Court of Appeal criticises the Immigration Rules and changes law on 10 year rule

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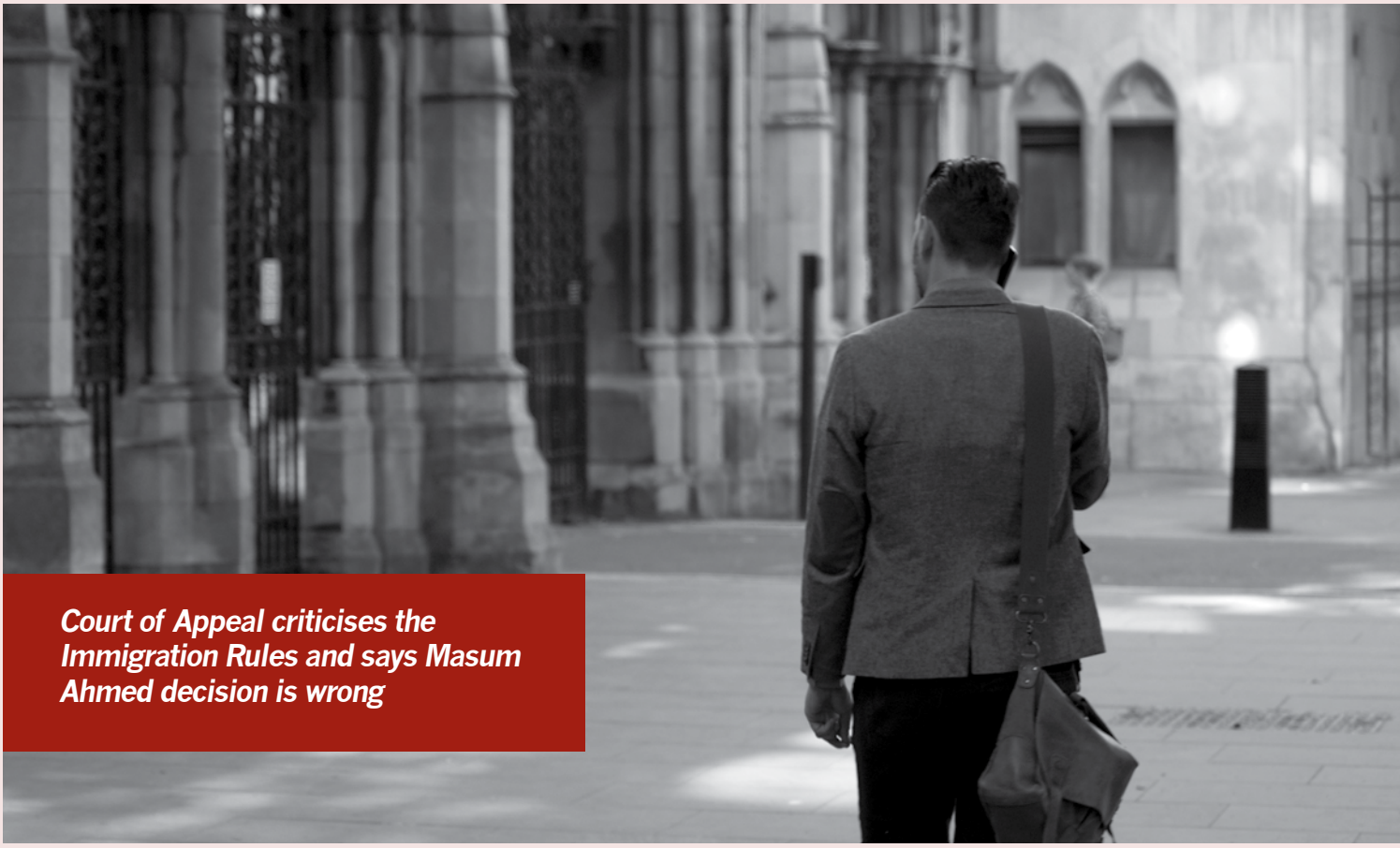

Court of Appeal criticises the Immigration Rules and says Masum Ahmed decision is wrong

The Court of Appeal handed down its long awaited decision in Hoque & Ors v SSHD [2020] EWCA Civ 1357 on the 23 October 2020, here they address the issue of gaps in lawful residence in 10 Years Long residence applications. Specifically, it was the operation of 276B(v) with 39E, which had provided an exception for overstayers, where periods of overstaying could fall to be disregarded under 276B(v), that was the subject of much scrutiny by the Court.

It is rare that a 10 years long residence application is straightforward. Many clients will have what at first appearance appears to be a break in a period of lawful residence. This could be because they had not applied in time to renew their Leave To Remain ("LTR") or where they were initially refused and there were administrative delays, leaving some short but conspicuous gaps in periods of lawful residence. Lawyers in these circumstances assiduously check periods of section 3C leave under the Immigration Act 1971 and/or whether the gaps in their immigration history may attract the operation of paragraph 39E and 276B(V) of the Immigration Rules and thus be disregarded.

10 Years Long Residence

The Immigration Rules ("the Rules") allow people to apply to remain in the UK on the basis of long residence. Under paragraph 276B of the Rules, people who have 10 years of continuous lawful residence are able to apply for indefinite leave to remain ("ILR"). Paragraph 276A of the Rules sets out the key definitions. Where a person overstays this is deemed unlawful residence and could potentially break a period of continuous lawful residence. However, Paragraph 39E of the rules provides exceptions to overstaying and when read with 276B(v) had often been relied on by Immigration practitioners to "cure" any periods of overstaying.

The law on 276B applications goes off-piste

The cases 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") and *R (Ahmed) v Secretary of State for the Home Department [2019] EWCA Civ 1070 ("Masum Ahmed")* therefore came as an unpleasant surprise to practitioners.
In Juned Ahmed the applicant argued that he had made his application for LTR within 28 days of his leave expiring and that the time he spent waiting for the decision should be added to the period of continuous lawful residence. Further to a substantive Judicial Review, Mr Justice Sweeney held at [75] that the provisions of 276B(v) were free standing and that it was obvious that it was additional to sub-paragraph (1)(a) and any period of overstaying would result in a failure to satisfy the requirements of the rule.

In Masum Ahmed the applicant argued that the 'gaps' in his period of residence, when he had applied for extensions to LTR out of time should be 'disregarded' by reason of

276B(v) and that as a result he could demonstrate 10 years of continuous lawful residence. The Court considered whether the operating of paragraph 276B(v) operated to 'cure short gaps' between periods of LTR. They determined that the requirements under paragraph 276B of the Immigration rules were free-standing and that the intention behind the drafting of 276B(v) could not be that it was to provide an exception to 276B(i)(a).

The idea that any overstaying, where there is an otherwise perfect immigration history would be fatal to an application under 276B seemed unreasonable and this decision was clearly not in line with how the Secretary of State had previously determined long residence ILR applications and her own guidance before these cases.

Hoque & Ors

The case of *Hoque & Ors v SSHD* has provided some much-needed clarity at least for now. The Court of Appeal were asked to consider four applications for permission to appeal, three of them turned on the correct interpretation of paragraph 276B of the Rules and in particular the two circumstances in which periods of overstaying may be disregarded under 276B(v). In all three cases there had been a period of overstaying before they had accumulated 10 years continuous lawful residence and all three appellants relied on 276B(v). The Secretary of State had maintained the position, that the subparagraphs under 276B were self- contained and the appellants could not rely on the disregard to have any effect on the requirements of 10 years of continuous lawful residence.

Lord Justice Underhill in giving the lead judgment along with Lord Justice Dingemans agreed with Mr Justice Sweeney in *Juned Ahmed* and the court in *Masum Ahmed* that it was clear from the language and structure of 276B that the requirements of the subparagraphs were 'free standing and self-contained' [29].

For ease of reference he inserted the letters [A]-[C] before each of the elements of sub-paragraph 276B(v), [A] being the primary requirements of the sub-paragraph and [B] and [C] being the two 'disregards", [B] referring to current overstaying and [C] overstaying between periods of leave.

> *(v) [A] the applicant must not be in the UK in breach of immigration laws, [B] except that, where paragraph 39E of these Rules applies, 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."*

He was clear of the circumstances when [B] would come into play but commented that element [C] was more problematic and that the court was faced with the option of either giving no effect to the provision [C] or treating it as a drafting error. He chose to view it as a drafting error and said at [35]:

> *It is unfortunately not uncommon for tribunals and courts to have to grapple with provisions of the Immigration Rules which are confusingly drafted, but it is our job to try to ascertain what the drafter intended to achieve and give effect to it so far as possible. In this case it is clear from its terms what the intended effect of element [C] is, but it has been put in the wrong place. Treating it as if it appeared in sub-paragraph (i)(a) does violence to the drafting structure, but I do not believe that that is a sufficient reason not to give effect to it.*

In deciding this he had considered the drafting history of paragraph 276B(v) as well as the Home Office's Guidance on Long Residence 3 April 2017. He concluded that the case of Masum Ahmed had been decided incorrectly and at [40].

> *40. If I am right up to this point, it must follow that Masum Ahmed, which was concerned with past overstaying, was wrongly decided. I have already acknowledged that normally it would be sufficient to proceed on the basis that a disregard under sub-paragraph (i)(a). But in my view that argument must yield to the considerations developed above, which centre on the fact that if argument must yield to the considerations developed above, which centr on the fact that if element [C] were treated as qualifying sub-paragraph (v) it would have no purpose or effect.*

He goes on to say at [41]:

> *What I take the Court to be saying in that passage is that the reference to previous periods of overstaying does have a role to play in sub-paragraph (v) because the requirement itself – element [A] – relates not only to the applicant's current position but to his or her "previous immigration status", i.e. to whether they had leave to remain over the entirety of the claimed period of continuous lawful residence. With respect, I am unable to agree with that, even though it appears to have been conceded by counsel for the claimant. As I have already said, the requirement is framed in the present tense – "must not be in the UK in breach of immigration laws" – and the first disregard refers to "current overstaying". I do not think that it is possible to read it as meaning "must not at any time in the ten-year period relied on have been in the UK in breach of immigration laws".*

He held that the requirement of continuous lawful residence in paragraph 276B (1) (a) is not qualified by the paragraph 39E disregard in element B of paragraph 276B (v) i.e. in relation to current periods of overstaying by it is by element C.

Implications for practitioners

What does this mean in practice? It means that when considering your client's application, any period of past overstaying, referred to as "book-ended overstaying" or "overstaying between the periods of leave" by the Court of Appeal, may be allowed where para 39E applies. However, unless you client has already accumulated 10 years lawful and continuous residence and the requirements of 39E disregard apply, any period of current overstaying will not be allowed. The case of *Hoque & Ors* certainly helps clarify the position in relation to gaps in LTR, it is not an entirely satisfactory position, however given the dissenting opinion of Lord Justice McCombe, I suspect this is not the last we will hear of this issue or indeed this case.

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Sharmistha's extensive experience and inclusive approach ensure she gains the confidence of those she represents and secures their full participation in the proceedings they are about to face. She is quick at understanding the important facts in each case, in order to make complex legal issues easy to understand for her clients. She is a persuasive advocate who combines sound judgment with meticulous preparation.