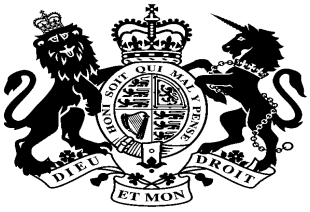

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/01269/2019
HU/01272/2019
HU/01274/2019

THE IMMIGRATION ACTS

At: Field House
On: 11th April 2022

Decision & Reasons Promulgated
On 20th April 2022

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Muhammad Yeasin Khan
Nahida Sultana Khan
Eesa Muhammad Khan
(no anonymity direction made)

Appellants

And

Secretary of State for the Home Department

Respondent

For the Appellant: Mr M.Gill QC, Counsel instructed by City Heights Solicitors
For the Respondent: Mr T. McGirr, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The First and Second Appellants in these linked appeals are, respectively, a husband and wife who are both nationals of Bangladesh. The Third Appellant is their son, who is a national of the

United States of America. They seek leave to remain in the United Kingdom on human rights grounds (Article 8).

2. The Appellants' appeals were dismissed by the First-tier Tribunal (Judge T Brown) on the 5th August 2019. Their applications for permission to appeal to the Upper Tribunal were successively refused by the First-tier and Upper Tribunal, latterly by Upper Tribunal Judge Smith on the 21st January 2020. The Appellants sought judicial review of Judge Smith's decision. Permission to judicially review that decision was granted by Mr Justice Johnson. On the 27th October 2020 Master Gidden made an order quashing the decision of Judge Smith. The Vice President Mr CMG Ockelton formally granted permission on the 20th January 2022.

Issue 1: 10 years continuous residence

3. The central plank of the Appellants' case before the First-tier Tribunal was that the First Appellant (hereinafter 'the Appellant') is entitled to indefinite leave to remain (ILR) in the UK pursuant to paragraph 276B of the Immigration Rules. Paragraph 276B provides that applicants should be granted ILR where they can demonstrate *inter alia* that they have had "at least 10 years continuous lawful residence in the UK". His wife and son are dependents to his application.

4. It is common ground that for the purposes of this appeal the Appellant started his period of continuous lawful residence on the 5th October 2008. He subsequently varied his leave on a number of occasions so that he had valid grants of leave until the 21st November 2016. Prior to that date he made an 'in-time' application so that he accrued a further period of statutory leave under section 3C of the Immigration Act 1971, which expired on the 17th October 2017.

5. The matter in issue before the First-tier Tribunal was the significance of the period 18th October 2017 to the 5th October 2018, the date upon which the Appellant reached the ten year mark. The Appellant argued that since he had made a new application on the 31st October 2017, within the 14 day 'grace period' set out at paragraph 39 of the Immigration Rules, he should be regarded as having continued his 'lawful' residence.

6. The First-tier Tribunal rejected this argument. Although the Appellant had made a new application within the grace period, he had not subsequently been granted any more leave. Following the Upper Tribunal decision in R (on the application of Juned Ahmed) v Secretary of State for the Home Department (para 276B – ten years lawful residence) [2019] UKUT 00010 (IAC) the Tribunal held that the period of overstaying after the 17th October 2017 could not be disregarded for the purpose of 276B: it rejected the argument advanced on behalf

of the Appellants that findings to that effect in Ahmed were decided *per incuriam*. The Appellant could not therefore show that he had accrued his ten years of continuous lawful residence.

7. The Appellants' grounds of appeal in respect of this issue were in essence that the decision in Ahmed was incorrect. As Mr Gill QC now accepts, those grounds have been overtaken by the decisions of the Court of Appeal in Hoque [2020] EWCA Civ 1357 and R (on the application of Afzal) [2021] EWCA Civ 1909 which for these purposes at least, materially endorse the position taken in Ahmed. Although in Hoque the Court held that periods of overstaying could be disregarded where it was "bookended" by periods of valid leave, perhaps the high water mark of this argument, that is not the case here. That being the case, Mr Gill QC did not seek to pursue this ground of appeal.

Issue 2: Article 8

8. The second ground of appeal concerns the approach taken by the First-tier Tribunal to Article 8. Having determined that the Appellants could not meet the requirements of either paragraph 276B or 276ADE(1)(vi), the Tribunal dismissed the appeal on human rights grounds without conducting any *Razgar* assessment of Article 8 'outside of the rules'.

9. There is no doubt that the First-tier Tribunal decision does not contain a *Razgar* assessment. One difficulty that the Appellants might have had in advancing this argument is that it does not appear that specific submissions were made to the First-tier Tribunal on Article 8 'outside of the rules' [see FTT paragraph 11]. That is however not something that deterred Mr McGirr from conceding that it was a material omission in the Tribunal's reasoning, and certainly in granting permission to move for judicial review Mr Justice Johnson considered that this was arguably an error of law. I would agree. As to materiality it cannot be said that this was a case that could not possibly succeed under Article 8, the appeal 'under the Rules' having been dismissed as it was: although Mr Khan's residence fell short of the 10 year mark by approximately one year, the calculus under the rule left no room for consideration of the fact that he had spent much of his life in the UK prior to that last date of entry, having lived here as a student from approximately the age of 15 until he completed his Masters degree in 2005.

10. In the circumstances the parties agreed that the failure to conduct the *Razgar* assessment was material, and it was an error that required rectification by the decision being 're-made'. Given the extent of the fact finding required, and the fact that a decision on Article 8 'outside the rules' has not yet been made by a First-tier Tribunal judge, it was

agreed that the most appropriate disposal would be for the matter to be remitted to the First-tier Tribunal to a judge other than Judge T. Brown. Although I did not hear submissions on 276ADE(1)(vi) Mr McGirr agreed that given the passage of time since the decision of Judge Brown it would be appropriate that the Appellants can argue the case on that point if they so wish.

Decisions

11. The decision of the First-tier Tribunal is set aside.

12. The matter is remitted to the First-tier Tribunal to be heard by a judge other than Judge Brown. The issues to be determined are a) whether the Appellant should be granted leave to remain pursuant to paragraph 276ADE(1)(vi) of the Immigration Rules and b) whether it would be a disproportionate interference with the Article 8 rights of this family to refuse to grant them leave to remain.

13. There is no order for anonymity.

Upper Tribunal Judge Bruce
11th April 2022