



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

Appeal Number: HU/05551/2020

THE IMMIGRATION ACTS

**Heard at Field House
by Microsoft Teams
On 11 June 2021**

**Decision sent to parties on:
On 23 June 2021**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**JEEVITHAN MAHENDIRAJAH
[NO ANONYMITY ORDER]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Parminder Saini of Counsel, instructed by My Legal Limited

For the respondent: Mr Stephen Whitwell, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal on 4 January 2021 dismissing his appeal against the respondent's decision on 13 March 2021 to refuse him leave to remain in the United Kingdom on long residence grounds pursuant to paragraph 276B(i)(a) (10 years' lawful residence), 276ADE(1)(vi) (significant obstacles to

reintegration in his country of origin) or outside the Immigration Rules HC 395 (as amended) on Article 8 ECHR human rights grounds. The appellant is a citizen of Sri Lanka.

2. **Mode of hearing.** The hearing today took place remotely by Microsoft Teams. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.
3. **Technical difficulties.** Mr Saini, who appears for the appellant, is a practising barrister who is also a Deputy Upper Tribunal Judge. He appeared on Teams this morning as 'Deputy Upper Tribunal Judge Saini', having signed in with his eJudiciary email address. Mr Saini explained that he was having some technical difficulties in switching between that and his professional identity as Counsel.
4. I have made it clear to Mr Awan (the appellant's solicitor) and to the appellant that this error is a professional matter which will have no effect on the outcome of the appeal. Mr Whitwell, who appeared for the respondent, consented to the Upper Tribunal proceeding to hear the appeal.

Background

5. The appellant came to the United Kingdom as a Tier 4 student on 24 October 2009. He made his application for indefinite leave to remain on the basis of 10 years' lawful residence on 1 October 2019, when he was three weeks short of the required 10 years' residence, leaving to one side the question whether such residence was lawful.
6. His history is that he had Tier 4 leave until 15 March 2014, when it ended by curtailment with no right of appeal. On 14 March 2014, before the curtailment took effect, the appellant made an in-time fresh application for further Tier 4 leave but that was refused on 27 May 2014. The respondent's case is that the appellant had no extant leave thereafter.
7. On 16 June 2014, the appellant made another Tier 4 application in the Integrated Case Worker process, which was refused with an in-country right of appeal on 19 May 2015. The appellant now asserts, without proof, that he was never served with the 27 May 2014 refusal letter and that the 16 June 2014 application was a variation of his 14 March 2014 application, which if correct would extend his valid leave to 16 November 2017. The appellant was appeal rights exhausted on 16 November 2014 on that application.
8. On 30 November 2017, the appellant made an in-country application for leave to remain on Article 8 grounds outside the Rules. The application was refused initially with an out of country right of appeal, then reconsidered and voided on 20 September 2019. On 8 August 2018, the

appellant made a private and family life application which was also declared void on 14 October 2019.

9. On 1 October 2019, the appellant submitted the present application.

Refusal letter

10. In her letter of 13 March 2020, the respondent noted the gap of more than 30 days between 27 May 2014 and 26 June 2014, such that section 3C of the Immigration Act 1971 did not apply to extend the appellant's lawful residence. The appellant's continuous lawful residence was 4 years and 7 months and paragraph 276D with reference to paragraph 276B(i)(a) was inapplicable to him.
11. No family life was or is asserted. In considering private life, the respondent applied paragraph 276ADE. The appellant was 33 years old at the date of decision, having come to the United Kingdom in 2009, age 22. Sub-paragraphs 276ADE(1)(iii),(iv), and (v) were not applicable on the facts. Sub-paragraph 276ADE(1)(vi) (very significant obstacles to reintegration) was not applicable either as the appellant had not shown that he had completely lost all ties to Sri Lanka: his mother still lived there and he had spent 2/3 of his life there before coming to the United Kingdom.
12. Nor were there any exceptional circumstances for the grant of human rights leave to remain outside the Rules. The appellant had only ever had limited leave as a student which was not a route to settlement. The appellant had not relied on any family life relationships in the United Kingdom and the state had a right to control the entry of non-nationals into its territory. The appellant's removal would be proportionate. No compassionate factors had been advanced.
13. The respondent refused the application and the appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

14. On 7 January 2021, First-tier Judge O'Rourke dismissed the appeal. It is relevant to note at [15 (iii) and (iv)] certain of the submissions made by Mr Awan, the appellant's solicitor, who argued that:

"15. ...(iii) It is conceded that applying [*Hoque & Ors v The Secretary of State for the Home Department* [2020] EWCA Civ 1357 (22 October 2020)], the appellant cannot meet the requirements of paragraph 276B, even if applying paragraph 39E, when considering open-ended overstaying. Nonetheless, the Tribunal is invited to find, as a fact, that he remained within the ambit of 39E, as a result of his valid application in 2017. If indeed he had no status, why was he subsequently given a right of appeal? Therefore, applying 39E and taking into account his consistent immigration

history, he has not overstayed. In any event, as it seems likely that *Hoque* is to go to appeal to the Supreme Court, the appellant reserves his position on this issue. ...

(v) In respect of Article 8, the Rules don't have to be met to make a positive finding, and in this case, as the appellant meets all the requirements of section 117B [(2) and (3)] in respect of language, behaviour and educational quals, it would be disproportionate to refuse his appeal. It cannot be in the public interest, in respect of the United Kingdom econ, to return such a highly-educated person to Sri Lanka, particularly when he is already integrated into the United Kingdom."

15. The First-tier Judge found as a fact that the appellant could not show 10 years' continuous lawful residence, since from June 2014, he was an 'open-ended' overstayer to whom paragraph 39E was not applicable. He had not made the June 2014 application within 14 days of the expiry of his most recent leave, nor shown any good reason beyond his control as to why he could not have done so.
16. The appellant conceded in his chronology for the First-tier Tribunal that his previous Article 8 ECHR appeal had been unsuccessful. His evidence on job offers and so forth in the United Kingdom was described as 'confused and contradictory' and the judge noted that applying *Jeunesse v. the Netherlands - 12738/10* [2014] ECHR 1309 he had no right to expect that he would be permitted to settle in the United Kingdom.
17. The judge then applied section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended). He gave little weight to the private life the appellant developed while unlawfully in the United Kingdom. At [24(iii)] he may have misdirected himself in relation to section 117B(4)(a), but plainly, section 117B(4)(b) does not apply. All of the appellant's residence in the United Kingdom has been either precarious or unlawful. There was in any event, very little evidence of private life, even had there been no such statutory presumption in operation.
18. The First-tier Judge dismissed the appeal and the appellant appealed to the Upper Tribunal.

Permission to appeal

19. The application for permission to the Upper Tribunal on 21 January 2021 argued that:
 - (a) the First-tier Judge's findings of fact about the appellant's immigration history were inadequate. His appeal rights on the 26 June 2014 ICW application were not exhausted until 16 November 2017, not 2016, by which time paragraph 39E had been added to the Immigration Rules (it was added on 24 November 2016). The applicant contended that he had section 3C leave during the appeal and that he had made his next application on 30 November 2017, within 14 days of becoming

appeal rights exhausted on that appeal. The Upper Tribunal had failed to make solid findings of fact on this point; and that

- (b) the 26 June 2014 application was a timely application under the pre 39E version of the Immigration Rules. The applicant had been an overstayer only since 16 November 2017.

The appellant continued to reserve his position pending the expected appeal to the Supreme Court against the Court of Appeal's decision in *Hoque*. There was no challenge to any other findings of fact or credibility in the First-tier Tribunal's decision.

20. Permission to appeal was granted by First-tier Judge Parkes, for the following reasons:

“...2.The grounds argue that the judge erred in the findings made on the appellant's immigration history and failed to address the length of the appellant's lawful residence and whether the appellant had overstayed from 27 May 2014 or from 16 November 2017.

3. With some hesitation, it may be arguable that the judge did not address properly the actual lawful residence and the periods involved. I bear in mind the differences expressed in *Hoque*, but as Dingemans LJ observed, it could not have been intended that an appellant would qualify if an application was refused and followed by a further application with [sic] the required period. ...”

21. Following triage directions given in the light of the Covid pandemic, both parties agreed to a remote video hearing and made further written submissions.

Appellant's skeleton argument

22. For the appellant, Mr Saini in his skeleton argument identified that there was an issue as to whether the appellant's 3C leave ended on 27 May 2014 or 16 November 2017, Mr Saini set out the chronology at [9]. I do not recite the chronology here, since it is not disputed, save for the argument as to service of the 27 May 2014 decision.

23. Mr Saini contended that it was for the respondent to show that the May 2014 decision had been served, and that as the appellant had been given a right of appeal against the respondent's decision of 26 June 2014, that raised a presumption that it had not been served and 3C leave still applied. The respondent had not produced evidence of service of the 27 May 2014 decision and that the June 2014 application was a variation of the application made in March 2014, thereby extending section 3C leave until 16 November 2017. The First-tier Judge had erred in failing to resolve the issue.

24. Mr Saini in his skeleton argument criticised the decision of the Court of Appeal in *Hoque* and put the Upper Tribunal on notice that if *Hoque* were

followed in this decision, he would seek permission to appeal by way of leapfrog directly to the Supreme Court. That is a matter for the appellant and his advisers, not for this Tribunal. *Hoque* has not been overturned by the Supreme Court nor does it appear that permission to appeal was granted there: accordingly, the Court of Appeal's judgment remains binding on the Upper Tribunal, as are all Court of Appeal decisions.

25. Mr Saini's skeleton argument contains submissions on whether the appeal should be remitted to the First-tier Tribunal, if the decision were set aside. That argument is not reached, because for the reasons I give below, I am not satisfied that the grounds of appeal or Mr Saini's skeleton argument identify any material error of law in the decision of the First-tier Tribunal.

Respondent's case

26. The respondent did not file a Rule 24 Reply but did file a position statement following the triage directions, settled by Mr Stefan Kotas, a Senior Home Office Presenting Officer. Mr Kotas accepted that a further hearing was necessary, and rule 34 was not applied to this appeal.
27. Mr Kotas noted that the appellant had accepted before the First-tier Tribunal that he could not meet the requirements of paragraph 276B, and on that basis, argued that his application for indefinite leave to remain within the Rules was bound to fail. Mr Kotas contended that the appellant would not have submitted a fresh Tier 4 application on 26 June 2014 had he still been awaiting the outcome of his March 2014 application. He invited me to find that it was more likely than not that the May 2014 refusal had been served.
28. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

29. At the hearing today, Mr Saini accepted, as he must, that the appellant could not show 10 years' lawful residence. However, applying *TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department* [2018] EWCA Civ 1109 (17 May 2018), he argued that there was a reduced public interest in the appellant's removal, and repeated his contentions regarding the judgment of the Court of Appeal in *Hoque*.
30. For the respondent, Mr Whitwell acknowledged that the 2014 application would have been handled under the Integrated Case Worker process (ICW). That platform was now defunct and it was not possible for the respondent to interrogate it and provide any further information on what had been served, or when. The evidence that the appellant had, or had not, sought to vary his application in 2014 was within the appellant's possession or control and he should have produced it, if he had it.
31. The accepted immigration history could not be explained by the appellant having asked to vary his application: the section 2014 Tier 4 student application was on its face a fresh application and the grant of an in-

country right of appeal was not dispositive of jurisdiction. The appellant's latest argument, as set out in Mr Saini's skeleton argument, required an application to vary the grounds of appeal which had not been made.

32. The appellant had not challenged the judge's conclusions on proportionality, either in the grounds of appeal or in the appellant's skeleton argument. There was no material error of law and Mr Whitwell invited the Upper Tribunal to dismiss the appeal.
33. In reply, Mr Saini said that the appellant, who had formerly been represented by different solicitors, had no recollection of receiving the May 2014 refusal letter. Mr Saini had sought instructions from his present solicitors and the appellant while Mr Whitwell was speaking: he had been unable to obtain clear instructions or evidence that the June 2014 application was a variation, rather than a fresh application.
34. If the Upper Tribunal were minded to set aside the decision, Mr Saini was instructed to ask for the appeal to be remitted to the First-tier Tribunal rather than for the decision to be remade in the Upper Tribunal.
35. I reserved my decision, which I now give.

Analysis

36. It is quite clear to me that whichever date is applied, the appellant could not at the date of application or the date of decision demonstrate 10 years' lawful residence in the United Kingdom. He entered on 24 October 2009 and on his best case, had no leave after 16 November 2017. He was an 'open-ended' overstayer, in *Hoque* terms. The judgments of Lord Justices Underhill and Dingemans in *Hoque* were subject to a dissent by Lord Justice McCombe. It is the majority view which binds the Upper Tribunal.
37. I have regard to the approach in *TZ (Pakistan)* and approach the Rules first, before moving to consider the judge's analysis of Article 8 ECHR outside the Rules. The judgment of Underhill LJ in *Hoque* sets out a the correct approach to paragraph 276B(v) on which this appellant would have to rely in order to succeed:
 - "8. Paragraph 276B provides (so far as material for our purposes):

"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) ... 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, ... 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

(v) [A] the applicant must not be in the UK in breach of immigration laws, [B] except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. [C] 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."

I have inserted the letters [A]-[C] before each of the elements in sub-paragraph (v) so as to make subsequent reference to them easier.

9. To anticipate, these appeals primarily focus on the effect of sub-paragraph (v) of paragraph 276B. I will have to analyse it more fully later, but at this stage it is important to note that it consists of the primary "requirement" ([A]), followed by provision for two circumstances in which periods of overstaying may be "disregarded" ([B] and [C]), the first of which relates to "*current ... overstaying*" and the second to "*previous ... overstaying between periods of leave*". Those two kinds of overstaying were referred to in the argument before us as, respectively, "open-ended" and "book-ended" overstaying. I should also explain that the distinction under element [C] based on the date of the previous/further application reflects the fact that as from 24 November 2016 the previous general policy under the Rules of disregarding periods of overstaying of under 28 days was abandoned and a regime providing for different kind of disregard ("the paragraph 39E regime") was introduced. ..."

38. The appellant, on his best case, was lawfully present in the United Kingdom from 24 October 2009 to 16 November 2017, a period of less than 10 years. As conceded in the First-tier Tribunal, he cannot therefore succeed within the Rules and the First-tier Judge did not err in so finding.

39. There remains the question whether the appellant can succeed outside the Rules. As regards the question of proportionality, the grounds of appeal do not challenge the judge's analysis, save to contend that the appellant should be given credit for being able to meet sub-paragraphs 117B(2) and (3). In relation to sub-paragraph 117B(2) and (3), I am guided by the reasoning of Lord Justice Sales (with whom Lord Justices Moore-Bick and Sir Stephen Richards agreed) at [59]-[65] in *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803 (02 August 2016). While an *inability* to speak English may be a negative factor, an ability to speak English is neutral in the proportionality assessment, and the same is true of financial independence. I note that the appellant required a fee waiver

in this appeal, but the respondent has not challenged his assertion that he is financially independent.

40. There is no challenge in the grounds of appeal or in Mr Saini's skeleton argument to the conclusion of fact that the appellant had only a minimal private life, as evidenced by a number of letters in his First-tier Tribunal bundle, but no witnesses at the hearing. Such private life as he developed in his period of lawful leave can be given little weight (section 117B(4)(a)) and section 117B(5) also requires that little weight be given to the period when he was here unlawfully. The First-tier Judge did not, therefore, err in giving little weight to his private life.
41. No exceptional circumstances or compassionate circumstances have been advanced. It was also open to the First-tier Judge to conclude that the appellant, who lived in Sri Lanka until he was 22, and whose mother still lives there, had not satisfied him that there would be very significant obstacles to his reintegration, if he were required to return to Sri Lanka now.
42. For all of the above reasons, I find that the grounds of appeal, even taken with the novel contentions in Mr Saini's skeleton argument, do not disclose any material error of law in the decision of the First-tier Tribunal.
43. The appeal is dismissed.

DECISION

44. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed [Judith AJC Gleeson](#)
Upper Tribunal Judge Gleeson

Date: 11 June 2021