In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR/912/2020

In the matter of an application for Judicial Review

The Queen on the application of

MOHAMMAD SALEEM

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ORDER

BEFORE Upper Tribunal Judge O'Callaghan

HAVING considered all documents lodged and having heard Mr. D Hayes, Solicitor Advocate, on behalf of Deo Volente Solicitors, for the applicant and Mr. Z Malik of counsel, instructed by the Government Legal Department, for the respondent at a hearing held at Field House on 6 January 2021.

IT IS ORDERED THAT:

(1) The application for judicial review is granted.

(2) The decision of the respondent dated 3 February 2020 is quashed.

(3) The respondent is to pay the applicant's reasonable costs in this matter, to be subject to detailed assessment if not agreed.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Dated: **5 February 2021**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date):

Solicitors:

Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR/912/2020

In the Upper Tribunal
(Immigration and Asylum Chamber)

Field House
Breams Buildings
London, EC4A 1WR

5 February 2021

Before
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

REGINA

On the application of
MOHAMMAD SALEEM

Applicant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Daniel Hayes (instructed by Deo Volente Solicitors) for the Applicant
Zane Malik (instructed by the Government Legal Department) for the Respondent

Hearing date: 6 January 2021

JUDGMENT

Judge O'Callaghan:

Introduction

1. In this judicial review application, the applicant seeks to establish that the respondent failed to follow her published policy guidance when revoking his indefinite leave to remain and, further, failed to provide adequate reasons when deciding to revoke. The respondent's decision is dated 3 February 2020.

2. The respondent says that she lawfully abided by her policy guidance when exercising her discretion to revoke the applicant's indefinite leave to remain, which the applicant accepts he secured consequent to the use of deception, and provided adequate reasons for her decision.

3. Permission to apply for judicial review was granted by UTJ Allen at an oral permission hearing held on 8 July 2020.

The Hearing

4. The hearing was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in the hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the daily list. I was addressed by the representatives in exactly the same manner as if we were together in the hearing room. The applicant and his solicitor accessed the hearing remotely. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Legal Framework

5. The Immigration Rules ('the Rules') provide for a foreign national to secure indefinite leave to remain on the ground of long residence: paragraph 276C, with reference to paragraph 276B. At the material time in 2011, when the applicant applied for and secured indefinite leave to remain under this Rule, the relevant provisions of paragraph 276B detailed:

> '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) ...

(b) he has had at least 14 years continuous residence in the United Kingdom, excluding any period spent in the United Kingdom following service of notice of liability to removal or notice of a decision to remove by way of directions under paragraphs 8 to 10A, or 12 to 14, of Schedule 2 to the Immigration Act 1971 or section 10 of the Immigration and Asylum Act 1999, or of a notice of intention to deport him from 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:

…

(c) personal history, including character, conduct, associations and employment record;

… ‘

6. Paragraph 276B was amended from 9 July 2012 to remove reference to the 14-year rule. Such amendment is not material to this claim.

7. The statutory power enjoyed by the respondent to revoke indefinite leave to remain is granted by section 76 of the Nationality, Immigration and Asylum Act 2002 (‘the 2002 Act’). The material part in this matter is:

‘76 …

(2) The Secretary of State may revoke a person’s indefinite leave to enter or remain in the United Kingdom if -

(a) the leave was obtained by deception.

…'

Respondent’s Policy Guidance

8. The respondent’s relevant policy guidance instruction is ‘*Revocation of Indefinite Leave’* Version 4.0 (19 October 2015), (‘the policy’) which details at section 1.1:

‘This guidance explains the circumstances when the Home Office may consider revoking a person’s indefinite leave to enter or remain in the United Kingdom.’

9. The parties each rely upon several paragraphs of the policy. I observe that the policy intention behind revocation is identified at section 1.3:

> 'The underlying policy objective when considering revoking a person's indefinite leave to remain is to:
>
> - enable action to be taken against foreign national offenders who cannot be deported only because of the UK's obligations under the European Convention of Human Rights or the Refugee Convention;
>
> - ensure that war criminals and perpetrators of other serious crimes cannot avoid the consequences of their actions simply because they were granted indefinite leave at some point in the past;
>
> - instill public confidence in the immigration system by ensuring any abuse is tackled and dealt with accordingly.

10. Section 3.2 addresses 'deception cases' and details, *inter alia*:

> 'Section 76(2) gives the Secretary of State the power to revoke a person's indefinite leave to enter or remain in the UK where a person has obtained indefinite leave to enter or remain in the UK by deception.
>
> Section 10(1) of the 1999 Act provides for the removal of the person who requires leave to enter or remain does not have it [possibly as a result of Section 76(2) action].
>
> Deception has the same meaning as in paragraph 6 of the Immigration Rules. This means making false representations or submitting false documents (whether or not material to the application), or failing to disclose material facts.
>
> …'

11. Section 4 is concerned with 'reasons for not revoking Indefinite Leave'. Relevant to this claim are section 4.1 and 4.3:

> '4.1 Passage of Time
>
> Length of time spent in the UK *may* constitute a reason for not revoking indefinite leave. It would only be relevant to cases under section 76(2) and 76(3). For cases under section 76(1) length of time spent in the UK will not constitute a bar to revocation of indefinite leave because it, and any other Article 8 considerations, will have been taken into account in deciding whether the person should be deported.
>
> What is of more relevance is the length of time that has passed since the incident(s) which is/are causing the review of a person's continuing entitlement to indefinite leave.
>
> For example, indefinite leave would not normally be revoked where the deception question or where the person's travel to

> their home country occurred more than five years ago. Each case must be considered on its merits. The longer the person has been in the UK or, more crucially, the more time it has been since the incident, the less likely it will be appropriate to revoke ILR.'
>
> ...
>
> 4.3 Previously Overlooked or Considered
>
> Indefinite leave should not normally be revoked where the decision-maker had the information available in either previously overlooked it, could reasonably have been expected to act on it all considered it and granted anyway.
>
> Where the decision-maker had the power/authority to grant leave and did so in error and if there was no deception by the applicant, it will not normally be appropriate to revoke the indefinite leave to remain or enter.'

12. Section 6 of the policy guidance is concerned with the process for referring and considering cases. Section 6.2.2. addresses 'deception cases':

> 'A person whose leave was obtained by deception will have this revoked under Section 76(2) and will, unless any other leave is granted, be liable to removal under section 10(1). In such cases a person should normally be removed from the UK.
>
> Examples where removal may not be appropriate, but revocation should still be pursued include – but are not limited to – where a person has:
>
> i. been granted leave as a refugee and it is subsequently established that they are not the nationality that claimed to be.
>
> ii. been granted leave on the basis of marriage and it subsequently established that the marriage was a sham or that the letter of support was forged or the spouse is not a British citizen/ settled in the UK or the person had not disclosed that the marriage had already ended in divorce.
>
> iii. used different or multiple identities.
>
> iv. submitted forged documents such as bank statements, employment references.
>
> v. failed to declare that they have criminal convictions, including those outside of the UK particularly where these would have arguably led to a different outcome on the application.

vi. failed to declare that they have been involved in war crimes, crimes against humanity or genocide; or

vii. failed to declare that they are a member or supporter of a proscribed organisation.

The Facts

13. The applicant is a national of Pakistan. For the purpose of his application for indefinite leave to remain on the basis of 14-year long residency, he asserted his name to be 'Mohammad Saleem'. He stated that he arrived in the United Kingdom clandestinely in May 1997 and remained here unlawfully until his application dated 24 June 2011.

14. By means of his SET(O) application form he asserted, *inter alia*:

'Q.6.1. When did you (the main applicant) first enter the UK? This refers to the date of your first entry into the UK at the beginning of the period of stay in which this application is based.

A.6.1. 14 May 1997

Q.6.2. Since then have you had any absences from the UK? if yes, give the date you left and returned to the UK and the reason for any absence in the spaces below. List all absences however short and in date order…

A.6.2. *[Ticked]* No'

15. As evidence of his long residency in this country the applicant provided a variety of information dating from 1997 to 2011. The respondent considered that the applicant had provided substantial and extensive evidence to demonstrate that he had resided in this country for 14 years and a decision was made to grant him indefinite leave to remain under paragraph 276C of the Rules, with reference to paragraph 276B, on 12 September 2011.

16. The applicant applied to the respondent on 26 November 2012 to have a no time limit endorsement of indefinite leave to remain placed onto his Pakistani passport, the latter having been issued to him on 7 November 2012. This application was granted on 9 January 2013.

17. On 28 June 2016, the applicant applied to the respondent for naturalisation to become a British citizen. The application was refused by a decision dated 29 September 2016 as the respondent considered that the applicant did not qualify under the good character requirement consequent to having worked illegally in this country.

18. On 16 December 2016, the applicant's wife submitted an entry clearance application to join her husband in this country. Linked to the application were those made by the applicant's three minor children who were born in 2001, 2003 and 2013. The applicant was named as the sponsor in all four applications.

19. The applicant was interviewed by telephone on 23 March 2017 where he confirmed that he married his wife in Pakistan in April 2000. He accepted that he had travelled to Pakistan in 2000 and 2003.

20. Having considered her records the respondent identified that a Pakistani national named 'Mohammed Saleem' with the same date of birth as the applicant had arrived at Heathrow airport on 7 February 1998 and was given 'temporary visitor admission' for six months.

21. Her records further identified that a 'Muhammad Saleem' with the same date of birth as the applicant applied in Pakistan for a student visa in August 2001 and entry clearance was granted on 9 October 2001. The date of 'Muhammad Saleem's' entry into this country is unknown but on 1 October 2002 he submitted an in-time application for leave to remain as a student and this application was granted on the same day with leave expiring on 26 February 2004. Later an in-time work permit employment application was made and before a decision was made upon it by the respondent a subsequent application was made for leave to remain as a student. The latter application was rejected on 23 March 2004. A further application for leave to remain as a student was made on 6 May 2004 but refused by the respondent on 30 June 2004 with no attendant right of appeal. The work permit application was refused on 26 July 2005 and no in-country right of appeal was filed.

22. The respondent decided to revoke the applicant's indefinite leave to remain status by a decision dated 3 September 2019.

23. The applicant served upon the respondent a detailed pre-action protocol letter dated 16 September 2019 observing, *inter alia*, that the respondent had:

> '... failed to consider or apply, adequately or at all, her own policy guidance entitled 'Revocation of Indefinite Leave' Version 4.0 dated 19 October 2015, prior to revoking the proposed applicant's Indefinite Leave to Remain'.

24. By means of this letter, the applicant accepted that he had used deception in his application for indefinite leave to remain in June 2011 by asserting that he had continuously resided in this country for 14-years, when the true position was that he had left the country during such time. He disputed the contention that he had arrived in the United Kingdom on 7 February 1998 in the name of 'Mohammed Saleem'. Rather, he accepted that he had been granted entry

clearance as a student in the name of 'Muhammad Saleem' in 2001 and had his leave varied to leave to remain as a student following an application in October 2002. He confirmed that he subsequently used the name 'Mohammed Saleem' in correspondence with the respondent as this was the name recorded by a GP and he had consequently adopted it. He denied having made subsequent applications to the respondent in 2004, stating that he had lost his passport earlier that year.

25. The pre-action protocol letter further detailed, *inter alia:*

> 'The proposed Applicant, a national of Pakistan, arrived into the United Kingdom on 17 May 1997. By application dated 3 August 2001 the proposed Applicant applied for entry clearance to enter the United Kingdom as a student under the name of Muhammad Saleem. This was issued on 9 October 2001 and was valid until 9 October 2002. A further application for leave to remain as a student was submitted on 1 October 2002 and was granted until 26 February 2004.
>
> In 2004, the proposed Applicant lost his passport. The proposed Applicant disputes that he made any further applications for leave to remain following the last grant of leave to remain in 2004 until the last application dated 24 June 2011.'
>
> …
>
> 'The reasons for refusal letter finds that the proposed Applicant used deception in his application for Indefinite Leave to Remain dated 24 June 2011 on the basis that:
>
> i) he had previously claimed to have lived in the United Kingdom continuously for 14 years despite having left the United Kingdom during this time …
>
> ii) the proposed Applicant did not enter the UK on 14 May 1997 as he had claimed in the course of his application and that he had in fact entered the UK on 7 February 1998 ...
>
> iii) the proposed applicant had used the name Mohammad Saleem after his entry into the UK and therefore the true factual background had not been apparent to the proposed Respondent before this time as he had originally used the name Muhammad Saleem.
>
> The proposed Applicant does not dispute (I) above but does dispute (ii) above. In respect of iii) above, his name had been recorded as Mohammad by his GP on registration in 1997 shortly after he arrived in the UK and he then used this spelling following this time from [sic].'

26. By a decision dated 3 February 2020 the respondent observed:

> 'The decision to revoke your client's Indefinite Leave to Remain has now been fully reconsidered. All the points raised have been noted and fully considered. The decision to revoke your client's Indefinite Leave to Remain has been maintained.'

27. Before me the parties agreed that this constituted a new decision and Mr. Hayes withdrew a submission advanced by means of his skeleton argument that the February 2020 decision was supplementary to that taken in September 2019.

28. The respondent confirmed in her decision that she had considered the relevant policy:

> 'A full and thorough consideration of your case was made before a decision to revoke your Indefinite Leave to Remain was made. Your full immigration history, background and circumstances have been re-assessed and reconsidered alongside the relevant policy. The reasons for the decision to revoke have been fully explained and clarified. You have deliberately provided a false immigration history in order to benefit from a grant of Indefinite Leave to Remain using the 14-year route, despite you knowing that you are not entitled to such a grant. You were knowingly untruthful on your Indefinite Leave to Remain application, stating that you had not left the UK in the 14-year qualifying period. Taking into account the deception you have practised and continue to practice until such time as the Home Office discovered this dishonesty in 2017, revocation is considered wholly appropriate.'

29. Section 4.3 of the policy was addressed:

> 'It is noted that the time of the refusal of your Naturalisation application information regarding your deception was, at that point, unknown to the Home Office. As previously detailed, your deception came to light on 23-Mar-2017 during an interview with an Entry Clearance Assistant as part of the process for your wife's application for a 33-month Spouse visa. As such when the decision-maker refused your application to be naturalised as a British citizen, they would not have been aware of your deception. Taking this into account it is considered that section 4.3 of the policy guidance does not apply in your case.'

30. I observe that the respondent's consideration of section 4.3 in her February 2020 decision is not challenged by the applicant.

<u>The Parties' Contentions</u>

31. The applicant's grounds of claim, which were not drafted by Mr. Hayes, advance two complaints:

i) The respondent failed to 'consider and apply' her policy; and

ii) The respondent failed to provide adequate reasons when deciding to revoke the applicant's indefinite leave to remain.

Application of policy

32. As to ground one, the challenge is drafted in general terms and identifies a 'complete failure' to adequately apply relevant guidance. The core of this complaint is succinctly identified at para. 31 of the grounds as:

> '31. The Applicant made his application for Indefinite Leave to Remain on 24 June 2011; namely 8 years and 3 months before the revocation decision was made. [Section] 4.1 of the guidance as outlined above is specifically relevant to this factual matrix. Failure to consider this policy guidance renders the revocation decision as both unreasonable and unlawful.'

33. Mr. Hayes observed by means of his skeleton argument that some eight years and three months had passed from the date of the application for indefinite leave to remain in June 2011 and the initial decision to revoke in September 2019. This was said to be beyond the five-year period identified by the policy as being a factual basis upon which such leave would not normally be revoked.

34. He submitted that there is no support for an interpretation that the 'passage of time' in section 4.1 begins from the date of discovery of any deception, or that cases of continuing deception fall under the policy. As section 4.1 does not mention or import 'knowledge of the incident' for discovery as the starting point for the calculation for the passage of time, the policy was said to have provided a closely defined restriction on the period of time applicable to the section.

35. It was contended on behalf of the applicant that the 'incident' identified in section 4.1 must properly be linked to the statutory power established by section 76 of the 2002 Act and so crystallises at the point deception was used in the application. Consequently, the time when the respondent first has knowledge of deception is not the 'incident' for the purpose of section 4.1.

36. As for the requirement that 'each case must be considered on its own merits' Mr. Hayes submitted that reliance upon previous immigration history prior to the use of deception would defeat the crystallising effect of section 76(2)(a) of the 2002 Act. Further, adverse reliance upon subsequent applications dependent upon the status secured by deception would nullify the purpose of the policy.

37. As to 'merits' it was contended that to the extent that this is a wider consideration than 'time', it is limited in scope by section 6.2.2. Mr.

Hayes asserted that it must include any positive factors and be proportionate. He observed that in this matter there was a delay of over 27 months between the respondent becoming aware of the deception and her decision of September 2019.

38. As to ground 2, the applicant advanced a general reasons challenge identifying factual errors and a failure to provide adequate reasoning as to why the applicant did not benefit from the policy.

39. The respondent's position as to ground 1 was that whilst passage of time from the deception to revocation may be relevant, such passage does not mean that she could not revoke indefinite leave to remain. Each case was required to be considered on its own merits. The words used within section 4.1 provided maximum flexibility for the respondent, consistent with the policy consideration identified at section 1.3: 'instill public confidence in the immigration system by ensuring any abuse is tackled and dealt with accordingly'.

40. As to the reasons provided within the decision, the respondent observed that the applicant's challenge was advanced on reasonableness grounds and submitted that the conclusion reached was reasonable in all the circumstances. The decision identified clear reasons for the revocation consequent to a comprehensive assessment. Cogent reasons were provided as to why when considering the particular circumstances of this matter the length of time from the deception did not outweigh the particular abuse of the system utilised by the applicant in this matter. Reliance could, as part of the assessment, properly be placed upon the delay in the respondent becoming aware of the use of deception.

41. The parties agreed at the hearing that the Tribunal was not invited to consider precedent fact evidence in relation to the deception itself, the applicant accepting that he had used deception in his June 2011 application.

Reasoning and Conclusions

42. Lord Dyson confirmed in *R. (Lumba) v. Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, at [34], that the rule of law calls for a transparent statement by the executive of the circumstances in which broad statutory criteria will be exercised. The policy applicable in this matter fulfils that role in respect of the respondent's statutory powers under section 76 of the 2002 Act.

43. When considering policy guidance, it should be interpreted objectively in accordance with the language used, read as always in its proper context: *Tesco Stores Limited v. Dundee City Council* [2012] UKSC 13, at [18], *per* Lord Reed.

44. The Tribunal is ultimately the final arbiter of what a policy means: *R. (on the application of Kambadzi) v. Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 W.L.R. 1299, at [36], *per* Lord Hope. I am therefore to determine the meaning for myself and not to ask whether the meaning the respondent has attributed to it is reasonable.

45. Lord Wilson confirmed in *R. (Lee-Hirons) v. Secretary of State for Justice* [2016] UKSC 46, [2017] A.C. 52, at [17]:

> '17. Where a public authority issues a statement of policy in relation to the exercise of one of its functions, a member of the public to whom it ostensibly applies, such as this appellant, has a right at common law to require the authority to apply the policy, so long as it is lawful, to himself unless there are good reasons for the authority not to do so: *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546, paras 29-31.'

46. The reference by Lord Wilson to his judgment in *Mandalia v. Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 W.L.R. 4546 encompasses his confirmation at [29]:

> '29. So the applicant's right to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing, which was best articulated by Laws LJ in *R. (Nadarajah) v. Secretary of State for the Home Department* [2005] EWCA Civ 1363, as follows:
>
> > "68 … Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public."'

47. Section 4.1 constitutes one part of a section within the policy that details the discretion enjoyed by the respondent not to exercise statutory power under section 76 of the 2002 Act. It is focused upon 'passage of time', a term enjoying its natural meaning as the process by which time passes. That discretion is enjoyed by the respondent in the application of section 4.1 is confirmed by reference to 'length of time spent in the UK *may* constitute a reason for not revoking indefinite leave'. The use of the word 'may' in policy imports an

element of discretion, reflecting different possible outcomes, by contrast with mandatory words, and in this matter constitutes a reliable indication of the creation of a discretion.

48. Section 4.1 expressly recognises that the passage of time may be relevant in consideration of revocation in circumstances where indefinite leave to remain was obtained by deception or, alternatively, where someone, or someone of whom s/he is a dependant, ceases to be a refugee consequent to the undertaking of identified acts: section 76(2) and 76(3).

49. The second paragraph of section 4.1 links the passage of time with 'the incident(s) which is/are causing the review of a person's continuing entitlement to indefinite leave'. The grounds of claim sought to establish the passage of time as running in this matter from the date the applicant made his application for indefinite leave to remain on 24 June 2011. At the hearing, Mr. Hayes adopted an approach consistent with the intention of the policy, namely that the passage of time ran from the date the deception was used to obtain leave, namely the date of decision. For the purpose of section 76(2) of the 2002 Act, the operative factor is that leave was obtained by deception. The only legitimate interpretation of 'incident(s)' is that it is concerned with the circumstances identified by section 76 as constituting a lawful basis for revocation, as they are the only grounds upon which the respondent can lawfully review a person's continuing entitlement to indefinite leave. Time in this matter therefore runs from the date the deception became operative upon the decision-making process, namely the date indefinite leave to remain was granted on 12 September 2011.

50. Further, time does not run from the date the respondent became aware of the deception or could reasonably have been expected to have become aware. If the policy intended this to be the case, it would have been clearly identified as an exception to the requirement that consideration be given to the passage of time that has passed since the incident(s) causing the review.

51. A focus of submissions in this matter was upon the reference in paragraph 3 of section 4.1 that indefinite leave would *not normally* be revoked where the deception in question occurred more than five years ago. At the hearing Mr. Hayes initially sought for a close restriction on permissible circumstances in which the discretion to revoke could be exercised where deception was used more than five years previously. His focus was upon the relevance of the reference to 'length of time', asserting that the policy expressly provided for only two factors to be attributed weight: 'the longer the person has been in the UK', and 'the more time it has been since the incident, the less likely it will be appropriate to revoke ILR'.

52. This suggested scope of the policy would establish a very narrow permissible exercise of discretion as to fundamentally diminish its worth. The exercise of discretion permitted under section 4.1 must properly be read in context, and this requires consideration of section 1.3. I observe that section 4.1 confirms that length of time 'may' constitute a reason for not revoking indefinite leave. This is consistent with a decision-maker being required to consider public confidence in the immigration system when considering the exercise of the statutory power under section 76. It is not consistent with such requirement that a decision-maker enjoy only a narrow discretion. The words 'not normally' have been used thereby establishing that it remains open to a decision-maker to adopt a different course in a particular case so long as the substance of the discretion concerning passage of time is taken into account and lawful reasons for so deciding are provided. I observe that the factors relied upon by Mr. Hayes are themselves simply examples to be considered when considering a case 'on its merits'. They are not identified to be an exhaustive list of relevant considerations, as to be otherwise would undermine a merits-based assessment. It is consistent with the policy intention identified at section 1.3 that a decision-maker enjoy maximum possible discretion, permitting the placing into the assessment the installation of public confidence in the immigration system. To read the policy in the manner advanced by the applicant would clearly be inconsistent with the stated policy intention.

53. Such an approach is consistent with the clear instruction in section 4.1 that each case must be considered on its own merits. During his submissions Mr. Hayes accepted that it would be permissible when considering passage of time for a decision-maker to take into account post-incident events such as marriage to a British citizen or the birth of a British citizen child. He further accepted that the respondent could properly consider adverse behaviour including the continued reliance upon act(s) of deception in respect of subsequent applications, such as seeking naturalisation, though he observed that such acts should not be considered determinative nor undermine the underlying rationale of the passage of time policy. I conclude that Mr. Hayes was correct to accept that a decision-maker is not excluded from consideration of any relevant information. Evaluative relevance is primarily a matter for the decision-maker upon considering the particular facts arising, being informed by the policy and its intention. Consequently, a decision-maker is not excluded from placing weight upon previous immigration history prior to the use of deception, or post-deception acts. However, such events must be relevant to the exercise of power under section 76 of the 2002 Act and the application of the discretion as to passage of time.

54. As an alternative, Mr. Hayes submitted by means of his skeleton argument that to the extent the merits consideration could be wider, it was limited by section 6.2.2. During his submissions, Mr. Hayes

placed limited weight on this argument, ultimately accepting that the examples provided were specifically concerned with instances where revocation 'should still be pursued', though 'removal may not be appropriate'. This is not said to be the position in this matter. In any event, even when considered at its highest, the submission failed to engage with the examples provided in this section not being an exhaustive list, as confirmed by the clear confirmation that the examples 'include - but are not limited to'.

55. The last sentence of section 4.1's third paragraph confirms that the longer a person has been in the United Kingdom or, more crucially, the more time it has been since the incident(s), the less likely it will be appropriate to revoke indefinite leave. This is consistent with an implicit acknowledgement that article 8 rights may be established through lawful residence in this country. However, such passage of time is not determinative of the approach to be adopted by the decision-maker, as tentatively suggested by the applicant in his grounds of claim. Rather, it is a recognition of the fact sensitive consideration that must be undertaken by a decision-maker and is not to be divorced from the context in which the policy is to be applied.

56. Whilst the passage of time from the respondent becoming aware of the deception to the consideration of the exercise of power under section 76 may on the facts of a particular case be a relevant factor to be weighed, it is not determinative. Its relevance is to be considered consequent to the underlying rationale of the passage of time policy, and its recognition through the five-year threshold that though it may take some time for deception to be identified by the respondent a point may be reached where discretion can properly be exercised in favour of a foreign national in relation to section 76 of the 2002 Act.

57. To the extent that ground 1 seeks to narrow the respondent's discretion when applying section 4.1 of the policy this ground must be refused.

Reasoning

58. The grounds of claim have been drafted in an idiosyncratic manner that fails to clearly delineate the respective grounds relied upon. Rather, the two grounds identified at para. 31 above are drawn from the section of the grounds inappropriately entitled 'Submissions'. Consequent to the imprecise nature of the drafting, elements of the complaint advanced as to ground 1 flow more appropriately into the reasons challenge advanced by ground 2.

59. Whilst the interpretation of policy is ultimately a question for the Tribunal, its application to particular facts is a matter for the

judgement of the respondent, susceptible to challenge on irrationality grounds. Therefore, consideration as to whether the respondent acted within the limits of her discretion when applying the policy to the relevant facts is one to which a *Wednesbury* test applies. I observe that it is entirely for a decision-maker to attribute to the relevant considerations such weight as they think fit, and the Tribunal will not interfere unless they acted unreasonably: *Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 559, 764 G-H, *per* Lord Keith. The weight to be ascribed to any particular factor or criterion in reaching a decision remains quintessentially a matter for the decision-maker.

60. As to adequacy of reasons Lord Brown confirmed in *South Buckinghamshire District Council v. Porter (No. 2)* [2004] UKHL 33, [2004] 1 WLR 1953, at [36]:

> 'The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration.'

61. Public law standards require that there be proper, adequate and intelligible reasoning when discretion is exercised, such standards to be applied to the context and circumstances of the individual case.

62. The Tribunal confirmed in *R. (SA) v. Secretary of State for the Home Department* [2015] UKUT 536 (IAC), at [11]-[16], that in general it is right that the assessment of fact is left to the public authorities which are primarily suited to gathering and assessing evidence.

63. Mr. Malik candidly accepted at the outset of his submissions that the February decision letter was not a perfect example of its type but observed that the true question was whether in the circumstances the decision-maker had come to a reasonable conclusion when exercising discretion, and he submitted that in this matter only a positive answer could be given to the question.

64. The decision letter can be broken down into two distinct sections. The first details the relevant background. It identifies the substance of the deception exercised in the June 2011 application, the arrival of 'Mohammed Saleem' at Heathrow airport in February 1998 and the various applications made by 'Muhammad Saleem'. This section also provides relevant detail as to the telephone interview held with the applicant on 23 March 2017.

65. The second section is entitled 're-consideration' and initially sets out the provisions of section 76 of the 2002 Act. It then proceeds over

three pages to address concerns raised by the applicant in his pre-action protocol letter of September 2019.

66. I observe that the applicant has not challenged the consideration of his matter under section 4.3 of the policy. There can be no proper challenge to the fact that the decision-maker was unaware of the deception in September 2011, because knowledge of the two absences from this country during the 14-year period would have precluded the applicant from securing indefinite leave to remain under the 14-year continuous residence rule.

67. The applicant complains that the respondent relied upon continuing deception in subsequent applications consequent to the grant of indefinite leave to remain when deciding to exercise her discretion not to give him the benefit of the passage of time under section 4.1. However, whilst I have detailed above that the continued use/reliance upon previous use of deception in applications can be relied upon by the respondent if relevant to her exercise of discretion, upon carefully considering the decision the respondent's assessment of the refusal of the naturalisation application is identifiable only in respect of her consideration under section 4.3 of the policy. Contrary to the applicant's concern this point did not form part of the respondent's consideration under section 4.1.

68. By means of her decision the respondent observed that the applicant deliberately used fraud in his application for indefinite leave to remain and that such leave would not have been granted if the decision-maker had been aware as to the true circumstances. The statutory power provided by means of section 76 of the 2002 was therefore available to the respondent.

69. The respondent proceeded to provide reasons as to why the applicant did not enjoy the benefit of section 4.1.:

> 'As previously explained all sections of Reasons for not Revoking Indefinite Leave to Remain have been taken into account and fully weighed against the facts of your case. In support of your case your representatives have referred to Section 4 of the Revocation of Indefinite Leave policy, in particular Section 4.1 Passage of Time which states:
>
> > '... What if of more relevance is the length of time that has passed since the incident(s) which is/are causing the review of a person's continuing entitlement to indefinite leave. For example, **indefinite leave would <u>not normally</u> be revoked where the deception in question** or where the person's travel to their home country occurred more than five years ago.'
>
> 'In your case, it is clear that the deception of your immigration history only came to light on 23-Mar-2017 when, by your own

> admission, you admitted to having travelled outside of the UK and back to Pakistan during the qualifying period to be granted Indefinite Leave to Remain under the 14-year route. It was at this point in time your deception became known to the Home Office.'

70. The respondent reasoned, *inter alia*:

> 'Whilst it is clear your deception has been utilised in the UK since your entry in 1998 of [sic] which amounts to 21 years, 11 months, the Home Office has only been aware of your deception for 2 years, 10 months.'

71. Addressing the respondent's reliance upon the utilisation of deception in this country as having occurred over a period of 21 years, it is appropriate to observe that the decision identifies the applicant's residence in this country having commenced in 1998:

> 'It is not accepted that you arrived in May 1997 as you have claimed, as there is evidence taken from Home Office systems which shows that your first arrival into the UK was 07-Feb-1998 based on this your residency has been taken from this time. It is therefore acknowledged that although you have resided in the UK for over 21 years, this was not continuously prior to your grant of Indefinite Leave to Remain. had the decision-maker been aware of the deception then it is considered that she would not have met the requirements to be granted Indefinite Leave to Remain and would therefore not have been in a position to accrue the length of residence as it is now.'

72. Such reasoning does not engage with the respondent's own conclusion earlier in the decision letter that the applicant subsequently secured entry clearance in 2001, and so on the basis of such conclusion he had resided in this country for at most 18 years by the time of the February decision. In any event, the actual length of residence in this country is irrelevant on the facts of this case as nowhere in the decision is it stated that the applicant's entry into this country in 1998 was secured through deception. Nor is it said that the grant of entry clearance in 2001 and subsequent grant of leave to remain in 2002 were secured by deception. The conclusion by the respondent that the applicant had utilised deception since his entry in 1998, and so for a period of 21 years and 11 months, is irrational.

73. Further, having determined that the applicant had utilised deception for over 21 years the decision adopts a simple, and erroneous, approach of relying upon the length of time the respondent has been aware of the deceit when assessing the application of section 4.1.:

> 'Therefore, it is considered that the amount of time that you have practiced deception does not fall in scope of section 4.1 as a reason to not pursue revocation and far outweighs the length of time the Home Office has been aware of your deception.'

74. Such approach is wholly irrational. As detailed above, section 4.1 permits the favourable exercise of discretion in circumstances where the deception in question occurred more than five years ago. If time were to run from the respondent having knowledge of the deception section 4.1 would be expected to say so in clear terms. As observed above, it does not. Rather, the true starting point is the length of time from the incident which causes the review of a person's continuing entitlement to indefinite leave. The policy does not establish a mathematical exercise in identifying whether the length of time the deception was practiced is much longer than the time the deception has been known to the respondent. Consequently, the approach adopted is irrational and unsustainable.

75. The February decision provides no other reasons concerning the exercise of discretion in respect of passage of time. In the circumstances, the reasoning provided is unsustainable and erroneous in law.

Relief

76. In all of the circumstances, I am satisfied that the decision leaves room for genuine, as opposed to forensic, doubt as to the basis of the decision-maker's reasoning and I find that the applicant has satisfied the Tribunal that he has genuinely been substantially prejudiced by the failure of the respondent to provide an adequately reasoned decision. I conclude that the respondent unlawfully failed to reach a rational decision on the exercise of her discretion under relevant policy guidance.

77. As this is a matter where the defect in reasons goes to the heart of the justification of the decision, and so undermines it validity, I find that the applicant is successful in respect of ground 2 and the only appropriate remedy is to quash the decision and for the matter to return to the respondent to make a fresh decision as to whether she wishes to revoke the applicant's earlier grant of indefinite leave to remain under section 76 of the 2002 Act.

78. In conclusion, I allow the application for judicial review on the reasons challenge advanced by ground 2.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 5 February 2021