



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: HU/13977/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

**On 15 September 2020 by Skype for
Business**

**Promulgated
On 17 November 2020**

Before

**THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT**

Between

**MOHAMMED ALAUDDIN
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel (Direct Access)

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION ON APPLICATION FOR PERMISSION

1. The appellant, a citizen of Bangladesh born in 1974, has applied for permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (First-tier Tribunal Judge Herlihy) who, following a hearing at Taylor House on 25 January 2019, dismissed the appellant's human rights appeal against the decision of the respondent on 20 June 2018 to refuse the appellant's application for indefinite leave to remain on the basis of ten years' lawful residence. It is common ground that the refusal of that application constituted the refusal by the respondent of a

human rights claim made by the appellant, thereby generating a right of appeal to the First-tier Tribunal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002.

2. The appellant arrived in the United Kingdom in March 2007 with leave as a student. Further leave was granted by the respondent to the appellant in that capacity; but on 6 January 2015, the appellant's application for such further leave was refused. The appellant exercised his right of appeal to the First-tier Tribunal but he became appeal rights exhausted on 19 September 2016.
3. On 13 October 2016, the appellant applied for leave to remain on the basis of his family/private life, varying that application on 2 December 2016 to one for indefinite leave to remain outside the Immigration Rules. On 8 March 2017, the appellant again varied the application; this time, to make it one for indefinite leave to remain on the basis of ten years' residence under paragraph 276B of the Immigration Rules.
4. On 20 June 2018, the respondent refused the appellant's application on the basis that, when he became appeal rights exhausted in September 2016, the appellant was more than 28 days away from accruing ten years' continuous residence. As we have said, this decision is the subject of the present appeal.
5. At the hearing on 25 January 2019, there was discussion before Judge Herlihy as to the effect of paragraph 276B(v) of the Immigration Rules. Paragraph 276B provides as follows:-
 - "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."

6. Judge Herlihy noted the appellant's representative as submitting that, because the appellant made an application for leave in September 2016 which was, in fact, within 24 days after his statutorily extended leave (under section 3C of the Immigration Act 1971) had expired, the effect of paragraph 276B(v) was to treat the appellant's new application as if it had been made while the appellant had leave to remain. This meant that the appellant had achieved ten years' continuous lawful residence, as required by paragraph 276B(i)(a).

7. Judge Herlihy found on this issue as follows:-

- "18. Having carefully considered the submissions made by the Appellant's representative I find that he has conflated 3C leave with provisions allowing for the disregarding of any period of overstaying of up to 28 days which was a position at the time the Appellant submitted his current application that he subsequently varied. The Appellant's period of lawful leave (which had been extended by section 3C of the 1971 Act) ended on 19 September 2016 when his appeal rights became exhausted. As the Appellant's lawful leave expired on 19 September 2016 when his appeal rights were exhausted, I find that that [sic] his leave could not be extended by virtue of section 3C when submitting a fresh application and there was a break in his lawful residence. The Appellant needs to rely on the statutory extension of leave allowed by section 3C as had not accrued 10 years lawful continuous residence when he made his application on 19 September 2016.
- 19. The effect of paragraph 276B(v) was that the Appellant was able to make a further application which would be regarded as an in-time application but this did not extend his 3C leave. He was not covered by the provisions of section 3C of The Immigration Act 1971 when he made his application on 13 October 2016 and therefore that the Appellant cannot demonstrate 10 years continuous lawful residence in the United Kingdom since at the date of the application, he had only accrued continuous lawful residence totalling 7 years and 9 months.
- 20. Section 3C applies, by subsection (1), where an application for variation of an existing leave is made before that leave expires (and provided that there has been no decision on that application before the leave expires). However, in this case there had been a decision on the Appellant's application on 19 September 2016 so that by the time he made his subsequent application on 13 October 2016 there was a break in his continuous lawful

residence as at that date he had no extant leave. Section 3C does not extend leave where the application is made after the applicant's current leave has expired. If a person does not already have section 3C leave the fact that they are entitled to an in-country right of appeal against a decision does not give them section 3C leave."

8. At paragraph 21, Judge Herlihy considered the submission that, regardless of paragraph 276B, the appellant had now been in the United Kingdom for over eleven years and most of that time had been with lawful leave. Discretion should, therefore, have been exercised in the appellant's favour. Judge Herlihy was unpersuaded by that submission. Turning to Article 8, outside the Rules, Judge Herlihy found that the appellant had spent his formative life in Bangladesh, having studied to postgraduate level in that country. He had obtain further qualifications in the United Kingdom. The appellant had an uncle in the United Kingdom but no evidence to attest to the strength of his relationship with that relative, other than the general claim that he and his uncle were close.
9. Judge Herlihy found that the appellant's family ties subsisted entirely in Bangladesh. There was no satisfactory evidence that he would face any significant obstacles in Bangladesh, where he had family members. He had spent the first 33 years of his life there. There were no disclosed health conditions. The judge was not satisfied that the appellant had lost cultural, family and social ties to Bangladesh or that he had disclosed the existence of an unjustifiably harsh set of exceptional circumstances; or that there were insurmountable obstacles or arguably good grounds for granting leave to remain outside the Rules (paragraphs 22 and 23).
10. The appellant had submitted "almost no evidence of his private life in the United Kingdom or the extent of his ties and connections to the country" (paragraph 24). There was no evidence as to how he supported himself financially. There were no letters of support from friends, employers or organisations to whom he had links (paragraph 24).
11. At paragraph 25, Judge Herlihy noted that the appellant had developed such private life as he had in the United Kingdom at a time when he knew that the same was dependent upon meeting the requirements of the Immigration Rules. His immigration status throughout had been precarious.
12. At paragraph 27, balancing everything for and against the appellant, Judge Herlihy concluded that the respondent's decision was proportionate and would not cause the United Kingdom to be in breach of its obligations under the ECHR. She accordingly dismissed the appeal.
13. The appellant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. First-tier Tribunal Judge Robertson refused the application on 25 February 2019. The appellant then applied to the Upper Tribunal for permission. The first ground asserted that Judge Herlihy erred in law in conducting the proportionality exercise under Article 8. Candidly, the grounds submitted that the appellant "did not place significant

evidence before the FTJ but this it is submitted down to the representatives” [sic]. The appellant had subsequently changed representatives and if permission were granted, could, “subject to Rule 15(2) [sic] provide further evidence of his life in the UK to substantiate his claim”. The grounds then contended that the consideration of proportionality was flawed, given that the appellant “is 44 years old, has been in the UK for almost 12 years and the basis of the Respondent’s refusal is incorrect and failed to consider their own discretion under the Rules”. Finally, it was submitted that the appellant had been waiting between 2016 and 2018 for a decision which he believed would be successful. If the application had been refused sooner, then the appellant “could have made a different application, for discretionary leave or 30 months leave for example, instead which would likely have been successful”.

14. Ground 2 related to the Immigration Rules. The ground contended that the appellant had applied within 28 days of his section 3C leave expiring. Having regard to paragraph 276B(v) and paragraph 39E of the Immigration Rules, the thrust of the ground was that the appellant had, in fact, met the requirements of paragraph 276B in order to be granted indefinite leave to remain in the United Kingdom, because of 10 years’ lawful residence in the United Kingdom.
15. On 15 April 2019, Upper Tribunal Judge Kekić refused permission to appeal. She concluded that the grounds were not made out. Judge Herlihy had “properly considered all the available evidence and reached wholly sustainable conclusions”. Judge Kekić regarded the challenge as no more than a disagreement with the outcome of the appeal.
16. The appellant challenged Judge Kekić’s refusal of permission to appeal by means of a judicial review under CPR 54.7A. That judicial review was ultimately successful, resulting in the quashing of the refusal of permission. Regrettably, the Upper Tribunal has not been provided with the grounds of challenge or the decision to grant permission. What we do have, is a copy of the summary grounds of resistance filed by the Secretary of State, as an interested party. These grounds were, apparently, ordered to be filed by Sir Ross Cranston, sitting as a High Court Judge.
17. The following passage is of significance:-

“Grounds of challenge: UTJ Kekic has failed to properly engage with the grounds of appeal before the UT and those previously before the FTT and no consideration has been given to the FTT’s failure to consider Paragraph 39E of the Immigration Rules
21. The Claimant asserts that UTJ Kekic has failed to give reasons for refusing the application for PTA. The Defendant submits that this is entirely unarguable. However, the substance of the Claimant’s first ground of challenge appears to be that no consideration has been given to the grounds of appeal, as before either the UT or the FTT, as no consideration has been given to the failure of Judge Herlihy to

properly consider paragraph 39E of the Immigration Rules (in combination with paragraph 276B).

22. The Defendant submits that, UTJ Kekic's statement that "[t]he Judge properly considered all the available evidence" and his emphasis on the Claimant's failure to show that the outcome of the FTT appeal "is arguably tainted by legal errors" demonstrates that he considered the grounds of appeal along with the FTT's determination and reached his decision on the basis of such a consideration.
23. In any event, the Defendant submits that Paragraph 39E of the Immigration Rules 'Exceptions for overstayers' does not apply. Paragraph 39E states:

"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 administration review or appeal being concluded, withdrawn or abandoned or lapsing.
24. The FTT determination, at paragraph 18, finds that *"As the appellant's lawful leave expired on 19 September 2016 when his appeal rights were exhausted, I find that his leave could not be extended by virtue of section 3C when submitting a fresh application and there was a break in his lawful residence. The Appellant needs to rely on the statutory extension of leave allowed by section 3C as he had not accrued 10 years lawful continuous residence when he made his application on 19 September 2016" [see DB/6].* Before the FTT the Claimants' and the Defendant's positions as to the date upon which section 3C leave expired differed. The Claimant submitted that section 3C leave expired on 19 September 2016 whilst the Defendant submitted that it expired prior to 26 January 2015 when the Claimant lodged his appeal in relation to the refusal of 6 January 2015 out of time. The Defendant accepts that the FTT determination proceeds on the basis that 3C leave expired on 19 September 2016. The Claimant then made a fresh application on the basis of family and private life on 13 October 2016.

25. The Claimant appears to rely on Paragraph 39E(2)(ii) on the basis that his family and private life application of 13 October 2016 was made following the refusal of a previous in-time application for leave and within 28 days of any leave extended by section 3C. The Claimant submits that Paragraph 39E was amended in November 2016 so that the reference at subparagraph 1 to '14 days' replaced an earlier reference to '28 days'. The Defendant submits that this is incorrect. The Defendant emphasises that Paragraph 39E did not exist before it was inserted into the Immigration Rules on 24 November 2016 (see paragraph 1.13 of the Statement of Changes at DB/17-18 and, as such, it does not apply to applications made prior to this date. Prior to that date, the applicable paragraph was the former Paragraph 276B, as in place at the time of the application dated 13 October 2016, which read:

"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 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 of up to 28 days and any period of overstaying pending the determination of an application made within that 28 days period."

26. Upon insertion of Paragraph 39E into the Immigration Rules, Paragraph 276B was substituted as follows [see paragraph 7.11 of the Statement of Changes at DB/19:
- “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 further 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.”
27. The Defendant submits that the amended Paragraph 276B (at paragraph 26 above) only applies to applications made on or after 24 November 2016 per the Statement of Changes which states that the changes set out in paragraph 7.11 “... *shall take effect from 24 November 2016, but will only apply to applications made on or after 24 November 2016*” [see DB/15]. As the application is dated 13 October 2016 the former Paragraph 276B applies (see paragraph 25 above). Therefore, if Claimant had met the requirements of Paragraph 276B(i) (a), which he did not as he did not have 10 years of continuous lawful leave, the overstaying of 24 days could have been disregarded in accordance with the former Paragraph 276B(v). The Defendant submits that it is on this basis that the application of 13 October 2016 was refused (see decision letter dated 20 June 2018 at DB/20-27] not, as the Claimant argues, on the basis of him being an overstayer.
28. The Defendant submits that the correct application of the Immigration Rules is not as set out above. The Claimant argues that proper consideration has not been given to Paragraph 39E however, the Defendant submits that this is because Paragraph 39E simply does not apply.”
18. Before us, Mr Turner applied for an adjournment, which we declined. Both he and Mr Deller, who appeared for the Secretary of State, noted that cases involving paragraph 276B(v) were pending before the Court of Appeal. As matters stood on 15 September, however, Mr Turner accepted that the judgment of Sweeny J in R (Juned Ahmed) v Secretary of State for the Home Department [2019] UKUT 10 (IAC) and the citable permission decision of the Court of Appeal in R (Masum Ahmed) v Secretary of State for the Home Department [2019] EWCA Civ 1070 stood in the way of the appellant, so far as concerned his ability to show that he met the requirements of paragraph 276B. We would merely add that this concession is underscored by the now disclosed summary grounds of defence of the respondent, which explain why paragraph 39E of the Immigration Rules in fact could have no application to the appellant’s case.
19. Since the hearing on 15 September, the Court of Appeal has handed down its judgments in Hogue v Secretary of State for the Home Department and Another [2020] EWCA Civ 1357. By a majority, the Court held that where

an individual became an overstayer and remained as such, neither (a) the reference in present paragraph 276B to the current period of overstaying being disregarded where paragraph 39E applies, nor (b) the reference in the previous version of paragraph 276B to “any period of overstaying for a period of 28 days or less” being disregarded enabled an individual to satisfy 276B(i)(a), by counting any part of the period of overstaying so as to show 10 years continuous lawful residence . In each case, the overstaying is, in Underhill LJ’s phrase, open-ended. Properly construed, paragraph 276B does not enable a person who had leave but who becomes an overstayer and remains as such, to contend that such open-ended overstaying counts towards the 10 year requirement.

20. As we have seen, the appellant was, on any view, several months short of 10 years’ continuous lawful residence, when he became appeal rights exhausted on 19 or 29 September 2016. The fact that he may have applied for further leave to remain within 28 days of becoming appeal rights exhausted is irrelevant.
21. Before us, Mr Turner, understandably, did not pursue the Article 8 proportionality ground with any vigour (see paragraph 13 above). That ground, as articulated in the grounds of application to the Upper Tribunal, is entirely hopeless. Judge Herlihy carefully examined such evidence as there was regarding the appellant’s private life in the United Kingdom. She contrasted that with what he would face, if returned to Bangladesh. Her conclusions disclosed no hint of arguable error.
22. For these reasons, we refuse permission to appeal.

No anonymity direction is made.

Mr Justice Lane

Signed

Date: 13 November 2020

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber