In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR/3792/2019

In the matter of an application for Judicial Review

The Queen on the application of

Miah Mohammed Eneath Kabir (+1)

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Kebede

HAVING considered all documents lodged and having heard from Mr J Fraczyk of counsel, instructed by GLD for the respondent, and from the Applicant in person, at a hearing on 18 October 2021

IT IS ORDERED THAT:

(1) The application for judicial review refused for the reasons in the attached judgment.

(2) The Applicant shall pay the Respondent's costs of these proceedings, summarily assessed as £16,868.95, together with any additional costs of attending the substantive hearing.

(3) Permission to appeal to the Court of Appeal is refused because there are no arguable errors of law in the judgment. The applicant's grounds are simply an attempt to re-argue the matters already fully and properly considered in the judgment, based upon his own erroneous understanding of the law.

Signed: *S Kebede*

Upper Tribunal Judge Kebede

Dated: **27 October 2021**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): **27/10/2021**

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR/3792/2019

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

18 October 2021

Before:

UPPER TRIBUNAL JUDGE KEBEDE

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Between:

THE QUEEN
on the application of

Miah Mohammed Eneath Kabir (+1)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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The Applicant
(litigant in person)

Mr J Fraczyk, Counsel
(instructed by the Government Legal Department) for the respondent

Hearing date: 18 October 2021

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J U D G M E N T

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Judge Kebede:

1. This in an application for judicial review of the decision of the Secretary of State for the Home Department dated 28 April 2019 refusing the applicant's application for indefinite leave to remain on the basis of ten years' continuous lawful residence in

the UK and refusing to treat his application as a fresh human rights claim under paragraph 353 of the immigration rules.

2. Permission to apply for judicial review was granted at an oral hearing, in part, on 12 March 2020 by Upper Tribunal Judges Allen and Finch, and on the remaining grounds by Upper Tribunal Judge Gleeson on 15 September 2020.

3. The applicant is a national of Bangladesh, born on 1 March 1979. He first entered the UK on 12 October 2006 with prior student entry clearance and was granted leave to enter until 31 October 2007. His leave was extended following further applications, until 21 June 2011 as a Tier 4 student and until 14 March 2013 as a Tier 1 Post Study Migrant. On 14 March 2013 the applicant applied for leave to remain as a Tier 1 Entrepreneur but his application was refused and his appeal against the refusal decision was dismissed. He became appeal rights exhausted on 19 June 2015. On 15 July 2015 he applied for leave to remain on family and private life grounds and was refused leave on 25 November 2015, with his claim being certified as clearly unfounded. That decision was reconsidered and he was then refused again, on 19 January 2016, but with an in-country right of appeal which he exercised.

4. Whilst that appeal was pending, on 9 November 2016, the applicant made an application to the respondent for indefinite leave to remain on the basis of long residence, claiming to have completed ten years' lawful residence on 12 October 2016. He contemporaneously served a section 120 notice on the respondent, copied to the First-tier Tribunal, asserting new grounds of appeal on the basis of the completion of ten years of continuous, lawful residence, in relation to his pending appeal. His appeal was dismissed on 12 May 2017. His application for indefinite leave to remain was refused by the respondent, without a right of appeal, on 19 July 2017. On 24 January 2018 the Upper Tribunal upheld the decision of the First-tier Tribunal, following a grant of permission. The applicant sought to appeal to the Court of Appeal but was refused permission and became appeal rights exhausted once again on 30 November 2018.

5. On 8 February 2019 the applicant applied again for indefinite leave to remain on the basis of long residence and was again refused, on 28 April 2019, which is the decision under challenge in these proceedings.

6. In refusing the applicant's application, the respondent considered that he did not qualify for a grant of leave. He could not meet the requirements of paragraph 276B of the immigration rules as he had not completed ten years of lawful residence in the UK, but had held continuous lawful residence only until 19 June 2015 when his appeal rights were exhausted following his unsuccessful application for leave to remain. The respondent did not accept that there were very significant obstacles to the applicant's integration in Bangladesh for the purposes of paragraph 276ADE(1)(vi) of the immigration rules nor any exceptional or compelling circumstances justifying a grant of leave outside the immigration rules. The respondent considered, further, that the appellant was relying upon matters which were not significantly different from those considered previously and that his submissions did not therefore amount to a fresh claim. The only different matter was the birth of the applicant's child on 15 March 2018, but the respondent

considered that that did not create a realistic prospect of success before a Tribunal. The requirements of paragraph 353 were therefore not met.

7. Following the pre-action protocol process, the applicant lodged a judicial review claim on 15 July 2019 seeking to challenge the decision on the grounds: firstly, that the respondent's decision that his lawful leave ended on 19 June 2015 was wrong and that he had completed ten years lawful residence; secondly, that his appeal under Article 8 should have been allowed since he met the requirements of paragraph 276B; and thirdly that his submissions amounted to a fresh claim under paragraph 353 of the immigration rules.

8. Permission was refused on the papers by the Upper Tribunal on 29 August 2019. The applicant sought to renew his claim to an oral hearing and it was decided to link his claim to two other cases which raised the same issues, JR/3246/2019 and JR/1043/2019, and to list the three cases together. By that time, and owing to developing caselaw, the grounds had expanded.

9. Following an oral hearing before Upper Tribunal Judges Allen and Finch, on 13 March 2020, permission was refused in respect of the long residence grounds, in light of the judgments in Masum Ahmed v The Secretary of State for the Home Department [2019] EWCA Civ 1070 and Juned Ahmed v Secretary of State for the Home Department (para 276B – ten years lawful residence) [2019] UKUT 10, but was granted on three other grounds, namely the arguable failure by the respondent to apply the long residence policy, the arguable unlawfulness of the decision on paragraph 353 of the immigration rules and the arguable unlawfulness of the Article 8 evaluation. Directions were made for amended pleadings to be served by the applicant and in accordance with those directions the applicant's representatives served amended grounds of judicial review, dated 16 August 2020.

10. The grounds at that stage were that the respondent had erred by failing to consider exercising her residual discretion in accordance with the long residence policy guidance and had erred by failing to consider that the application for indefinite leave to remain amounted to a fresh human rights claim for the purposes of paragraph 353 of the immigration rules.

11. At a further hearing before Upper Tribunal Judge Gleeson on 15 September 2020, which was to consider the amended pleadings in relation to the challenge to the decision under the long residence rules, it was decided to stay the proceedings pending the handing down of the judgment of the Court of Appeal in Hoque & Ors v The Secretary of State for the Home Department (Rev 1) [2020] EWCA Civ 1357 which in turn was considering the decision in the case of Masum Ahmed.

12. The applicant then applied, on 5 January 2021, to amend his grounds further in response to the judgment in Hoque, and advised the Tribunal that he was now acting in person and had not authorised the previous adjournment. In an order of 7 January 2021, Upper Tribunal Judge Gleeson permitted the applicant further time to amend his grounds and de-linked his claim from the two other applicants since he was now acting in person.

13. In those amended grounds, the applicant submitted that he was entitled to be granted indefinite leave to remain under paragraph 276B of the immigration rules, in line with the judgment in Hoque, as he had completed ten years continuous lawful residence by the time of the First-tier Tribunal's decision of 12 May 2017. The First-tier Tribunal decision had been wrong. He submitted that the application he had made on 15 July 2015 was within the permitted 28 day period and therefore extended his lawful residence. He claimed that his case was distinguishable to that of Juned Ahmed. The applicant asserted further that the respondent had failed to consider her policy in relation to that period of time, that paragraph 353 was irrelevant to his application as he was relying upon a new ground, namely his entitlement to ILR, and that the respondent's assessment of Article 8 was unlawful as he succeeded under paragraph 276B.

14. The respondent responded to those points in the amended detailed grounds of defence, submitting that the applicant became an overstayer on 19 June 2015 and was therefore approximately 16 months short of the threshold of ten years continuous lawful residence. The long residence guidance did not assist him because it specifically related to gaps in periods of leave, whereas the applicant was not subsequently granted leave after his 3C leave expired on 19 June 2015. The applicant was not assisted by Hoque, and in fact Hoque was fatal to his case, because he was an open-ended overstayer. The applicant failed under the policy for the same reason that he did under the rules, he had no claim under paragraph 353 as he was not entitled to ILR and his Article 8 claim had been fully assessed and was bound to fail.

15. On 3 June 2021 a Presidential panel of the Upper Tribunal promulgated its judgment in the case of Waseem & Ors, R (on the application of) v Secretary of State for the Home Department (long residence policy - interpretation) (Rev1) [2021] UKUT 146, which related to the two applicants whose claims were previously linked to that of the applicant. The applicants' judicial review claims were refused.

16. In an order of 11 June 2021 an Upper Tribunal Lawyer made directions requiring the applicant to confirm whether he was still pursuing his claim in light of the judgment in Waseem. The applicant confirmed that he was pursuing his claim and was representing himself. Directions were then made for the preparation for the substantive hearing.

17. The respondent produced further amended detailed grounds of defence relying on Waseem and reiterating the assertion that the applicant was an open-ended overstayer who did not benefit from the long residence policy guidance, that he could not demonstrate ten years' continuous lawful residence and that he could therefore could not succeed in his claim.

18. The applicant then filed a reply to the respondent's detailed grounds, again asserting that his case was different and that he had accumulated ten years continuous lawful residence by 12 October 2016, at a time when he had a pending appeal.

19. The matter then came before me for a substantive hearing.

20. The applicant was not represented and was acting as a litigant in person. He relied upon his skeleton argument of 24 September 2021 together with a flowchart for lawful residence comparing the situation before and after 24 November 2016 and a case history comparison whereby he compared his situation to that of the applicants in Juned Ahmed, Hoque and Waseem.

21. The applicant made lengthy submissions which were somewhat repetitive and which I shall attempt to summarise. His case essentially, as I understood it to be, is as follows. The First-tier Tribunal, Upper Tribunal and Court of Appeal had wrongly decided his appeal because they had applied the version of paragraph 276B which Lord Justice Underhill in Hoque had considered to be wrongly drafted and they had failed to consider the policy guidance from which he ought to have benefitted, and that his appeal ought to have been allowed since he had accumulated ten years of lawful residence by that time. In accordance with the Home Office Long Residence policy guidance version 13.0 pages 27 and 28 (pages 207 and 208 of the judicial review bundle) he had accumulated ten years of continuous, lawful residence by 12 October 2016 as the period of 26 days from 19 June 2015 and 15 July 2015 was disregarded as being under 28 days. He was not an open-ended overstayer and that was made clear by Lord Justice Underhill in Hoque. The applicant sought to distinguish his case from the other unsuccessful applicants in the above-mentioned cases on the basis that they had made several applications seeking to vary their leave whereas he had not and that he had never abused the immigration system.

22. Mr Fraczyk made brief submissions in response. He submitted firstly that the applicant's claim was seeking to challenge the earlier decisions of 19 January 2016 and 19 July 2017 and the decisions of the courts on appeal, which was out of time and was an abuse of process. In any event, the applicant was clearly an open-ended overstayer and so could not succeed in demonstrating ten years continuous lawful residence, as per [43] and [44] of Hoque. There was nothing unlawful about the respondent's policy guidance and nothing in the guidance which supported the applicant's case. The respondent was entitled to refuse to consider the applicant's application as a fresh claim under paragraph 353 and had given full and proper consideration to his Article 8 claim.

Discussion

23. As a starting point, I agree entirely with the submission made by Mr Fraczyk, that the applicant is essentially seeking to make a significantly out of time challenge to the earlier decisions of 19 January 2016 and 19 July 2017 refusing him leave to remain in the UK. Not only is that the case, but he is also effectively seeking to re-open an appeal which the Court of Appeal, in refusing permission on 30 November 2018, made clear had been finally decided (page 133 of the judicial review bundle). Whilst the applicant now seeks to undermine the appeal proceedings which took place in 2017, it is relevant to note that it was conceded on his behalf before the First-tier Tribunal, as recorded in its decision of 12 May 2017 (page 115, at [3]), that he could not meet the ten years' lawful residence test and could not succeed on that basis. The Upper Tribunal, in upholding the decision of the First-tier Tribunal on 24 January 2018, relied upon that concession, whilst finding in any event that the

applicant was not able to benefit from the 26-day period between becoming appeal rights exhausted on 19 June 2015 and his further application on 15 July 2015 as amounting to lawful residence and that decision was in turn upheld by the Court of Appeal. The applicant is accordingly seeking to relitigate the matter and, moreover, he seeks to do that in the face of a series of relevant recent authorities which unequivocally undermine his case and in the face of the recent rejection of the cases of the two applicants previously listed alongside his own claim. I am in agreement with Mr Fraczyk that that is an abuse of process and on that basis alone, together with the timeliness issue, I refuse this judicial review claim.

24. In any event, the applicant's challenge is plainly misconceived. He relies upon the judgement of Underhill LJ in the case of Hoque in asserting that the previous decisions of the respondent and the courts were wrong because they relied upon an erroneously drafted version of paragraph 276B. However, there is clearly nothing in Underhill LJ's re-formulation of paragraph 276B that assists the applicant, contrary to his own belief. The applicant insists that he is not an "open-ended overstayer" because he made his application for leave to remain on family and private life grounds within the permitted period of 28 days. That is plainly wrong, as is made clear in the respondent's re-amended detailed grounds of defence at [18] to [21]. The applicant's section 3C leave ended on 19 June 2015 when he became appeal rights exhausted, following the refusal of his application for leave to remain as a Tier 1 (Entrepreneur) Migrant. He could not resurrect his 3C leave and his application on 15 July 2015 did not have such an effect. He therefore became an overstayer from 19 June 2015 and has never had any further periods of leave since that time to enable him to become "book-ended". The fact that the applicant's application was made before 24 November 2016 and prior to the introduction of paragraph 39E of the immigration rules is immaterial, as is made plain at [15] of Hoque, where the court explained that paragraph 39E did not itself provide for the disregard but that that was provided for by paragraph 276B itself. The applicant is under the misapprehension that his case was de-linked from the other two applicants in Waseem because it was recognised that he benefitted from falling under the 2013 regime, whereas the only reason for the de-linking, as is clear from Upper Tribunal Judge Gleeson's order dated 7 January 2021, was that he was no longer legally represented and wished to amend his grounds as a litigant in person.

25. As for the applicant's claim that he was assisted by the long residence policy which had been overlooked by the courts in his previous appeal, that is also manifestly wrong. It is clear that the effect of the policy is no different to that explained above and that is made clear in Waseem at [230] where the Upper Tribunal said as follows:

> "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."

26. As clearly explained in the respondent's re-amended detailed grounds of defence, at [9] to [16], the discretion afforded to the respondent's caseworkers, through the policy guidance, to overlook certain periods of overstaying was directed at short gaps or breaks in an applicant's leave or at situations where an applicant had already accumulated ten years of continuous lawful residence but had delayed by a short period in applying for indefinite leave. That was clearly not the same as the applicant's situation and he is misconceived in understanding that it is. Likewise is his understanding of the excerpt from version 13 of the long residence guidance at page 28 of 54 upon which he relied:

> "If an applicant submits an out-of-time application, they will have a gap in continuous lawful residence, from the date their leave expires until the date they are next granted leave.."

as qualified by the following:

> "…The exception to this is where the application is out-of-time for 28 days or less, but you exercise discretion and count the residence as continuing".

As Mr Fraczyk submitted, it is impossible to see how that assisted the applicant: on the contrary it is clearly referring to book-ended overstayers and not to the applicant's own situation. As for any residual discretion otherwise afforded to the respondent, it was made clear in Waseem at [240] that to the extent that there was any such discretion, that would apply only in 'special circumstances' which clearly did not apply to this applicant.

27. Finally, the applicant seeks to distinguish his case from those of Juned Ahmed, the applicants in Hoque and the applicants in Waseem, on the basis that his application was made before 24 November 2016, that their cases involved several variations of the original application which was a relevant factor in considering the actual date of the application and thus the period of residence, and that their cases involved abuse of the system whereas his did not. None of these matters assist the applicant. I have already addressed the first point above. The fact that variations of the original applications were made clearly does not detract from the relevant issue, namely that the applicants were open-ended overstayers who had not been granted a period of leave following the expiry of their 3C leave. That was the case with Juned Ahmed, as made clear at [75] in the judgment in that case, with the applicants in Hoque and with the applicants in Waseem. The applicant is in no different position to those applicants. As for this applicant's claim that, unlike the others, he had not violated the law and become an overstayer, it clearly is the case that he has been an overstayer for many years, since 2015 and has not in fact had any leave other than 3C leave since March 2013. He has consistently extended his stay in the UK for the past eight years by making unsuccessful applications when he had no proper basis of stay in the UK.

28. For all of these reasons the respondent was fully entitled to conclude that the applicant's lawful residence ended on 19 June 2015, less than ten years after his arrival in the UK, and properly concluded that he had not demonstrated a continuous period of ten years' continuous lawful residence in the UK for the purposes of paragraph 276B of the immigration rules. The applicant's other challenges plainly fall away with that conclusion as there was little relied upon by the applicant other than the long residence claim and certainly nothing that would create a realistic prospect of success before another Tribunal. Likewise, there was no basis for the applicant's claim that there had been an inadequate Article 8 assessment, when it is clear that the respondent considered all relevant matters and provided proper reasons for concluding that the requirements of Appendix FM and paragraph 276ADE(1)(vi) could not be met on the basis of family or private life and that there were no compelling circumstances outside the immigration rules. Certainly neither matter was actively pursued by the applicant as a distinct challenge before me.

29. Accordingly, the respondent's decision, that the applicant did not qualify for leave to remain in the UK on grounds of long residence or on any other basis, and that his application was not to be treated as a fresh human rights claim, was one which was properly made and which was reached in accordance with the relevant guidance in WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495. There was nothing irrational, unreasonable or unlawful about the respondent's decision to refuse the applicant's application on the basis that she did.

30. The applicant's application for judicial review is refused.

Costs

31. The applicant, being the losing party, is to pay the respondent's reasonable costs. Mr Fraczyk, in his costs submissions, has requested in addition that the respondent recover her costs incurred after the handing down of Waseem, or alternatively her costs of the substantive hearing, on an indemnity basis. The applicant, in his costs submissions, has asked that the costs order be postponed until the case has been decided by the Court of Appeal.

32. I have no hesitation in refusing the applicant's request since I refuse permission to appeal to the Court of Appeal on the basis that there are no arguable errors of law in my judgment. As for Mr Fraczyk's request, whilst I order that the applicant pay the respondent's costs of the proceedings as set out in her statement of costs, at a total of £16,868.95, together with any further costs of attending the substantive hearing not included within the statement, I make the order on the standard basis. Mr Kabir's insistence in pursuing a matter which has been unequivocally resolved against him, in particular following Waseem, is clearly misguided and frustrating, but I do not consider that it is sufficient to justify an order that the recovery of costs be on an indemnity basis.