



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2023-003405**  
**First-tier Tribunal Nos:**  
**HU/50733/2022**  
**LH/00864/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 10 October 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE STOUT**

**Between**

**JA**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr M Fazli, Counsel, instructed by Kalam Solicitors  
For the Respondent: Mr A Basra, Senior Home Office Presenting Officer

**Heard at Field House on 25 September 2023**

**Anonymity order**

*Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of JA who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.*

***Any failure to comply with this direction could give rise to contempt of court proceedings.***

**DECISION AND REASONS**

## Background

1. The appellant is a national of Bangladesh born on 4 March 1989. He appeals against the decision of First-tier Tribunal Judge Farrelly made following a hearing on 9 January 2023 and signed on 3 March 2023. First-tier Tribunal Judge Farrelly dismissed the appellant's appeal against a decision of the respondent dated 24 January 2022 refusing his application for leave to remain based on Article 8 long residence under paragraph 39E and/or paragraph 276ADE(1) of the Immigration Rules.
2. The appellant was born in Bangladesh and lived there until he arrived in the UK on 1 February 2012 then aged 22 with a visa as a student. His visa was renewed a number of times but an application made on 5 April 2017 was refused and he became appeal rights exhausted on 28 March 2019, at which point he had seven years and one month of lawful residence.
3. The appellant's representatives opted for a paper hearing for his Visa appeal. It is the appellant's case in this appeal, and was his position in his witness statement and skeleton argument for the hearing below, that that was done against his instructions, he having expected and paid for an oral hearing.
4. The appeal was dismissed by First-tier Tribunal Judge Greasley in a decision promulgated on 14 November 2018. At paragraphs 8 to 11 of that judgment First-tier Tribunal Judge Greasley considered arguments the appellant had raised that could form the basis for an asylum claim and on which he still relies, concluding at paragraph 11 that the appeal must be dismissed:

"It is relevant to my mind that at no stage has the appellant ever sought fit to actually pursue an asylum claim. He has had every opportunity to do so and the burden clearly rests upon him to do so. Despite such opportunity being available, the appellant still not pursued such application".
5. Permission to appeal that decision was refused by First-tier Tribunal Judge Andrew on 31 December 2018 and Upper Tribunal Judge Kamara on 28 February 2019. In refusing permission to appeal against that judgment, Upper Tribunal Judge Kamara observed as follows: "The judge did not err in recording that the appellant had avoided scrutiny of his case by requesting a paper consideration of his appeal".
6. On 11 April 2019 the appellant applied to the Asylum Intake Unit and made a claim for asylum on 15 April 2019. This was converted into an Article 8 long residence claim which was refused by the Secretary of State by letter of 24 January 2022. The appellant argued that his asylum claim continued his lawful residence so that he was entitled to the benefit of paragraph 39E of the Immigration Rules and/or that there were very significant obstacles to his reintegration in Bangladesh and thus that he was entitled to the benefit of paragraph 276ADE(1) of the Immigration Rules.
7. It was also contended by the appellant that he suffered an injustice in his earlier appeal against the refusal of a student visa because his former representative allowed his appeal to be heard on the papers contrary to his instructions. The appellant's oral evidence to the First-tier Tribunal Judge, as recorded at paragraph 10 of the decision, was that his former representatives did not explain to him the

difference between an oral and paper hearing and he did not complain at the time because he did not know the procedure and their office has closed down.

### **First-tier Tribunal decision**

8. The First-tier Tribunal decision in this case held so far as material as follows:-
9. First-tier Tribunal Judge Farrelly decided at paragraphs 12 to 13 that the appellant was not entitled to the benefit of paragraph 39E because he was not granted any further leave after becoming appeal rights exhausted and so his leave had not been book-ended as required by that paragraph applying Hoque & Ors v Secretary of State for the Home Department [2020] EWCA Civ 1357.
10. At paragraph 14 First-tier Tribunal Judge Farrelly rejected the appellant's claim to have suffered injustice in his earlier appeal on the basis that he was refused permission to appeal further by the First-tier Tribunal and the Upper Tribunal so any such argument must have been considered and rejected at that stage and he had made no complaint to the regulators about his solicitors. At paragraph 15 the judge concluded that there were no significant obstacles to his reintegration in Bangladesh as he has an MSc in tourism and hospitality and is well placed to find employment in Bangladesh as well as having spent his childhood there, so that he was not entitled to the benefit of paragraph 276ADE(1)(vi).
11. The judge went on to consider the arguments that had formed the basis of the appellant's asylum application as exceptional circumstances on the basis that there would be very significant obstacles to his integration in Bangladesh because of his family and political opinions. The judge accepted at paragraph 26 that the appellant when in Bangladesh and the United Kingdom expressed political opinions by being a member of a party opposed to the Awami League, but rejected his claims that his home in Bangladesh was attacked in November 2016, that police officers came looking for him when he was not at home, and that the family home was again attacked in June 2017. Documents produced by the appellant as newspaper articles were found by the judge not to be credible (paragraph 19). He accepted the evidence that his father was assaulted, paragraph 20, but stated that there was no evidence as to the reason behind the assault. The First Information Report (FIR) relied on by the appellant, the judge stated, did not demonstrate the appellant was specifically at risk or could not relocate. The judge also apparently accepted that there were three arrest warrants for the appellant but found that the appellant had no genuine fear because he had returned to Bangladesh in 2016 to visit his sick mother and had not pursued his asylum claim or these arguments until such a late stage.
12. The judge went on to consider and reject other arguments that the appellant had raised that I do not need to go into for the purposes of this appeal and concluded at paragraphs 31 to 32 that the appellant had not established ten years' lawful residence, would not be at risk if returned, and could reintegrate into Bangladesh.

### **Upper Tribunal hearing**

13. By a Rule 24 response in relation to this appeal following the grant of permission by First-tier Tribunal Judge Grant-Hutchison on 14 April 2023, the Secretary of State conceded part of the appeal. It is accepted by the Secretary of State that the judge failed to give adequate reasons in relation to what Mr Basra today has

characterised as the protection claim elements of the claim. In reality, those elements are part of the Article 8 claim, part of the argument as to whether the appellant would face very significant obstacles on return to Bangladesh. The Secretary of State accepts that the decision needs to be set aside insofar as it has rejected that argument by the appellant and that in particular the judge has failed to give adequate reasons for rejecting elements of the appellant's argument based on the FIR and the arrest warrants and that that part of the decision will need to be re-made.

14. This hearing has therefore focused on what were grounds 2 and 3 of the appellant's grounds of appeal. Mr Fazli relied on the skeleton argument prepared by different counsel for the First-tier Tribunal hearing below, and also made oral submissions. Mr Basra made oral submissions. I intend no disrespect to them in not setting their submission out in full here, but I refer to their arguments in the course of setting out my conclusions on the appeal below.

## **Analysis and conclusions**

15. I will take each ground in turn.

### Ground 2

16. Ground 2 was addressed to the finding that the appellant did not have ten years' lawful residence for the purposes of paragraph 276B(i)(a) of the Immigration Rules. The appellant contends that as he falls within paragraph 39E of the Rules as having made an application within fourteen days of the rejection of the previous application, his overstaying after that point should have been counted by the judge towards the period of ten years' continuous lawful residence required by paragraph 276B(i)(a).
17. It is convenient to set out paragraphs 276B and 39E of the Immigration Rules (interpolating into paragraph 276B(v) the additional letters [A], [B] and [C] as used by Underhill LJ in the Court of Appeal in *Hoque* [2020] EWCA Civ 1357 (see [8] of that judgment).

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:
  - 1. (a) age; and
  - 2. (b) strength of connections in the United Kingdom; and
  - 3. (c) personal history, including character, conduct, associations and employment record; and
  - 4. (d) domestic circumstances; and
  - 5. (e) compassionate circumstances; and
  - 6. (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) [A] the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, [B] 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.

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 or rejection of a previous application for leave which was made in-time; and

(b) within 14 days of:

(i) the refusal or rejection 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 in relation to the previous application (where applicable); or

(iv) any such administrative review or appeal being concluded, withdrawn, abandoned or lapsing; or

(3) the period of overstaying was between 24 January and 31 August 2020; or

(4) where the applicant has, or had, permission on the Hong Kong BN(O) route, and the period of overstaying was between 1 July 2020 and 31 January 2021.

18. In relation to Ground 2, Mr Fazli today relied on the skeleton argument that was submitted on behalf of the appellant before the First-tier Tribunal Judge and in essence what the argument comes down to is this. The appellant seeks to re-run an argument that was considered in Hoque. The argument is that a period of what is referred to in Hoque as open-ended overstaying for the purposes of paragraph 39E should count, it is argued, towards the period of lawful residence for the purposes of paragraph 276B(i). Mr Fazli today accepts that Hoque on that point was against him and that is clear from the following paragraphs of Hoque per Underhill LJ, giving the judgment of the majority in that case (McCombe LJ dissented on this point):

32. I should mention one other point. In course of the hearing Dingemans LJ pointed out that a further distinction between sub-paragraphs (i) (a) and (v) is that the phrase 'in breach of immigration laws' in the latter is wider than the requirement of 'lawful' residence in the former (as defined in paragraph 276A (a)), in that it covers not only cases where the person has no leave but also cases where they have it but are in breach of conditions: a breach of conditions does not automatically terminate leave, though it will be a ground on which it can be curtailed. The result is that an applicant with ten years' continuous lawful residence whose leave remains current at the date of decision will still be refused ILR if (say) they have leave as a student and are found to be working in excess of the permitted number of hours. I understood Ms Giovannetti to accept that this was correct. That is, however, entirely consistent with the purpose of sub-paragraph (v) being to address the

applicant's position at the date of the decision. There is nothing surprising in the Secretary of State wishing to ensure compliance with immigration laws at the date of decision but not reserving a right to rely on past breaches (maybe up to ten years previously) which did not attract curtailment at the time.

33. Element [B] is, expressly, an exception to that requirement – ‘except that’. Subject to the arguments which I consider below, its effect is that where the applicant has had ten years' continuous lawful residence in the past but it has expired, so that he or she is ‘currently’ (i.e. at the date of decision) overstaying, that breach of the immigration laws will be disregarded in deciding whether the requirement in sub-paragraph (v) is satisfied, provided that one of the two ‘paragraph 39E circumstances’ applies. Such a situation might readily occur. The applicant's current limited leave (or, perhaps, an extension of it under section 3C) might expire after the ten-year anniversary and without them having made a further application on the basis of their ten years' residence: they would thus become overstayers. The effect of paragraph 39E would be that if they made that application within the 14-day grace period, or could show that the omission was the result of circumstances beyond their control, the overstaying would be disregarded with the result that the requirement in sub-paragraph (v) was treated as satisfied.
19. Underhill LJ in *Hoque* went on to decide that the same was not true of element [C], which was the result of a drafting error and did in fact qualify the requirement at (i) for 10 years' lawful residence, rather than the requirement in (v) for the appellant not to be in breach of immigration laws as at the date of the decision. In *Hoque* Underhill LJ continued as follows:-
43. However, as Ms Giovannetti pointed out, that conclusion does not directly assist the Appellants because, unlike in *Masum Ahmed*, their cases do not involve a ‘previous period of overstaying between periods of leave’, and element [C] of sub-paragraph (v) is accordingly of no assistance to them. Rather, they are current overstayers, and their cases, like *Juned Ahmed*, involve open-ended rather than book-ended overstaying. Cases of current overstaying are addressed by element [B]. Ms Giovannetti's concession did not extend to the effect of element [B]. She submitted that it was clear that that element was intended only to qualify the requirement in sub-paragraph (v) itself, which is concerned with the requirement not to be in breach of UK immigration laws at the date of decision, and not the requirement in sub-paragraph (i) (a), which was concerned with the requirement to have accumulated ten years' continuous lawful residence. She accepted that it was clumsy that different parts of sub-paragraph (v) should qualify different requirements; but she said that that was the only possible conclusion both from the language and from the drafting history.
44. I accept that submission. For the particular reasons which I have given, it is necessary to do violence to the structure of the drafting in order to give effect to element [C]. However, those reasons do not apply to element [B]. Specifically:
- (1) It is expressed in terms as an exception to the requirement imposed in element [A], whereas element [C] and its predecessor use a different formulation – ‘as will’ or ‘will also be’.
  - (2) More substantively, the subject of the disregard in element [C] (past, book-ended, periods of overstaying) bears no relation to the primary requirement, whereas the subject-matter of the disregard in element [B] (current overstaying) clearly does.
  - (3) Element [B], albeit initially referring to the 28-day grace period rather than to paragraph 39E, has been part of sub-paragraph (v) from the beginning and is accordingly integral to it, whereas element [C] and its predecessor were introduced into the sub-paragraph by amendment.
  - (4) When sub-paragraph (v) was first introduced there could be no possible warrant for saying that the disregard applied to any other requirement. It would be remarkable

if its effect were changed because of the subsequent introduction of an additional disregard in 2013 or 2016.

There is thus no basis for treating the disregard in element [B] as applying to anything save sub-paragraph (v).

45. It follows that I would regard Juned Ahmed as correctly decided, although Sweeney J's reasoning is too broadly expressed to the extent that it is treated as applying to both disregards. Where, if I may respectfully say so, the Court went wrong in Masum Ahmed was that it treated the situations covered by the two cases – that is, open-ended and book-ended overstaying – as if they were the same. I quite agree that that is the natural starting-point, but on the arguments before us I do not think it can be the end of the analysis”,

20. At paragraph 50 Lord Justice Underhill considered a further argument to the effect that that interpretation of the relationship between paragraph 39E and paragraph 276B amounted to a disproportionate interference with the applicant's Article 8 rights and it was submitted that there was no justification for the Secretary of State to treat book-ended and open-ended overstaying differently for the purposes of paragraph 276B. Lord Justice Underhill in Hogue held that there was a justification for that difference and thus the outcome in the Hogue case was that although book-ended overstaying falls to add to the period of lawful residence for the purposes of 276B(i), open-ended overstaying does not and does not count towards that lawful residence period.

21. Mr Fazli today has relied on what is said in the subsequent Court of Appeal authority of Afzal [2021] EWCA Civ 1909 and in the judgment of Sir Patrick Elias in that case, with whom the other members of the Court of Appeal agreed. Mr Fazli relies on paragraphs 59 through to 70 which are as follows:-

59. The court in Hogue also considered the meaning of “disregarded” in the context of an open-ended paragraph 39E period of overstaying. Underhill LJ, with whose judgment on this point Dingemans LJ agreed, adopted essentially the same approach as was later adopted by the court in Ali. As a matter of construction, he held that the open-ended period of overstaying did not, unlike the book-ended periods, qualify in any way the calculation of ten years' continuous lawful residence in paragraph 276B(i)(a). Rather it allowed an application to be considered which would otherwise be rejected on the grounds that the applicant was in breach of the immigration rules as an overstayer, even where the applicant had accumulated ten years' continuous lawful residence in the past. Underhill LJ said in terms (para 49) that there was “no room for ambiguity” about the meaning of the first sentence in paragraph 276B(v) and that “on no possible reading can it be construed as qualifying the definition of continuous lawful residence”. This was critical on the facts of that case. The applicants made an application out of time but satisfying the conditions of paragraph 39E. They did not have ten years' continuous residence when the application was made, but they would have had by the time the application was refused if the paragraph 39E period of overstay could count towards the ten years. They would then have been entitled to ILR (subject to satisfying the other conditions in paragraph 276B).

60. McCombe LJ disagreed with the majority on this point. He thought that even in an open-ended period of overstaying the period should count towards lawful residence. The essence of the argument is contained in para 76:

“In my judgment, for the purposes of paragraph 276B, if one is not present in breach of the immigration laws because the period since the expiry of leave is disregarded (and therefore to be treated as present with leave— paragraph 6 ) it is

odd to say that none the less one is not present lawfully in the UK for the purpose of calculating the ten-year period under paragraph 276B(i)(a).”

61. This analysis is not only inconsistent with the views of the majority, but also with the analysis of Simler LJ in *Ali*. Those judges see the role of disregard, at least in an open-ended case, as being essentially a shield, not a sword. A person whose application attracts the protection of paragraph 39E can counter a challenge that he or she is present in breach of the Immigration \*14 Rules by asserting that this cannot be so because the period of overstaying must be disregarded. McCombe LJ sees it as a sword; the applicant can assert that the period actually counts as a period when the applicant is lawfully present.

62. There are, I would respectfully suggest, three difficulties with McCombe LJ's approach. First, it does not logically follow that because the period of overstaying is ignored, it must be treated as a period of lawful presence. It is perfectly rational to treat its effect simply as a period to be ignored which therefore bars the Secretary of State from refusing to consider a fresh application on the grounds that the applicant is in breach of immigration law, provided it is lodged within the grace period conferred by paragraph 39E. Second, McCombe LJ's analysis means that the first sentence of section 276B(v) is qualifying the concept of continuous lawful residence in sub-paragraph (i), yet for reasons given by the majority in *Hoque*, it is in my view impossible to treat it as having that effect. Third, it is difficult to see how it can be said that the period of overstaying is being disregarded when in fact it is being positively regarded and taken into account as a period of lawful residence.

63. I turn to analyse the meaning of “disregarded” in the second sentence of paragraph 276B(v), where the period of overstaying is historic and is book-ended by periods of leave. Again, I set it out again here for convenience:

“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.”

64. The difference here, as the majority held in *Hoque*, is that since this provision interacts with paragraph 276B(i)(a), the requirement that a paragraph 39E period of overstay be disregarded must be intended to qualify the way in which continuous lawful residence would otherwise be calculated; if that were not so, there would be no purpose in the two provisions being linked together. The question is: in what way does disregarding historic periods of overstaying affect the calculation of lawful residence?

65. In *Hoque*, Underhill LJ concluded that the concept of a period of overstay being “disregarded” had to be given a different meaning than in the first sentence. Its effect was to enable the period of overstaying, when book-ended between two periods of leave, to count towards the period of continuous residence. He considered that there was a sensible rationale for allowing the period to count in book-ended periods of overstaying but not in open ended periods (para 50):

“I should therefore also say that I do not regard it as unreasonable or disproportionate for the Secretary of State to treat book-ended and open-ended periods of overstaying differently. In the case of a book-ended gap the applicant has been granted further leave, and has attained ten years’ residence, since the period of overstaying; and the only reason why the overstaying occurred was that they did not make in-time the ex hypothesi well grounded application which led to the grant of leave. It is in those circumstances unsurprising that the Secretary of State should think it right to allow the period between the expiry of the previous leave and the grant of the future leave to count as continuous lawful residence—assuming of course that the applicant can satisfy the requirements of paragraph 39E.”

66. I do not disagree that it would not have been irrational for the Secretary of State to have allowed the gaps in book-ended periods of overstaying to count. But



nor is it irrational for the Secretary of State to take the view that they should not count and that it would not be appropriate to allow periods of overstaying in breach of the immigration rules to be treated for all purposes as if they were periods of lawful residence with the same status as [section 3C](#) periods. Underhill LJ appears to have made an assumption that the only way in which the second sentence of paragraph 276B(v) could qualify the concept of continuous lawful residence was by permitting the period of overstaying to count. He does not appear to have considered the alternative possibility that the intended impact on the calculation of ten years' residence is simply to preclude paragraph 39E periods of overstaying from breaking continuity which, but for paragraph 39E, they would do.

67. The approach of the majority is inconsistent with each of the three preliminary observations which I suggested above should guide the construction of these provisions. First, it significantly distorts the natural meaning of a period being "disregarded" to allow it to count; \*15 far from disregarding it, this involves positively having regard to the period of overstaying and treating it for all the world as if it were a period of lawful residence.

68. Second, as Underhill LJ recognised, it is giving the concept of "disregarded" in the context of book-ended periods of overstaying a wholly different meaning from that adopted with respect to open-ended periods of overstaying. If this were a necessary implication, that would be justified. But in my view it is not: the concept of disregard can be given the same meaning in both cases, namely that the period of overstaying is ignored. The significance of this in an open-ended period of overstaying is that the applicant is not to be treated as being resident in breach of the immigration laws. The significance of it in the case of book-ended periods is different because of the focus on past rather than present periods of overstaying; its effect is that when calculating whether there is a continuous period of ten years, a gap resulting from a paragraph 39E period of overstaying will not break continuity. In both cases the period of overstaying is being ignored, but the implications are different in the two situations. This approach, giving the concept of disregard its natural meaning, still allows for a purpose in linking sub-paragraphs (i)(a) and (v) but it also means that there is no justification for treating the period of overstaying as counting towards the period of continuous residence.

69. Third, this approach re-writes the meaning of lawful residence to include periods not granted pursuant to leave in circumstances where in my view the extension of the definition is not a necessary implication arising out of the linking of the two provisions, as Underhill LJ seemed to assume.

70. We are not bound by the view of the court in [Hoque](#) on this point, and for the reasons I have given, I would respectfully not follow it. Whilst I accept that paragraph 39E periods of overstaying do impact upon the question of continuous lawful residence, as the majority in [Hoque](#) thought, they do so because they ensure that such periods do not break continuity of residence. But for this provision, continuity would be broken. But it is not expressly stated that they should actively count towards the period of lawful residence, and in my view this is not a necessary implication. The concept of "disregard" in paragraph 276B can be given a perfectly cogent meaning which in my view accords with its natural meaning and does not require the term being deemed to have two different meanings in the same paragraph.

22. It is not an easy analysis to follow. Paragraph 70 seems to have given hope to this appellant that there was a material disagreement between the Court of Appeal in [Afzal](#) and the Court of Appeal in [Hoque](#) on whether open-ended staying could count towards a period of continuous lawful residence for the purpose of Paragraph 276B(i). However, that is clearly not the case. The appellant in this case is seeking to re-run the argument that found favour with McCombe LJ as the

minority in Hogue and which is quoted at paragraph 60 in Afzal. As is clear from what follows in Sir Patrick Elias' judgment at paragraphs 61-65 (and paragraph 80 where he states: "Suffice it to say that ... I take the view that the rules do not allow the paragraph 39E period of overstaying to count when deciding whether the ten-year period has accrued..."), he disagrees with Lord Justice McCombe's approach and affirms the decision of the Court of Appeal in Hogue on this point. (What he was not agreeing with at paragraph 70 was an aspect of the reasoning of Underhill LJ in Hogue which had resulted in the word 'disregard' meaning something different for open-ended and book-ended periods of overstaying. He explained how a consistent meaning could be attributed to that word, but the same substantive result reached.

23. In short, it seems to me that there are two Court of Appeal authorities against the appellant's argument in this case and that certainly both of them are binding on me on this point as both of them address it directly and as part of the ratio of the cases.
24. It follows that the appellant's argument on Ground 2 must be dismissed as being inconsistent with both Hogue and Afzal. It is clear that when applying paragraph 276B it is necessary for an appellant both to satisfy (i) which is having ten years' continuous lawful residence for the purpose of which in the light of Hogue and Afzal a period of book-ended overstaying can be counted, and also for the appellant not to be in the UK in breach of immigration laws at the time of the decision as required by (v), with the exception to (v) being that where paragraph 39E of the Rules applies, a period of open-ended or book-ended overstaying, that period is to be disregarded for the purposes of satisfying the requirements of (v), but a period of open-ended overstaying does not assist the appellant with adding to the period of continuous lawful residence that he has accumulated for the purposes of (i).
25. It follows that the judge in this case made no error in concluding that the appellant's period of lawful residence was seven years and one month and not any longer than that and that accordingly the appellant was not entitled to the benefit of the ten-year rule in paragraph 276B. That is ground 2 and it must be dismissed for those reasons.

### Ground 3

26. Ground 3 deals with the appellant's arguments about historic injustice, as they are characterised.
27. The argument is that the judge has erred in law in failing to make proper findings of fact in relation to the appellant's claim that he had suffered historic injustice at the hands of his previous solicitors when they failed to follow his instructions and requested that his previous appeal be dealt with orally rather than on the papers.
28. In my judgment there is no error of law in the judge's approach to this issue either.
29. Even without the benefit of the authorities to which I have been referred, and to which I will come in a moment, my reading of the judgment, when it is read fairly and as a whole, is that the judge has adequately dealt with the factual argument that the appellant made in relation to this issue. The judge expressly

acknowledges the appellant's argument that the solicitors failed to follow his instructions (that is in the judgment at paragraph 9), and also records his oral evidence that he did not understand the difference between an oral and a paper hearing. Then, it seems to me, that on a fair reading of paragraph 14 of the decision the judge's reasons for rejecting the appellant's argument that he had suffered an injustice are clear. In short, as I read paragraph 14, the judge was not satisfied that the solicitors did act contrary to his instructions because there was insufficient evidence that the appellant had been aggrieved by his solicitors' actions, having apparently not raised that point when seeking permission to appeal at the time and having filed no complaint with the Solicitors Regulation Authority. On the face of the judgment it therefore seems to me means that there is no error of law in the approach and adequate reasons have been given. The facts have been considered by the judge and the judge has reached a conclusion on the facts that was open to him or her on the evidence.

30. However, I need also to deal with the authorities to which the parties have referred me.

31. Mr Basra for the Secretary of State has referred me to the case of BT (Former solicitors' alleged misconduct) [2004] UKIAT 00311. That case is authority for the proposition as recorded in the summary in the headnote that:

"If an appeal is based in whole or in part on allegations about the conduct of former representatives, there must be evidence that those allegations have been put to the former representative, and the Tribunal must be shown either the response or correspondence indicating that there has been no response".

32. It seems to me that although the judge in this case did not refer to that authority, his decision is entirely consistent with it and no doubt if it is an authority that is familiar in the immigration field it is one that the judge had in mind. The effect of it is that in this case the failure by the appellant to raise a formal complaint with his solicitors or with the regulators was, in and of itself, in line with that authority sufficient basis to dismiss the argument on historic injustice.

33. Mr Basra has also referred me to the case of Patel (historic injustice) [2020] UKUT 351 in which the Upper Tribunal held, and again I take this from the headnote, that in future, the expression "historic injustice", as used in the immigration context, was to be reserved for cases in which there had been injustice by the Secretary of State and the operation of the immigration functions by the Secretary of State and that the phrase should not be used to apply to cases in which an appellant complained about wrong conduct by his or her solicitor.

34. In response to that authority Mr Fazli refers me to Mansur (Immigration adviser's failings, Article 8) [2018] UKUT 274. Again, it seems to me that that case does not assist Mr Fazli greatly. Again, taking it from that headnote what was held in that case is as follows:

- (1) Poor professional immigration advice or other services given to P cannot give P a stronger form of protected private or family life than P would otherwise have.
- (2) The correct way of approaching the matter is to ask whether the poor advice etc that P has received constitutes a reason to qualify the weight to be placed on the public interest in maintaining firm and effective immigration control.

- (3) It will be only in a rare case that an adviser's failings will constitute such a reason. The weight that would otherwise need to be given to that interest is not to be reduced just because there happen to be immigration advisers who offer poor advice and other services. Consequently, a person who takes such advice will normally have to live with the consequences.
- (4) A blatant failure by an immigration adviser to follow P's instructions, as found by the relevant professional regulator, which led directly to P's application for leave being invalid when it would otherwise have been likely to have been granted, can, however, amount to such a rare case".
35. The Mansur case thus leaves open a small chink in what was said in the Patel case about historic injustice arguments applying only to actions by the Secretary of State, but it is a small chink and one that has to be applied consistent with the approach of the Upper Tribunal in the BT case. Mansur does not depart from BT at all in giving the example of a case that might succeed as a case in which a complaint to a regulator had been upheld and it had been found that there had been a failure by solicitors to follow instructions.
36. It seems to me that the judge's decision in this case is entirely consistent with all three of those authorities. As a matter of fact, as I have already indicated, it seems to me the judge reaches a not perverse finding that the appellant has not satisfied him that there was any wrong conduct or failure to follow his instructions by the previous solicitors, his assertion to that regard being undermined by his failure to complain and the failure to raise it on appeal. Those facts, consistent with those three authorities, make it impossible for the appellant to succeed on an argument that any alleged failure by his previous solicitors should have been taken into account in assessing his Article 8 claim in this case.
37. So it follows that I dismiss ground 3 as well and those elements of the decision will accordingly fall to be preserved at re-making.

## Disposal

38. Paragraphs 7.2 to 7.3 of the Senior President's Practice Statement 2012 provide:

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier

Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.

39. I have also considered the guidance *AEB v Secretary of State for the Home Department* [2022] EWCA Civ 1512, where the Court of Appeal emphasised the importance of remitting a case where a party had been deprived of a fair hearing,

the logic being that even if little further fact-finding is required, a party is still entitled to have a fair hearing before the FtT and then enjoy a right of appeal to the UT if need be, rather than being required to go straight to the CA.

40. In this case, it seems to me, having heard submissions from the parties, that the nature and extent of the fact-finding required on the Article 8 case in relation to the significance of the FIR and the arrest warrants will be significant so that the case needs to be remitted to re-decided in the First-tier Tribunal by a new judge. The elements of the decision that were not appealed, or were appealed unsuccessfully are preserved. So the health issues point is preserved, as well as the finding on the ten year residence and the historic injustice argument and what is in paragraph 30 of the original decision about employment with Royal Mail and friends made and so on, that is also preserved. The remission is limited to Article 8 and whether there are insurmountable obstacles to the appellant's return in the light of his arguments about risk on return.

### **Notice of Decision**

**The decision of the First-tier Tribunal contains material errors of law and I set it aside insofar as concerns the First-tier Tribunal's conclusions about risk on return (but not otherwise). The decision shall be remade in the First-tier Tribunal.**

**The anonymity directions continue to apply.**

Signed H Stout

Date: 2 October 2023

Deputy Upper Tribunal Judge Stout