R (on the application of Ahmed) v Secretary of State for the Home Department (para 276B – ten years lawful residence) [2019] UKUT 10 (IAC)

IN THE UPPER TRIBUNAL

JUDGMENT GIVEN FOLLOWING HEARING

Field House
London

7 March 2018

THE QUEEN
(ON THE APPLICATION OF)
JUNED AHMED

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

THE HONOURABLE MR JUSTICE SWEENEY

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Mr M Biggs, Counsel, instructed by Chancery Solicitors, appeared on behalf of the Applicant.

Mr Z Malik, Counsel, instructed by the Government Legal Department, appeared on behalf of the Respondent.

If there is no ten years continuous, lawful residence for the purposes of para 276B(i)(a) of the Immigration Rules, an applicant cannot rely on para 276B(v) to argue that any period of

overstaying (for the purposes of 276B(i)(a)) should be disregarded. Para 276B(v) involves a freestanding and additional requirement over and above 276B(i)(a).

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APPROVED JUDGMENT

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MR JUSTICE SWEENEY:

Introduction

1. By permission of Upper Tribunal Judge Kopieczek, granted at an oral hearing on 17 November 2017, the Applicant (a citizen of Bangladesh who is now aged 31) seeks judicial review of the Respondent's decision, made by a decision letter dated 13 March 2017, refusing the Applicant's application made on 4 February 2016, as ultimately varied on 7 November 2016, for indefinite leave to remain on the ground of his ten year residence, pursuant to paragraph 276B of the Immigration Rules, and certifying, pursuant to Section 94 of the Nationality, Immigration and Asylum Act 2002 Act 2002, as amended ("the 2002 Act"), that the human rights claim made by that application was "*clearly unfounded*".

2. There are three Grounds of Review, namely that:-

   (1) The 13 March 2017 decision was based on a material flaw and was thus unreasonable, because it rested on a misinterpretation of paragraphs 276B and 276A of the Immigration Rules to the effect that the period of time between the making of the Applicant's original application to further remain on 4 February 2016 and the decision on the varied application for leave to remain on the ground of long residence, was not to be counted when considering whether, for the purposes of paragraph 276B(i)(a) and taking into account paragraph 276B(v), the Applicant had had at least ten years' continuous lawful residence.

   (2) The Respondent acted unreasonably in failing to reach a decision with respect to the exercise of her discretion; and/or failed to provide any, or any adequate, reasoning as to the exercise of that discretion; and/or failed to consider material matters.

(3) In all the circumstances, the Respondent's certification of the Applicant's human rights claim was unlawful – as there is a real prospect of the Applicant showing on appeal that he was entitled to leave pursuant to paragraph 276B of the Immigration Rules, and/or that the Respondent acted unlawfully and unreasonably regarding the exercise of her discretion; and in any event, given the length of the Applicant's lawful residence in the UK and all the circumstances.

3. It is thus clear that the target of the Applicant's claim is the Section 94 certificate. The relief sought by the Applicant is an Order quashing that certificate and a declaration that the Applicant may and should pursue his appeal from the 13 March 2017 decision before the First-tier Tribunal in the ordinary way. In the alternative, an order quashing the 13 March 2017 decision is sought.

4. Whilst otherwise opposing the claim on all fronts, the Respondent accepted that, in the event that the Applicant succeeded, there were no "special or exceptional factors" justifying the retention of the case in the Upper Tribunal – (see **R (Khan) v SSHD [2017] 4 WLR 152** at [9] and [26]-[32]) and that the appropriate course would be for any appeal to be heard in the First-tier Tribunal.

Factual Background

5. The Applicant arrived in the United Kingdom on 11 October 2006, with an entry clearance as a student, valid from 25 September 2006 until 30 September 2007. He made an application for further leave to remain as a student on 5 September 2007 and was granted further leave to remain on 1 October 2007, until 31 October 2010.

6. The Applicant made an application for further leave to remain as a Tier 1 (Post-Study Work) Migrant on 8 October 2010 and was granted further leave to remain on 24 November 2010 until 24 November 2012.

7. The Applicant made an application for further leave to remain as a Tier 4 (General) Student on 27 September 2012 and was granted further leave to remain on 5 December 2012, until 30 April 2014. He made a further application for leave to

remain as a Tier 4 (General) Student on 22 April 2014 which was granted on 16 May 2014, until 28 August 2015.

8. On 28 August 2015 the Applicant made another application for leave to remain as a Tier 4 (General) Student, which was refused on 4 December 2015. On 29 December 2015 the Applicant applied for Administrative Review, which was refused on 20 January 2016. The refusal was deemed served on 22 January 2016.

9. Some 13 days later, on 4 February 2016, the Applicant made an application for further leave to remain, this time based on his ancestry. On 31 March 2016 he made a further application for leave to remain based on his private and family life. The Respondent refused the ancestry application on 24 July 2016. On 28 July 2016 the Applicant sent a pre-action protocol letter. On 11 August 2016 the Respondent maintained her decision, in consequence of which, on 8 September 2016, the Applicant issued judicial review proceedings (JR/9897/2016) challenging the Respondent's ancestry decision.

10. On 22 September 2016 the Applicant made an application for indefinite leave to remain outside the Immigration Rules. Finally, on 7 November 2016, the Applicant made an application for indefinite leave to remain on the grounds of his ten years' residence in the United Kingdom.

11. On 17 November 2016 the parties settled the judicial review proceedings in relation to the ancestry application, and it was agreed that the application made, outside the Rules, on 22 September 2016 would be considered as a variation of the applications made on 4 February 2016 (ancestry) and 31 March 2016 (private and family life).

12. The Respondent refused the long residence application for indefinite leave to remain in a letter dated 13 March 2017 and, under Section 94 of the 2002 Act, certified the Article 8 claim made therein as "*clearly unfounded*"– concluding that the Applicant had not lived in the United Kingdom continuously and lawfully for a period of ten years.

13. The letter set out the Applicant's immigration history and, as to consideration under paragraph 276B of the Immigration Rules, concluded that:

> "*You subsequently applied for further leave to remain on 04 February 2016 13 days out of time for Family / Private Life leave to remain which you then varied to another Family / Private Life leave application, then varying to Outside the Rules indefinite leave to remain then finally varying to indefinite leave to remain based on 10 years lawful residency.*
>
> *As this has not been followed by a grant of leave to remain your continuous lawful residence was broken on 22 January 2016. Therefore, you have only completed 9 years 3 months continuous lawful residence in the United Kingdom.*
>
> *With this in mind, you have not demonstrated ten years continuous lawful residence and cannot satisfy the requirement of Paragraph 276B(i)(a).*
>
> *For the reasons outlined above, your application is refused under Paragraph 276D with reference to Paragraph 276B(i)(a) of HC 395 (as amended)*".

14. The letter went on to make clear that, in considering the application, it had also been considered whether the exercise of discretion was appropriate as the Applicant could not demonstrate 10 years continuous lawful residence.

15. As to family life, it was recorded that the Applicant's partner was a Bangladesh national who was currently present in the UK with no leave to remain – and was therefore not a British citizen, was not settled in the UK, and was not in the UK with refugee leave or as a person with humanitarian protection. It was also noted that the Applicant had no children in the UK. In those circumstances, it was concluded that the family life application failed.

16. Consideration was then given to the requirements for leave to remain on the basis of the Applicant's private life in the UK under paragraph 276ADE(1) of the Rules. It was concluded that the Applicant did not meet the requirements of paragraph 276ADE(1) (iii), (iv), (v) & (vi). It was also concluded, against the background that the Applicant had lived the majority of his life (including his formative years) in

Bangladesh, and the maintenance of his family ties there, that there were no significant obstacles to the Applicant's reintegration into Bangladesh. Therefore, it was concluded that the private life application failed.

17. Consideration was finally given to whether the Applicant's application raised any exceptional circumstances which might warrant the grant of leave to remain outside the requirements of the Immigration Rules. The letter recorded that the Applicant had stated that he was concerned about the risk to his and his partner's lives from political opponents if they returned to Bangladesh but noted that the Applicant had not made a protection claim. The letter continued:

> "*Consideration has been given to the fact that you may have established relationships with people resident in the UK, other than with your partner. However, you have provided no evidence of an exceptional level of dependency between you and any such people in the UK. Furthermore, there is no reason why contact with any people you may know in the UK cannot be maintained from abroad. Many people maintain contact with family and friends from abroad through modern means of communication and visits. You have provided no reason why you cannot be expected to do the same.*
>
> *Consideration has also been given to the fact that you have studied and worked in the UK and it is asserted that you can utilise the skills that you have acquired to assist you in securing employment in your home country in order to support yourself.*
>
> *Consideration has also been given to the extent of the possible interference with your private life, as compared to the legitimate need to maintain a national immigration control. Any private life you have established here has been done so when you were here in a temporary capacity. Therefore, you have no legitimate expectation of being granted on this basis. Furthermore, there is no evidence to show that you cannot re-establish a similar private life in Bangladesh to that which you have in the UK.*
>
> *It has therefore been decided that there are no exceptional circumstances in your case. Consequently, your application does not fall for a grant of leave to remain outside the Rules*".

18. Finally, the letter dealt with certification, as follows:

> "*In addition, after considering all evidence available to them, the Secretary of State's official has decided that your Human Rights Claim is clearly unfounded and hereby certifies it to be so under s.94(1) of the Nationality, Immigration and Asylum Act 2002. This is because you do not meet the requirements for leave to remain on grounds of family life under Appendix FM or private life under Paragraph 276ADE(1) of the Immigration Rules. Further, you have not raised any circumstances that are considered to be exceptional. In the light of this and the consideration above, it is considered that your application for leave to remain on the basis of your Human Rights is clearly without substance and cannot succeed on any legitimate view.*
>
> *This means you may not appeal whilst you are in the United Kingdom*".

19. The Applicant sent a pre-action protocol letter to which the Respondent replied on 5 April 2017, maintaining her decision. In consequence, the Applicant issued this judicial review claim on 9 May 2017. The Respondent filed her Acknowledgement of Service on 21 June 2017.

20. Upper Tribunal Judge Kekic considered the case on the papers and, in a decision promulgated on 10 August 2017, refused permission. On granting permission at the oral renewal hearing on 17 November 2017 Upper Tribunal Judge Kopieczek said this:

> "*I consider that it is at least arguable that the period of time between the making of the application for further leave to remain (before its variation) on 4 February 2016 until the decision on the (varied) application for leave to remain on the grounds of long residence, on 13 March 2017, is to be counted when considering whether the Applicant has, for the purposes of paragraph 276B(i)(a) had at least ten years' continuous lawful residence, taking into account paragraph 276B(v) of the Rules.*
>
> *Whilst, on a self-contained basis, I would not have considered that the 'discretion' point or the 'certification' point have any extrinsic merit, they contain arguments that are bound up with the main argument in terms of long residence. Accordingly, I do not*

limit the grounds that may be argued and, for the avoidance of doubt, even taking into account that the main ground may not be successful."

Legal Framework

21. At the material time, paragraph 34 of the Immigration Rules required that an application for leave to remain had to be made in accordance with sub-paragraphs (1) - (10) of that Rule. As to multiple applications, paragraph 34BB (1) & (2) made clear that an applicant could only have one outstanding application for leave to remain at a time, and that where an application for leave was submitted in circumstances where a previous application for leave to remain had not been decided, it would be treated as a variation of the previous application. Paragraph 34E provided that an application to vary had to comply with the requirements of paragraph 34. Paragraph 34F provided that any valid variation of a leave to remain application would be decided in accordance with the Immigration Rules in force at the date that the variation was made. Paragraph 34G dealt with the date an application (or variation of an application) was deemed to be made, depending on whether it was sent by post by Royal Mail, submitted in person, sent by courier or other postal service provider, or made via the online application process.

22. Section 82(1)(b) of the 2002 Act provides that a migrant may appeal from "*a decision*" to refuse his or her "*human rights claim*" (as defined in Section 113 of the same Act).

23. The Respondent's policy entitled "*Rights of Appeal*" as in force at the time, deemed, amongst other things, an application for indefinite leave to remain made pursuant to paragraph 276B of the Immigration Rules to be a "*human rights claim*" for these purposes, and acknowledged that a human rights claim may be made implicitly. Hence there is no dispute that the Applicant's application for indefinite leave to remain on the ground of long residence was a human rights claim.

24. By Section 92(3) of the 2002 Act a migrant who holds a right of appeal pursuant to Section 82(1)(b) of the Act "*must*" bring that appeal while he remains in the UK unless the human rights claim "*to which the appeal relates*" has been certified by the

Secretary of State as being "*clearly unfounded*", pursuant to Section 94 of the 2002 Act, in which case the appeal "*must*" be brought from outside the UK.

25. Section 94 of the 2002 Act provides, insofar as relevant, as follows:

> "*(1) The Secretary of State may certify a protection claim or human rights claim as clearly unfounded.*
>
> *(2) A person may not bring an appeal to which this Section applies in reliance on Section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in sub-Section (1) is or are clearly unfounded.*
>
> *(3) If the Secretary of State is satisfied that a claimant is entitled to reside in a state listed in sub-Section (4) he shall certify the claim under sub-Section (1) unless satisfied that it is not clearly unfounded*."

26. Section 117A of the 2002 Act provides:

> "*(1) This Part applies where a court or Tribunal is required to determine whether a decision made under the Immigration Acts –*
>
> *(a) Breaches a person's right to respect for private and family life under Article 8, and*
>
> *(b) As a result would be unlawful under Section 6 of the Human Rights Act 1998.*
>
> *(2) In considering the public interest question, the court or tribunal must, in particular, have regard –*
>
> *(a) in all cases to the considerations listed in Section 117B, and*
>
> *(b) in cases concerning the deportation of foreign criminals, to the considerations listed in Section 117C,*

(3) In sub-Section (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family is justified under Article 8(2)".

27. Section 117B of the 2002 Act provides that:

"(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) *In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –*

(a) *the person has a genuine and subsisting parental relationship with a qualifying child, and*

(b) *it would not be reasonable to expect the child to leave the United Kingdom*".

28. At the material time paragraph 6 of the Immigration Rules provided that:

"*In these Rules the following interpretations apply....*

Overstayed or overstaying means the Applicant has stayed in the UK beyond the latest of:

(i) *the time limit attached to the last period of leave granted; or*

(ii) *beyond the period that his leave was extended under Section 3C or 3D of the Immigration Act 1971*".

29. Paragraph 276B of the Immigration Rules, as applicable in this case, provided (as amended by the addition of sub-paragraph (v) by HC 194 which was laid before Parliament in June 2012) that:

"*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 any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period".

30. Paragraph 276D of the Immigration Rules made clear that indefinite leave on the ground of long residence in the UK was to be refused if the Secretary of State was not satisfied that each of the requirements in paragraph 276B was met, by providing that:

"Indefinite leave to remain on the ground of long residence in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met".

31. Paragraph 276A of the Immigration Rules provided that:

"For the purposes of paragraphs 276B to 276D and 276ADE (1) –

(a) 'Continuous residence' means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an Applicant is absent from the United Kingdom for a period of six months

or less at any one time, provided that the Applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the Applicant:

(i) has been removed under Schedule 2 of the 1971 Act, Section 10 of the 1999 Act, has been deported, or has left the United Kingdom having been refused leave to enter or remain here; or

(ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or

(iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or

(iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) provided that the sentence in question was not a suspended sentence; or

(v) has spent a total of more than eighteen months absent from the United Kingdom during the period in question.

(b) 'Lawful residence' means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

(ii) temporary admission within Section 11 of the 1971 Act where leave to enter or remain is subsequently granted; or

(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.

(c) 'Lived continuously' and 'living continuously' mean 'continuous residence', except that paragraph 276A(a)(iv) shall not apply".

32. Paragraph 276ADE of the Immigration Rules provided that:

> "*(1) The requirements to be met by an Applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the Applicant:*
>
> *(i) Does not fall for refusal under any of the grounds in Section S-LTR1.2 to S-LTR2.3 and S-LTR3.1 in Appendix FM; and*
>
> *(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and*
>
> *(iii) has lived continuously in the UK for at least twenty years (discounting any period of imprisonment); or*
>
> *(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the Applicant to leave the UK; or*
>
> *(v) is aged 18 or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or*
>
> *(vi) subject to subparagraph (2) is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but there would be very significant obstacles to the Applicant's integration into the country to which he would have to go if required to leave the UK.*"

33. The applicable version of the Respondent's policy, namely "Long Residence v.14" at page 18 provided that a period of overstaying of 28 days or less on the date of the application (calculated from the end of the last period of leave to enter or remain granted, or the end of any extension of leave under sections 3C or 3D of the Immigration Act 1971) would be disregarded. There was a requirement, when refusing an application made by an applicant who had overstayed by more than 28

days, to consider any evidence of exceptional circumstances which had prevented the applicant from applying within the first 28 days of overstaying. The threshold for what constituted 'exceptional circumstances' was said to be high but could include delays from unexpected or unforeseeable causes.

Submissions

General

34. In the combination of his written and oral submissions Mr Biggs, on behalf of the Applicant, reminded me of the correct approach to the interpretation of the Immigration Rules as explained by the Supreme Court in **Mahad (and Others) v Entry Clearance Officer [2009] UKSC 16** at [10] and subsequently by the Court of Appeal in **Pokhriyal v SSHD [2013] EWCA Civ 1568** at [39]-[43]. Ultimately, it was common ground that it was not appropriate, when construing Paragraph 276B(v), to consider the Explanatory Memorandum to Statement of Changes HC 194 which accompanied its introduction on 13 June 2012.

35. Mr Biggs submitted that the correct approach to decisions under Section 94 of the 2002 Act and their review is to be found in **ZT (Kosovo) v SSHD [2009] UKHL 6**, at [22]-[24] approving **RL & Another v SSHD [2003] 1 WLR 1230** at [56]-[58] in particular that whether a claim is "*clearly unfounded*" is a black and white objective test, independent of the burden of proof. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded or, put another way, if on at least one legitimate view of the facts or the law the claim may succeed, it is not clearly unfounded. Likewise, Mr Biggs underlined, if a court concludes that a claim has a realistic prospect of success, the court will necessarily conclude that the Secretary of State's view was irrational. Only when the decision maker is satisfied that nobody could believe the Applicant's story will it be appropriate to certify on the ground of lack of credibility alone.

36. Mr Biggs added that by virtue of **ZT (Kosovo)** (above) at [21]; **R (YH Iraq) v SSHD [2010] EWCA Civ 116**; and **FR (Albania) & Another v SSHD [2016] EWCA Civ 605**

the court must apply the intensive "*anxious scrutiny*" standard of **Wednesbury** review, including properly taking into account every factor that might tell in favour of an Applicant and examining the substantive integrity of the analysis displayed in the decision letter when giving the reasons for rejecting the application – given that the decision maker must demonstrate that account has been taken of relevant matters and that the correct test has been applied.

37. As to the consideration of a human rights claim made in reliance on Article 8 ECHR, Mr Biggs reminded me that the Secretary of State and the Tribunal must consider the five sequential questions identified in **Razgar v SSHD [2004] UKHL 27** at [17] namely:

> "*(1) Will the decision be an interference with the exercise of the Applicant's rights to respect for his private or (as the case may be) family life.?*
>
> *(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?*
>
> *(3) If so, is such interference in accordance with the law?*
>
> *(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
>
> *(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?*"

38. Mr Biggs accepted that, at stage 5, the decision maker must decide if the interference with the individual's Article 8 interest/interests strikes a fair balance between the interests involved and must give proper weight to the Immigration Rules, which will normally entail giving them substantial, or very substantial, weight where they reflect the Secretary of State's view as to the correct balance to be struck in a general class of case. That is because, as numerous authorities make clear, the Secretary of State has constitutional responsibility for immigration policy and special expertise

and reflects the Secretary of State's view of the public interest and where a fair balance between the public interest and, in general terms, Article 8 interests lie. Further, they are partly endorsed by Parliament.

39. However, Mr Biggs submitted, where the Rules do not concern matters of policy and balance they have little or no weight in the proportionality exercise – see **R (MM) (Lebanon) and Others v Secretary of State and Another [2017] UKSC 10** at [76], and the contrast drawn between underlying public interest considerations and the working out of policy through the detailed machinery of the Rules. Additionally, he submitted, where the Rules are themselves not rationally justifiable or are disproportionate, they should be given no weight in the proportionality scales.

40. Whilst Mr Biggs accepted that those principles were normally invoked in cases where a migrant cannot satisfy the Rules, he argued that they apply with equal, if not greater force, where a migrant is able to rely upon the Rules – see the discussion in **Mostafa (Article 8 – entry clearance) [2015] UKUT 112 (IAC)**.

41. Further, Mr Biggs argued that as the Rules confer rights, whether as a special feature of the statutory scheme, or as an application of the public law principle that the Respondent is required to act consistently with her policy absent sufficient reason not to, it followed that when the Rules were satisfied it would be unlawful to remove a migrant because to do so would not be in accordance with the law because it was inconsistent with the Rules.

42. Even leaving that aside, Mr Biggs submitted, it would not be proportionate to remove a migrant unless the Secretary of State could point to some sufficiently cogent and compelling factor not addressed by the Rules justifying removal in the public interest – with such cases being rare, if possible at all.

First Ground

43. Mr Biggs' first submission was that this ground had already been decided in the Applicant's favour by Upper Tribunal Judge Kopieczek – whose grant of permission entailed, Mr Briggs argued, the binding and unassailable conclusion that the

Applicant's case as to the correct approach to paragraph 276B(v) of the Rules was properly arguable. That meant, Mr Biggs submitted, that it would be arguable before the First-tier Tribunal and that therefore there was a legitimate view of this case pursuant to which the Applicant's human rights claim could succeed before the First-tier Tribunal. It followed, Mr Biggs submitted, that there was a binding decision that entailed that the Applicant's human rights claim was not bound to fail, that that decision was correct, and that therefore the application for judicial review must succeed.

44. As to that, Mr Malik, on behalf of the Respondent, submitted that Judge Kopieczek had simply been deciding on permission and that it was wholly inappropriate and misconceived to regard that as being in any way binding on the issue. That, he said, was a matter for me, with the benefit of full argument – which the judge, on permission, had inevitably not received.

45. In the alternative, Mr Biggs submitted that:

(1) The effect of paragraph 276B(v) of the Rules was that someone who has made an application for indefinite leave to remain pursuant to paragraph 276B within 28 days of becoming an overstayer is to be treated, for the purposes of paragraph 276B, as if the application was made while he held leave to remain so that the period during which the application is awaiting decision is added to the period of continuous lawful residence required by paragraph 276B(i)(a), in the light of paragraphs 6 and 276A(b) of the Rules (above).

(2) That was consistent with the language and purpose of paragraph 276B(v) and the purpose and structure of Paragraph 276B generally.

(3) The Applicant undoubtedly made an application within the 28-day period and the word "*disregarded*" in Paragraph 276B(v) must mean that he cannot be treated as having the status of an overstayer whilst awaiting the outcome of his application. It followed that he must be treated as a person who was not an overstayer.

(4) It further followed, from the definition of overstayer in paragraph 6 of the Rules, that a person who by virtue of paragraph 276B(v) was to be treated as not being an overstayer must be someone who had, or was to be treated as though they had, leave.

(5) Such a person, who by paragraph 276B(v) was to be treated as not being an overstayer (because his status in that respect is "disregarded"), fell within paragraph 276A(b)(i) because, for the purposes of the Rules, he was a person who is treated as though he has leave.

(6) Further, the only sensible way to treat someone who was deemed not to be an overstayer by the Rules was to treat that person as being a person who was lawfully within the UK. That was the reality of their residence which was therefore "*lawful residence*" pursuant to paragraph 276B(i)(a) of the Rules.

(7) Paragraph 276A(b) was no answer to that point as, on any view, it does not provide an exhaustive definition of "*lawful residence*", only examples.

(8) The purpose of paragraph 276B(v) was tolerably clear, namely to ensure that migrants took steps to regularise their stay by making an appropriate application for leave to remain within a reasonable period (i.e. 28 days) of becoming an overstayer or by leaving the UK and applying from abroad if they could not do so – with those who did apply within 28 days being permitted to reside here whilst awaiting a decision, which was an entirely natural and unobjectionable interpretation of the provision – see, by analogy, **R (Bhudia) v SSHD** [2016] UKUT 00025 (IAC) at [284 (iv) & (ix)].

46. Mr Malik submitted that Mr Biggs' submissions were plainly wrong and that the position was straightforward. It was common ground that the Applicant had first arrived in the UK on 11 October 2006; had thereafter lived here continuously and lawfully until 22 January 2016 (when the administrative review decision was served on him); and had then made an application for further leave to remain on 4 February 2016, which he had varied on 7 November 2016 to an application for indefinite leave

to remain on the ground of long residence. It was therefore, Mr Malik submitted, hopeless to argue that the Applicant could meet the requirements for indefinite leave to remain under Paragraph 276B which had five freestanding requirements, each of which (as Paragraph 276D made clear) had to be met for an applicant to succeed.

47. Mr Malik emphasised that the first requirement, under sub-paragraph (i)(a), was that "*he has had at least 10 years continuous lawful residence in the United Kingdom*". The definition of "*lawful residence*" was provided in paragraph 276A(b) (above) which made clear that it meant continuous residence which was pursuant to existing leave to enter or remain; or to temporary admission within s.11 of the 1971 Act where leave to enter or remain was subsequently granted; or to an exemption from immigration control (including where an exemption ceases to apply it is immediately followed by a grant of leave to enter or remain). Thus, Mr Malik submitted, after 22 January 2016 the Applicant had no "*lawful residence*" as he had no existing leave, temporary admission or exemption from immigration control. Equally, and obviously, the Applicant's residence from 11 October 2006 to 22 January 2016 was for less than 10 years. Therefore, Mr Malik submitted, the Respondent was clearly right to have concluded in her decision of 13 March 2017, that the Applicant was unable to show that he had had "*at least 10 years' continuous lawful residence in the United Kingdom*".

48. Further, Mr Malik submitted that the Applicant's reliance on paragraph 276B(v) was misconceived. It was, he submitted, plain from the structure of paragraph 276B, read in conjunction with paragraph 276D, that sub-paragraph (v) represented a freestanding requirement that was additional to sub-paragraph (i)(a). The former did not negate or compromise the requirement under the latter of showing 10 years continuous lawful residence. Rather, sub-paragraph (v) involved an additional requirement, which did not qualify any other pre-existing requirement in the Immigration Rules, such that even if a person had had at least 10 years continuous lawful residence in the UK, he would not be entitled to indefinite leave to remain if he was in the UK in breach of immigration laws unless one of the exceptions in sub-paragraph (v) applied. The exceptions were consistent with the general amendment

of the Rules to the effect that applications for leave to remain by persons who had overstayed for more than 28 days would be refused on that Ground.

49. Mr Malik underlined that in **Mahad v Entry Clearance Officer [2009] UKSC 16** at [10] Lord Brown noted, by reference to **Odelola v Secretary of State for the Home Department [2009] UKHL 25**, that the question of construction of the Immigration Rules "*depends upon the language of the rule, construed against the relevant background*" and "*that involves a consideration of the immigration rules as a whole and the function that they serve in the administration of immigration policy*". Viewed in that light, Mr Malik submitted, the Applicant's case was not only inconsistent with the natural reading and structure of paragraph 276B but was also inconsistent with the Immigration Rules read as a whole.

50. Mr Biggs submitted that the Respondent's construction would lead to starkly unfair results, inconsistent with the specific purpose of paragraph 276B(v) and the overarching purpose of paragraph 276B which was to recognise that those who have residence within the UK for ten years lawfully should be entitled to remain permanently. Contrary to those purposes, he submitted, the Respondent's construction would mean that:

    (1) An Applicant could not rely on the period when their application was outstanding even though the delay in deciding was the Secretary of State's responsibility and even if the delay was extensive.

    (2) To treat an Applicant as unlawfully resident would be counterproductive as it would undermine the aim of permitting Applicants who have made prompt applications after overstaying to remain until their application is decided.

    (3) Against the background of the Respondent's acceptance that an application pursuant to paragraph 276B entailed a human rights claim (as defined in Section 113 of the 2002 Act) it was clear that a refusal of an application relying on paragraph 276B would engage Article 8 in most cases as a decision to refuse such a claim would be a decision that removal would not breach Section 6 of

the Human Rights Act 1998 and there was no rational, let alone proportionate, justification for allowing a migrant to remain in the UK in order to apply for leave to remain, but then to refuse to acknowledge that legitimate period of residence as lawful.

51. Mr Biggs accepted that the Respondent's argument that paragraph 276B set out a series of separate requirements was correct, but submitted that the fact that it did so was clearly not inconsistent with the Applicant's submission as to the correct interpretation of paragraph 276B(v), namely that an Applicant must be treated as if he/she had leave or as otherwise lawfully residing in the UK such as to enable the period to count towards the total period of lawful residence required by paragraph 276B(i)(a).

52. Although not part of the decision letter, Mr Malik also argued that, in any event, the critical date was 7 November 2016 (when the applicant had again varied his original application of 4 February 2016 and applied for indefinite leave to remain), by which time he had undoubtedly overstayed for more than 28 days and was therefore unable to rely on Paragraph 276B(v).

53. In furtherance of that argument Mr Malik submitted that under paragraphs 34E and 34F of the Immigration Rules a person wishing to vary the purpose of an application for leave to remain in the UK the application must comply with the requirements of paragraph 34 as if the variation was a new application, and that any valid variation of a leave to remain application will be decided in accordance with the Immigration Rules in force at the date such variation is made. Mr Malik then drew attention to the decision of the Court of Appeal in **Secretary of State for the Home Department v Khan [2016] EWCA Civ 137** at [27] & [50] in which the Court concluded that it was clear that Paragraph 34E was concerned with variation of an application and from its text that there must be compliance with the relevant requirements as they apply at the date that the variation was made as if the variation was a new application or claim and that accordingly "*At the date of the application*" in paragraph 1A(a) of Appendix C of the Immigration Rules (which dealt with the need to prove a certain

level of funds when applying to remain as a Tier 4 student) had to be "*read accordingly*". Thus, submitted Mr Malik, "*an application*" in paragraph 276B(v) had to be "*read accordingly*" as well and thus meant that the application was made on 7 November 2016 – by which time the Applicant had overstayed for longer than 28 days, such that refusal of indefinite leave to remain under Paragraph 276B was inevitable.

54. Mr Biggs submitted that the Respondent's argument as to 7 November 2016 was obviously wrong, given that:

(1) It was only possible to vary a single continuing application and doing so does not amount to a new distinct application – see paragraph 34BB (1)-(2) of the Rules (above); **AQ (Pakistan) v SSHD [2011] EWCA Civ 833** at [22] and **JH (Zimbabwe) v SSHD [2009] EWCA Civ 78** at [35].

(2) That was why the Rules drew a distinction between an "*application*" and a "*variation*" "of the purposes of an application for leave to remain" – see paragraphs 34E and 34G of the Rules.

(3) Whilst the Rules treated a variation of an application as though it was an application for some purposes (e.g. requiring a charge to be paid and a prescribed procedure to be followed), that was only necessary because a variation was merely an alteration of the purpose of a pending application for leave to remain and was not a separate application.

(4) An application could only be varied whilst it was pending (i.e. before it was "*determined*") and under paragraph 276B(v) an application was "*pending*" until it was "*determined*" – which must mean decided or finally decided.

(5) The language used in paragraph 276B(v) was general. It was not limited to an application made pursuant to paragraph 276B(v) – e.g. it covered the situation where an applicant applied within 28 days of becoming an overstayer who might then apply years later for indefinite leave to remain pursuant to paragraph 276B.

(6) The Respondent's interpretation was totally wrong as it would require the re-writing of paragraph 276B, which was clearly inappropriate – "*an application*" would have to become "*an application or a variation of a pending application for leave to remain pursuant to paragraph 276B of the Immigration Rules*".

55. For all those reasons, Mr Biggs submitted that the decision of 13 March 2017 was based upon a misinterpretation or misapplication of paragraphs 276B and 276A of the Immigration Rules, and that it was unreasonable and vitiated by clear material public law errors as a result.

Second Ground

56. Mr Biggs submitted that, as demonstrated by numerous authorities, most recently **Mandalia v Secretary of State for the Home Department [2015] 1 WLR 4546** at [29] – [31] and **SH (Pakistan) v SSHD [2016] EWCA Civ** at [17] – [23] & [29], the Respondent's discretion to waive the Immigration Rules was a broad one, and could not be fettered by the terms of her policies.

57. Mr Biggs underlined that, in the decision letter, the Respondent had accepted that she had a discretion as to whether to treat the applicant as having accrued the required 10 years continuous lawful residence (see [14] above) and had considered it. However, Mr Biggs submitted, whilst clearly under a duty to give sufficient reasons to allow the reader to understand what decisions had been reached and why, the Respondent had nevertheless provided no, or no adequate, reasoning as to the basis for and outcome of that consideration, and that it was therefore (at least) unclear on what basis (if any) a decision was made in that regard

58. In the result, Mr Biggs submitted, the Respondent had acted unreasonably in failing to reach a decision with respect to the exercise of discretion, and/or had failed to provide any, or any adequate reasoning as to the exercise of that discretion (which, given that the applicable standard of review was "anxious scrutiny", was sufficient to justify a **Wednesbury** review); and/or (by inference from the absence of any

reasoning showing that the Respondent had properly considered her discretion) had failed to consider material matters and to exercise her discretion reasonably.

59. Those public law errors were material – with the obvious factor supporting the possibility of the exercise of discretion being that the applicant had applied for indefinite leave based on his understanding of Paragraph 276B(v) which, the grant of permission to apply for judicial review by Judge Kopieczek confirmed, was a proper position for him to take.

60. Moreover and importantly, Mr Biggs continued, as argued in support of the first Ground, it was entirely within the spirit and purpose of paragraph 276B generally, and of paragraph 276B(v) in particular, to treat the period awaiting the decision on his application for indefinite leave to remain as a period of "lawful residence", even if that period of lawful residence did not qualify for the purposes on Paragraph 276B(i)(a).

61. At all events, Mr Biggs submitted, it was plainly open to the Respondent to exercise discretion in the Applicant's case and to treat him as having accrued 10 years' continuous lawful residence, and it would be wrong in principle for the Tribunal to usurp the Respondent's decision-making function by imposing its own view as to whether the discretion should have been exercised.

62. Mr Malik submitted, by reference to **R (Thebo) v Entry Clearance Officer [2013] EWHC 146 (Admin)** and **R (Sanaiya) v Upper Tribunal [2016] EWCA Civ 85**, that the Respondent is entitled to have Immigration Rules in mandatory and inflexible terms and to apply them consistently. Thus here, as the Applicant did not meet the requirements of paragraph 276B of the Rules, the Respondent was entitled to refuse his application for indefinite leave to remain.

63. Mr Malik further submitted that it appeared that the Applicant had not asked the Respondent to grant him leave to remain in the exercise of her residual discretion outside the Rules, nor pointed to any exceptional circumstances. Nevertheless, under the heading "Exceptional Circumstances" in her decision, the Respondent had

given express consideration to the Applicant's particular circumstances. There was nothing in the Respondent's published policy that applied to the Applicant's circumstances and, in the context of this Ground, she had acted lawfully and rationally in refusing the Applicant's application.

64. As to the Respondent's consideration of the Applicant's family life, Mr Malik pointed out that the Applicant did not suggest that he qualified under Appendix FM of the Immigration Rules, and submitted that, in any event, it was clear that the Applicant could not meet the requirements for leave to remain – whether as a partner or a parent.

65. Mr Malik submitted that, as to the Respondent's consideration of the Applicant's private life, it was clear that the Applicant had not discharged the burden on him to satisfy the Respondent that he met the requirements of paragraph 276ADE of the Immigration Rules, and that there was no prospect whatsoever of the Applicant being granted leave on that basis. As noted by the Respondent in her decision, he had spent the majority of his life in Bangladesh; he spoke the language; he had material connections there; and would be able to integrate without any significant difficulty.

66. Citing the judgment of Sales J (as he then was) in **R (Nagre) v SSHD [2013] EWHC 720 (Admin)**, as approved by the Court of Appeal in **Singh & Khalid v SSHD [2015] EWCA Civ 74** and in **Agyarko and others v SSHD [2015] EWCA Civ 440**, and by reference to the judgment of Beatson LJ in **Butt v Secretary of State for the Home Department [2017] EWCA Civ 184** at [28], Mr Malik argued that whilst it was technically possible for a person to fail under the Immigration Rules, but to qualify under Article 8, such cases would be exceptional.

67. Mr Malik reminded me of the approach of Lord Bingham in **Huang v Secretary of State for the Home Department [2007] 2 AC 167** at [20]; and of Lord Reed in **Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60** at [53] and **Agyarko v Secretary of State for the Home Department [2017] UKSC 11** at [49] as to the need to bear in mind certain general considerations – including the

general desirability of applying known rules; the damage to good administration and effective control if a scheme is perceived to be unduly porous, unpredictable or perfunctory; the fact that a failure to meet the requirements in the Immigration Rules is a relevant and important consideration in an Article 8 assessment because the Rules reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament; and the importance of considering whether a person's immigration status was "precarious" when the relevant life was established.

68. Mr Malik went on to underline that, in any event, the judgments of the Supreme Court in **Hesham Ali (Iraq)** and **Agyarko** (both above), and the subsequent judgment of the Court of Appeal in **EEA (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 239**, show that Article 8 must now be considered in the light of changes made to the legislative scheme by the Immigration Act 2014 – in consequence of which, he submitted, the appellate scheme is no longer based on the premise that a person may fail under the Immigration Rules, but succeed under Article 8 on appeal. Now, he argued, Courts and Tribunals are obliged to follow sections 117A – 117D (above) – which include the provision that little weight should be given to a private life established by a person at a time when their immigration status is precarious. In that regard, Mr Malik drew attention to the observations of Sales LJ (as he then was) in **Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803** at [30]-[44], [49] & [63].

69. In the result, Mr Malik submitted, taking into account the general considerations to which he had drawn attention, together with the evidence put forward by the Applicant, there was no arguable case that the Applicant could not enjoy his private or family life (if there was one) elsewhere, or that the Respondent's decision prejudiced the Applicant's private or family life in a manner sufficiently serious to amount to a breach of Article 8. The Applicant's Article 8 claim was bound to fail.

Third Ground

70. Mr Biggs submitted that the Respondent's certification of the Applicant's human rights claim was plainly unlawful. It was clear, he argued, from the submissions that

he had advanced in support of the first and second Grounds that "*on at least one legitimate view of the facts or the law the claim may succeed*". It was certainly not a case that was so weak that it was bound to fail. Rather the plainly correct decision of Judge Kopieczek showed that it was at least arguable that the Applicant's case as to paragraph 276B(v) was right. There was at least a real prospect of the Applicant showing on appeal that he was entitled to leave under paragraph 276B; and/or that the Respondent had acted unlawfully and unreasonably regarding the exercise of discretion; and in any event given the length of the Applicant's lawful residence in the UK and all the circumstances.

71. Even if Grounds 1 & 2 were rejected, Mr Biggs submitted, a crucial factor which supported the Applicant's Article 8 case was the lack of any rational or proportionate justification for the restrictive construction of paragraphs 276B(1)(a) and 276B(v). There could, he submitted, be no justification for allowing a migrant to reside in the UK by paragraph 276B(v), while also preventing that migrant from relying on his legitimate residence in the UK for at least ten years continuously. For that reason, and by reference to **R (Quila & Anor) v SSHD [2012] 1 AC 621** at [45] – [59] & [73] – [80], there was, he submitted, no proportionate justification for refusing the Applicant's application for indefinite leave to remain.

72. Adopting his earlier submissions, Mr Malik argued that there was clearly a rational and proportionate justification for the Respondent's construction of paragraphs 276B(1)(a) and 276B(v); that the Respondent had carefully considered everything that the Applicant had put forward; that, on any legitimate view, the Applicant's Article 8 claim had no prospect of success and was bound to fail; and that the Respondent's certificate under s.94 was plainly rational.

Conclusions

73. I accept that the question of whether the Applicant's human rights claim is "clearly unfounded" involves a black and white objective test independent of the burden of proof. If there is any reasonable doubt in favour of the claim, then it is not "clearly

unfounded". Equally, I have applied the "anxious scrutiny" standard of **Wednesbury** review, and considered the questions posed in **Razgar** (above).

74. As to the first Ground, I reject Mr Biggs' argument that Upper Tribunal Judge Kopieczek's decision to grant permission amounted to the binding and unassailable conclusion that the Applicant's case as to the correct approach to paragraph 276B(v) of the Immigration Rules was properly arguable. Rather, I agree with Mr Malik that the ultimate decision is a matter for me, with the benefit of full argument – which the judge, on permission, had inevitably not received.

75. The parties are rightly agreed that paragraph 276B of the Immigration Rules sets out five separate requirements. For the reasons advanced by Mr Malik (summarised above) I conclude that:

    (1) Given the definition of "*lawful residence*" in paragraph 276A(b), it is hopeless to argue that the Applicant could meet the first requirement under paragraph 276B(i)(a).

    (2) It is obvious from the structure of paragraph 276B, read in conjunction with Paragraph 276D, that paragraph 276B(v) is a freestanding requirement additional to sub-paragraph (1)(a) and consistent with the general amendment of the Immigration Rules to the effect that applications for leave to remain by persons who have overstayed for more than 28 days will be refused on that Ground.

    (3) There is no arguable merit in Mr Biggs' contention that the Applicant was to be treated, for the purposes of paragraph 276B, as if he had leave to remain and thus to be in "*lawful residence*"; nor in the contention that the Respondent's construction would lead to starkly unfair results to applicants. Rather, it is readily foreseeable that if applicants were to be so treated, it would create fertile ground for the abuse of the system.

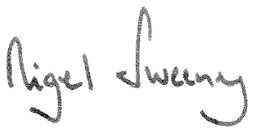
76. In those circumstances it is not necessary to reach any concluded view in relation to Mr Malik's argument that the critical date was 7 November 2016, not 4 February 2016.

77. As to the second Ground, and again for the reasons advanced by Mr Malik (summarised above), I conclude that it is simply not arguable that the Respondent acted unreasonably by failing to reach a decision with respect to the exercise of discretion; and/or by failing to provide any, or any adequate, reasoning as to the exercise of that discretion; and/or by failing to consider material matters and to exercise her discretion reasonably. In my view, having considered the questions posed in **Razgar** (above), the Applicant's Article 8 claim was bound to fail.

78. I therefore conclude in relation to the first and second Grounds, for the reasons referred to above, that this is not a case in which "*on at least one legitimate view of the facts or the law the claim may succeed*". On the contrary, it was "*clearly unfounded*" bound to fail. Hence, I have rejected those Grounds.

79. That rejection is fatal to the principal argument advanced by Mr Biggs in support of the third Ground. Equally, in my view, and again for the reasons advanced by Mr Malik (above), there is no arguable merit in Mr Biggs' alternative argument that the Respondent's construction of paragraphs 276B(1)(a) and 276B(v) lacked rational or proportionate justification.

80. In the result, I have no hesitation in concluding that the Applicant's Article 8 claim had no prospect of success and was bound to fail, and that the Respondent's certificate under s.94 that the application was "*clearly unfounded*" was plainly rational. Accordingly, the application for judicial review is refused.



The Honourable Mr Justice Sweeney

22 October 2018