Upper Tribunal
(Immigration and Asylum Chamber)

Muneeb Asif (Paragraph 276B – disregard – previous overstaying) [2021] UKUT 00096 (IAC)

THE IMMIGRATION ACTS

Heard remotely by video (Skype for Business)	**Decision & Reasons Promulgated**
On 16 November 2020	**On 10 March 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MUNEEB ASIF

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the appellant: Mr A Rehman, Counsel, instructed by Lawfare Solicitors

For the respondent: Mr D Clarke, Senior Home Office Presenting Officer

On the proper construction of paragraph 276B any period of overstaying between periods of leave that has been disregarded in accordance with sub-paragraph (v)(a) or (b) is treated as lawful residence for the purpose of sub-paragraph (i).

DECISION AND REASONS

The issue

1.
In Hoque & Ors v The Secretary of State for the Home Department [2020] EWCA Civ 1357 (" Hoque ") the Court of Appeal was tasked with interpreting paragraph 276B of the Immigration Rules which establishes the requirements to be met by an applicant seeking Indefinite Leave to Remain ("ILR") on the ground of long residence in the United Kingdom ("UK"). A majority of the Court concluded that sub-paragraph 276B(i)(a), which requires an applicant to have had "at least 10 years continuous lawful residence", was to be read in conjunction with sub-paragraph 276B(v) which provides for a 'disregard' in respect of "any previous period of overstaying between periods of leave".

2.
The issue before this Tribunal is whether any “previous period of overstaying” that has been “disregarded” should be taken into account when determining whether an applicant has fulfilled the requirements for “10 years continuous lawful residence.”

The relevant Immigration Rules

3.
Paragraph 6 of the Immigration Rules contains a list of definitions of terms used in the Immigration Rules. “In breach of immigration laws” means without valid leave where such leave is required, or in breach of the conditions of leave. “Overstayed” or “overstaying” means the applicant has stayed in the UK beyond the time limit attached to the last period of leave granted or beyond the period of their leave extended under sections 3C or 3D of the Immigration Act 1971.

4.
Paragraph 276A defines “continuous residence” and “lawful residence”. So far as material for this appeal, “continuous residence” means “residence in the United Kingdom for an unbroken period”. Paragraph 276A(b) states:

(b) 'lawful residence' means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

…

5.
Paragraph 276B of the Immigration Rules reads, in material part:

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.

…

(v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –

(a)
the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or

(b)
the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.

6.
Although paragraph 276B(i) contains a further subsection (a), there is no subsection (b). For the remainder of this decision I will refer to paragraph 276B(i) only.

7.
Paragraph 39E of the Immigration Rules 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.

8.
The respondent's Long Residence Guidance, version 16, published on 28 October 2019 states, in material part:

Gaps in lawful residence

You may grant the application if an applicant:

• has short gaps in lawful residence through making previous applications out of time by no more than 28 calendar days where those gaps end before 24 November 2016

• has short gaps in lawful residence on or after 24 November 2016 but leave was granted in accordance with paragraph 39E of the Immigration Rules

• meets all the other requirements for lawful residence

9.
The Guidance gives examples of gaps in lawful residence where it may be appropriate to grant an application. The first two examples are instructive:

Example 1

An applicant has a single gap in their lawful residence due to submitting an application 17 days out of time. All other applications have been submitted in time, throughout the 10 years period.

Question : Would you grant the application in this case?

Answer : Grant the application as the rules allow for a period of overstaying of 28 days or less when that period ends before 24 November 2016.

Example 2

An applicant has 3 gaps in their lawful residence due to submitting 3 separate applications out of time. These were 9, 17 and 24 days out of time.

Question : Would you grant the application in this case?

Answer : Yes. Grant the application as the rules allow for periods of overstaying of 28 days or less when that period ends before 24 November 2016.

Hoque

10.
The appellants in Hoque all came to the UK with leave to enter as students and were granted further periods of leave to remain. They had all resided in the UK for over 10 years. They all applied for ILR on the basis of their long residence. The respondent rejected their applications as their leave to remain had expired when they made their applications and they were overstayers. Whether the respondent's decisions were lawful depended on the correct interpretation of paragraph 276B.

11.
In Underhill's LJ judgment, with whom Dingemans LJ agreed, three separate elements were identified in paragraph 276B(v). The first element was the primary requirement that an "applicant must not be in the UK in breach of the immigration laws". The second and third elements related to circumstances in which periods of overstaying may be "disregarded." The second element, concerning the '1 st disregard', related to current overstaying by an applicant at the time of their application for ILR. The third element, concerning the '2 nd disregard', related to "previous … overstaying between periods of leave." Central to Underhill's LJ judgment was the distinction between "open-ended" overstaying, in which there is a current period of overstaying in respect of the ILR application (which concerns the 1 st disregard), and "book-ended" overstaying, which involves previous periods of overstaying between periods of leave (concerning the 2 nd disregard) [9].

12.
The joint appeals in Hoque all concerned open-ended overstaying, the appellants contending that they benefitted from the 1 st disregard relating to 'current overstaying' and therefore fell to be treated as having been continuously lawfully resident for the requisite 10 year period as required by paragraph 276B(i), which fell to be read in conjunction with the whole of paragraph 276B(v) [22].

13.
Underhill LJ first analysed the issues and the material reasoning in the earlier Upper Tribunal's decision of R (on the application of Ahmed) v Secretary of State for the Home Department (para 276B – ten years lawful residence) [2019] UKUT 00010 (IAC) (" Juned Ahmed "), which dealt with open-ended overstaying, and the earlier Court of Appeal permission decision in Masum Ahmed, R (on the application of) v The Secretary of State for the Home Department [2019] EWCA Civ 1070; [2019] Imm AR 1316 (" Masum Ahmed "), which concerned book-ended overstaying. At [27] Underhill LJ set out the essential reasoning of Floyd LJ and Haddon-Cave LJ in Masum Ahmed for rejecting the argument that paragraph 276B operated so as to cure shorts gaps between periods of leave so as to entitle persons to claim '10 years continuous lawful residence'. At [27] Underhill LJ set out paragraph 15(4) of the decision in Masum Ahmed :

15(4) The critical point is that the disregarding of current or previous short periods of overstaying for the purposes of sub-paragraph (v) does not convert such periods into periods of lawful LTR; still less are such periods to be "disregarded" when it comes to considering whether an applicant has fulfilled the separate requirement of establishing " 10 years continuous lawful residence " under sub-paragraph (i)(a).

14.

It was clear to Underhill LJ (at [29] and [30]), based on the structure and language of paragraph 276B, that the requirements identified at sub-paragraphs (i)-(v) were intended to be free-standing and self-contained, but he considered that the effect of sub-paragraph (v) was “seriously problematic”.

15.
At [31] His Lordship noted that sub-paragraph (i), by contrast with sub-paragraph (v):

“… requires that the applicant "has had" ten years' continuous lawful residence. That formulation does not necessarily require that the lawful residence is continuing at the date of decision. No doubt typically that would be the case, but it would also be satisfied in a case where an applicant has accrued the relevant period in the past but has become an overstayer since then. In my view the purpose of the requirement in sub-paragraph (v) is evidently to ensure that overstayers are not entitled to ILR in those circumstances (subject to the effect of the disregard).

16.
Paragraph 276B(v) was concerned with addressing an applicant’s position at the date of the decision in respect of their ILR application. If an applicant had accumulated 10 years continuous lawful residence but was an overstayer when they applied for ILR, that overstaying would be disregarded if paragraph 39E applied with the result that the requirement in sub-paragraph (v) was treated as being satisfied ([32] & [33]).

17.
Underhill LJ found there was “a frank disconnect” between the 2 nd disregard in sub-paragraph (v) and the requirement to which it appeared to be applied [34]. On its true construction, Underhill LJ found that the 2 nd disregard did not belong to 276B(v), but instead belonged to 276B(i) ([34] & [35]), a conclusion that was supported by reference to the drafting history ([36] & [37]). Applying the interpretative principle established in Pokhriyal v SSHD [2013] EWCA Civ 1568; [2014] Imm AR 711 Underhill LJ found further support for his construction in the Home Office’s Guidance on “Long Residence”, version 15, issued on 3 April 2017, which enabled caseworkers to grant an ILR application in circumstances that reflected the third element in paragraph 276B(v). His Lordship concluded that Masum Ahmed was consequently wrongly decided [40].

18.
At [43] Underhill LJ accepted the Secretary of State’s submission that the 2 nd disregard could not however assist the appellants who were open-ended overstayers as the 1 st disregard only qualified the requirement in sub-paragraph (v) and not sub-paragraph (i). He concluded, at [45], that Juned Ahmed had been correctly decided and that, “… on no possible reading can [the 1 st disregard] be construed as qualifying the definition of continuous lawful residence” (at [49]).

19.
Underhill LJ then considered, at [50], whether it was unreasonable or disproportionate under Article 8 ECHR for the respondent to treat open-ended and book-ended overstaying differently. His Lordship did not consider it unreasonable or disproportionate:

“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-founded application which in due course 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 further leave to count as continuous lawful residence – assuming of course that**

the applicant can satisfy the requirements of paragraph 39E. The case of open-ended overstaying is necessarily different because, ex hypothesi , there will have been no grant of leave on the original application: it will have remained, in effect as a place-marker, until the point where it is varied by the making of an application based on ten years' continuous lawful residence. That is an essentially different situation from one where the application has in fact been granted. It is also one that is capable of being abused, since an applicant could in principle make a wholly unfounded application as he or she approached the end of the ten-year period and count on the time taken to determine it (perhaps prolonged by a variation) in order to get to the point where an application under paragraph 276B could be made." [**My emphasis**]

20.
Dingemans LJ agreed with Underhill's LJ construction of paragraph 276B(v). At [102] his Lordship stated:

"I cannot accept the arguments of the appellants, or that part of the judgment of McCombe LJ, which treat the exception set out in the first part of paragraph 276B(v) "except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded" as qualifying the requirement set out in paragraph 276B(i). This exception is self-contained within sub-paragraph 276B(v) and does not appear either by punctuation or formatting as an exception or proviso to the whole of paragraph 276B. In my judgment sub-paragraph 276B(v) is an independent requirement, with its own internal first exception to that requirement, which first exception says nothing about sub-paragraph 276B(i). Further even if the "current period of overstaying" is "disregarded" for the purposes of paragraph 276B(i) there is nothing which converts that period of overstaying into "lawful residence" as defined in paragraph 276A(b)."

21.
McCombe LJ delivered a minority judgment. Contrary to the majority decision he accepted the appellants' arguments that the 1 st disregard in sub-paragraph (v) should also condition sub-paragraph (i). He considered however the wording of paragraph 276B(v) as a whole, including the 2 nd disregard. At [64] his Lordship stated:

"The first sentence of para. 276B(v) (dealing with "any current period of overstaying") says expressly that "breach of immigration laws" by reason of "any current period of overstaying" will be "disregarded" where para. 39E applies, i.e. in a case where the new application is made within the specified short time after expiry of previous leave. In other words, for those purposes the applicant is not treated as being in the UK "without leave". This must be so because the relevant part of the definition of "breach of the immigration laws", in para. 6, is that it means "without valid leave where such leave is required ...". It seems to me clear that for the purpose of that paragraph he is to be treated, in those circumstances, as having existing leave within the meaning of para. 276A(b)(i). If so, it should mean that his residence continues to be "lawful" for the purposes of para. 276B(i)(a) [sic]. Given the approach that one is required to adopt in seeking to understand the Rules, in my judgment, the ordinary reader of para. 276B would be in difficulty in distinguishing the idea of "lawful residence" in 276B(i) from not being "in the UK in breach of immigration laws" in 276B(v) by being resident here."

The facts of the present appeal

22.
The appellant is a national of Pakistan born on 10 September 1986. He entered the United Kingdom on 14 October 2009 as a student. He was granted further periods of leave valid until 3 March 2013.

He made an in-time application for further leave as a Tier 1 Migrant on 3 February 2013. This application was refused but the appellant availed himself of a right of appeal. It is not necessary to dwell on the particular appeal history and it is accepted that the appellant withdrew his appeal on 3 July 2014. His leave, extended by virtue of s.3C of the Immigration Act 1971, ceased on this day. The appellant made a further application for leave to remain on 25 July 2014. It is not in dispute that this application was made within 28 days of the expiry of his previously extended s.3C leave.

23.
The application made on 25 July 2014 was initially refused on 8 September 2014. This decision was judicially reviewed and, pursuant to a jointly signed consent order sealed by the Upper Tribunal on 15 October 2015, the respondent agreed to reconsider the appellant's Tier 1 (Entrepreneur) application of 25 July 2014. As a result of the consent order the judicial review was withdrawn and the appellant's application was granted on 23 November 2015. The appellant was subsequently granted further periods of leave to remain, the last as a Tier 1 (Entrepreneur) valid until 15 March 2021.

24.
On 28 October 2019 the appellant applied for ILR based on his 10-year residency. This constituted a human rights claim. The human rights claim was refused on 13 November 2019. The respondent noted that the application made on 25 July 2014 had been made 22 days after the applicant's previous leave expired. The respondent maintained that any time spent following the submission of an out-of-time application waiting for consideration of the application was not considered lawful even if leave was subsequently granted. On this basis the respondent was not satisfied that the appellant had lawful leave for a 507-day period between 3 July 2014 and 23 November 2015. The respondent was not consequently satisfied that the appellant could demonstrate 10 years continuous lawful residence in the UK.

25.
The respondent did not consider it appropriate to exercise her discretion pursuant to her guidance dealing with Long Residence. Nor was the respondent satisfied that the appellant met any of the requirements for further leave to remain pursuant to paragraph 276ADE of the Immigration Rules (dealing with Article 8 private life claims). Nor was the respondent satisfied that there were any exceptional circumstances such that a refusal to grant the appellant's application would lead to a breach of Article 8 ECHR. The appellant appealed the respondent's decision to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The Decision of the First-tier Tribunal

26.
The appeal was heard by First-tier Tribunal Dhaliwal ("the judge") on 7 February 2020. As it was agreed between the parties that the only issue for determination was whether the appellant met the requirement of 10 years continuous lawful residence, there was no need for oral evidence.

27.
In her decision promulgated on 9 March 2020 the judge considered the decisions of the Upper Tribunal in Juned Ahmed and the Court of Appeal's decision refusing permission to appeal in Masum Ahmed and, in reliance on those decisions, concluded that the appellant could not rely on paragraph 276B(v) to support his claim to have achieved 10 years continuous lawful residence. The judge stated, at [12]:

“The disregarding of current or short periods of overstaying does not convert them into periods of lawful residence neither does it mean periods of overstaying are disregarded when considering whether 10 years continuous lawful residence has been fulfilled. The lawfulness of continuous residence must be unbroken.”

28.
And at [13] the judge stated:

“The Appellant relies on 39E in that where an application was made within 28 days, the period must be disregarded. I agree with that contention but based on the case law, that period is disregarded in so far as the Appellant does not become an overstayer, it does not convert unlawful leave into lawful leave as suggested in R (on the application of Ahmed) [2019] EWCA Civ 1070. Thus, the period from 3 April 2014 to 25 July 2014 can be disregarded but it does not become lawful leave either. I agree with the Respondent’s position so far as the first gap concerned. In essence, this means that even at this early stage, the 10-year lawful residency is broken.”

29.
It is apparent from the immigration history that the judge wrongly concluded that the appellant withdrew his appeal on 3 April 2014; the appeal was withdrawn on 3 July 2014.

30.
The judge then found that the respondent reconsidered the lawfulness of her decision of 8 September 2014 and granted the appellant leave to remain on 23 November 2015, but that the appellant did not have any leave to remain following the expiry of his leave on 3 July 2014 until 23 November 2015. The judge indicated that she did not have any power to convert a previous unlawful period into a lawful period. The appeal was dismissed.

The challenge to the judge’s decision

31.
The appellant advanced various grounds in his application for permission to appeal, including a challenge to the judge’s reliance on Juned Ahmed and Masum Ahmed . By the time of the “error of law” hearing Hoque had been handed down and the parties submissions evolved accordingly.

32.
In his skeleton argument and his oral submissions Mr Rehman submitted that, following Hoque , periods of overstaying subject to the 2 nd disregard were counted as lawful residence for the purposes of paragraph 276B(i). This approach was supported in particular by reference to Underhill’s LJ decision at [50].

33.
Mr Rehman made additional written submissions concerning the judge’s approach to the entire period of the appellant’s overstaying, and in respect of the exercise of discretion relating to gaps in lawful leave.

34.
Mr Clarke submitted that there was an 18-month gap in the appellant’s lawful residence and that Hoque was not authority for the proposition that periods of unlawful residence could be converted to lawful residence. There was an intrinsic difference between disregarding periods of overstaying and converting those periods into lawful leave for the purpose of sub-paragraph (i). Disregarding meant not taking into account at all.

Discussion

35.
There was no dispute at the “error of law” hearing that the judge, through no fault of her own, erred in law in effectively concluding that the 2 nd disregard in paragraph 276B(v) did not apply to paragraph 276B(i)(a).

36.
The appellant entered the UK on 14 October 2009 and had existing leave until 3 July 2014, a period of 4 years, 8 months and 19 days. On 23 November 2015 the appellant was granted leave to remain, and he had lawful leave to remain from that date up to (and beyond) the date of his ILR application on 28 October 2019. This is a period of 3 years, 11 months and 5 days. The combined periods amount to 8 years, 7 months and 24 days. The only way the appellant can be said to have had at least 10 years continuous lawful residence is if the period during which he was an overstayer, when he made his application within 28 days of his earlier leave expiring, is treated as lawful residence.

37.
Although the definition of “lawful residence” in paragraph 276A(b)(i) requires the residence to be pursuant to existing leave to enter or remain, the requirement of “at least 10 years continuous lawful residence” in paragraph 276B(i) must be understood in the context of the application of the 2 nd disregard. Paragraph 276B must be construed sensibly, according to the natural meaning of the words used, recognising that the Immigration Rules are statements of the respondent’s administrative policy (Mahad v ECO [2009] UKSC 16, at [10]; [2010] Imm AR 203).

38.
The respondent’s submissions are superficially attractive. If a matter is disregarded then it is not counted or not taken into consideration. If an applicant has been an overstayer but has made applications within the prescribed periods set out in paragraph 34E then the period of overstaying is not counted against them, but nor can it be regarded as lawful residence in light of the definition in paragraph 276A(b)(i). For the following reasons I am however unable to accept the construction advanced by the respondent.

39.
The observation of Underhill LJ at [50], set out above at [18], is illuminative. His Lordship was satisfied that the respondent treated the period between the expiry of an applicant’s previous leave and the grant of further leave as counting as continuous lawful residence (the reference to the respondent’s treatment must be in relation to her Long Residence Guidance). On this construction the disregard relates to the unlawful nature of a person’s residence occasioned by their being an overstayer rather than the actual length of residence as an overstayer. In making his observation Underhill LJ was clearly mindful of the Court’s view in Masum Ahmed (at [15(4)]) that disregarding such periods did not convert them into periods of lawful leave (at [12] above) as he set out the relevant extract in his own judgment, and he demonstrably considered the definitions of “lawful residence”, “in breach of immigration laws” and “overstaying” (see [11] – [13]). It is inescapable that Underhill LJ rejected the view expressed in Masum Ahmed and that he concluded that it is the unlawfulness occasioned by being an overstayer that is being disregarded rather than the chronological gap between grants of leave.

40.
Although McCombe LJ disagreed with the judgments of Underhill LJ and Dingemans LJ, elements of his reasoning, at [64] (set out above at [20]), support Underhill’s observations. McCombe LJ

considered that the consequence of periods of overstaying being “disregarded” was that a person who made their application within the relevant prescribed time limits after their leave expired was to be treated as having valid leave, and therefore was to be treated as being lawfully resident. Although this reasoning may sit uncomfortably with the comments of Dingemans LJ set out at [19] above, it is not inconsistent with the views of Underhill LJ considered above or the majority decision in Hoque that the 1 st disregard only related to current overstaying. I find this aspect of McCombe’s LJ reasoning to be persuasive and adopt it.

41.
Both McCombe LJ and Underhill LJ considered it appropriate, applying the principle established in Pokhriyal , to have regard to the Secretary of State’s published guidance where a rule is ambiguous and the interpretation in the guidance is more favourable to applicants. Adopting the same approach, and having considered the respondent’s extant guidance as set out at [8] and [9] above, I find that the respondent’s practice, as disclosed in her guidance and the examples contained therein, does treat periods of overstaying that meet the requirements of the 2 nd disregard as constituting lawful residence for the purpose of paragraph 276B(i). This constitutes further support for the construction advanced on behalf of the appellant.

42.
On the proper construction of paragraph 276B any period of overstaying that has been disregarded in accordance with sub-paragraph (v)(a) or (b) is treated as lawful residence for the purpose of sub-paragraph (i).

43.
As the appellant’s application made on 25 July 2014 was in accordance with paragraph 276B(v)(a), the period of his overstaying is treated as lawful residence in accordance with the principles established in Hoque . The appellant consequently meets all the requirements of paragraph 276B. As he meets the requirements of the immigration rules pertaining to his human rights application, his human rights appeal is allowed (applying TZ (Pakistan) [2018] EWCA Civ 1109; [2018] Imm AR 1301).

Notice of Decision

The making of the First-tier Tribunal’s decision involved the making of an error on a point of law and is set aside.

The appellant’s human rights appeal is allowed.

D.Blum 4 March 2021

Signed Date

Upper Tribunal Judge Blum