



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/17001/2019

THE IMMIGRATION ACTS

Heard remotely at Field House  
On 16 April 2021 *via Skype for Business*

Decision & Reasons Promulgated  
On 4 August 2021

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR SANJAYKUMAR KANTIBHAI RAMI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr M. Biggs, Counsel, instructed by Connaught Law  
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Following a hearing on 16 April 2021, in a decision and reasons dated 26 May 2021, I found that a decision of First-tier Tribunal Judge Beach promulgated on 8 July 2020 involved the making of an error of law, and set it aside, with all findings of fact preserved. The judge had dismissed an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 against a decision of the Secretary of State dated 8

October 2019 to refuse the appellant's human rights claim, made on the basis of his claimed ten years' continuous lawful residence.

2. My decision of 26 May 2021 may be found in the **Annex** to this decision.
3. As may be seen from my "error of law decision" at [35], following the hearing in the Upper Tribunal on 16 April 2021, I invited written submissions on the impact, if any, of Muneeb Asif (Paragraph 276B - disregard - previous overstaying) [2021] UKUT 0096 (IAC) on the parties' submissions in the case. I am grateful to Mr Biggs for his written submissions in response, received on 10 May 2021. There was no response from the Secretary of State.
4. For the reasons given at [39] of my error of law decision, having set aside the decision of the First-tier Tribunal, in light of the preserved findings of fact and the law as clarified by the Court of Appeal in Hoque v Secretary of State for the Home Department [2020] EWCA Civ 1357, and by this tribunal in Muneeb Asif, my provisional view was that the appeal should be allowed on human rights grounds, on the basis that the appellant met the requirements for paragraph 276B of the Immigration Rules. Pursuant to the clarification provided by Hoque and, in particular Muneeb Asif, which confirmed that "disregarded" overstaying amounts to positive residence for the purposes of accruing ten years' continuous lawful residence, I explained that I was minded to allow the appeal.
5. In order to secure the greatest possible fairness to the parties, in particular the Secretary of State, I gave the parties 14 days within which to make any submissions concerning that proposed approach. The appellant, not surprisingly, did not object. The Secretary of State did not respond, as was within her gift to do so, of course.
6. I have considered whether it is necessary to reconvene the parties in order justly and fairly to dispose of this appeal. In light of the position adopted by the Secretary of State on both occasions post-hearing submissions were sought, I consider that there would be no reason to reconvene the hearing, with the ensuing cost, delay and impact on the tribunal's resources, in light of the unchallenged findings of fact, and the position adopted by the Secretary of State.
7. Accordingly, for the reasons set out in the accompanying error of law decision, and pursuant to the preserved findings of fact, I allow this appeal on human rights grounds. The appellant meets the requirements of paragraph 276B of the Immigration Rules, pursuant to the understanding of that provision as clarified by the two authorities referred to above. I provided the Secretary of State with the opportunity to make submissions contending that a different approach should be adopted, and she declined to do so.
8. I remake the decision of the First-tier Tribunal by allowing the appeal.

**Notice of Decision**

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed            *Stephen H Smith*            Date 27 July 2021

Upper Tribunal Judge Stephen Smith

Annex - Error of Law Decision



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/17001/2019

THE IMMIGRATION ACTS

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Appellant

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**Representation:**

For the Appellant: Mr M. Biggs, Counsel, instructed by Connaught Law  
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS (V)**

*This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.*

*The documents that I was referred to were the grounds of appeal, the appellant's written submissions dated 3 December 2020, the respondent's written submissions dated 4 December 2020, and the decision of the First-tier Tribunal, the contents of which I have recorded.*

*The order made is described at the end of these reasons.*

*The parties said this about the process: they were content the proceedings had been conducted fairly in their remote form.*

1. This is an appeal against a decision of First-tier Tribunal Judge Beach promulgated on 8 July 2020 dismissing an appeal by the appellant, a citizen of India born 28 August 1975, against a decision of the respondent dated 8 October 2019 to refuse his human rights claim made in the form of an application for indefinite leave to remain under paragraph 276B of the Immigration Rules.
2. The hearing before me took place remotely in order to guard against the spread of Covid-19. Both parties confirmed at the end of the hearing that they were content that the proceedings had been conducted fairly.

#### *Factual background*

3. The appellant entered the United Kingdom on 16 September 2009 with leave to remain as a student. On the unchallenged findings of fact reached by the First-tier Tribunal, he held leave to remain until 28 November 2018. That was the date upon which proceedings challenging the refusal of an application he submitted on 1 April 2014 for further leave to remain as a student was finally determined. On 12 December 2018, fourteen days after the final determination of his 1 April 2014 application, the appellant submitted a further application, which, following two variations, led to leave being granted to the appellant as a Tier 4 dependent partner on 30 April 2019.
4. On 1 October 2019, the appellant made a human rights claim in the form of an application for indefinite leave to remain under the long residence provisions of the Immigration Rules. Paragraph 276B, under which the appellant applied, requires applicants to demonstrate ten years' continuous lawful residence, as well as to meet other criteria. That application was refused on 8 October 2019, and it was that refusal decision that was under appeal before the First-tier Tribunal.
5. The appellant's application for indefinite leave to remain was refused on the basis that he had not accrued ten years' continuous, lawful residence for the purposes of paragraph 276B. His relevant immigration history is as follows:

16 September 2009	Appellant entered the UK with leave as a Tier 4 student, valid until 31 October 2010
26 October 2010	Appellant applied for further leave to remain as a Tier 4 migrant
16 February 2012	Appellant's 26 October 2010 application refused and directions are given for the

	appellant's removal under section 47 of the Nationality, Immigration and Asylum Act 2006. The appellant appeals.
24 April 2012	Appellant's appeal dismissed.
4 May 2012*	Appellant is 'appeal rights exhausted'
2 July 2012*	Appellant applies for further leave to remain as a Tier 4 student.
15 November 2012*	Appellant's 2 July 2012 application is refused 'with no right of appeal'
23 January 2013*	Appellant lodges an appeal
30 January 2013*	Duty Judge of the First-tier Tribunal accepted that the 15 November 2012 refusal carried a right of appeal
5 June 2013*	Appellant's appeal allowed
22 October 2013*	Appellant granted further leave to remain, valid until 13 April 2014
1 April 2014	Appellant applies for further leave to remain as a Tier 4 migrant
20 May 2014	The appellant's 1 April 2014 application is refused, appeal, remittal to the Secretary of State, reconsideration, and a further appeal followed.  At [51], the First-tier Tribunal held that the appellant held leave to remain between 13 April 2014 and 28 November 2018
27 May 2014	Appellant lodges appeal against 20 May refusal
21 August 2014	Appeal allowed, matter remitted to the Secretary of State to be reconsidered
1 February 2016	Upon reconsideration, the 1 April 2014 application is refused
24 March 2016	Secretary of State undertakes reconsiders her reconsideration of the 1 April 2014 application
3 July 2017	1 April 2014 application refused, with right of appeal
14 July 2017	Appellant appeals against 3 July 2017 refusal of 1 April 2014 application
17 July 2018	Appeal against refusal of 1 April 2014 application dismissed by the First-tier Tribunal; permission to appeal refused by the FTT on 13 September 2018, and by the UT on 28 November 2018

28 November 2018	Appellant becomes 'appeal rights exhausted' in relation to the challenge to the 1 April 2014 decision
12 December 2018	Appellant applies, initially for leave outside the rules, varied on 22 March 2019 to an application for leave on the basis of his family life, and again on 10 April 2019 to the spouse of a settled person, and again on 30 April 2019 to a Tier 4 dependent partner
25 September 2019	Appellant granted leave as Tier 4 dependent partner, valid until 15 April 2020
1 October 2019	Appellant applies for indefinite leave to remain under paragraph 276B
8 October 2019	Application refused (decision under appeal in these proceedings)

I deal with the events marked \* at paragraph 27, below.

6. The basis upon which the respondent initially refused the application in her letter of 8 October 2019 differs from the position she was subsequently to adopt before the First-tier Tribunal, in particular concerning the appellant's immigration history. Whereas the refusal letter dated 8 October 2019 contended that the appellant was without leave from 13 April 2014 to 25 September 2019, the presenting officer before the First-tier Tribunal accepted that the appellant held leave to remain from 22 October 2013 until the final determination of his 1 April 2014 application, on 28 November 2018. See [35] and [36].

*Decision of the First-tier Tribunal*

7. The judge reached a number of unchallenged findings which, when taken together, amount to finding that the appellant held leave to remain from 16 September 2009 until 28 November 2018.
8. At [19], the judge recorded a concession by the presenting officer that the appellant held valid leave to remain, extended by section 3C of the Immigration Act 1971 ("the 1971 Act"), from 13 April 2014 until 28 November 2018.
9. At [50], the judge found that an application made by the appellant for further leave to remain on 12 July 2012 had not been out of time, even though the appellant last held leave to remain on 4 May 2012. Under the regime then in force, as set out by the judge at [44] of her decision, a right of appeal only attached to a decision which had the effect of leaving a person without leave to remain. The judge held that, because on 30 January 2013 the appellant was found by a duty judge of the First-tier Tribunal to enjoy a right of appeal against the 15 November 2012 refusal, the application which led to that refusal, made on 2 July 2012, must have been in time.

10. The judge did not have a copy of the duty judge's decision finding that the First-tier Tribunal enjoyed jurisdiction to hear the appeal, but she did note that, in the decision of First-tier Tribunal Judge Mitchell promulgated on 6 June 2013 determining the appeal against the 15 November 2012 refusal, First-tier Tribunal Judge Mitchell noted at [3] that the Secretary of State did not raise a jurisdiction-based objection to the appeal proceeding on that occasion. Judge Beach said this, at [50]:

“I find that it is more likely than not that the First-tier Tribunal had found that the appellant made an in-time, valid application for further leave to remain, that the refusal of that leave to remain application led to a valid right of appeal and that the respondent did not challenge any of those findings. I find, therefore, that there was not a break in the appellant's continuous residence between 5 May 2012 and 2 July 2012 when he made his application for leave to remain.”

11. The effect of Judge Beach's finding that the 2 July 2012 application had been made 'in time' was that it treated the appellant as having enjoyed continuous, lawful residence from his entry in September 2009 until 28 November 2018.
12. The operative reasons for the judge dismissing the appeal related to the impact of the appellant being without leave from 28 November 2018 until 12 December 2018, the date upon which he submitted what would eventually become a successful application for leave as a Tier 4 dependent. The judge held that, pursuant to the then understanding of the law in light of Masum Ahmed v the Secretary of State for the Home Department [2019] EWCA Civ 1070, the period during which the appellant did not hold leave to remain prior to the submission the application was fatal to his case. Having quoted extensively from [15] of Masum Ahmed, at [53] she held:

“Even if the period of 14 days between becoming appeal rights exhausted and making a new application were disregarded, this does not convert the period without leave (which ended on 25 September 2019 when the appellant was granted leave to remain in the UK) to 'lawful residence' for the purposes of paragraph 276B. The arguments put forward on behalf of the appellant as to why the Court of Appeal incorrectly decided [R (oao Ahmed) v Secretary of State for the Home Department (para 276B – ten years lawful residence)] [2019] UKUT 10 (IAC)] have, in effect, been considered by the Court of Appeal [in Masum Ahmed] who found that the provisions were freestanding provisions. The appellant cannot, therefore, meet the requirements of paragraph 276B as a result of his lack of continuous residence between 28 November 2018 and the grant of leave on 25 September 2019 or alternatively, having 10 years' residence in the UK as at 16 September 2019 (because his leave to remain had not been lawful leave throughout that time).”

13. At [54], the judge also found that the respondent's *Long Residence* guidance did not assist the appellant. An argument had been advanced that provision made in the guidance of the respondent to exercise discretion in favour of certain applicants in the case of out of time applications. The judge found that, on her understanding of the gaps in the appellant's lawful residence from 4 May 2012 to 22 October 2013, the respondent would not necessarily have exercised discretion in favour of the appellant. She concluded the paragraph stating:



“This was not a case, therefore, where it can clearly be stated that had discretion been exercised, it would have been exercised in favour of the appellant.”

*Permission to appeal*

14. The appellant advanced two grounds of appeal. The first contended that the judge misapplied the *Long Residence* guidance, which suggested that short periods of overstaying in between periods of extant leave and a subsequently successful application could be the subject of a favourable exercise of discretion. The second ground contended that the judge was wrong to find against the appellant on the basis of Masum Ahmed, in light of a concession made by the Secretary of State in what would later become Hoque v Secretary of State for the Home Department [2020] EWCA Civ 1357 that Masum Ahmed was wrong decided. Hoque was not handed down until after the application for permission to appeal had been made, but the appellant had obtained a copy of the Secretary of State’s supplementary skeleton argument dated 22 July 2020 in which the concession was said to have been made: see paragraph 19.
15. Permission to appeal was granted by Upper Tribunal Judge Macleman on both grounds, on both grounds, but primarily upon the basis of the respondent’s concession in Hoque.

*Submissions*

16. The appellant provided written submissions dated 3 December 2020, and the respondent provided written submissions on 4 December 2020, pursuant to directions given by Upper Tribunal Judge Keith on 18 November 2020.
17. Mr Biggs submitted that the Court of Appeal in Hoque is positively dispositive of the appellant’s appeal, on the basis of what he described as the preserved, unchallenged findings of fact of the judge at [50]. This is “book-ended” overstaying, which, provided the terms of rule 39E are met, may be “disregarded”. There had been no express challenge to the judge’s findings at [50] by the respondent; although in her written submissions of 4 December 2020 she appeared to be critical of them, she did not do so in a formal rule 24 notice, and nor did the apparently critical observations relating to those findings in the 4 December 2020 submissions expressly seek to challenge the findings, in a manner compatible by the Court of Appeal in Secretary of State for the Home Department v Devani [2020] EWCA Civ 612 at [31], concerning the obligation on a successful party before the First-tier Tribunal to challenge a ground upon which they were not successful by means of a notice under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
18. Mr Tufan submitted that, even post-Hoque, the appellant cannot point to ten years’ continuous lawful residence.

*Legal framework*

19. Paragraph 39E of the Immigration Rules, concerning certain exceptions for overstayers, provided, at the time of the Secretary of State's decision:

"39E. 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 administrative review or appeal being concluded, withdrawn or abandoned or lapsing."

20. Paragraph 276B, concerning indefinite leave to remain on grounds of long residence, provided at the time of the Secretary of State's decision:

"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.”

### *Discussion*

21. By way of a preliminary observation, I queried with the parties whether the First-tier Tribunal, and indeed this tribunal, had jurisdiction to hear this case. The Secretary of State refused the human rights claim in circumstances which she considered to attract a right of appeal. However, the appellant already held leave to remain upon his application for indefinite leave to remain being refused, raising the question as to whether the refusal decision amounted to the refusal of a “human rights claim” as defined in section 113 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). Certainly, if the appellant had been granted some other form of leave *after* the institution of these appeal proceedings, section 104(4A) of the 2002 Act provides that the appeal “shall be treated as abandoned”. That does not cover the position where, as here, upon the refusal of the putative human rights claim, the appellant *already held* a different form of leave.

22. Section 113(1) of the 2002 Act provides:

“‘human rights claim’ means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention)...”

23. This tribunal and the Court of Appeal has recently considered this issue. The President of this tribunal held in R (oao Mujahid) v First-tier Tribunal (Immigration and Asylum Chamber) and the Secretary of State for the Home Department (refusal of human rights claim) [2020] UKUT 85 (IAC), at [31] and [31]:

“31. [...] It is clear from the definition of ‘human rights claim’ in section 113(1) of the 2002 Act that the presumed removal of an individual from, or the presumed requirement on that individual to leave, the United Kingdom is an essential element in order for there to be an appeal. A person who makes a human rights claim is asserting that they (or someone connected with them) have, for whatever reason, a right recognised by the ECHR, which is of such a kind that removing that person or requiring them to leave would be a violation of that right. In the case of a qualified right, such as Article 8, a violation may

result from the fact that it would be disproportionate to remove or to require the person to leave.

32. Accordingly, the refusal of a human rights claim made by a person who is in the United Kingdom can occur only where the Secretary of State's case, **in response to the claim**, is that she does not consider her obligations under section 6 of the 1998 Act require her to respond to the claim by recognising the human right to remain in the United Kingdom and so granting the individual leave to remain." (Emphasis added)

24. The above judgment of the President was recently upheld by the Court of Appeal, which did not disturb any of his reasoning: see [2021] EWCA Civ 449.
25. I consider that, by refusing the appellant's paragraph 276B long residence indefinite leave to remain human rights claim, the Secretary of State had "decided to refuse a human rights claim" for the purposes of section 82(1)(b) of the 2002 Act. Although at the time when the appellant made the human rights claim he held a different form of limited leave to remain, he maintained through making the human rights claim that his putative removal, or a putative requirement to leave the country, would be a breach of the UK's obligations under Article 8 of the European Convention on Human Rights. In response to that claim (see Mujahid in the UT at [32]), the Secretary of State maintained that her obligations under the Convention were not such that she was required to grant leave to remain to the appellant, such that the statutory criteria for a right of appeal to this tribunal were met.
26. In my judgment it is significant that not only did the Secretary of State refuse the human rights claim in circumstances which she considered to attract a right of appeal, she did not raise jurisdiction-based concerns before the First-tier Tribunal, and did not do so before this tribunal. I consider that she was correct to do. There was an appealable refusal of a human rights claim, such that a right of appeal has been generated.

### *Discussion*

27. Before considering the import of Hoque, I must address the judge's findings that the appellant held leave to remain for the period covering 4 May 2012 to 22 October 2013. The relevant stages in the chronology are marked\*. Judge Beach's findings at [50] were based on the First-tier Tribunal accepting that it had the jurisdiction to hear an appeal against the 15 November 2012 refusal, even though on the Secretary of State's chronology the application leading to that refusal was submitted 'out of time.' Neither Judge Beach nor I have seen the duty judge's 30 January 2021 decision accepting jurisdiction. Those currently representing the appellant had been unable to obtain a copy from the First-tier Tribunal: see [22] and [45]. The Secretary of State has not volunteered a copy.
28. My preliminary view was that this was a troubling finding of fact. If the application had been submitted out of time, it was difficult to see how it could be open to any tribunal to find otherwise, still less conclude that the individual concerned had held

leave to remain at the time. However, my considered view is that that was a finding of fact open to the judge to reach, for the following reasons.

- a. It is not difficult to envisage a basis upon which it would have been open to the duty judge to reach the finding. For example, there may have been an issue with service of the notice that led to the appellant becoming appeal rights-exhausted on 4 May 2012. There could also have been concerns surrounding the lawfulness of the underlying refusal decision on 16 February 2012, in light of rulings at the time about decisions taken under section 47 of the Immigration, Asylum and Nationality Act 2006;
- b. The Immigration and Asylum Chamber of the First-tier Tribunal is a specialist tribunal with particular expertise in procedural matters such as this;
- c. The Secretary of State did not apply to judicially review the duty judge's decision;
- d. At the appeal before Judge Mitchell on 31 May 2013, the Secretary of State did not contest the jurisdiction of the tribunal: see [3] of Judge Mitchell's decision promulgated on 6 June 2013;
- e. I have not been told that the Secretary of State applied for permission to appeal against the decision of Judge Mitchell;
- f. The Secretary of State did not seek to cross-appeal against Judge Beach's findings concerning the application having been submitted in-time, nor provide this tribunal with a copy of the duty judge's decision, or any other relevant details, for example notes from her Case Information Database. The Secretary of State did not, for example, submit a notice under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, pursuant to the process described in Secretary of State for the Home Department v Devani [2020] EWCA Civ 612 at [31]. In written submissions submitted in advance of the hearing, but not in accordance with rule 24, the Secretary of State asserted that the appellant did not have leave to remain from 4 May 2012 until 22 October 2013, with no supporting reasoning. Before me, Mr Tufan very fairly accepted that the Secretary of State had not advanced a reasoned challenge to Judge Beach's findings at [50].

29. Drawing these factors together, therefore, I approach my analysis on the basis that the unchallenged findings of fact reached by the First-tier Tribunal are that the appellant enjoyed leave to remain continuously from his arrival in the UK on 16 September 2009 until 28 November 2018. On 28 November 2018, the appellant's leave under section 3C of the 1971 Act expired.
30. Against that factual background, I turn to Mr Biggs' submissions concerning the import of Hoque.
31. Pursuant to Hoque, the gap in the appellant's leave from its expiry on 28 November 2018 until 25 September 2019 is known as "book-ended overstaying": see [9]. Where

paragraph 39E applies to “book-ended” overstaying, it benefits from the “disregard” in paragraph 276B(v). The disregard concerning “any previous period of overstaying” is therefore to be applied as though it featured in paragraph 276B(i), which governs the requirement for ten years’ continuous lawful residence. See [35] per Underhill LJ.

32. Paragraph 39E plainly applies to the appellant’s 12 December 2018 application. Under rule 39E(2)(b)(ii), an application submitted within 14 days of the expiry of section 3C leave benefits from the application of paragraph 39E. The appellant’s 12 December 2018 application was, following its third variation, ultimately successful. It was submitted within 14 days of the expiry of the appellant’s leave under section 3C of the 1971 Act. I find that paragraph 39E applied. The appellant’s overstaying between 28 November 2018 to 25 September 2019 is to be “disregarded”. It was an error of law for the judge to approach matters as she did, although of course it was entirely understandable that she did so, in light of what was the prevalent view of the law at the time, pursuant to Masum Ahmed. The question then arises as to whether the error of law was such that the decision must be set aside.
33. Mr Tufan submitted that, even if the appellant’s book-ended overstaying was “disregarded”, he had not accrued ten years’ lawful residence. Disregarded overstaying does not amount to positive lawful residence. Merely being insulated from the otherwise adverse effects of overstaying is not the same as accruing positive lawful residence.
34. My provisional view accorded with Mr Tufan’s submissions. However, in Muneeb Asif (Paragraph 276B - disregard - previous overstaying) [2021] UKUT 0096 (IAC), reported after the hearing in this matter, a different constitution of this tribunal held:
 

“On the proper construction of paragraph 276B any period of overstaying between periods of leave that has been disregarded in accordance with subparagraph (v)(a) or (b) is treated as lawful residence for the purpose of subparagraph (i).”
35. As Muneeb Asif was reported after the hearing in the present matter, I provided the parties with the opportunity to respond to this direction:
 

“If either party wishes to address the impact, if any, of Muneeb Asif (Paragraph 276B - disregard - previous overstaying) [2021] UKUT 96 (IAC) on their submissions in this matter, they must do within 14 days of being sent these directions.”
36. Not surprisingly, in his post-hearing submissions, Mr Biggs relied on Muneeb Asif to underline the submissions he made at the hearing. As such, although the appellant was without leave to remain from 28 November 2018 until 25 September 2019, such overstaying was “disregarded” and treated as lawful residence, that overstaying is treated as lawful residence for the purposes of paragraph 276B.
37. There was no response from the Secretary of State.

38. In light of Muneeb Asif, I consider that the appellant's "bookended" overstaying between 28 November 2018 and 25 September 2019 should be treated as lawful residence for the purposes of paragraph 276B.
39. No other issues were raised by the Secretary of State which undermined the appellant's claimed reliance on the other criteria in paragraph 276B. In light of the unchallenged findings of fact reached by the First-tier Tribunal, I consider the appellant to have accrued ten years' continuous lawful residence. The appellant enjoyed leave to remain from 16 September 2009 until 24 April 2012. In the unchallenged findings of fact at [50] of her decision, set out above, the judge found that the appellant's application on 2 July 2012 was in time and that the appellant enjoyed section 3C leave at the time.
40. In light of the above analysis, the decision of the First-tier Tribunal involved the making of an error of law such that it must be set aside. I set the decision aside.
41. My provisional view is that this appeal falls to be allowed on the correct application of paragraph 276B to the facts as found by the judge. In these circumstances I propose to substitute a decision allowing the appeal without more ado. Any submissions to the contrary will be taken into account if received within 14 days of the date this decision is sent out.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

All findings are preserved, save for those at [52] and following.

I propose to substitute a decision allowing the appeal without more ado. **Any submissions to the contrary will be taken into account if received within 14 days of the date this decision is sent out.**

No anonymity direction is made.

Signed *Stephen H Smith*

Date 26 May 2021

Upper Tribunal Judge Stephen Smith