



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/02960/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3 January 2020**

**Decision & Reasons Promulgated  
On 20 January 2020**

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**LOKESH CHIPPADA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Karim

For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. By a decision promulgated on 3 October 2019, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons were as follows:

“1. The appellant was born on 11 April 1986 and is a male citizen of India. By a decision dated 30 January 2019, he was refused leave to remain in the United Kingdom by reason of long residence. He appealed to the First-tier Tribunal which, in a decision promulgated on 22 July 2019, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The judge has produced a thorough and detailed decision. It is challenged by the appellant on the basis that the judge relied upon the

case of R ( on the application of Masum Ahmed v Secretary of State for the Home Department [2019] EWCA Civ 1070 which had not been cited in argument before him and which the appellant now claims he is able to distinguish on the facts from his own circumstances. Mr Waheed, who appeared before the Upper Tribunal, submitted that Ahmed was, in essence, a ‘rules-based decision’ in which reference had not been made to the Secretary of State’s own policy, Long Residence Version 15.0 (April 2017). Likewise, although the judge had before him the Secretary of State’s policy, he appears to have made no reference to it in reaching his decision. Mr Waheed submitted that, on the particular facts as found by the judge, the appellant may have benefited from an application of the policy notwithstanding the fact that he failed to meet the strict letter of the relevant Immigration Rules.

3. Mr Tarlow, who appeared for the Secretary of State before the Upper Tribunal, submitted that there was no material error in the decision of the First-tier Tribunal.

4. It is clear from what the judge states at [52] that he placed considerable weight upon the decision in Ahmed. It is also clear that, by relying upon the case but failing to give the appellant’s representative any opportunity to make submissions in respect of it and, in particular, to explain why the present appellant’s circumstances were not covered by the ratio of the judgement, the judge may have deprived the appellant of a fair hearing of his appeal. For this reason, I set aside the decision of the First-tier Tribunal. However, I see no reason to set aside the judge’s decision not to uphold the refusal under paragraph 320(1) for the reasons which he gives at [54]. I briefly discussed disposal of the appeal with the representatives at the initial hearing and they agreed that, if the decision were to be set aside, it would be necessary for there to be a resumed hearing at which both parties may make submissions in respect of the relevant jurisprudence and, in particular, the application and relevance, if any, of the Secretary of State’s policy. I therefore make the following directions:

### **DIRECTIONS**

A. The decision of the First-tier Tribunal promulgated on 22 July 2019 is set aside. The only issue remaining to be determined in the Upper Tribunal concerns the application to the facts as found by the judge of any relevant jurisprudence including R (on the application of Masum Ahmed v Secretary of State for the Home Department [2019] EWCA Civ 1070 and also the Secretary of State’s policy, Long Residence Version 15.0 (April 2017). The judge’s finding that paragraph 320(1) does not apply in the instant appeal shall stand.

B. Both parties shall file at the Upper Tribunal and send to the other party a skeleton argument addressing the issues remaining to be determined in this appeal no later than 10 days prior to the resumed hearing.

C. The resumed hearing shall take place before Upper Tribunal Judge Lane at Field House on a date to be fixed not before 1 November 2019. No interpreter. 2 hours allowed.

### **Notice of Decision**

The decision of the First-tier Tribunal is set aside. The decision will be remade in the Upper Tribunal (Upper Tribunal Judge Lane) at or

following a resumed hearing on a date to be fixed. The attention of the parties is drawn to the directions at A-C above.”

2. My primary concern at the initial hearing was that the judge had placed heavy reliance upon the case of *Ahmed* without having given the appellant’s representative an opportunity to make submissions in respect of it. Having considered the oral submissions are both representatives at the resumed hearing, including their submissions in respect of *Ahmed*, I am satisfied that the appellant’s appeal against the decision of the Secretary of State should be dismissed.
3. The agreed facts are that the appellant entered the United Kingdom on 11 October 2008 with entry clearance as a student. He applied for further leave to remain which was refused by decision dated 20 June 2011. The appellant made an appeal against that decision outside the 14 day period permitted but he withdrew the appeal on 25 October 2011. He made a further application for leave to remain on 2 December 2011, an earlier application having been lost by in the post. The appellant was then granted leave to remain until 28 March 2014. Thereafter, he applied in time for further leave to remain as an entrepreneur migrant and his application was granted until 28 March 2017. The appellant was granted further leave to remain till 18 April 2019. The appellant’s leave was curtailed on 16 March 2018 to expire on 22 May 2018. The appellant then applied in time for further leave to remain outside the Immigration Rules and that application was subsequently varied to an application for indefinite leave to remain on the basis of long residence. The application was refused by a decision dated 30 January 2019. It is that decision which is the subject of this appeal.
4. The appellant submits that the respondent has failed to follow his own policy as regards long residence (Version 15.0, April 2017). This policy provides that ‘when refusing an application on the grounds that was made by an applicant who had overstayed by more than 28 days before 24 November 2016, [the respondent’s officer] must consider any evidence of exceptional circumstances which prevented the applicant from applying within the first 28 days of overstaying.’ Given that the respondent had exercised discretion on the same facts when granting the application which the appellant resubmitted in December 2011, the appellant submits that the respondent should properly have exercised discretion in the appellant’s favour by finding that exceptional circumstances had prevented the appellant showing 10 years continuous lawful residence.
5. The appellant does not disagree that, during the period 20 June 2011 until he was granted leave to remain on 27 January 2012, he did not reside lawfully in the United Kingdom. What is also clear is that, following the Court of Appeal’s decision in *Ahmed*, the saving provisions of the Immigration Rules (in particular, 39E (Exceptions for Overstayers) do not convert periods of overstaying which are to be disregarded as regards the lodging of leave to remain applications into periods of continuous lawful residence. The appellant cannot, therefore, enjoy any relief from the

provisions of the Immigration Rules. Further, the Court of Appeal in *Ahmed* said this in respect of the Secretary of State's policy:

(8) If and insofar as reliance is placed on the SSHD's "Long Residence" Guidance (Version 15.0) published on 3rd April 2017, this does not avail the Appellant. We note that "Example 1" and "Example 2" on page 16 of the Guidance say that "gaps in lawful residence" can be disregarded because "the rules allow for a period of overstaying of 28 days or less when that period ends before 24 November 2016". This does not accord with the true construction of paragraph 276B as set out above, although it may reflect a policy adopted by the SSHD. However, it is axiomatic that the intention of the Rules is to be discerned "objectively from the language used" not from e.g. guidance documents (per Lord Brown in *Mahad (Ethiopia) v. Entry Clearance Officer* [2010] 1 WLR 48 (2009) at paragraph 10). The SSHD may wish to look again at the Guidance to ensure that it does not go any further than a statement of policy.

6. As the Court of Appeal notes, the Immigration Rules and the policy are not consistent. Even if discretion were to be exercised in the appellant's favour under the policy, this would not mean that he satisfied the provisions in the Immigration Rules for long residence; only compliance with the Rules would weigh as a factor in favour of the appellant in the Article 8 proportionality assessment. Further, the fact that the Secretary of State chose to grant leave to remain to the appellant after a period of overstaying cannot mean that the Secretary of State is obliged to find that exceptional circumstances existed which prevented the applicant from applying within the first 28 days of overstaying. The examples in the policy refer to 'travel or postal delays which meant the applicant or their representatives not able to submit the application in time' I take that provision to refer to problems which might prevent an applicant by, for example, reasons of sickness from submitting an application in time as indicated in Example 3 which is quoted in the appellant's grounds of appeal. Moreover, I do not consider, as asserted in ground 3, that the treatment by the Secretary of State of this appellant is so inconsistent as to threaten the administration of fair immigration control. Ultimately, and for the reasons articulated by the Court of Appeal in *Ahmed*, there was a break in the appellant's continuous lawful residence in the United Kingdom which meant that he did not satisfy the provisions in the Immigration Rules. Consequently, the appellant was unable to assert that he has satisfied the provisions of the Immigration Rules as a factor weighing in his favour in the Article 8 ECHR appeal. As a result, the succinct disposal of the human rights appeal which was provided by the First-tier Tribunal at [57] is unimpeachable. Indeed, other than the failure of the judge to give the appellant's representative the opportunity to make submissions in respect of *Ahmed*, I agree with the entirety of the First-tier Tribunal judge's approach and analysis. In the circumstances, the appeal is dismissed.

### **Notice of Decision**

The appeal against the decision of the Secretary of State dated 30 January 2019 is dismissed.

Signed

Date 14 January 2020

Upper Tribunal Judge Lane