Ten years continuous lawful residence as grounds for indefinite leave to remain, paragraph 276B of the Immigration Rules (Hoque v Secretary of State for the Home Department)

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Immigration analysis: The Court of Appeal held an overstayer applying for indefinite leave to remain (ILR) relying upon paragraph 276B of the Immigration Rules (which, if its requirements are met, confers an entitlement to ILR on those with ten years continuous lawful residence in the UK) cannot rely upon her time in the UK while the application for ILR is pending in order to make up the required period of ten years' continuous lawful residence. This was also the Upper Tribunal's conclusion in *R (Juned Ahmed) v Secretary of State for the Home Department*, which the court therefore approved. Additionally, it was held that where a period of overstaying permitted by subparagraph 276B(v) was bookended by periods of leave, that period of overstaying did not reset the clock in respect of the requirement for ten years continuous lawful residence. In fact, the court appears to have gone further, holding that these periods of residence counted towards the period of continuous lawful residence required by subparagraph 276B(i)(a). In *R (Masum Ahmed) v Secretary of State for the Home Department* the Court of Appeal held otherwise. It was therefore held to be wrongly decided. As none of the cases before the court depended on treating bookended periods of overstaying as counting towards the ten years lawful residence requirement, and as the court resolved the other issues against the appellants, the appeals failed. Lord Justice McCombe dissented, holding that both *Juned Ahmed* and *Masum Ahmed* were wrongly decided. He would have allowed the appeals. Written by Michael Biggs, barrister, at 12 Old Square Chambers.

Hoque v Secretary of State for the Home Department and other cases [2020] EWCA Civ 1357

What are the practical implications of this case?

It confirms subject to an exception for bookended periods of permitted overstaying addressed in the next paragraph—that applicants for ILR pursuant to paragraph 276B of the Immigration Rules must hold ten years continuous lawful residence as defined by paragraph 276A(b) of the Immigration Rules, and so cannot rely upon time in the UK as an overstayer even where this is permitted by paragraphs 39E and 276B(v) of the Immigration Rules.

The Court of Appeal held there was an exception. Gaps in lawful residence permitted by paragraph 276B(v) do not break, or 'reset', the period of continuous lawful residence required by paragraph 276B(i)(a). That much had been conceded by the Secretary of State. The court, in fact, went even further, holding that bookended periods of permitted overstaying count towards the requirement for ten years continuous lawful residence in subparagraph (i)(a) (see para [50] (per Lord Justice Underhill) and para [104] (per Lord Justice Dingemans)).

Notably, the majority did not consider the possibility of relying directly upon the Secretary of State's policy on long residence applications when seeking ILR. McCombe LJ held that this policy allowed applicants for ILR to rely upon periods of overstaying 'disregarded' by paragraph 276B(v) as the

policy treated these periods as counting towards the ten years continuous lawful residence requirement (at paras [91]–[92]).

The Secretary of State's policy must be applied unless there is good reason not to do so (see *Lumba and Another v SSHD* [2012] AC 245 at [26]). Policy is also highly significant in evaluating the strength (or weakness) of the public interest in an immigration decision (or removal pursuant to it) when considering whether the decision amounts to a disproportionate interference with article 8 ECHR rights (see for eg *R (MM (Lebanon) and others v Secretary of State for the Home Department and another* [2017] UKSC 10 at paras [74]–[75], *TZ and another v Secretary of State for the Home Department* [2018] EWCA Civ 1109 at para [34], and *SF and others (Guidance, post-2014 Act) Albania* [2017] UKUT 120 (IAC) at paras [7]–[13]).

The case therefore leaves open the possibility of direct reliance on the Secretary of State's policy in appropriate cases in the future.

Finally, the Court of Appeal (once again) expressed concern at the way the Immigration Rules are expressed. The postscript to Underhill LJ's judgment (at para [50]) criticised the 'labyrinthine structure and idiosyncratic drafting conventions' and the sometimes 'confused language and/or structure of particular provisions' within the Immigration Rules. It also highlighted the unsatisfactory reality that the Secretary of State appeared to have 'no reliable mechanism for reaching a considered and consistent position on what its own Rules mean'. The court expressed the hope that some of these problems would be addressed when the Law Commission reports on simplification of the Immigration Rules. McCombe LJ (at para [96]) and Dingemans LJ (at para [105]) agreed with these observations and added their own comments.

What was the background?

The four cases came before the Court of Appeal as 'rolled up' hearings (ie as applications for permission to appeal (PTA), with the substantive appeals to follow immediately if permission was given). Indeed, in one case (Arif) there were two applications for PTA—one seeking to appeal from the Administrative Court's refusal of permission to apply for judicial review, out of time, and a further application for permission to appeal from the order of the Administrative Court declining to set aside its refusal of permission.

Paragraph 276B of the Immigration Rules provides, in short, that a person is entitled to ILR if they have ten years continuous lawful residence in the UK and they satisfy other requirements listed in the rule.

In three of the cases before the Court of Appeal—Hoque, Kabir and Arif it was argued that subparagraph 276B (v) of the Immigration Rules, properly construed, meant the applicants were entitled to ILR under paragraph 276B. Their submission was that paragraph 276B(v), correctly interpreted, allowed periods of permitted overstaying 'disregarded' by this subparagraph to count towards the requirement in subparagraph 276B(i)(a) that the applicant had accrued ten years 'continuous lawful residence'. This submission was not advanced by Mr. Mubarak.

The point was open to the four applicants because each of them had been in the UK for a substantial period of time with leave; they had each applied for leave to remain after becoming overstayers, but within the period permitted by paragraph 276B(v) of the Immigration Rulesthey had each (as permitted by the rules) then varied their applications in order to rely upon paragraph 276B of the Immigration Rules; and the applications, as varied, were each decided after the applicant had been in the UK for over ten years continuously (note, there is an error in the chorology in respect of Mr. Kabir at paragraph [18], the correct position is however set out at paras [124]–[126]). This meant that if the period of residence with leave to enter/remain was added to the period of permitted overstaying under subparagraph 276B(v) (ie the period during which the last application, as varied, was outstanding), the requirement for ten years continuous lawful residence would be satisfied.

In addition, all four applicants (Hoque, Kabir and Arif and Mubarak) argued that the Secretary of State had unlawfully evaluated human rights claims/ submissions pursuant to paragraph 353 of the Immigration Rules or section 94 of the Nationality, Immigration and Asylum Act 2002.

Each of the judges decided to grant permission to appeal in three of the four appeals. Two judges (Underhill LJ and Dingemans LJ) refused to extend time (in respect of the challenge to the refusal of permission to apply for judicial review) and declined to grant permission to appeal (in respect of the decision to refuse to set aside the refusal of permission to apply for judicial review) to Mr. Arif. His appeal was undermined because he had sought, unsuccessfully, to set aside the Administrative Court's refusal of permission to apply for judicial review and had delayed seeking to appeal from the refusal of permission until after that application had been refused.

What did the court decide?

The court's holdings are apparent from the first two sections of this note. It is useful however to consider its reasoning in a little more detail.

The majority held (see paras [29]–[45] and [97]–[104]) that subparagraph 276B(v) contained three elements. First, a negative requirement that the applicant for ILR is not in the UK in breach of immigration law (ie in the UK as an overstayer) at the time of the application (or perhaps at the time it is considered), (aspect A). Secondly, an exception to the first requirement, which excuses periods of overstaying that would otherwise be fatal pursuant to element A, (element B).

Finally, a qualification to, or more aptly, a liberalisation of, the requirement in subparagraphs 276B(i)(a) and 276A(b) for ten years continuous lawful residence, which operates by disregarding gaps in lawful residence bookended by periods of leave to remain, where the leave ending the overstaying was granted following an application made within the time permitted by the last part of paragraph 276B(v) (ie by reference to paragraph 39E of the Immigration Rules, 14 days after becoming an overstayer, or, if the application was made before 24 November 2016, 28 days after becoming an overstayer), (element C).

It is important to see that element C could work in two ways. The first was argued for by the Secretary of State. On this view, C operates by ignoring (disregarding) residence during the

permitted gaps in continuous lawful residence so that the ten-year clock is not reset by each gap. Note that this approach does not mean the disregarded period is counted towards the requirement for ten years continuous lawful residence. It merely ignores the gap.

The second approach was adopted by the court (see paras [50] and [104]). It not only ignores residence during permitted gaps in leave so as not to reset the ten-year clock but adds the disregarded period of overstaying to the required period of continuous leave to remain. The difference might seem small, but it could make all the difference in a given case.

By selecting the second approach the court implicitly accepted the view—argued before the court and advanced for the applicant in *R (Juned Ahmed) v Secretary of State for the Home Department* [2019] UKUT 10 (IAC) that the word 'disregarded' in the second part of subparagraph 276B(v) means that the applicant's status as an overstayer is disregarded (not, as the Secretary of State argued, merely that the period of overstaying is disregarded).

McCombe LJ gave a forceful dissenting judgment. He accepted, in essence, the submissions advanced for the applicant in *Juned Ahmed* and would have overruled that decision. His key point is that the ordinary reader of paragraph 276B(v) would understand the disregard provided by that rule to concern the applicant's status as an overstayer, and not the period of residence as an overstayer (at paras [64]–[71]).

Applications for permission to appeal to the Supreme Court have been made to the Court of Appeal. At the time of writing the outcome is awaited.

Case details:

- Court: Court of Appeal, Civil Division
- Judge: Underhill LJ, McCombe LJ, and Dingemans LJ
- Date of judgment: 22 October 2020

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