of candour. Therefore the evidence should be admitted as it supported the applicants' construction of the guidance and was relevant to its exercise of discretion that there was no consistent policy being applied, and instead evidence of a dysfunctional policy, as supported by the view of Dingemans LJ at [105] of Hoque.

57. In response, Mr Harland raised four points: first, the lateness of the application; second, how this fitted in with the grant of permission in terms of the case; third, the prejudice to the respondent; and fourth, the impact on proceedings.

58. First, the application was manifestly late. Judge Gleeson had directed on 15th September 2020 that a consolidated bundle be filed not later than 21 days before the hearing and no further documents or evidence would be accepted thereafter without the leave of the Upper Tribunal. This was a long running judicial review application with re-amended grounds and two skeleton arguments. It was common sense that the application was made late (only the day before the hearing). The reasons given for the lateness of the application were unsustainable. Whilst the applicants had claimed only to have just become aware of other cases, there was no detail about what enquiries had been made before, or what earlier steps had been taken, in a timely fashion. Was it really the applicants' case that the possibility of inconsistent decisions had only just occurred to them?

59. Second, the disclosure did not appear to be relevant to the permitted grounds. Ground (1) was an arguable failure to consider and apply relevant sections of the respondent's policy. There was no permission granted to argue that the policy had been applied inconsistently. That would have required a further amendment to the grounds.

60. Third, in terms of prejudice, on the one hand, the evidence may in fact be of very little import. Various solicitors had expressed experience of grants to 'open-ended' overstayers, but without detail of the underlying decision. Taken even at its highest, the evidence referred to around 20 grants having been made to 'open-ended' overstayers or there being decisions of the First-tier Tribunal in favour of such applicants. There was no evidence that these were more than isolated cases. It was not appropriate for us to take into account unreported decisions of the First-tier Tribunal. There might be some case workers who applied the policy incorrectly, or not at all, but it was for this Tribunal to understand and determine the meaning of the respondent's policy.

61. On the other hand, the prejudice to the respondent was that there was no opportunity to review the relevant circumstances of the cases; cross-examine the representatives who provided these statements; or point out where the analysis was wrong. It was impossible for the respondent to put together a response in relation to those statements. On the applicants' question in correspondence of February 2021, of how many grants of leave had been given to 'open-ended' overstayers, there was no way of addressing that except by going through each and every file, which would be an enormous exercise in a tiny timeframe.

62. Fourth, it could not be right to adjourn the hearing of this long-running application again.

63. In response, for the applicants, Ms Naik QC added that there was a duty of candour and the respondent was obliged to show the full picture. It could perhaps be dealt

with by way of submissions after the hearing, but Mr Harland was without instructions on such next steps.

64. We concluded that it was appropriate to admit the new evidence, but its relevance should be limited to the interpretation of the policy, i.e. the first ground that was permitted to proceed. Our decision to admit new evidence was a finely balanced one. We regarded the application as late and without satisfactory explanation of the timeliness of earlier enquiries. On the other hand, we accepted that such evidence could potentially be relevant to the pleaded first ground, but the prejudice to the respondent was mitigated by admitting it only by reference to that permitted ground (as to which the applicants made no objection) and by allowing the parties do deal with the evidence by way of written submissions.

65. Having agreed to admit the evidence, Mr Harland indicated that he was content to proceed without an adjournment, but said that there may need to be an application for permission to respond with the respondent's own statement on the narrow issue to which the new evidence related and the specific, third-party decision relied on.

66. As it happened, the hearing then went part-heard (it was only originally listed for a day), with the adjourned hearing relisted for 30th March 2021.

67. The respondent herself made a late application on 29th March 2021, to adduce her own witness statement, as to which there was no objection by the applicants. The witness statement was of a Senior Executive Officer of the respondent, Richard Holmes, with supporting exhibits. We also admitted that evidence, which we have considered in our discussion below. Mr Holmes did not attend the Tribunal to give oral evidence.

***The applicants' combined written submissions***

68. We considered the applicants' combined written submissions dated 28th January 2021. While we do no more than summarise the submissions, we have considered them in full.

69. The applicants acknowledged the Court of Appeal's decision in Hoque, which confirmed that 'open-ended' overstayers could not succeed under paragraph 276B, but the Court had not considered in detail the respondent's policy guidance. That policy was central to the applicants' claims, so no real, or very limited assistance could be derived from the Court of Appeal's decision. In any event, the Court of Appeal's decision was a split judgment and the Court was unanimous in its criticism of the respondent's own understanding of the Rules and immigration policy.

70. In those circumstances, the policy needed to be read with great circumspection, particularly in the absence of a witness statement adduced by the respondent setting out the policy background or other considerations in applying the policy. Adverse inferences could be drawn from the absence of such a witness statement (see the authority of R (Das) v SSHD [2014] EWCA Civ 45, at [80]).

71. The relevance of Hoque was also limited, as Underhill LJ had expressly stated at paragraph [3], that the article 8 issues were case-specific and did not themselves raise any issue of principle.

72. In relation to the first ground, namely the respondent's arguable failure to consider and apply the relevant sections of her policy on long residence to the facts of the case, the Rules had to be considered as a coherent scheme, rather than in isolation and the context of the introduction of paragraph 39E on 3rd November 2016, as explained in the explanatory memorandum to the Statement of Changes in the Immigration Rules (HC 667), at [7.49], was for "*reasons of fairness*". Where an individual fulfilled the requirements of the discrete scenarios provided for in paragraph 39E, they would not be seen as being in breach of immigration control. A period of overstaying was one that could be disregarded or overlooked.

73. The background to paragraph 276B was the earlier long residence concession, based on the European Convention on Establishment, which itself was based on the ECHR. While therefore ultimately arising from the ECHR, the focus of the concession and later the Rule, was the length of lawful residence, with no other factors such as the quality of residence and the extent of private and family life established in the UK being relevant. While arising out of the ECHR, applying the long residence rule was a very different matter to considering article 8.

74. While there were apparently strict requirements in the long residence rule prior to changes brought into effect on 1st October 2012 requiring continuous lawful residence, which would mean that even if there were one day of overstaying due to ill-health or other matters beyond an individual's control, their application for long residence would be unsuccessful, increasing discretion was introduced over time. For example, limited discretion was introduced in April 2009, allowing single short gaps to be disregarded. The respondent's guidance in version 15.0 (2017) was now much broader, going beyond paragraph 39E and its predecessor provision, to include many examples, which were just that – examples, which did not define the scope of the policy but merely illustrated its application. They included examples of early applications and those with temporary admission. The policy reflected what was stated in the long residence concession – the recognition of an applicant having "*shown the necessary commitment to ensuring that they have maintained lawful leave throughout their time in the UK.*" There was a significant difference between the overall immigration policy on overstaying, as reflected at paragraph 39E; the specific policy with regard to long residence; and the specific provisions of the Rules.

75. Neither GA's nor AW's applications were appropriately considered. The respondent had not considered the exercise of discretion at all. Instead, the respondent relied on the circular reasoning that as GA and AW had not satisfied paragraph 276B, an exercise of discretion was not appropriate.

76. Proportionality was said to be relevant to the first and second grounds of the permission application. In relation to the first ground, when applying her policy, the respondent ought to have recognised that after a certain period of continuous lawful

residence, people should not be required to leave the UK. This was a broader policy discretion, in addition to the human rights framework of article 8. The degree of weight given to the assessment of a primary decision-maker depended on the context, (see [69] of Bank Mellat v Her Majesty's Treasury [2014] AC 700), but we should go beyond a 'range of reasonable responses' review, to consider the aim of the respondent's policy and whether the refusal of leave was disproportionate, striking a 'fair balance' as per [74] of Bank Mellat. The respondent had failed to apply her mind to the proportionality of refusing leave in the broader policy discretion sense, for example in failing to distinguish the applicants as lawful migrants to the UK who properly made in-time, paid applications, with periods of lawful leave, from others such as those involved in deception.

77. The applicants accepted that it was open to the respondent to apply a longer 20 year rule under paragraph 276ADE where an applicant did not meet the requirement of paragraph 276B, but this could not absolve the respondent of her responsibility to consider properly where applicants were lawfully present and had made proper applications for leave to remain and would not have breached the Rules save for where the respondent herself would otherwise disregard such breaches. Adopting the 'fair balance' review enjoined in Bank Mallet, there was a difference between whether a particular objective was, *in principle*, sufficiently important to justify limiting a particular right and whether in fact it constituted a fair balance. The respondent had failed to consider the fair balance.

78. The respondent's application of her policy could also be considered through the framework of a 'rationality review', described most recently in R (Pantellerisco) v SSWP [2020] EWHC 1944 (Admin), at [47] to [50], which encompassed an assessment of the comparative disadvantages of the various options open to the respondent, the reasons for the course taken and whether that course struck a 'reasonable balance'. The question here was whether, notwithstanding the applicants not meeting the requirements of paragraph 276B, the applicants ought to have had discretion exercised in their favour.

79. In relation to the second ground, the applications had also raised human rights claims under article 8. The respondent's consideration of the applications outside the Rules had failed to apply the requisite structured approach to article 8 mandated by the Court of Appeal and endorsed by the Supreme Court in R (Aguilar Quila) v SSHD (AIRE Centre intervening) [2012] 1 AC 621; [2012] Imm AR 135 and Bank Mellat. There was no assessment of the strength of the public interest, and where the fair balance of competing interests lay. The assessment of a fair balance required consideration of the respondent's long residence policy, which was not considered or applied at all, and the applicants' adherence to the respondent's wider immigration policy during the course of their stay in the UK, namely their attempts to maintain lawful status.

80. The respondent had not given consideration to the weight to be attached to the policy. Instead, she had erred in relying narrowly on paragraph 276B, where this pulled in a different direction from paragraph 39E and there was a wider policy still,

beyond the Rules. If the applicants in fact met the respondent's wider policy, as correctly understood, the respondent would not be able to point to the importance of maintaining effective immigration controls as a factor weighing in favour of the respondent (see the recent Upper Tribunal decision of OA (Human Rights) v SSHD [2019] UKUT 65 (IAC); [2019] Imm AR 647).

***The applicants' oral submissions***

***Ms Naik QC, on behalf of GA***

81. By way of introduction, this Tribunal should look at the respondent's application of her policy and her exercise of discretion in a broader way than a First-tier Tribunal could, because the First-tier Tribunal was limited to consideration of article 8 in a statutory appeal. Ms Naik QC emphasised the residual discretion under section 3 of the 1971 Act, in the context of GA's specific circumstances, namely the brief period of overstaying and the completion of nine years and 10 months' lawful residence and the completion of over 10 years' residence by the date of the impugned decision. The respondent had impermissibly limited her assessment to paragraph 276B and had had no regard to paragraph 39E and the respondent's wider policy. Hoque did not assist as it did not examine the application of the respondent's residual discretion. There needed to be a structured approach to that, as per Bank Mellat. For the purposes of article 8, the respondent ought to have considered the quality of GA's private and family life in the context of the respondent's policy, as correctly understood, and a 'fair balance' test should be applied.

82. Dealing with the lack of foreseeability or accessibility, it was difficult for GA to know how she would be treated and how she should manage her affairs, when the respondent herself did not know what her policy was, or the purpose behind it, and had changed her mind the day before the hearing in Hoque. It was not sufficient for the respondent to adopt the rationale for the Rules as understood in Hoque. We needed to consider what the purpose of the policy was. No evidence had been put by the respondent as to her intended purpose. Moreover, the dichotomy in Hoque between 'open-ended' and 'book-ended' overstayers, with the former being cast as unmeritorious because of the risk of spurious repeat applications, ignored the applicants' attempts to comply with the Rules and make timeous, paid applications.

83. It was also clear that the respondent's policy was more generous than the Rules and so it needed to have specificity, to avoid arbitrary decisions. Instead, the respondent's policy demonstrated ambiguity. The policy was insufficiently precise to be able to be applied compatibly with article 8.

84. The answer to the respondent's challenge that the applicants had not identified a particular part of the respondent's policy which they could benefit from was that there was express flexibility in how the criteria in paragraph 276 applied, as confirmed by McCombe LJ, which allowed for discretion to be extended to 'open-ended' overstayers.

85. The purpose of the long residence rule and earlier concession was like no other. It allowed somebody the right to apply for settlement if they complied with the law based on the ties that had been built up and was an indicator of how article 8 obligations should lie. From July 2012, the 14-year rule had been removed and instead there had been the introduction under paragraph 276ADE of the 20 year route, but the applicants were not arguing a 'near-miss' case. The respondent claimed that in the absence of 10 years' continuous lawful residence, 20 years' residence was needed, but the purpose of the rule which informed the 10 year requirement also informed the 'fair balance' for a wider policy review and an article 8 assessment, beyond paragraph 276B. In the context of that 'fair balance', it was hard to see why the applicants should not benefit from the exercise of discretion, when those with temporary admission could; and where the applicants could be forgiven for misunderstanding the Rules and had not been able to manage their affairs appropriately. To the extent that the respondent relied on the public interest in the maintenance of effective immigration controls, the applicants had attempted to comply with the law, with paid applications.

86. Ms Naik QC referred to the purpose set out in the policy guidance and passages of it, which were consistent with the flexibility of the respondent's policy. The long residence guidance, version 15.0, at page [730] of the Core Bundle ('CB') stated:

> "The rules on long residence recognise the ties a person may form with the UK over a lengthy period of residence here."

87. The section "Extension requirements" (page [732] CB) included the following:

> "Applicants in the UK with temporary admission
>
> If an applicant with temporary admission meets all the other requirements of rule 276B, discretion can be exercised by Border Force to grant them 6 months code 1 outside the Immigration Rules, so they can make an application in the UK."

88. The section included a passage about the grant of limited leave, stating that long residence applicants could be granted limited leave, including where any overstaying was disregarded pursuant to paragraph 39E. Whilst Ms Naik QC acknowledged that in the same section at the bottom of page [732] CB, the guidance required case workers not to grant an applicant an extension of leave in order to complete the qualifying period of 10 years, the fact that limited leave could be granted demonstrated the flexibility within the policy.

89. Ms Naik QC turned next to the section on 'Requirements for long residence' at page [734] CB, which repeated the exception permitted under paragraph 39E for overstayers. At page [735] CB, the 'Definition of continuous lawful residence' section included:

> "temporary admission within section 11 of the 1971 Immigration Act where leave to enter or remain is subsequently granted".

90. Such periods of temporary admission could last for years and yet those benefitting from this exception could still be eligible for ILR. If the respondent's contention for the interpretation of her policy were correct, she would have to explain why it was rational to distinguish between those with temporary admission and the applicants.

91. Next, at page [736] CB, the guidance contained a section on 'Breaks in continuous residence'. This permitted short gaps in lawful residence and there was a further passage dealing with where discretion could be exercised.

92. The guidance then contained worked examples of breaks in continuous residence. 'Example 4' on page [743] CB, which had been referred to expressly by McCombe LJ at paragraph [92] of Hoque, described the circumstance of an applicant's leave having expired on 10th July 2012 but they only left the UK on 1st August 2012, after the expiry of their leave. They had then submitted an application for entry clearance on 5th August 2012 and when returning to the UK on 27th October, they submitted a long residence application. In answer to the question of whether the application should be granted, the answer was "yes". The answer continued:

> "Grant the application as the rules allow for periods of overstaying of 28 days or less and the period ends before 24 November 2016. This applicant submitted their application for entry clearance less than 28 days after original grant of leave had expired and returned to the UK within 6 months of last leaving."

93. The fact that there were four examples given illustrated the extent of the exercise of discretion. In GA's case, she was an overstayer prior to 24th November 2016 and therefore fell directly within this example.

94. Even for applications after 24th November 2016, at page 745 [CB], the guidance required case workers to consider paragraph 39E. 'Example 1' on the same page, which indicated that there was a break in lawful residence where an in-country overstayer made an out-of-time application before 24th November 2016, was capable of applying to 'book-ended' as well as 'open-ended' overstayers.

95. At page [763] CB, the guidance set out circumstances where an extension of stay in the UK could be granted, by reference to paragraph 276A2. They included those who had applied for long residence but were unable to meet the requirement of paragraphs 276B(iii) and/or (iv). The use of the word '*includes*' in the guidance recognised that an exemption could be granted under other provisions. The same section also made clear that if an applicant had less than 20 years' residence in the UK, a decision-maker must grant an extension on the same conditions to which an applicant was subject on their previous grant of leave, even where an applicant would not qualify for further leave in that category if they were to apply separately. This reflected the proportionate restrictions on grants of limited leave to remain, such as no recourse to public funds, which showed the mechanisms by which discretion could be exercised.

96. The applicants could not be blamed for not setting out a specific exception in the guidance into which they fell, as the policy was complex and there were so many

reasons why exemptions could be granted and limited leave could also be granted. The overstayer exception in paragraph 39E was of wide application, applying to the following (non-exhaustive list) of paragraphs of the Rules: 128A; 134; 135; 142; 158, 159G; 176 and 192. Simply referring to paragraph 276B was therefore not an answer. If the respondent had exercised her discretion, the applicants would have become 'book-ended' overstayers and their applications would then have succeeded.

97. Turning next to the authority of Hoque, the Court had construed the Rules purposively (see [49]) and had said that it was not unreasonable to treat 'open-ended' overstayers differently from 'book-ended' overstayers. However, the Court was considering and applying the Rules only and had not heard argument about the guidance and the width of the respondent's discretion. The Court had limited its review of article 8 issues at [53] and [54], to the principles set out in sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 and the (accepted) lack of a 'near miss' principle.

98. The applicants' challenge was to whether the respondent had adequately considered her discretion, in the context of paragraph 353. A 'rationality review' was necessary, as per the approach endorsed in the cases of R (Lord Carlisle) v SSHD [2014] UKSC 60 and Pham v SSHD [2015] UKSC 19; [2015] Imm AR 950. The applicants' cases were more complex than narrow private life claims, with no other distinguishing features, such as in Rhuppiah v SSHD [2018] UKSC 58; [2019] Imm AR 452.

99. The Court in Hoque had criticised the drafting of the Rules (at [59] and [103]) and all three LJJs had taken different views in dismissing the applicants' appeals in that case. GA and AW had done everything they could, by making paid applications in good time, and that was how they squared the circle of meeting the policy purpose, on a rationality review, even if they did not meet the Rules. The respondent's discretion would otherwise be meaningless. The policy could reward those who made meritorious applications, by complying with making paid applications, even if the Rules were more limited.

100. McCombe LJ's dissenting judgment had referred at [75] to the lack of a distinction between current and previous overstaying when changes to the Rules were introduced in 2012. He then analysed further changes and concluded, at [87], that the policy of objective overstaying was as follows:

> "In my view, all these provisions are designed to ensure that applications for new leave to remain, made on expiry of a old period of leave, should be made promptly and within the period of grace provided for in paragraph 39E."

101. McCombe LJ also observed at [91] that no counsel had taken the Court to the detail of the guidance issued to case workers and they had not focussed on this in their arguments on the construction of the Rules. While he agreed with the other two LJJs on the article 8 assessment, the applicants in Hoque had not pursued appeals on the same basis as GA and AW, namely on the basis of the flexibility of the respondent's policy; and the lack of proportionality in, and a fair balance struck by, the impugned decisions.

102. No one had argued in Hoque that the respondent's policy lacked foreseeability or accessibility, so as to enable the applicants to arrange their affairs properly. Had GA known what the respondent's position now was, she could have left the UK; applied to re-enter in a different capacity; and then become a 'book-ended' overstayer and obtained ILR.

103. Returning next to the need for a 'fair balance' review, Ms Naik QC referred to the four-stage test in [74] of Bank Mellat:

> "(1) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right.
>
> (2) Whether the measure is rationally connected to the objective.
>
> (3) Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
>
> (4) Whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

104. The Supreme Court had endorsed the 'fair balance' test in the case of R (Aguilar Quila) – see [45]. In differing circumstances, the courts had applied that test, for example in the case of R (Kiarie and Byndloss) v SSHD [2017] UKSC 42; [2017] Imm AR 1299, ([48]) and Rhuppiah v SSHD [2018] UKSC 58. GA and AW accepted that the respondent was entitled to 'draw a line', but the policy needed to be flexible and this Tribunal's interpretation of what her policy meant required a consideration of whether the measure was rationally connected to the objective in question. The objective was to reward those who were present in the UK lawfully but also required consideration of whether a less intrusive measure should be used, and whether, balancing the effects on GA and AW against the importance of the policy objective, the former outweighed the latter. GA and AW were not pursuing a 'near miss' argument. Rather, they were arguing that if an individual were, for example, a couple of months short of the required period of lawful residence, the policy required consideration of whether, instead of refusing leave, it was a fair balance to grant some form of limited leave. It would very much depend on an applicant's individual circumstances.

105. In relation to consideration of GA's human rights, other parts of the Rules, for example Paragraph 276A02, referred to the grant of leave outside the Rules. In that context, it would be perverse to require someone like GA, who had applied for ILR, to have to also specify that they also wanted consideration of limited leave to remain outside the Rules. Following the changes to rights of statutory appeal (so that the relevant right to appeal was limited to human rights grounds), an application for leave to remain both within, and outside, the Rules could be made in one application and the respondent was required to consider all of the relevant circumstances, including an assumption that GA would be removed.

106. Ms Naik QC recognised the discussion by the Supreme Court in Patel & Ors v SSHD [2014] AC 651; [2014] Imm AR 456 in terms that there was no 'near miss' or 'sliding scale' for an applicant who did not meet the Rules; that article 8 was not a 'general dispensing' power; and that article 8 considerations needed to be distinguished from the exercise of discretion outside the Rules, which may be for factors unrelated to article 8 (see [56]). That being said, common values may underlie some Rules which were also at the heart of article 8. The Rules balanced lawful long residence with the public interest in the maintenance of effective immigration controls. GA was not asking for the exercise of a 'general dispensing power,' but recognition of the fact that she had made every endeavour to make timely, paid applications, when the respondent considered whether to exercise her discretion. That discretion was part of the respondent's policy.

107. Ms Naik QC emphasised the level of scrutiny needed in this case. The Supreme Court had noted in Pham v SSHD [2015] UKSC 19, at [107], the differences between concepts of proportionality at common law and for the purposes of the ECHR (citing R (Daly v SSHD [2001] 2 AC 552). The former was not limited to classic notions of 'Wednesbury unreasonableness' and the intensity of scrutiny depended on the right which was at risk of infringement. In GA's case, there should be a searching review where fundamental rights were at stake. In the context of such a searching review, there was no suggestion that the applicants had been involved in evading immigration control. The construction or interpretation of the Rules had been confusing.

108. While risks of abuse of the system had been posed as a justification, GA had not attempted to abuse the system. In GA's application (page [166] CB), her solicitors had emphasised that if the respondent were minded to reject the application on the basis of article 8, she should let them know, so they could address any concerns. A 'minded to refuse' process was mirrored in the well-known authority of Balajigari v SSHD [2019] EWCA Civ 673; [2019] Imm AR 1152.

109. While Ms Naik QC accepted that the May 2018 application had referred to GA initially entering the UK in 2008 (page [96] CB), the impugned decision in response (page [242] CB), had ignored GA's earlier period of lawful residence during and prior to 2008. This lack of consideration of GA's earlier residence was consistent with the case records held in respect of GA (the 'GCID' notes), at page [370] CB, which made no reference to the earlier period of residence. Moreover, the GCID notes at page [370] CB did not suggest any consideration under paragraph 353. In addition, they supported GA's case that no consideration of discretion or her article 8 rights had been considered. The notes record the following question at page [373] CB:

> "Grant LOTR [Leave Outside the Rules?]
>
> Nothing to be considered."

110. This was consistent with the section of the decision, entitled 'Consideration of exceptional circumstances' (page [245] CB), which had stated:

> "You have claimed that even if your removal from the UK would not be a breach of the Refugee Convention or ECHR, there are exceptional circumstances for allowing you to remain in the UK. Consideration has therefore been given to the following relevant factors."

111. The analysis that followed was outside any consideration of GA's article 8 rights, which were based not only on the length of her residence but its lawful nature. In contrast, the 'safety valve' envisaged by paragraph 353 was extremely narrow, as confirmed by the Court of Appeal in the case of Qongwane & Ors v SSHD [2014] EWCA Civ 957; [2014] Imm AR 1179.

112. Following the decision in Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC); [2018] Imm AR 911 this Tribunal had to consider whether GA's human rights were engaged for the purposes of proportionality before considering paragraph 353. Given its narrow nature, paragraph 353 could not resolve the issue of GA's human rights and a statutory appeal was not open to GA. That was the reason why the applicants were applying for judicial review and there had not been a failure to exhaust any statutory remedies.

***Mr Jafferji, on behalf of AW***

113. Mr Jafferji emphasised that AW had entered the UK lawfully. AW had obtained an extension of leave to remain on various bases and then made an in-time application, which had referred to him being on the cusp of being in the UK for 10 years. The application had been refused on 20th April 2019 (see page [328] CB) with a reference to his application being submitted out of time. In fact, his application was not out of time and at page [332] CB, the impugned decision omitted any consideration of discretion. Instead the paragraph stated:

> "In considering your application it was considered whether the exercise of discretion was appropriate as you could not demonstrate 10 years continuous lawful residence. However, it is noted that you have resided in the UK for a period of 10 years and 1 day to date of which only 9 years 9 months and 12 days are considered to be continuous and lawful…..As you fail to meet the fundamental requirement of the rules to have established 10 years continuous lawful residence the Secretary of State is not satisfied that yours is a case where the exercise of discretion is appropriate."

114. The respondent's reasoning was circular. The respondent considered that as AW did not have 10 years continuous lawful residence, she declined to exercise any discretion. Had AW had such residence, the exercise of discretion would have been unnecessary.

115. Mr Jafferji then referred to the development of the respondent's long residence concession, a copy of which was at page [723] CB. The background to the concession was the UK's ratification of the European Convention on Establishment, which provided that nationals of any contracting party who had been lawfully residing for more than 10 years in a territory of another party may only be expelled for limited reasons.

116. The concession document confirmed that the respondent's practice had been to extend this provision in three respects: to include all foreign nationals; to grant

indefinite leave rather than simply to refrain from removing such a person; and to allow those who had been here illegally to benefit. The long residence concession continued with a section entitled 'Considerations' at page [724] CB, which included a provision that those who had 10 years' or more continuous lawful residence or 14 years' continuous residence of any legality should normally be granted ILR. There then followed sections with more detail, including a passage dealing with those who had not completed 10 years' continuous lawful residence, in which case applications should normally be refused, unless there were very strong compelling circumstances. The strength of ties with the UK; continuing ties with the home country; the total length of the continuous period; and the proportion of it which is lawful were the primary determining factors when deciding whether to grant or withhold a grant of ILR.

117. Thus, there was a consistent theme of considering lawful residence and considering what gaps in that residence should still be considered as lawful. The section headed 'Lawful residence' at page [724] CB indicated that certain breaches could still be regarded as lawful, such as: a short delay in submitting an application, provided the application was subsequently granted; a period between the submission and determination of an appeal, if it were successful; and where an appeal was unsuccessful but leave was subsequently granted, the period between submitting the appeal and the determination may be treated as lawful. Also included was the time taken by the respondent to reach a decision, at a time when there was no section 3C leave and so it permitted 'open-ended' overstaying, which was analogous to AW's current situation. AW's application was not novel or an attempt to abuse the Rules, but reflected the position from the date when the long residence concession first came into force. At the time of the concession, there was no temporary admission which would be a route to applying for ILR.

118. Turning next to the April 2009 'Instructions' on 'Long Residence' at page [707] CB, paragraph [2.2.7] considered early applications that were made less than 28 days before the 10 or 14 year period in question. Applications earlier than 28 days should be refused, while applications within 28 days before the anniversary might be granted. Paragraph [2.3.3] (page [708] CB) of the same Instructions considered breaks in lawful residence and the use of discretion. This included a statement that where an applicant had a single short gap in lawful residence through making one single previous application a few days out of time, that case workers should use discretion in granting ILR. On the other hand, it would not usually be appropriate to grant discretion where an applicant had more than one gap. This illustrated the core of the policy, with multiple out-of-time applications not showing sufficient commitment to lawful residence. ILR was on the basis of long residence and that was the title of the concession and the guidance. Whilst the provision in paragraph 276A(b) referred to 'lawful residence', that was wider than residence without any concession, as it included temporary admission and time spent as an overstayer where it was 'book-ended'. Trying to put a finger on the essential element of the Rules was not served by focussing on the lawful element of residence, but on the length of residence and the 2009 Instructions had at their core, the purpose of

recognising those who had shown the necessary commitment to ensuring that they had maintained lawful leave throughout their time in the UK.

119. The later guidance of 8th November 2011, at page [959] CB, confirmed that when exercising discretion for breaks in lawful residence, those applying for leave to remain should make every effort to obey the Rules. This was consistent with the guidance in force from 10th April 2013, in particular at page [888] CB, which included similar guidance and also introduced a 28 day concession, which allowed for gaps of no more than 28 calendar days through making applications out of time, and there was no limit on the number of gaps, which represented a huge expansion of discretion.

120. The respondent had sought to criticise GA and AW because they were unable to point to a section of the policy guidance which they could benefit from. This was the relevant section (page [891] AB), which confirmed that applicants must not have overstayed for more than 28 days on the date of the application. This was not limited to those who were 'book-ended' overstayers and there was no reference to a requirement for 10 years having to be built up before their leave expired. Instead there was simply a reference to the 28 day concession.

121. Mr Jafferji moved on to the guidance in force at the date that GA and AW made their applications (version 15.0), at page [730], CB which focussed on the length of residence, rather than a narrower focus of lawful residence:

> "The rules on long residence recognise the ties a person may form with the UK over a lengthy period of residence here."

122. The guidance did not refer to other matters that had been included in the original long residence concession, such as the quality of residence. It was, however, generous in the scope of discretion, illustrated at page [736] CB, which related to 'Events that break continuous residence' and 'Time spent outside the UK'. The policy allowed for 18 months outside the UK throughout the whole of the 10 year period. To pick 'Example 4' referred to by McCombe LJ at page [743] CB, AW could have left the UK, applied for entry clearance and returned within six months with entry clearance and would satisfy the policy. On entering for a day, he would have met the 10 year lawful residence requirement. This would have been possible even as a visitor, as the requirement for ILR required 10 years' lawful residence, not an intention to settle. Bearing in mind that this had been open to AW as an option, GA and AW had been hampered in organising their affairs advantageously, by poor guidance. The confusion was illustrated by 'Example 4'.

123. The guidance also contained wide discretion, at page [739] CB, for early applications and at page [744] CB, for out of time applications. This required decision-makers considering applications made on or after 24th November 2016 to consider exercising discretion in line with paragraph 39E. There could only be one intent, namely to make good the continuous lawful residence requirement. This could not be relevant to paragraph 276B(v) as that paragraph confirms that an applicant must not be in breach of the Rules. There was therefore a clear difference between a grant under the

Rules and an exercise of discretion. 'Example 1' (page [745] CB), relating to a pre-November 2016 application, considered that a person was nevertheless granted leave as a student despite making an out of time application. 'Example 3,' at page [743] CB, stated that an applicant had a single gap in their lawful residence of 34 days but a decision-maker was nevertheless right to use discretion in the case. That could not be by reference to 276B(v) but instead was an exercise of discretion by reference to paragraph 276B(i)(a), namely a requirement of 10 years continuous lawful residence.

124. If we considered the previous versions of the policy, the introduction of paragraph 39E changed the nature of the discretion. Part of the overstayer concession was now included in the Rules, but even if 'open-ended' overstaying was not so included in the Rules, it remained in the wider policy. Only if the wider policy were interpreted to include 'open-ended' overstaying was it coherent and rational.

125. Mr Jafferji then returned to the case of Hoque and in particular, [3] where Underhill LJ had made clear that the article 8 issues were case specific and did not in themselves raise any issue of principle. Whilst at [50], Underhill LJ had discussed a rationale for treating 'open-ended' overstayers differently from 'book-ended' overstayers and the potential for abuse, that was not a reason advanced by the Court for its analysis of the Rules and it was not even advanced by the respondent. Taking a realistic example, an applicant might make an application for leave to remain which was refused and his appeal rights were exhausted and make a further application within 14 days, which took time to resolve. If his situation changed, for example, he got married and was granted leave, his overstaying would become 'book-ended,' despite the merits of his original application being unchanged. He would still have been an overstayer and there was no reason to think that in comparison, an 'open-ended' overstayer was attempting to abuse the Rules any more than he was. The fear of 'repeat' applications was not correct, as there was only one chance to rely on paragraph 39E.

126. The false characterisation of 'open-ended' overstaying as abusive and 'book-ended' as not abusive was further illustrated by the way that the 'temporary admission' exception worked. In the section on temporary admission at page [746] CB, the example referred to somebody who was granted temporary admission on 31st January 1995 and remained on temporary admission until 27th June 2003, namely for eight years. If the respondent's interpretation of the policy were correct, then whilst the whole of the eight year period counted as lawful residence, it was difficult to see how AW's behaviour was more abusive. Indeed AW had only been technically overstaying at the very end of his period of residence. He had been in the UK lawfully for a far greater period of time, working and contributing to the UK, factors which were specified as being relevant to the exercise of discretion, in the 'Personal history' section at page [758] CB.

127. The breadth of the discretion was further illustrated by the section in the current guidance, 'Time spent in the UK with a right to reside under EEA Regulations,' at page [750] CB. While 'lawful residence', as defined, did not extend to a right of residence under EU law, there was a discretion to treat it as such, beyond the Rules.

128. In relation to the assessment of AW's article 8 rights, the respondent had made no assessment at all and for that reason alone, the impugned decision should be quashed. Instead, the respondent had merely referred to paragraph 353 and consideration of what were termed 'exceptional circumstances', but not an article 8 assessment. This was shown by the wording used in the decision at page [333] CB, which made an assessment '*even if your removal would not be in breach of the Refugee Convention or ECHR*.' Had there been a proper article 8 assessment, first, the respondent should have considered paragraph 276ADE, and then gone on to make a wider article 8 assessment, as the long residence rule was now solely based on the length and not quality of residence. For private life, there was no real mechanism equivalent to paragraph GEN.3.2. of Appendix FM for family life. A proper assessment of proportionality, on a 'balance sheet' approach, should have considered, on AW's side, the length of lawful residence; the length of residence overall; the education AW undertook in the UK; AW's work history; the lack of absence from the UK in contrast to those who might otherwise leave the UK for up to one and a half years; and the fact that AW made an application, as he was permitted to do so by the Rules.

129. An article 8 assessment might not have resulted in a grant of ILR but the respondent could at least have considered whether instead AW should be required to leave the UK. In that context, the question here was what the public interest was in AW's removal. He had complied with the timeliness of applications and he could have left and returned to the UK and met the requirements, had the guidance in question been clearer. Whilst the applicants may not be able to benefit within the Rules as 'open-ended' overstayers there was no reason why, in a proportionality assessment, 'open-ended' overstayers should be treated differently from 'book-ended' overstayers. The apparent explanation given by the Court of Appeal in Hoque was not entirely correct because it misunderstood the quality of residence and suggested one category of those abusing the system and another of those who were not, whereas in fact, as the examples demonstrated, this was not a fair distinction. In that context, the exclusion of 'open-ended' overstayers was unexplained and arbitrary and there is no provision for limited leave to be granted under the policy, except where an applicant could not meet an English language requirement.

130. The case of EB (Kosovo) (FC) v SSHD [2008] UKHL 41; [2008] Imm AR 713 was authority for the proposition that the public interest in the maintenance of effective immigration control could be reduced where there was delay because of a dysfunctional system. The circumstances of this case showed a dysfunctional system. R (Agyarko) v SSHD [2017] UKSC 11 confirmed that where a court was considering the weight to be given to the public interest, it could envisage a less stringent approach, in certain circumstances, for example, where people were under a reasonable misapprehension as to interpretation of the Rules. That was equally applicable in these cases where people had placed reliance upon Rules that were not properly drafted and were prevented from ordering their affairs in a way that they could have done. There was clearly also no requirement to show an 'exceptional case' (see the authority of Unuane v United Kingdom (Application No: 80343/2017); [2021] Imm AR 534 and consideration of a proportionality assessment was

particularly important where, as here, a policy pulled in different directions and was potentially unclear. Dingemans LJ had doubted, in Hoque, that proper thought had been given to the interaction of the various provisions and what weight should be applied to competing elements of the policy and the Rules. This had resulted in a lack of foreseeability and complete confusion about what the Rules meant, as exemplified by the respondent's 'volte-face', when she had changed her position on what the Rules had meant a mere day or two before the hearing in Hoque.

131. Turning to AW's witness evidence, these were statements of practitioners which showed treatment which was consistent with what AW was seeking. There was one case where an 'open-ended' applicant had been granted leave outright and a second had had their application refused, but won on appeal to the First-tier Tribunal and in circumstances where there was no challenge to those decisions. The witness statement adduced by the respondent, from Richard Holmes, did not discuss the policy guidance and was limited to a discussion that Mr Holmes had had with a single colleague. Nothing in the witness statement suggested that either of them had expertise in the formulation of the long residence policy or the policy guidance document. Of note, nowhere in the witness statement could it be discerned why the decision-makers in the examples given by AW had interpreted the policy in the way that they did, despite the fact that one decision-maker could be identified by name. There was no attempt to address or investigate any wider pattern of decision-making. Mr Holmes had even misunderstood the policy himself, when at [8] of his statement he had referred to 'book-ended' overstayers benefitting from the exercise of discretion, when in fact on the respondent's case in Hoque, such applicants had the required long residence and no discretion was needed.

***The respondent's submissions***

***Written submissions***

132. In written submissions dated 4th February 2021, Mr Harland first summarised the respondent's case; dealt with applications for ILR under the Rules and the respondent's policy, together with a discussion of the distinction between 'book-ended' and 'open-ended' overstayers; then focused on the applicants' cases under article 8 and the respondent's impugned decisions; and finally the extent of the respondent's residual discretion to grant ILR under the 1971 Act.

133. In summary, the applicant's ILR applications were based on a false premise, namely because they had made further applications for leave within 28 days after their section 3C leave had come to an end, they were continuing to accrue continuous lawful residence whilst those applications were outstanding. That was a basic misunderstanding of the Rules and the respondent's policy. They failed both within the Rules and the wider policy and there was nothing which could potentially engage any residual discretion.

134. The applicants, like the appellants in 'Hoque', were 'open-ended' overstayers. The sections of the respondent's guidance referred to gaps in lawful residence which had ended before 24th November 2016 or where leave had been granted in accordance

with paragraph 39E. Neither circumstances applied to GA or AW. At no point had the respondent's policy encompassed 'open-ended' overstayers, and all of the examples given in the long residence concession referred to subsequent grants of leave.

135. Underhill LJ had, at [50] of Hoque, provided a rationale for distinguishing between 'open-ended' and 'book-ended' overstayers. In the former case, the anniversary was without legal significance as there was no grant of leave on the original application. It was also capable of abuse as an applicant could make a wholly unfounded application and rely upon time taken to determine it, perhaps prolonged by a variation, in order to get the point where an application under paragraph 276B could be made. AW's and GA's anniversaries were no more than what Underhill LJ had described as 'place markers'.

136. Mr Harland reiterated AW's and GA's circumstances as supporting the risk of abuse. Their earlier ILR applications were bound to fail and their article 8 claims had similarly been rejected.

137. The applicants' reliance upon an explanatory memorandum of changes in the Rules did not assist them, as the guidance had to be read objectively (see Mandalia v SSHD [2015] UKSC 59). Reliance upon the memorandum took statements in it out of context, as paragraph [7.49] had referred explicitly to disregarding periods of overstaying between periods of leave, for reasons of fairness. Changes in the Rules were only ever intended to assist those who had historically short gaps between periods of leave, i.e. 'book-ended overstayers'.

138. The interpretation of the Rules and policy as contended for by the respondent sat comfortably with the overarching immigration system and the section 3C regime under the 1971 Act, which allowed for leave to be extended while in-time, valid applications were outstanding or being appealed, but not beyond that. Any alleged inconsistencies with paragraph 39E were illusory. The person who might benefit from paragraph 39E could be a skilled worker, who possessed the fundamental attributes which would allow them to remain and take up a role which might benefit society and who, for personal reasons, had made the application late. This was entirely different from a person applying for ILR under paragraph 276B who had fallen short of the 10 year requirement and had failed to fulfil even the most basic requirement. The respondent would not merely be asked to disregard overstaying, as per paragraph 39E, but to treat such applicants as having fundamental attributes that they did not have, akin to pretending that a Worker visa applicant had a certificate of sponsorship when they did not.

139. GA and AW had not forgotten to submit a valid application in time, rather they were unable to make such applications and the respondent was not required to make up missing time. They did not fail because they were overstayers, but because they did not have 10 years' long residence.

140. The respondent's policy was a constrained, rather than a broad one and none of the examples of favoured applicants, with whom GA and AW compared themselves, had analogous attributes. These included those who had accumulated 10 years' long residence, but were overstayers; those within 28 days of completing the required qualifying period, with ongoing leave when the application was being considered; and those with certain recognised breaks in their continuous residence, i.e. those who had spent time outside the UK. The applicants were not analogous to those benefiting from the concession for periods of time spent outside the UK because they had not overstayed for less than 28 days prior to 24th November 2016, in combination with a further grant of leave so that they had a 'gap' which could then be overlooked. Those who were resident in the UK on temporary admission or immigration bail only benefited from such periods counting as lawful residence if leave to enter or remain was later granted. The 'book-ended'/'open-ended' dichotomy also applied for those who lodged appeals out of time, but their appeals were ultimately successful.

141. In summary, the policy did not assist the applicants, and for good reason, because of the potential for abuse, and as Dingemans LJ had described it at [103] of Hoque, such an interpretation "*defies reason*."

142. The criticism that the respondent had failed to provide a witness statement to explain the meaning of the policy was not consistent with the view of the Supreme Court in Mandalia, which confirmed that the interpretation of the policy was for this Tribunal. The case of Das v SSHD [2014] EWCA Civ 45, where a statement had been provided to explain the length of detention for an individual detainee, related to individual circumstances and not the interpretation of a policy. There was no evidence of a different or hidden policy.

143. In relation to the article 8 arguments, the test was that set out in WM (DRC) v SSHD [2006] EWCA Civ 1495, namely whether having asked the right question and applied anxious scrutiny, the respondent was entitled to come to the conclusion that she did. The applicants' challenges must boil down to their proposition that despite failing under paragraph 276B, they had realistic prospects under a wider article 8 analysis. The applicants had acknowledged that article 8 was not a general dispensing power; nor were they entitled to a grant on the basis of a 'near miss.'

144. The decisions in AW and GA, when considering the particular circumstances, did not demonstrate any factor counterbalancing the need to comply with the Rules. AW had no family and had lived for the majority of his life in Pakistan, where he grew up, studied and worked until aged nearly 27. The fact that he had spent nine years in the UK did not lend any real weight to his private life claim, as found by the First-tier Tribunal. AW's assertion that he was on track to obtain 10 years' qualifying continuous lawful residence was simply wrong, as his leave had ended. The respondent was entitled to consider that his submissions were not significantly different to those put before the First-tier Tribunal and dismissed by it some seven and a half months earlier.

145. GA's case was also considered by the First-tier Tribunal, which had refused her article 8 appeal on the basis that there were no circumstances which made refusal of leave unjustifiably harsh. None of her article 8 private life submissions subsequently made in her application of 9th June 2018 were significantly different from those considered by the First-tier Tribunal in April 2017. She was a 43 year old woman who had arrived in the UK originally aged 29, although her current period of leave began when she was aged 34. She had no family in the UK, save for her Sri Lankan national husband who would return to Sri Lanka with her.

146. In terms of residual discretion, this was not to be seen as a way of getting round the Rules or introducing a 'near miss' principle by other means. As confirmed by Davis LJ in R (Junied) v SSHD [2019] EWCA Civ 2293, ([42]), an argument that considerations of fairness meant that the residual discretion should be exercised to waive compliance with the Rules would drive a 'heavy goods vehicle' through the whole scheme and would run counter to the approach in the decided authorities. Whilst it remained true that the respondent retained a discretion to grant leave, such a grant would be truly exceptional. If that were not the case, the purpose of the Rules and the published policy, to provide certainty to applicants; guidance to caseworkers; and clarity to the public, would be wholly undermined. The argument that residual discretion should be exercised in the absence of any article 8 claims of any merit was unsustainable.

***Oral submissions on behalf of the respondent***

147. The cases were, in fact, far simpler than the applicants suggested. They related to a fundamental attribute needed for ILR under paragraph 276B, which none of the applicants had, namely 10 years' continuous lawful residence. That attribute was as fundamental a requirement as a certificate of sponsorship for a Worker visa application. If an applicant had the required residence, they could then 'bank' this and apply at a later date, provided they were not in breach of the Rules at the time of their application. That was a requirement of the Rules, as in force from July 2012. The second requirement of not being in breach of the Rules at the time of the application was an additional, different requirement. Paragraph 39E provided an exception to the latter, not the former. It never gave applicants the core attribute that they had never had. As with any attribute, there would inevitably be bright lines, which do not allow for 'near misses'. Hoque confirmed this. To get ILR, one could be a 'book-ended,' but not an 'open-ended' overstayer, but the key to that distinction was that those in the first category, even book-ended, needed to have the core attribute. AW and GA did not.

148. The respondent was entitled to have a policy guiding its decision-makers that could be more generous than the Rules. However, it was for the applicants to show which part of the policy that they fell within and it was not enough for them to point out that other people could come within the policy and that they did not. They must indicate which parts of the policy they fell within and they had not done so.

149. The applicants were then thrown back to article 8, which was not coterminous with paragraph 276B. These applicants did not assert that they succeeded under the Rules. Their cases were standalone, outside the Rules. There was nothing on which to 'bite', in respect of their article 8 claims. Their article 8 claims had previously been rejected by First-tier Tribunals shortly before their renewed applications and the only development by the time of the renewed applications was the 'place marker' of 10 years' residence, which had no legal significance. On a more minor point, it was beside the point to say that the applicants had done everything they could to try to remain within the UK lawfully. If that were enough, Worker visa applicants could be granted visas even without a certificate of sponsorship.

150. Whilst Mr Jafferji had criticised the consistency of the Rules, the position for 'open-ended' overstayers had always been the same, as per the authority of R (Juned Ahmed) v SSHD [2019] UKUT 10 (IAC). As the case of Hoque confirmed, 'open-ended' overstayers were not permitted within the Rules. While McCombe LJ had considered, at [92], 'Example 4', (page [743] CB), his was a dissenting judgment, and he had misunderstood that example, which actually related to a 'book-ended' overstayer. Mr Harland urged us to consider instead [11] to [22] of Hoque, which set out the relevant provisions and the applicants' circumstances in that case; and at [25], Underhill LJ had noted the case of R (Juned Ahmed), with facts which were materially identical to those in the present applications; and he had rejected counter-arguments at [48] to [49]. Underhill LJ confirmed that the requirement of continuous lawful residence was not qualified by paragraph 39E. At [37], he had referred to paragraph [7.49] of the explanatory memorandum for the 2016 changes and the requirement for ILR applicants to have the required period of continuous lawful residence. Any gaps could potentially be cured, provided there was a subsequent grant in accordance with paragraph 39E. That assisted 'book-ended' overstayers, but not 'open-ended' overstayers. These applicants were 'open-ended' overstayers and they could not point to a 'gap', so that neither the Rules not the explanatory memorandum assisted them.

151. The Court in Hoque had referred to the validity of the distinction between 'book-ended' and 'open-ended' overstayers. A 'book-ended' overstayer had a valid reason for remaining in the UK and, for example, may have missed an application date for one renewal but then had established another valid reason to remain, which the respondent had recognised in granting further leave. In that case, the person with the 'gap' had then gone on to accrue long residence and could be treated validly in a different way to an 'open-ended' overstayer. An 'open-ended' overstayer's leave had ended and they did not have any further lawful reason to remain in the UK. They had not accrued 10 years' lawful residence and their further application was merely a 'place holder' application with no inherent merit on its own. They had run out of lawful leave and there was nothing to show why paragraph 39E should apply.

152. Underhill LJ had correctly noted the possibility for abuse if the applicants' contention were permitted. As in GA's and AW's cases, an application for leave, however unfounded, could be pursued; appeal rights be exhausted; and then an applicant could simply make a further application within a short time of the exhaustion of the

last appeal rights. An argument similar to the applicants' had been pursued in R (Juned Ahmed) and had been rejected. Whilst Mr Jafferji was correct that a person could not make repeatedly rejected applications, a person could apply for ILR based on long residence despite being resident for only 7 years; vary their application a number of times which the respondent then had to consider afresh and then, when finally rejected, make a further application within 14 days and start off all over again.

153. AW had arrived in 2009 and applied in 2017 for ILR, with only just over eight years' residence, (i.e. nearly two years' short) which was the last time when he had anything other than section 3C leave. There was no undue delay in the refusal of his application (five months later) and he was then given an in-country right of appeal. GA had returned to the UK on 6th July 2008, with her leave, except as extended because of statutory appeals, ending in 2015, so she had seven years' leave. Her application was also swiftly rejected but she then appealed all the way to the Upper Tribunal and then made varied applications. The Court of Appeal's fears were justified in the cases of GA and AW.

154. The applicants may say that this was how section 3C leave worked. However, the answer was that if the applicants had found other lawful reasons to remain, they would then be 'book-ended' overstayers. The system had some degree of flexibility, but the 'bright line' lay in having the required period of lawful residence, whether such residence included 'book-ended' gaps or otherwise. The applicants could not succeed under the Rules or the policy.

155. Looking at what the policy said, first, while the Court in Hoque had focussed on the Rules, Underhill LJ had stated at [38] that the policy was consistent with his interpretation of the Rules.

156. Turning next to the history of the guidance and first, the April 2009 version, the background section made clear at page [702] CB that until April 2003 there was no provision in the Rules for a person to be granted ILR based on the grounds of long residence. Instead, the long residence concession allowed for a discretionary grant, based on UK residence, the length of which varied depending on whether residence was continuously lawful or not (if 'yes', it was 10 years; if 'no,' the period was 14 years).

157. The implementation of the Nationality, Immigration and Asylum Act 2002 in April 2003 meant that there was no right of appeal against refusal of those seeking leave to enter or remain under concessionary arrangements. To provide a right of appeal, the long residence concession was brought within the scope of the Rules from 1st April 2003. Page [704] CB of the same 2009 guidance included a flowchart for '10 years long residence'. The first question in that flowchart was whether an applicant had at least 10 years' continuous lawful residence. If the answer was 'no,' then the application would be refused under paragraph 276D. This was consistent with Mr Harland's characterisation of the requirement being a fundamental attribute.

158. Turning to the section [2.3.3] of the 2009 guidance (page [709] CB) – 'Examples of use of discretion' in the context of gaps in lawful residence, one example given was of an applicant having a single short gap in lawful residence through making one single previous application out of time. The point was that if it were a 'gap,' it could not be 'open-ended'. Whilst Mr Jafferji relied upon the earlier paragraph on that page stating that case workers needed to be satisfied that every attempt had been made to comply with the Rules, it did not follow that they should succeed because they had made attempts. They should only succeed if their application was in the context of a 'gap'. The discretion was constrained and not a broad one as contended for by the applicants.

159. Moving to the subsequent version of the guidance of November 2011 at page [959] CB, it too referred to discretion for breaks in lawful residence. A decision-maker had to be satisfied that an applicant had acted lawfully throughout the whole 10 year period and had made every effort to obey the Rules. The guidance continued that it would be appropriate to use discretion for a single gap in lawful residence through making one previous application out of time. The emphasis was upon a gap in lawful residence.

160. The next version of the guidance of April 2013 was at page [888] CB. Once, again short gaps were allowed, where applications were out of time by no more than 28 days. The policy was that any gap must be 'book-ended' by a grant of leave.

161. The first time that overstaying was included in the guidance was in the April 2013 guidance at page [891] CB, in the context of 'out of time' applications. This distinguished between applications made before 9th July 2012 and those made on or after 9th July 2012. After 9th July 2012, applicants must not have been in breach of the Rules. Whilst the applicants sought to argue that these 'overstayer' exceptions allowed an applicant to build up a period of lawful residence, they did not and could not. Instead, they protected overstayers who had built up 10 years' continuous lawful residence but had made 'out of time' applications, within 28 days of the last grant of leave and now wished to 'bank' their accrued lawful residence. The provisions could not be read as relating to 'open-ended' overstayers who had not accrued the required lawful residence, as their applications were not 'out of time' – rather they were without the required lawful residence.

162. The 2017 policy, applicable to the applicants, contained a section on 'breaks in lawful residence,' at page [741] CB and as before, allowed for short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days where those gaps ended before November 2016 (the 'out of time' provisions, as before), or where leave was granted in accordance with paragraph 39E. The further section on 'out of time applications' (page [744] CB) dealt with the circumstance of those who had accrued 10 years' continuous lawful residence but were overstayers at the time of the application. It was that guidance that was considered in Hoque and in particular, the paragraph dealing with breaks at page [741] CB, where Underhill LJ took the policy as support for his interpretation of the Rules. This was consistent with 'book-ended' overstaying being allowed, but 'open-ended' overstaying, not

allowed. Whilst Mr Jafferji had referred to, and relied upon the 2009 guidance, (page [701] CB) as stating that the Rules recognised the ties a person may form in the UK over a lengthy period of residence, that was not coterminous with article 8. Recognition of article 8 flowed from other provisions of the Rules, for example paragraph 276ADE, following the abolition of the 14 year long residence route. The Rules did not recognise that 10 years' continuous lawful residence equated to an article 8 family or a private life claim and indeed one could have remained for 15 years with no article 8 claim to speak of, or instead may have established such private or family life so as to engage article 8 with only a couple of years' residence.

163. Mr Jafferji had pointed to a number of parts of the policy that allowed applications for leave to remain on the basis of long residence to succeed, even though they were more generous than the Rules. In particular, at page [736] CB, there was a reference to a break in continuous residence being permitted where a person had been outside the UK for more than six months at any one time. However, there was no mystery as to why the policy allowed this, where paragraphs 276A(a) and 276A(b) defined lawful residence and allowed for individuals who had been absent for less than six months to maintain continuity, so that the policy was in fact consistent with the Rules.

164. Mr Jafferji had also raised an issue about leaving the UK with one grant of leave and returning with a different grant of leave and having been without leave outside the UK for some time. It was asked how that was fair that they were treated more favourably. The answer to that was that the applicants had remained in the UK unlawfully as overstayers and they had not established that had they left the UK, they would have been granted re-entry. They had not pursued this route and so we could not know what the outcome would have been. In that context, the policy was not arbitrary, but consistent with the Rules, which respected those who had left and re-entered on valid visas – in the latter case, if there had been any overstaying, this was 'book-ended,' as re-entry had been granted.

165. Next, Mr Harland referred to the section in the current guidance at page [747] CB, dealing with 'Time awaiting a decision on an application or appeal'. That had included a passage at page [748] CB, where a person's leave to remain had not been extended by virtue of section 3C because they had made an application out of time but nevertheless their appeal was subsequently admitted by a First-tier Tribunal and had succeeded. In those circumstances, discretion should normally be exercised to disregard any break in continuous lawful residence where an appeal was allowed, with a grant outside the Rules. This once again mirrored the 'book-ended' versus 'open-ended' distinction. If such an applicant were an 'open-ended' overstayer and their appeal was unsuccessful, they would not get a grant of further leave.

166. Mr Harland then referred to the section of the policy on 'Out of time applications' at page [744] CB and those applications where a period of overstaying, depending on when the application was made, would be disregarded. However, this section was not relevant because the applicants had not had their applications refused because

they were overstayers, but because they did not have 10 years' continuous lawful residence. They were two distinct concepts.

167. Turning to the next section of the 2017 policy on 'Treatment of temporary admission' at page [746] CB, this confirmed that temporary admission or release on immigration bail only qualified as lawful residence, if leave to enter or leave to remain was later granted. Once again, this was consistent with the 'book-ended' versus 'open-ended' overstaying distinction. On a connected section of the guidance at page [732] CB, for applicants in the UK with temporary admission, where it provided that an applicant with temporary admission meeting all of the other requirements of Rule 276B could have a six-month grant of leave outside the Rules, so that they could make an application within the UK, this was explicable because an ILR application had to be made in-country and in this case, all of the other requirements, including the 10 year continuous lawful residence requirement, had to be met. This was a discretion to allow an applicant with temporary admission to make their application within the UK.

168. The other cases where Mr Jafferji had referred to more favourable treatment of other groups, all had rational explanations consistent with the distinction between 'book-ended' and 'open-ended' overstayers. One such example was the discretion given to EEA nationals, when neither GA nor AW were EEA nationals. Next, Mr Jafferji had referred to the 'public interest' considerations at page [754] CB. However, those factors were relevant where, *despite* meeting the long residence requirements, it would be against the public interests to grant ILR. The factors were relevant to the assessment of that public interest. The fact that the applicants' circumstances were said to be consistent with the factors listed, took those factors out of context – they applied when considering whether to refuse leave, despite meeting residence requirements. The factors could not be read as being that a person who did not meet the residence requirements could succeed, or that 'open-ended' overstayers should succeed. This was a restricted policy in practice, not one applying to 'open-ended' overstayers.

169. Mr Harland dealt with two other examples in the guidance. The first was an early application, dealt with at page [739] CB, where an applicant needed to make a timely application very shortly (within 28 days) before meeting the residence requirement. The exception recognised people who would otherwise meet the residence requirement, but for the need to make an in-time application. Neither GA nor AW were within 28 days of a qualifying period; on the contrary they were 10 years away from being able to establish such continuous lawful residence, either because of a break in their period of lawful residence, or simply never achieving such a threshold. In particular, at page [739] CB, the guidance stated, in the penultimate paragraph, that if the person made an application more than 28 days prior to the acquisition of continuous lawful residence of 10 years, then a decision-maker must refuse it.

170. Second, in relation to 'Example 4' at page [742] CB and an observation by McCombe LJ that this might be of benefit to 'open-ended' overstayers, his observation was both obiter and misunderstood the example. In 'Example 4', the applicant had left the UK,

albeit as an overstayer, and had then applied from outside the UK for entry clearance, which he was granted. He was a classic 'book-ended' overstayer, as he had obtained further entry clearance, for reasons not specified as relating to long-residence. In contrast, the applicants had not, when their appeal rights were finally exhausted, left the UK and then re-entered with further leave. AW had last had leave, other than 'section 3C' leave, in June 2017; whereas GA had last had such leave in 2015. They did not fall into 'Example 4', nor would any open-ended overstayer. There were no circumstances independent of their applications for ILR such as any family life relied upon. While the applicants said it was unfair for others to benefit from provisions on which those others could rely, for different reasons, to get entry clearance, that reflected the reality of the lack of family life or other circumstances meriting a grant of leave or entry, to 'book-end' any gap in leave.

171. In response to the challenge to the evidence of Richard Holmes as not addressing the applicants' witness statements, Mr Harland had made clear at the end of the first day that he was only intending to adduce the evidence of Mr Holmes to respond to the specific decision letter which had been adduced. It was clear from Mr Holmes' statement that there was no secret policy of granting leave in cases such as this and if there had been a wrong decision, that was simply a mistake and did not assist the applicants.

172. In terms of any claim based on article 8, the impugned decisions had refused to treat the applicants' further submissions as fresh claims for the purposes of paragraph 353. The article 8 submissions did not have a realistic prospect of success. There was no near 'miss principle', and while the extent to which they nearly achieved any period of lawful residence was not wholly irrelevant, nonetheless, the applications for ILR were not coterminous with article 8. If the applicants needed to show a realistic prospect of success for a claim outside the Rules, on the basis of article 8, the starting point was to consider this through the lens of Appendix FM or paragraph 276ADE. They got nowhere close in relation to those provisions. By comparison, Mr Mubarak in the case of Hoque was only two months short of the 10 year residence requirement and while their Lordships expressed sympathy, all found that falling short to that limited extent was of no assistance. Arguably, Mr Mubarak had a stronger claim, as he also had a daughter, but still failed. The applicants in this case would have to show that there was a realistic prospect that they would have succeeded under article 8. In reciting their immigration histories, the applicants' representatives had not dwelt on the previous separate refusals of human rights appeals by the First-tier Tribunals, only a short time before their renewed applications.

173. In relation to AW, Judge Miah had, in a decision promulgated on 30th August 2018 at page [312] CB, indicated that there was nothing before her to allow the human rights appeal ([32]). The appeal in August 2018 came nowhere close to succeeding. AW's appeal rights were exhausted on 30th January 2019 and he then made his ILR application on 4th February 2019, which the respondent refused to treat as a fresh claim on 20th April 2019, so no more than eight months after the First-tier Tribunal had resoundingly refused his article 8 claim. The question therefore was what had changed between the First-tier Tribunal's decision in August 2018 and his further

application on 4th February 2019. The answer was that nothing had changed, other than a place marker which had no legal significance. AW was not within 28 days of acquiring 10 years' continuous lawful residence and was in fact 10 years away. He had not been outside the UK and returned lawfully. In AW's renewed application, there was nothing different from what the First-tier Tribunal had considered in the material before it, other than an incorrect assertion that AW met the requirement of paragraph 276B. The refusal in that context was entirely unsurprising. A discretion could not be used to waive a fundamental requirement of 10 years' continuous lawful residence and in the circumstances, the respondent was entitled then to consider whether there was any realistic prospect of success. The respondent was entitled to consider in her decision, at page [333] CB, that all of the submissions had previously been considered by a First-tier Tribunal, and to reject it as a fresh claim. Therefore the brevity of the respondent's reasoning had to be seen in the context of the First-tier Tribunal's very recent and resounding article 8 refusal and the absence of any new material.

174. GA's application had a similar pattern. In a decision promulgated on 5th April 2017, Judge Lawrence of the First-tier Tribunal had confirmed at page [257] CB, [13], that the applicants had not met the requirements of paragraph 276A, in the context of the respondent considering the exercise of discretion '*pursuant to the relevant guidance*'. Judge Lawrence had gone on to consider Appendix FM in respect of family life and also very significant obstacles to the applicants' integration to their country of origin, Sri Lanka, for the purposes of paragraph 276ADE and had similarly rejected the human rights appeals at [19]. Having had their appeals dismissed on 5th April 2017, GA sought permission to appeal to this Tribunal, which was refused both by the First-tier Tribunal and subsequently by Upper Tribunal Judge Hanson, in a decision promulgated on 9th May 2018. He had confirmed at that date that there was nothing outside the Rules raised, that required consideration separately pursuant to article 8, and that Judge Lawrence was clearly entitled to find that article 8 was not engaged. Having refused permission on 9th May 2018, the applicants then made a further application on 17th May 2018, varied to an ILR application on 9th June 2018, based on 10 years' lawful residence. The application had referred, at page [162] CB, to GA having at least 10 years' continuous lawful residence, which was not correct, and then at page [168] CB, to an application by reference to GA's human rights. However, all of the issues that had been raised, namely adapting to life and integrating in the UK; being without a poor immigration history or serious breach of the Rules; and making a positive contribution to the UK; were factors that had previously been considered, a matter of months earlier, by Judge Lawrence. In the circumstances, the respondent, in refusing to treat the further submissions as a fresh claim, noted at page [244] CB, that GA could not succeed on the basis of continuous lawful residence and there was nothing significantly different from that which had been considered some seven months earlier by the First-tier Tribunal.

175. Whilst Ms Naik QC had suggested that there should be some form of 'minded to refuse' letter analogous to the case of Balajigari v SSHD [2019] EWCA Civ 673, first, that was a new ground and second, it was unarguable. The applicants knew about the requirements under the Rules and also knew about the requirement to put

forward something outside the Rules for the purposes of article 8 and had not done so. Moreover, even if the respondent had done so, there was nothing that the applicants had pointed to now or since that resulted in an arguable claim under article 8. Whilst Ms Naik QC had referred to the GCID notes recording GA as entering the UK in 2008 whereas she had in fact entered earlier, albeit with a break, this was reflected in GA's own application letter which had referred to her arriving in the UK on 6th July 2008. Even though she had arrived earlier, that did not make out an article 8 claim. She would need to have been continuously present for 20 years and arguments around those human rights had not previously succeeded before the First-tier Tribunal.

176. The respondent's submissions were therefore straightforward. The applicants could not succeed under the Rules, as per Hoque. They could not succeed under the policy as no provisions under the policy stated that they should succeed. The applicants had been forced to turn to some form of 'near miss' argument for the purpose of article 8. For the same reasons that Mr Mubarak failed, these applicants should also fail. Their claims did no more than assert a period of time in which they had been in the UK, albeit without continuous lawful residence, and their lawful residence had ended some years previously, unless otherwise as extended by section 3C.

177. On one final point in terms of the extent of residual discretion, to the extent that there was residual discretion, it was of minimal scope, noting the recent authority of Kalsi v SSHD [2021] EWCA Civ 184. Nothing in the applicants' circumstances merited the exercise of such residual discretion.

***The applicants' response***

***GA's response***

178. Ms Naik QC said it was not sufficient for this Tribunal to consider only the First-tier Tribunal's decisions when considering the applicants' circumstances. GA had entered the UK lawfully in 2003, and maintained her lawful leave until it ended on refusal of an appeal by the AIT, as it then was, on 6th March 2008. Whilst GA had no leave when she then left the UK (and had overstayed by some 39 days) she was subsequently granted an entry visa on 3rd July 2008. Whilst GA had made an appeal to the First-tier Tribunal which had been rejected, her previous application was not wholly unmeritorious and indeed was far from it. She had a history of paid applications, her original ILR application being made in 2015, based on a claim of residence from 2003 to 2015 with a short gap in 2008, so that 12 years' residence was relied upon. Her 2015 application was refused in 2016 because of her overstaying and period of absence from the UK, which broke continuity of leave. Her most recent application was now refused because she was not a 'book-ended' overstayer, when she previously had been. The primary remedy for GA had been a statutory appeal on article 8 grounds and when this failed, her only option was to make further submissions. The only reason GA's application had failed in 2015 was because, as a 'book-ended' overstayer then, the gap in lawful residence exceeded 28 days.

Moreover, she had only been 60 days short of acquiring 10 years' continuous lawful residence when she made her renewed application in 2018.

***AW's response***

179. The respondent had made much of AW's circumstances not having changed since the First-tier Tribunal's rejection of his previous appeal under article 8, but what had changed was the weight to be attached to the public interest in refusing AW leave to remain, in the context of a 'fair balance'. The respondent said that the core attribute was 10 years' continuous lawful residence and Mr Harland had drawn the analogy to a certificate of sponsorship in the context of Worker visas. That was not a fair analogy, as without a certificate of sponsorship, a Worker visa application could not be made and there was no discretion. This was in contrast to the long residence policy, which was 'riddled' with discretion to waive particular rules, including a whole section on 'book-ended' overstayers which was a departure from the Rules; EEA nationals and temporary admissions; and concessions for late and early applications. The development of the long residence policy over the years had resulted in part of the policy being incorporated within the Rules; and part remaining within the guidance; but the fundamentals remained the same. The concession, as expanded, had been more generous than the Rules and had, as its purpose, a desire to ensure that an applicant's commitment to trying to comply with the Rules should be recognised.

180. On a separate note, it was dangerous to treat individual conclusions in Hoque as somehow setting precedents, when the Court of Appeal had made clear that they did not regard the applicants' article 8 rights as raising general issues of principle in that case. The article 8 issues in AW's case were different here. It was also not fair to characterise AW's previous applications as being made in bad faith or bound to fail. Had they been, the respondent could have certified the applications, and she had not. The easy way to resolve the problem of repeat or abusive applications was either to use certification or make more timely decisions. Moreover, Mr Jafferji emphasised that the Court of Appeal had not considered how a 'book-ended' period of overstaying could come about. There could be an in-time application which was refused, generating a right of appeal and then when appeal rights were exhausted, the applicant might make an application that could be granted for reasons entirely unconnected to the original application, which meant that the person was now entitled to succeed.

181. Responding to the remainder of Mr Harland's points, Mr Jafferji re-emphasised that there had been a significant change in policy in July 2012, which was reflected in the difference between pre- and post-July 2012 applications, where pre-July 2012 applications required 10 years' lawful residence, but post-July 2012 applications included no such requirement. There was a deliberate change in language. It was crucial to assess where the 'fair balance' was struck in interpreting the policy. The respondent had accepted that the applicants could have left and re-applied and a visit visa could be obtained, with the further intention of making an ILR application.

## *E. The Law and the Rules*

### *The Immigration Act 1971*

182. As recently discussed by the Court of Appeal in the decision of R (Kalsi & Ors) v SSHD [2021] EWCA Civ 184, [35] to [36], section 1 of the 1971 Act provides that while those with the right of abode in the UK may come and go freely, those without such a right may only do so, and live and work and settle in the UK, by permission and subject to such regulation and control as is imposed by Section 1(4), which:

> *"recognises that the Secretary of State may lay down rules 'as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom'…." (R (Kalsi), [36])*

183. Section 3(2) of the 1971 Act requires the Secretary of State:

> 'from time to time (and as soon as may be)' [to] 'lay before Parliament statement of the rules or of any changes in the rules, laid down by him as to practice to be followed in the administration of this Act…'

184. Section 3(1)(b) also recognises that an individual may be given leave to enter the UK, or to remain in the UK, either for a limited or an indefinite period.

### *The Immigration Rules*

185. The relevant provisions of the Rules are paragraphs 276B; 39E; and 353:

> "Requirements for indefinite leave to remain on the ground of long residence in the United Kingdom
>
> 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."

"Exceptions for overstayers

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 or abandoned or lapsing……."

186. The effect of paragraph 276B was the issue determined by the Court of Appeal in Hoque. That analysis was summarised succinctly by this Tribunal most recently in Muneeb Asif (Paragraph 276B - disregard - previous overstaying) [2021] UKUT 0096 (IAC), the relevant paragraphs ([11] to [18]) are set out below:

"11. In Underhill's LJ judgment, with whom Dingemans LJ agreed, three separate elements were identified in paragraph 276B(v). The first element was the primary requirement that an "applicant must not be in the UK in breach of the immigration laws". The second and third elements related to circumstances in which periods of overstaying may be "disregarded." The second element, concerning the '1st disregard', related to current overstaying by an applicant at the time of their application for ILR. The third element, concerning the '2nd disregard', related to "previous … overstaying between *periods of leave." Central to Underhill's LJ judgment was the*

*distinction between "open-ended" overstaying, in which there is a current period of* overstaying in respect of the ILR application (which concerns the 1st disregard), and "book-ended" overstaying, which involves previous periods of overstaying between periods of leave (concerning the 2nd disregard) [9].

12. The joint appeals in Hoque all concerned open-ended overstaying, the appellants contending that they benefitted from the 1st disregard relating to 'current overstaying' and therefore fell to be treated as having been continuously lawfully resident for the requisite 10 year period as required by paragraph 276B(i), which fell to be read in conjunction with the whole of paragraph 276B(v) [22].

13. Underhill LJ first analysed the issues and the material reasoning in the earlier Upper Tribunal's decision of R (on the application of Ahmed) v Secretary of State for the Home Department (para 276B – ten years lawful residence) [2019] UKUT 00010 (IAC) ("Juned Ahmed"), which dealt with open-ended overstaying, and the earlier Court of Appeal permission decision in Masum Ahmed, R (on the application of) v The Secretary of State for the Home Department [2019] EWCA Civ 1070; [2019] Imm AR 1316 ("Masum Ahmed"), which concerned book-ended overstaying. At [27] Underhill LJ set out the essential reasoning of Floyd LJ and Haddon-Cave LJ in Masum Ahmed for rejecting the argument that paragraph 276B operated so as to cure shorts gaps between periods of leave so as to entitle persons to claim '10 years continuous lawful residence'. At [27] Underhill LJ set out paragraph 15(4) of the decision in Masum Ahmed:

> '15(4) The critical point is that the disregarding of current or previous short periods of overstaying for the purposes of sub-paragraph (v) does not convert such periods into periods of lawful LTR; still less are such periods to be "disregarded" when it comes to considering whether an applicant has fulfilled the separate requirement of establishing "10 years continuous lawful residence" under sub-paragraph (i)(a).'

14. It was clear to Underhill LJ (at [29] and [30]), based on the structure and language of paragraph 276B, that the requirements identified at sub-paragraphs (i)-(v) were intended to be free-standing and self-contained, but he considered that the effect of sub-paragraph (v) was "seriously problematic".

15. At [31] His Lordship noted that sub-paragraph (i), by contrast with sub-paragraph (v):

> "… requires that the applicant "has had" ten years' continuous lawful residence. That formulation does not necessarily require that the lawful residence is continuing at the date of decision. No doubt typically that would be the case, but it would also be satisfied in a case where an applicant has accrued the relevant period in the past but has become an overstayer since then. In my view the purpose of the requirement in sub-paragraph (v) is evidently to ensure that overstayers are not entitled to ILR in those circumstances (subject to the effect of the disregard).

16. Paragraph 276B(v) was concerned with addressing an applicant's position at the date of the decision in respect of their ILR application. If an applicant had accumulated 10 years continuous lawful residence but was an overstayer when they applied for ILR, that overstaying would be disregarded if paragraph 39E applied with the result that the requirement in sub-paragraph (v) was treated as being satisfied ([32] & [33]).

17. Underhill LJ found there was "a frank disconnect" between the 2nd disregard in sub-paragraph (v) and the requirement to which it appeared to be applied [34]. On its true construction, Underhill LJ found that the 2nd disregard did not belong to 276B(v), but instead belonged to 276B(i) ([34] & [35]), a conclusion that was supported by reference to the drafting history ([36] & [37]). Applying the interpretative principle established in Pokhriyal v SSHD [2013] EWCA Civ 1568; [2014] Imm AR 711 Underhill LJ found further support for his

construction in the Home Office's Guidance on "Long Residence", version 15, issued on 3 April 2017, which enabled caseworkers to grant an ILR application in circumstances that reflected the third element in paragraph 276B(v). His Lordship concluded that Masum Ahmed was consequently wrongly decided [40].

18. At [43] Underhill LJ accepted the Secretary of State's submission that the 2nd disregard could not however assist the appellants who were open-ended overstayers as the 1st disregard only qualified the requirement in sub-paragraph (v) and not sub-paragraph (i). He concluded, at [45], that Juned Ahmed had been correctly decided and that, "… on no possible reading can [the 1st disregard] be construed as qualifying the definition of continuous lawful residence" (at [49])."

187. In conclusion, for the purposes of the Rules at least, the Court of Appeal had drawn the distinction between 'open-ended' overstayers and 'book-ended' overstayers, with the latter group being entitled to rely upon the 'second disregard' referred to above, (a previous period of limited overstaying between periods of leave), whereas the former group of 'open-ended' overstayers could not, and they could not rely on the 'first disregard' as qualifying the 10 year continuous lawful residence requirement in paragraph 276B(i)(a).

188. Paragraph 353 relates to the respondent's consideration of whether to treat further submissions as a fresh claim:

"Fresh claims

353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas."

## *F. Discussion and conclusions*

### *Ground (1) - the failure by the respondent to consider and apply her long residence policy*

189. The parties accepted it was for this Tribunal to decide the meaning of the Respondent's policy (as per Mandalia) and that the policy in principle could be, and in practice was, broader than the Rules. Where the parties differed was that Mr Harland submitted that the policy was fundamentally consistent with the Rules and had always distinguished between 'open-ended' and 'book-ended' overstayers, whilst for their part, Ms Naik QC and Mr Jafferji contended that the meaning of the policy was to enable a broader assessment of applicants' applications, even in circumstances where they were 'open-ended' overstayers, to recognise those applicants who had attempted to comply with the Rules. Construction of the policy in this way enabled it to be consistent with a "rationality" or "fair balance" review

and ensured that the respondent complied with her obligations to make decisions which were consistent with her article 8 obligations, and were not disproportionate. We were invited to consider the meaning of the policy from a variety of different perspectives: first, the development of the policy over time; second, the scope of the policy and the extent to which, where it encouraged decision-makers to exercise discretion outside the Rules, the exercise of such discretion was consistent with 'open-ended' overstayers being entitled to consideration of discretion; and third, the actions of the respondent in a third-party decision, which lent credence to the applicants' case on the meaning of the respondent's policy, always noting that the meaning of that policy was for us to decide.

190. The alternative formulation of the challenge was that the policy lacked 'accessibility' or 'foreseeability' – in other words, it was so vague as to result in arbitrary decisions, which the applicants point out have occurred; and has prevented the applicants from ordering their affairs in the most advantageous way, for example by leaving the UK and then applying for re-entry, to 'book-end' any gap in lawful residence. We accepted Mr Harland's submission that this was an attempt to add a new, fourth ground, in respect which the applicants have made no previous application for permission. We reminded ourselves of the need for appropriate procedural rigour in judicial review cases (see: R (Spahiu) v SSHD [2018] EWCA Civ 2604; [2019] Imm AR 524). Nevertheless, we are content to deal with the issue because our decision in respect of the first three grounds answers the challenge on the fourth ground, for reasons we set out later.

***History of the concession and long residence policy***

***The long residence concession***

191. We refer first to the Immigration Directorates' Instructions relating to the long residence concession (page [723] CB) dated December 2000. This confirmed the following:

> "1. Introduction
>
> There is no provision within the Immigration Rules for a person to be granted indefinite leave to remain solely on the basis of the length of his or her residence.
>
> The grant of indefinite to remain on the basis of lengthy continuous residence is discretionary, each case should be considered on its merits.
>
> 1.1 Background
>
> On 14 October 1969, the United Kingdom ratified the European Convention on Establishment, Article 3(3) which provides that nationals of any contracting party who have been lawfully residing for more than 10 years in the territory of another party may only be expelled for reasons of national security or for particularly serious reasons relating to public order, public health or morality. Home Office practice has been to extend this provision in three respects:
>
> • to include all foreign nationals

- to grant indefinite leave rather than simply to refrain from removing such a person; and

- to allow those who have been here illegally to benefit."

192. The concession document went onto distinguish between the situation of a person who had 10 years or more '**continuous lawful** residence' and a person with 14 years' continuous residence of '**any legality'**, (both original emphasis) and specified that ILR should normally be granted in the absence of strong countervailing factors. The concession continued:

> "Applications from people who have **not** completed **10 years continuous lawful residence** should normally be refused, unless there are very strong compelling circumstances. The strength of ties with the United Kingdom, the continued ties with the home country, the total length of the continuous period and the proportion of it which is lawful are the primary determining factors when deciding whether to grant or withhold indefinite leave to remain.
>
> 3. Lawful residence
>
> Where a person has completed 10 years continuous lawful residence he should normally be granted indefinite leave to remain without enquiry.
>
> When considering whether a person has remained in the United Kingdom lawfully for 10 years the following breaches of conditions may for the purposes of this concession be considered as lawful:
>
> - a short delay in submitted an application, provided the **application is subsequently granted**;
>
> - any period between the submission and determination of an appeal, **if it is successful**;
>
> - where an appeal is unsuccessful, but leave is subsequently granted, the period between submitting the appeal and the determination may be treated as lawful if, for example, the leave was granted on the recommendation of the adjudicator, leave was granted during the period before the determination or where a further successful application was submitted shortly after the determination.
>
> The time IND take to decide and inform the person of the outcome of an in-time application should be included as continuous lawful residence.
>
> [Original emphasis]"

193. The concession then went on to describe the situation of unlawful residence but where this was for 14 years or more.

194. Three points clearly emerge from that early version of the concession, albeit a policy outside the Rules. The first is that the respondent distinguished, and placed particular emphasis on, the distinction between those with 10 years' continuous lawful residence and those with a longer period of unlawful continuous residence. This reflected the ratification of the European Convention on Establishment and the primacy of the 10 year period of lawful residence, while recognising the practice of permitting regularisation of status to those here illegally.

195. The second point is that the breaches in continuity of lawful residence which the concession considered as permissible all related to where an application was subsequently granted or an appeal was subsequently successful, i.e. 'book-ended' overstayers, which was consistent with a continuing theme throughout the development of the policy of the distinction between 'open-ended' and 'book-ended' overstayers. This reinforced the main distinction and differential treatment between those with 10 years' continuous lawful residence, and those without it.

196. Third, that distinction did not mean that there were no circumstances in which the respondent would consider, in the absence of completion of 10 years' continuous lawful residence, the grant of ILR, but these had to be very strong compelling circumstances, including, as Mr Jafferji invited us to consider, those relating to the quality of life developed in the UK. The existence of that discretion within the policy does not, in our view, render the purpose of the concession unclear; nor detract from the central distinction and differential treatment already referred to. It also follows that the scope of that discretion was necessarily limited, because otherwise the central distinction would then become untenable.

***Immigration Directorates' Instructions – April 2009***

197. We turn next to the 2009 Instructions. The introduction and background to these Instructions were explained at paragraph [1.1] (page [702] CB):

> "Introduction
>
> The rules on long residence recognise the ties a person may form with the UK over a lengthy period of residence here. Paragraphs 276A-D of HC 395 as amended by HC 538 allow settlement to be granted after a period of:
>
> - 10 years continuous lawful residence or
> - 14 years continuous residence of any legality.
>
> 1.1 Background
>
> Until April 2003 there was no provision in the immigration rules for a person to be granted indefinite leave to remain on the grounds of long residence. The Long Residence Concession allowed for a discretionary grant of settlement after 10 years continuous lawful residence or 14 years continuous residence of any legality, provided there were no serious countervailing factors.
>
> Under the provisions of the Nationality, Immigration and Asylum Act (NIA) 2002, which came into effect in April 2003, there is no right of appeal against refusal for those seeking leave to enter or remain under concessionary arrangements. As a consequence the Long Residence Concession was brought within the scope of the immigration rules from 1 April 2003." [original emphasis]

198. Mr Jafferji placed particular emphasis on the introductory section as reflecting the purpose of the policy, namely to reflect the ties to the UK that a person may have formed. In our view, this takes the generality of that statement out of the context of the sentence which immediately follows, which is to tie the policy back to, and be consistent with, the Rules; and to emphasise (as underlined in the original text), the

differential treatment between the 10 and 14 year routes. There followed a table of flowcharts, depending on which of the two routes a person fell within, followed by the detail of the guidance. 'Continuous residence' was defined within section [2] and the guidance re-emphasised the two different routes (10/14 years). At section [2.2] (page [705] CB), the guidance referred to paragraph 276A(a) of the Rules, in particular, residence in the UK for an unbroken period, except where an applicant was absent from the UK for a period of six months or less at any one time, provided they had existing leave to remain on departure and to re-enter on return.

199. Two points emerge from this section. The first is that continuity of residence was important both for the 10 and 14 year routes, and permitted specified absences from the UK of multiple periods, provided that the total of multiple absences did not exceed 18 months throughout the 10 or 14 year period (section [2.2.3], page [705] CB). While the acceptance of periods of absence from the UK, as not breaking continuity of residence, was undoubtedly an expansion of the policy, there is, in our view, no arbitrariness in the way that the expanded policy operated, given that the 'absence from the UK' provisions could apply to both the 10 and 14 year routes.

200. Second, while applying to both routes, the 'absence from the UK' provisions were consistent with the 'book-ended'/'open-ended' distinction, as an applicant had to have leave (in this case, on departure and re-entry) to benefit from the extended policy. The policy recognised that specified periods of absence might not break the relevant ties in the UK, but continued to pin the policy back to the 10/14 year distinction, as underpinned by the need for a 'book-ended' grant of leave. We accept Mr Harland's submission that while the policy expanded, it did so within clear limits.

201. The Instructions also contained a section [2.2.7], 'Early applications,' (page [707] CB), which allowed early applications where an applicant had not yet completed the necessary qualifying period for settlement, either for the 10 or 14 year route. An application for settlement which was considered by decision-makers more than 28 days before the applicant had completed the required qualifying period '*should be refused on the basis that they have not completed the required period,*' but if an application was considered 28 days or less before the 10/14 years was to be completed, then ILR might be granted.

202. The first point is that as with the section relating to absences from the UK, the 'Early applications' provision applied to both the 10 and 14 year routes. The second point is that the same section required a decision-maker to consider fully the case and '*cite any other reasons for refusal in additional to an applicant not having spent enough time in the UK to have completed the qualifying period*' (page [707] CB), for example, breaks in continuous residence. In other words, the Instructions operated as a whole and the decision-maker was required to consider not only the timing of the application but breaks in continuity. The third point is the Instructions did not seek to penalise an applicant for a premature application, as they allowed a further application once an applicant was within 28 days of the qualifying period. They did not go so far as to say additional leave should be granted to permit such a further application, but this,

together with the limit of 28 days for early applications, was entirely explicable, in our view, by the need to prevent the early applications provision from being abused.

203. As with later versions of the guidance, the Instructions then went on to provide practical examples of continuous residence and the circumstances in which it might be broken. None of those examples support GA or AW, in the sense of having circumstances in common with them. The Instructions then considered, at section [2.3], (page [708] CB) the sub-category of continuous lawful residence. As with the earlier 2000 concession, they referred back to the Rules, in this case paragraph 276A, and defined lawful residence as including existing leave to enter or remain; and temporary admission within section 11 of the 1971 Act, where leave to enter or remain was subsequently granted. There followed a section [2.3.3], dealing with breaks in lawful residence and the use of discretion. That included the following provision, as already referred to by the representatives:

> "Caseworkers should be satisfied that the applicant has acted lawfully throughout the entire period and has made very attempt to comply with the immigration rules.
>
> If an applicant has a **single** short gap in lawful residence through making one **single** previous application out of time by a few days (not usually not more than 10 calendar days out of time) caseworkers should use discretion granting ILR, **so long as the application meets all the other requirements**.
>
> It would **not usually** be appropriate to exercise discretion when an applicant has **more than one** gap in their lawful residence due to submitting more than one of their previous applications out of time, as they would not have shown the necessary commitment to ensuring that that they have maintained lawful leave throughout their time in the UK." [original emphasis]

204. The section also allowed discretion for an out of time application of more than 10 calendar days in the event of 'extenuating circumstances' such as a postal strike or hospitalisation (page [709] CB). The remainder of the section contained examples of discretions, which included applicants having single gaps of seven days, where it would normally be appropriate to exercise discretion; and a lengthier gap of 24 days because of a documented hospitalisation, where once again, the exercise of discretion would normally be appropriate. In contrast, the example of three gaps, of 12, 4 and 8 days out of time respectively meant that it would not be appropriate to grant discretion.

205. Consistent with the other examples, none of these examples related to circumstances where an applicant had a period of 10 years' lawful residence, and was an 'open-ended' overstayer. All of these examples at page [709] CB must be read as referring to previous gaps in leave, in the context of lawful residence being defined as having existing leave or temporary admission where leave was subsequently granted (i.e. 'book-ended' overstaying).

206. The Instructions contained a section [2.3.4] (page [709] CB), relating to time spent outside the UK, which confirmed that continuous lawful residence would not be broken if there was a gap, during the entirety of which the applicant was outside the UK, and the gap lasted less than six months.

207. Section [2.3.5] (page [710] CB) considered out of time applications and confirmed that there was no requirement for applications to be made in time under the 10 year route. Out of time applications might qualify for a grant of ILR, provided that an applicant had previously built up an unbroken 10 year period of continuous lawful residence. The point here is that the guidance distinguished between having 10 years' continuous lawful residence, and an application being out of time. As Mr Harland contends was a consistent theme, they were two different concepts. The section cross-referred to an "Example 4" at page [713] CB, which described a person entering the UK on 31st March 1997 and being granted a series of extensions, which expired on 31st March 2007, so acquiring 10 years' continuous lawful residence. They could still obtain ILR, provided they met all other criteria, even if applying out of time, as "*they built up 10 years continuous lawful residence prior to their leave expiring*."

208. Finally, the Instructions also considered factors to be considered before granting ILR. They explained that possession of the required period of residence did not automatically entitle a person to a grant of leave, but merely entitled them to be considered for a grant. The factors that a decision-maker was to consider included age, strength of connections in the UK, and personal history. At page [715] CB, the instructions went on to confirm:

> **"If the applicant has <u>not</u> completed the necessary period of residence, they will <u>not</u> be able to satisfy the rules for long residence, regardless of any of the factors listed in paragraph 276B(ii)."** [original emphasis]

209. In our view, this undermines Mr Jafferji's submission that the policy mandated consideration of these factors as positive factors, where a person did not have the required period of continuous lawful residence.

210. In summary, we conclude that the 2009 Instructions were consistent in maintaining the distinction between continuous residence 'of any legality' and continuous lawful residence (with different periods of residence accordingly), while applying provisions across both routes in relation to: early applications; late applications; and time spent outside the UK. We do not accept that the purpose of the policy was to recognise that those who had developed UK ties or had attempted to comply with the Rules were entitled to a wide-ranging discretion. Instead, the discretion was clearly limited and needed to be, in order to maintain the distinction between the two routes. That distinction and the detailed examples, all of which were consistent with the 'open-ended/book-ended' distinction in relation to continuity of residence, were part of a whole.

***Long residence guidance version 1.0 – valid from 8th November 2011***

211. We next consider the 2011 long residence guidance, which continued, at page [942] CB, to draw the distinction between the two alternative routes (10/14 years). As with the 2009 Instructions, having either period of residence did not entitle someone to ILR, and page [944] CB had the familiar factors to consider if a person had the necessary residence, as to why it might still not be in the public interest to grant ILR;

as opposed to positive factors if the person did not meet either of the residence requirements.

212. A further development of the policy in 2011 was in relation to those who were present in the UK with temporary admission and wanted to apply for ILR. The section on 'Entry and extension requirements,' at page [946] CB, stated:

> **"Entry requirements**
>
> There is no provision in the long residence rules to grant indefinite leave to enter. This means that a person who has not previously been granted leave to enter the UK, for example, because they have been on temporary admission, cannot qualify under the rules. However, where such a person meets all of the other requirements of rule 276B, discretion should normally be exercised to grant them six months code 1 outside the Immigration Rules so that they can make an application in the UK."

213. As with other expansions in the policy, we regarded this as a defined, incremental change; clearly explained; not vague or prone to arbitrariness; and consistent with the 'open-ended/book-ended' overstayer distinction – indeed the very purpose of the addition was to ensure the maintenance of that distinction. The fact that such periods of temporary admission may have been for extended periods does not undermine the rationale for the exception, which was to recognise the absence of a provision in relation to indefinite leave to enter and address that problem in a limited way.

214. The guidance went on to include reference to the extension of limited leave in the context of paragraphs 276A1 and 276A2 (if an applicant met all requirements other than the 'knowledge of language and life in the UK' requirement). Once again, this change was incremental and within clear limits, as the section continued (page [946] CB):

> "You must only grant an extension of further leave on the basis of long residence if the applicant meets all the criteria for indefinite leave, except for knowledge of life. You must not grant an applicant an extension in order to complete the qualifying period of 10 or 14 years for long residence, if they have not spent enough time in the UK to be granted indefinite leave. For more information, see related link: Early applications."

215. As with the 2009 guidance, the 2011 guidance included separate provisions relating to events breaking continuity of lawful residence and residence 'of any legality' and the distinction between the two was clearly maintained. The 2011 guidance included a section, consistent with the 2009 guidance, on limits to the number of, and length of gaps in, leave. Multiple or extended gaps were generally regarded as breaking continuity of lawful residence. Single gaps of limited duration were permitted, or lengthier gaps due to postal strikes or hospitalisation, as before.

***The long residence guidance version 8.0 - valid from 10th April 2013***

216. This version of the guidance reflected the change to the Immigration Rules, with effect from 9th July 2012, in respect of the withdrawal of the route for obtaining ILR based on long residence 'of any legality' (the '14 year' route). In that context,

discussion and examples of continuity of residence 'of any legality' were now removed. The guidance stated, in the section 'Requirements for long residence' (page [880] CB) the following:

> "**Requirements for long residence**
>
> The applicant must meet the following requirements to be granted indefinite leave:
>
> - The applicant must have at least 10 years lawful residence in the UK.
> - There must be no reason why granting leave is against the public good.
> - The applicant must meet the knowledge of language and life requirement.
> - The applicant must not fall for refusal under the general grounds for refusal.
> - The applicant must not be in the UK in breach of immigration laws except for any period of overstaying:
>   - for 28 days or less, or
>   - if the application was submitted before 9th July 2012
>
> which will be disregarded."

217. The guidance made clear (at page [882] CB) that once an applicant had built up 10 years' continuous lawful residence, there was no limit on the length of time afterwards that they could apply for ILR. "*This means they could leave the UK, re-enter and apply based on a 10 year period…*" The guidance was consistent with earlier versions, as requiring the distinct and necessary qualification of 10 years' lawful residence, defined in the same way as earlier versions, i.e. an applicant needed existing leave to enter, temporary admission or exemption from immigration control (page [883] CB). The guidance contained sections similar to earlier versions on breaks in continuous residence, including time spent outside the UK (page [884] CB); and early applications (page [886] CB). There was one notable, but discrete and limited expansion, in the section 'Gap(s) in lawful residence' which allowed the grant of discretion if an applicant:

> - "has short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days, and
> - meets all the other requirements for lawful residence." (page [888] CB)

218. The more restrictive policy of permitting only a single gap was removed, but there remained the usual limit on the duration of the gap and the applicant had to otherwise meet the requirement of the Rules – critically, there was no statement that 'open-ended' overstaying suddenly became equivalent to lawful residence, the implication of Mr Jafferji's submissions when he argued that GA and AW fell within this exception. Indeed, such equivalence (and the conflation of the 'overstaying' concession with accruing lawful residence) was inconsistent, in our view, with a later part of the guidance dealing with out of time applications made on or after 9th July 2012, at page [891] CB:

"The 28 day period of overstaying is calculated from the latest of the:

- end of the last period of leave to enter or remain granted
- end of any extension of leave under section 3C or 3D of the Immigration Act 1971, or
- *the point that the migrant is deemed to have received a written notice of invalidity, in line with paragraph 34C or 34CA of the Immigration Rules, in relation to an in-time application for further leave to remain."*

219. The guidance then went on to consider exceptional circumstances where there was overstaying of more than 28 days, subject to 'exceptional reasons' (as with the 2009 Instructions and 2011 guidance) such as a postal strike or hospitalisation. However the 28 day period of overstaying was specifically calculated from the end or last period of the leave to enter or remain being granted, so once again was consistent with the requirement that an applicant must have 10 years' continuous lawful residence 'banked'. An applicant could nevertheless then make an out of time application, provided he did so within 28 days of overstaying.

***The respondent's long residence policy version 15.0 – published on 3rd April 2017***

220. While we were provided with versions 13.0 (published on 8th May 2015) and 14.0 (published on 24th November 2016) of the guidance, we were not referred to them by the parties and have proceeded on the basis that nothing turns on those versions which we have not already considered, or go on to consider in relation to the 2017 guidance. Instead, we turn next to the 2017 version of the guidance, which the Court of Appeal considered in Hoque, version 15.0. Many of the passages of the guidance were similar or identical to the earlier versions of the guidance. It included, at page [730] CB, reference to the rules on long residence recognising the ties a person may form with the UK over a lengthy residence, as emphasised by Ms Naik QC, although it did not include the previous reference to the previous distinction between 10/14 year routes, for the simple reason that the 14 year route had been abolished. Sections common to earlier versions included those relating to applicants in the UK with temporary admission (page [732] CB); and where limited leave had been granted on the basis of paragraphs 276A1 and 276A2 (also page [732] CB). The section on 'Limited leave' included a recent addition (originally incorporated in version 14.0, some five months' earlier) to paragraph 39E:

"On 2 April 2017, paragraph 276A1 and paragraph 276A2 were added to the Immigration Rules. This allows long residence applicants to be granted limited leave to remain, if:

- they have had at least 10 years continuous lawful residence in the UK
- there are no reasons why it would be undesirable for them to be given leave to remain, see: 10 years continuous lawful residence
- the applicant must not be in breach of immigration laws, except
    - for any period of overstaying for 28 days or less which will be disregarded where the period of overstaying ended before 24 November 2016

- where overstaying on or after 24 November 2016, leave was nevertheless granted in accordance with paragraph 39E of the Immigration Rules.

> Limited leave to remain is granted under paragraph 276A2 of the long residence category of the Immigration Rules, and not as an extension of their previous category of limited leave to remain. …
>
> You must only grant an extension of further leave on the basis of long residence if the applicant meets all the criteria in paragraph 276B(i), (ii) and (v). You must not grant an applicant an extension in order to complete the qualifying period of 10 years for long residence, if they have not spent enough time in the UK to be granted indefinite leave."

221. The wording and reminder that limited leave could not be used to complete the residence requirement reaffirmed the consistent theme, made clear as far back as the 2000 concession, that the continuous lawful residence requirement should not be compromised through the grant of a concession for other reasons (in this case in order to take a test relating to knowledge of English, etc), where those reasons did not apply. Contrary to the applicants' submissions that the inclusion of paragraph 39E resulted in the policy becoming ambiguous, with a tension between the requirement of the period of continuous lawful residence and paragraph 39E, the above section made clear that paragraph 39E was not inconsistent with the core lawful residence requirement.

222. This version of the guidance, at page [735] CB, defined 'continuous lawful residence' in identical terms to earlier versions. The section on 'Breaks in continuous residence,' (page [736] CB) included the provision relating to periods spent outside the UK; the need for leave to enter on return; and a limit on the period of absence after the last expiry of leave (limited to 28 days when a person left the UK before 24th November 2016, which applied to GA as she had left before that date, but where her leave had expired more than 28 days earlier). That section was consistent with the later 'Example 4', referred to by McCombe LJ, of a 'book-ended' returnee who had returned within 28 days of his last leave expiring.

223. As with earlier versions, at page [739] CB, the guidance included a section on 'Early applications,' with a reiteration that the long residence rule required applicants to have at least 10 years' continuous lawful residence and reiteration that if an application was made more than 28 days before completion of that period, the ILR application must be refused. At page [741] CB, the guidance contained a section on 'Breaks in lawful residence,' which included permissible gaps in lawful residence through making out of time applications, depending on when the date of those applications were made, where the period of overstaying was calculated from the most recent of: the end of the last period of leave to enter, with any extension of any section 3C leave, or the migrant having been deemed to have received a written notice of invalidity. Mr Jafferji had referred to 'Example 3' of this section, (page [743] CB) which was a case of someone who had a gap in lawful residence through making an application out of time by more than 28 calendar days due to hospitalisation, with supporting medical documentation. He relied on this as an example of a discretion outside the Rules, which could only relate to 'open-ended' overstayers. We reject the contention that the example benefitted 'open-ended'

overstaying. The example clearly focusses on the *length* of a time-bound gap, (as opposed to an 'open-ended' one), between two grants of leave, which is justified on the basis of exceptional circumstances, described at page [741] CB as including serious illness, with relevant supporting medical evidence. While we accept that this discretion is wider than the Immigration Rules, it is discrete in scope and explained. It is also a long-standing discretion, referred to in the 2009 Instructions and 2011 and 2013 versions of the guidance.

224. Turning next to the detail of 'Example 4', included in the section on gaps in lawful residence at page [743] CB, it stated:

> "Example 4
>
> An applicant's leave expired on 10 July 2012 but they only departed the UK on 1 August 2012. They submitted an application for entry clearance on 5 August 2012. When returning to the UK on 27 October 2012 they submitted a long residence application.
>
> Question: Would you grant the application in this case?
>
> Answer: Yes. Grant the application as the rules allow for periods of overstaying of 28 days or less when that period ends before 24 November 2016. This applicant submitted their application for entry clearance less than 28 days after their original grant of leave had expired and returned to the UK within 6 months of last leaving."

225. We accept the force of Mr Harland's submission that the example given does not detract from the requirement of continuous lawful residence of 10 years. It is also consistent with the 'open-ended/book-ended' distinction. The guidance does not require the decision-maker to grant entry clearance, which remains to be considered and possibly refused. It states that *having been granted* entry clearance and upon re-entering the UK with a new grant of leave, a person, as a 'book-ended' overstayer, does not have their continuity of residence broken. It does not speak to the issue of the period of residence they have and indeed no details of such period of residence are given – this is because the example relates to the preservation of continuity of lawful leave. Read in context, it cannot be read as suggesting that a person without the required period of lawful residence somehow gains it. It does not create equivalence between a period of lawful residence, and a period of residence 'of any legality'. To construe it as doing so takes it out of the context of guidance to the contrary in the period from 2000 to 2017; and ignores the fact that the policy ceased dealing with residence 'of any legality' after the abolition of the 14 year route.

226. Contrary to Ms Naik QC's assertion, GA did not meet the requirement of 'Example 4'. While she had been an overstayer before 24th November 2016, she submitted her application for entry clearance more than 28 days after her original grant had expired. 'Example 4' is consistent with paragraph 276B(v)(a), permitting exceptions for *book-ended* overstaying within certain time limits. For AW to fall within 'Example 4', as Mr Jafferji suggested, it would have to be assumed that AW would be granted leave to enter the UK on his return, 'book-ending' any period of overstaying. We do not accept that anything prevented AW from leaving the UK when he became an overstayer. It does not also follow that had he done so, he would have been granted

re-entry. We do not regard 'Example 4' as evidence that the policy provided guidance that was so unclear that AW and GA were unable to organise their affairs advantageously, as Mr Jafferji suggested.

227. The guidance continued at page [744] CB to deal with 'Out of time applications' and the requirement not to be in breach of the Immigration Rules. We accept that 'Example 1' (page [745] CB) is consistent with, and mirrors, the previous 'Example 4'. In 'Example 1', relating to an application made before 24th November 2016 (so paragraph 39E does not apply) the applicant had leave to enter as a student, valid until 31st July 2016. They submitted an out of time application for leave to remain on 15th September 2016, more than 28 days later. They were granted leave as a student on 15th October 2016. The question posed was whether there was therefore a break in lawful residence. The answer was 'yes', despite them later having 'book-ended' leave, as the example was not dealing with the effect of paragraph 39E and was instead focussing on the *length* of the gap in leave – in this case, more than 28 days, the mirror of 'Example 4', which considered a gap of less than 28 days. 'Example 1' does not suggest that there is no difference between 'book-ended' and 'open-ended' overstayers, as Ms Naik QC and Mr Jafferji sought to argue. In both Examples 1 and 4, the applicants were book-ended – the difference was the duration of the gap, and whether it was 28 days or less. Had they not been 'book-ended' overstayers and were relying on residence 'of any other legality' to meet the continuous lawful residence requirement, they would fail for lack of continuous lawful residence. As with 'Example 4,' Example 1 did not speak to the issue of whether the person had already acquired continuous lawful residence, in which case it may have been open to them to apply for ILR.

228. The guidance went on to recognise, at page [246] CB, in relation to the 'Treatment of temporary admission or temporary release', the fact that temporary admission could be for years, provided that 'book-ended' leave was subsequently granted. However, that had been the position since the 2009 guidance, see: section [2.3.7] (page [712] CB) and 'Example 6' of the 2009 guidance (page [714] CB). Put simply, it was an element of the policy introduced many years earlier.

229. The 2017 guidance repeated the exception relating to time spent in the UK with a right to reside under the EEA Regulations (page [750] CB) and the 'public interest' provisions, replicating paragraph 276B(ii), at page [754] CB, as well as the section granting an extension of leave by reference to paragraph 276A2. While Ms Naik QC placed emphasis on the word '*includes*', at [763] CB, as suggesting a wider discretion, it is clear that the discretion is limited as in earlier versions, with decision makers reminded that an applicant must meet the '*leave to remain rules for long residence*'.

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.

232. We are not persuaded that the letter adduced by the applicants for the third party decision lends support to their contention that the policy has wide discretion, which permits the equivalence of open-ended overstaying with continuous lawful residence. The document was not adduced to prove an unpublished policy and whilst the applicants' representatives have referred to a number of other cases where 'open-ended' overstayers have had leave granted, this is the one decision whose rationale we were asked to consider.

233. It related in fact to the refusal of an application, but where it suggested the possibility of exercising discretion for an 'open-ended' overstayer. It is a decision that was discussed in the witness statement of Richard Holmes, the senior Home Office official, who provided a detailed analysis and critique of it. Broadly speaking, he said that the decision's rationale was fundamentally flawed and that it was an incorrect decision. We accept his criticism that the rationale for the decision is internally inconsistent and flawed. It describes an applicant who entered the UK with leave in 2009, and whose appeal rights were exhausted on 12th August 2018. He then applied on 5th April 2019 for leave as a tier 1 entrepreneur and varied his application, for ILR, in 20th May 2019. The decision maker accepted that the applicant did not have 10 years' continuous lawful residence and continuity had ceased on 12th August 2018, but then referred to the 'out of time' provisions of the guidance relating to applications made before 24th November 2016. Put simply, the decision focused on the extent of the delay of the 'out of time' application, referring to a section of the guidance on 'out of time' applications which was clearly not

relevant, without explanation for why the 'out of time' provisions would have saved the applicant's application from failing, for lack of lawful residence. The lack of explanation is critical, as the decision repeatedly refers to the residence requirements not being met. The rationale for the decision is confusing but this does not lend support to the applicants' contention in the cases before us that the guidance itself is confusing or vague; rather that the specific decision relied upon is fundamentally flawed.

234. We also considered the meaning of the policy not only by reference to the wording in the versions from 2000 to 2017 but in the context of the applicants' challenge that to interpret it as having a circumscribed, narrow discretion meant the respondent would risk making arbitrary or oppressive decisions, on the basis that the operation of the policy was not rationally connected with its objective and/or any restrictions on the applicants were more than was necessary to accomplish the purpose of the policy (the so-called 'de Freitas' test – see de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing [1999] 1 AC 68, at [80]); or that the policy, as narrowly interpreted, would fail (and in the applicants case, did fail) to achieve a 'fair balance.'

235. We do not accept the operation of the policy, as we construe its meaning, makes it incompatible with a 'rationality review', or that it is incapable of resulting in a 'fair balance'. We do so for three reasons. First, as Mr Harland rightly points out, the long residence policy cannot be read in isolation from other policies, for example in relation to leave to remain outside the Rules, or policies on family life, private life and exceptional circumstances. To the extent that the applicants criticise what they regard as too narrow a focus on the requirement of qualifying residence, the answer is that this is but one policy, in the context of other policies which consider wider circumstances other than residence.

236. The second and third reasons are connected. The long residence policy at its heart comprises two strands. The first strand is the core attribute of continuous lawful residence. The second strand is a set of practical applications and exceptions, which ensure that the validity of that policy aim is maintained, whilst inequities which can reasonably be mitigated against are addressed. The exceptions, already discussed in detail, and with which the applicants seek to compare themselves, are the very evidence of the respondent striking such a 'fair balance', using worked examples, with detailed rationales. Whilst the applicants seek to challenge these as somehow confusing or examples of unfairness, they are, in our view, the opposite: an example of processes that have been developed with gradual and discrete expansion over many years, in a controlled way.

237. The second reason for compatibility with a rationality review and the policy striking a fair balance is the need for policy to maintain its core aim of recognising continuous lawful residence. We accept that were the policy to require decision-makers to treat residence 'by any other legality' as equivalent to continuous lawful residence, there would be no rational distinction between 10 years' continuous lawful residence and the old '14 year' route or the new '20 year' route. That 'bright line' which

distinguishes the two routes is one that is longstanding; and is also consistent with the long residence concession, which referred to the European Convention on Establishment. Whilst we note and accept Mr Jafferji's submission that there has been an expansion beyond that 10 year residence period, at its core, it remains the cornerstone. Were that cornerstone to be removed and replaced with discretionary assessments of individual circumstances, unrelated to the specific exemptions that have been outlined and published by the respondent over many years, it that would, in our view, inevitably result in a form of a 'sliding scale,' rather than a distinction between long residence on the 10 year route and other applications such as the 20 year route or applications for leave to remain outside the Rules on the basis of right to respect for a person's private or family life. Such a 'sliding scale' would undermine the very purpose of the 10 year route, the recognition of a specified period of lawful residence.

238. The third reason is that the exceptions outlined in the policy answer the criticism that the policy fails to draw a rational distinction between its purpose and its mechanisms and impact on applicants, and is incapable of achieving such a 'fair balance'. As we have outlined, the numerous exceptions do just that. The applicants' criticism is, at its core, a complaint that there ought to be a similar exception for them, to reflect the fact that they have had some period of lawful residence, just not enough. As we have already outlined, that would result in a 'sliding scale' which would risk the very arbitrariness that the applicants complain of. The exception that they seek is of a different nature to the exceptions contained within the policy, all of which recognise the core attribute of the period of lawful residence, but also recognise the practical needs, within limits, of early applications; those who need to leave the UK; and EEA nationals; to pick three examples. What the applicants instead want is an exception from the period of lawful residence itself.

239. In summary, in relation to ground (1), we conclude that the respondent correctly considered and applied her long residence policy to the applicants, GA and AW.

***Residual discretion***

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.

***Ground (3) – the respondent's consideration of the applicants' human rights***

241. We consider next ground (3), as the strength of the applicants' article 8 claims feed into whether the respondent was entitled to conclude that the applicants' further submissions had realistic prospects of success, for the purposes of paragraph 353.

242. We were conscious of one of the key challenges by Ms Naik QC and Mr Jafferji as to the brevity or absence of consideration in the impugned decisions of the applicants' article 8 rights, (page [242] CB, for GA; and page [297] CB, for AW); and the absence of reference in the decision in GA's case to her UK residence up to and including 2008. The central thrust of the applicants' argument is that the respondent had treated the applicants' failure to meet the long residence requirements as amounting to a lack of exceptional circumstances. This resulted in the respondent's consideration of their article 8 rights being divorced from any substantive article 8 consideration. There was the supplemental argument that the respondent had not provided a 'minded to refuse' process, similar to that in Balajigari v SSHD [2019] EWCA Civ 673. However, in our view, these arguments take both of the decisions out of context.

243. We return to where we began in this judgment, which is to remind ourselves that these are challenges to refusals by the respondent to treat the further submissions as fresh claims. In both cases, the applicants' previous applications had been refused and their human rights had been considered in wider detail by two separate judges of the First-tier Tribunal and dismissed by them. We do not accept, as a valid criticism, that the respondent could not conclude that there was no realistic prospect of success, as the decisions rejected by the First-tier Tribunals had not originally been certified as clearly unfounded. The original ILR applications were considered, we must assume in detail from a human rights perspective, by the First-tier Tribunals, which dismissed the applicants' human rights appeals. It was only a short time after that both applicants submitted renewed applications, and taking their cases at their highest, the new article 8 issue was the 'place marker' of 10 years' residence, a few months after their last human rights appeals were rejected. While the applicants criticise the respondent for the circularity of the reasoning of her decisions and not considering the further submissions at all, as supported by the GCID notes for GA, we conclude that the impugned decisions reflected the circularity of the applications.

The decisions considered the previous, recent rejections of article 8 claims, noted the reliance on the duration of residence of any legality in the UK, and focussed on that residence not meeting the 10 year continuous lawful residence rule. The applications themselves did no more than to rely on the duration of UK residence and swift renewal of ILR applications. The challenge that the respondent failed to consider whether to grant limited leave to remain is answered by the fact that had the applicants succeeded before the First-tier Tribunals, they would have been granted limited leave to remain, but they did not succeed in their appeals. The narrow focus of the decisions merely mirrors the narrow focus of the applications. In the particular circumstances of these applicants, while the engagement with article 8 was undoubtedly limited, they followed the recent article 8 decisions by the First-tier Tribunals. The decisions, when taken in context, do not offend the principles requiring a proportionality assessment or a rationality review.

***Ground (2) – the arguable unlawfulness of the decisions under paragraph 353***

244. This ground can be dealt with briefly, and follows on from our reasons in relation to ground (3). We have referred to the well-known case law in relation to our review of the paragraph 353 decisions: (WM (DRC) v SSHD [2006] EWCA Civ 1495). The key is the combination of the First-tier Tribunals' rejections of both article 8 appeals, followed months later by claims formulated either as 10 year ILR applications, which did not meet the Rules or policy; or article 8 claims where the only difference was the 'place marker' being passed. Wider article 8 factors relating to family and/or private life were considered in the First-tier Tribunal decisions. While GA's first ILR application had referred to a different period of UK residence than her second ILR application, shortly before her second ILR application, her human rights appeal had already been rejected by the First-tier Tribunal. In the circumstances, the respondent was unarguably entitled to conclude that the applicants did not satisfy paragraph 353 – any appeals would have been later dismissed by First-tier Tribunals, just as their earlier human rights appeals had been rejected only months earlier.

***The fourth new ground – lack of 'foreseeability' and accessibility'***

245. As we previously indicated, our conclusions in relation to the first three grounds address the challenge posed in AW's new, fourth ground. In AW's further amended grounds ([50] to [55], at pages [60] and [61] CB), the ground refers first to the criticism of the Court of Appeal's drafting of the Rules in Hoque; second, to the ambiguity in the claimed purpose of the policy guidance; third; that that the respondent operates a policy more generous than the Rules; and fourth, that any decision taken under the policy will breach the applicants' article 8 rights. There is no elaboration on this ground in the combined skeleton argument for the hearing before us, and in oral submissions, Mr Jafferji returned to his criticism about the confusion in relation to the Rules, which in turn meant that it was unclear how the respondent's policy operated.

246. Dealing with each of the points in turn, a criticism of the Rules does not render the policy unclear. For the reasons already given, we regard the policy as consistent with

the 'bright line' requirement of 10 years' continuous lawful residence, subject to discrete and rational exceptions, clearly explained and developed over time. Second, we reject the claimed 'ambiguity' in the purpose of the policy. The purpose is a constant theme since the introduction of the long residence concession, namely to strike the 'fair balance' between the need to maintain the 'bright line' and appropriate exceptions which recognise specific individual circumstances, which do not undermine the 10 year requirement. Third, the fact that the policy is more generous than the Rules does not make it lacking in accessibility or foreseeability – on the contrary, it provides applicants with detailed guidance and examples, which permits them to arrange their affairs how they see fit. The final point is a reiteration of the applicants' submission in relation to proportionality in relation to article 8, which is answered in our conclusion on ground (3). The essence of this ground is a claim that the policy is so vague and confusing as to be not fit for use – that is not a proposition we accept.

247. In the circumstances, the applicants' applications are refused on all grounds.

248. We invite Counsel to draw up an appropriate order.

Signed: *J Keith*

**Upper Tribunal Judge Keith**

Dated: **3rd June 2021**