



Neutral Citation Number: [2019] EWCA Civ 1070

Case No: C2/2019/0104

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM**  
**UPPER TRIBUNAL (IMMIGRATION & ASYLUM CHAMBER)**  
**UPPER TRIBUNAL JUDGE GLEESON**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/06/2019

**Before:**

**LORD JUSTICE FLOYD**  
**and**  
**LORD JUSTICE HADDON-CAVE**

-----  
**Between:**

**THE QUEEN ON THE APPLICATION OF  
MASUM AHMED**

**Appellant**

**- and -**

**THE SECRETARY OF STATE FOR THE HOME  
DEPARTMENT**

**Respondent**  
**/Claimant**

-----  
**Mr Jayed Sarker** (instructed by **Law Valley Solicitors**) for the **Appellant**  
**Mr Thomas Tabori** (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 13<sup>th</sup> June 2019  
-----

**Approved Judgment**

## **LORD JUSTICE FLOYD AND LORD JUSTICE HADDON-CAVE:**

### **Introduction**

1. The Applicant seeks permission to appeal (“PTA”) against a decision of UTJ Gleeson dated 27<sup>th</sup> September 2018 refusing permission to apply for judicial review and certifying the claim as totally without merit (“TWM”). The original substantive decision under challenge is the Respondent (“SSHD”)’s decision of 26<sup>th</sup> April 2018 refusing and certifying the Applicant’s application for Indefinite Leave to Remain (“ILR”) under paragraph 276B of the Immigration Rules on the basis of “*10 years continuous lawful residence*” in the United Kingdom.
2. On 15<sup>th</sup> March 2019, the Court of Appeal directed, pursuant to CPR 52 PDC 15(3), that written submissions be filed by both sides and there should be an oral hearing of the application for PTA. We are grateful for the written and oral submissions of Mr J Sarker, counsel for the Applicant, and Mr T Tabori, counsel for the SSHD.

### **The facts**

3. The Applicant (born on 30<sup>th</sup> January 1983), a citizen of Bangladesh, arrived in the United Kingdom on 23<sup>rd</sup> August 2002 on a valid student visa (EC). He was granted LTR from 29<sup>th</sup> July 2002 until 31<sup>st</sup> October 2005. On 31<sup>st</sup> January 2006, he was granted further LTR on the same basis valid until 31<sup>st</sup> January 2007 when his visa expired.
4. In December 2006, the Applicant visited Bangladesh (to see his mother). Following his return, on 23<sup>rd</sup> February 2007, the Applicant applied out of time for further LTR. On 19<sup>th</sup> March 2007, the application was returned as invalid. The Applicant re-submitted the application which was granted on 17<sup>th</sup> September 2007, with LTR valid until 31<sup>st</sup> May 2008.
5. On 2<sup>nd</sup> June 2008 (*i.e.* 2 days out of time), the Applicant made a further application to extend LTR which was granted. Thereafter, the Applicant made several further successful applications in-time to extend LTR under the Tier 4 (General Student) category. His last extension of leave was granted on 23<sup>rd</sup> August 2011, valid until 30<sup>th</sup> March 2013.
6. On 16<sup>th</sup> January 2013, the Applicant applied for ILR under paragraph 276B on the basis of ‘long residence’. The application was refused on 5<sup>th</sup> September 2013. Following various reconsiderations and appeals, the matter was remitted to the SSHD who again refused the application on 27<sup>th</sup> July 2015, with an in-country right of appeal. The Appellant lodged a further appeal, which was refused, with the Upper Tribunal who also refused permission to appeal. The Applicant became appeal rights exhausted on 21<sup>st</sup> December 2016.
7. On 29<sup>th</sup> December 2017 (*i.e.* 8 days later), the Applicant applied out of time under the FLR (FP) route for ILR on the basis of his private life in the UK. On 24<sup>th</sup> February 2017, whilst the decision of his FLR (FP) application was pending, the Applicant varied his application again to the FLR (HRO) method in line with Part 1 of Paragraph 34E of the Immigration Rules, before any decision was made.

8. On 22<sup>nd</sup> August 2017, the Applicant applied to vary his application again, so that the application was again for ILR under paragraph 276B on the basis of “*10 years continuous lawful residence*” in the UK.
9. On 26<sup>th</sup> April 2018, the Applicant’s paragraph 276B application was refused the SSHD and certified on 26<sup>th</sup> April 2018 as stated above.

### **The Immigration Rules**

10. Part 7 of the Immigration Rules provide in material part (underlining added):

#### **“Part 7**

#### ***Long residence***

#### ***Long residence in the United Kingdom***

276A. *For the purposes of paragraphs 276B to 276D and 276ADE(1).*

*(a) "continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return ...*

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

*(i) existing leave to enter or remain; or*

*(ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or*

*(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.*

*(c) 'lived continuously' and 'living continuously' mean 'continuous residence', except that paragraph 276A(a)(iv) shall not apply.*

...

***Requirements for an extension of stay on the ground of long residence in the United Kingdom***

276A1. *The requirement to be met by a person seeking an extension of stay on the ground of long residence in the United Kingdom is that the applicant meets each of the requirements in paragraph 276B(i)-(ii) and (v).*

...

***Requirements for indefinite leave to remain on the ground of long residence in the United Kingdom***

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) (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.*

***Indefinite leave to remain on the ground of long residence in the United Kingdom***

276C. *Indefinite leave to remain on the ground of long residence in the United Kingdom may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 276B is met.*

***Refusal of indefinite leave to remain on the ground of long residence in the United Kingdom***

276D. *Indefinite leave to remain on the ground of long residence in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met.”*

11. Paragraph 39E provides as follows:

*“Exceptions for overstayers*

*39E. This paragraph 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.”*

**Submissions**

12. The Applicant contends that he is entitled to ILR under paragraph 276B and the SSHD’s decision of 26<sup>th</sup> April 2018 refusing and certifying the Applicant’s application was wrong in law. Mr Sarker argued that the two ‘gaps’ in the Appellant’s period of residence when the Applicant applied for extensions to LTR out of time - namely (i) between 31<sup>st</sup> May 2008 and 2<sup>nd</sup> June 2008 and (ii) between 21<sup>st</sup> and 29<sup>th</sup> December 2016 - should be “disregarded” by reason of the operation of paragraph 276B(v) and paragraph 39E of the Rules and that the Applicant can, therefore, demonstrate “10 years continuous lawful residence” in UK under paragraph 276B. Mr Sarker submitted that PTA should be granted because the point raised in this appeal is, at least, arguable and, in any event, it is a point of general importance upon which guidance should be given because there are a number of other cases pending which raise the same argument.
13. The SSHD contends that his decision of 26<sup>th</sup> April 2018 was correct and the Applicant could not demonstrate “10 years” unbroken “continuous lawful residence” in the UK under paragraph 276B because of the ‘gaps’ arising from the Applicant applying for LTR out of time. Mr Tabori submitted that the Applicant has misunderstood paragraph 276B of the Rules. He submitted that paragraphs 276B(i)-(v) are quite separate requirements, each of which had to be fulfilled in order for a person to qualify for ‘long residence’ status. In the present case, the 10 year period of residence claimed by the Applicant did

not conform to paragraph 276B(i)(a) because it was not ‘unbroken’. In this regard, Mr Tabori relied upon the decision of Sweeney J in *R (on the application of Ahmed) v Secretary of State for the Home Department (para 276B – ten years lawful residence)* [2019] UKUT 00010 (IAC).

### Analysis

14. The point which arises is a short point of construction. The issue on this application for PTA is whether it is arguable that paragraph 276B(v) operates so as to cure short ‘gaps’ between periods of LTR so as to entitle persons such as the Applicant in the present case to claim “*10 years continuous lawful residence*” under paragraph 276B(i)(a).
15. In our view, the wording of paragraph 276B is clear:
  - (1) First, the provisions of paragraph 276B(i)-(v) are separate, freestanding provisions each of which has to be met in order to for an applicant to be entitled claim “*10 years continuous lawful residence*” under paragraph 276B (see paragraph 276C).
  - (2) Second, sub-paragraph (v) is not drafted as an exception to sub-paragraph (i)(a) and makes no reference to it. There are no words which cross-refer or link sub-paragraph (v) to sub-paragraph (i)(a), or vice-versa, whether expressly or inferentially.
  - (3) Third, there is no difficulty in giving sub-paragraph (v) a self-contained meaning. It makes use of the provisions of paragraph 39E of the Rules. Paragraph 39E is the ‘exceptions for overstayers provision’ which, in effect, grants a 14-day period of ‘grace’ in respect of the lodging of LTR applications in certain circumstances. Under sub-paragraph (v), where paragraph 39E applies, any *current* period of overstaying as well as any *previous* period of overstaying after the advent of the amendment to the rules on 24<sup>th</sup> November 2016 will be “*disregarded*”. In addition, periods of overstaying of less than 28 days before that date are also disregarded. The reference to previous periods means that, in requiring that the applicant should not “*be in the United Kingdom in breach of immigration laws*”, the sub-paragraph is not looking simply at the applicant’s status at the date of the application, but also looks back in time to his previous immigration status. Mr Sarker confirmed that the sub-paragraph referred to all previous periods of overstaying. This is, of course, subject to the SSHD’s residual discretion.
  - (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).
  - (5) Fourth, there is a marked contrast in the drafting of the definitions of “*continuous residence*” and “*lawful residence*” in paragraph 276A sub-paragraphs (a) and (b) respectively. In respect of continuous residence, in addition to defining it as an unbroken period, the sub-paragraph goes on to deem that it “*shall not be considered to be broken*” by certain periods of absence from the UK. Lawful residence, on the other hand, is simply required to be continuous residence (*i.e.* unbroken) pursuant to certain types of leave, temporary admission, immigration bail or exemption from

immigration control. Unlike sub-paragraph (a), in sub-paragraph (b) there is no corresponding provision which allows residence which is not continuously lawful to be deemed unbroken. It is here that one would expect to find the saving which the Applicant incorrectly contends is created by paragraph 276B(v), and one does not. We consider that to be a clear indication that the lawfulness of continuous residence must be unbroken.

- (6) Fifth, by contrast, there are examples elsewhere in the Rules expressly providing that “*continuous periods*” of lawful residence in the UK shall be considered “*unbroken*”, notwithstanding periods of overstaying, where paragraph 39E applies. There are to be found in specific areas where such an exception was clearly intended, *e.g.* Appendix ECAA relating to ECAA Nationals and settlement and *e.g.* Part 6A of the Rules in relation to the Points Based System. Part 6A provides as follows (emphasis added):

**“Part 6A**

***Points-based system***

*245AAA. General requirements for indefinite leave to remain*

*The following rules apply to all requirements for indefinite leave to remain in Part 6A and Appendix A:*

*(a) References to a “continuous period” “lawfully in the UK” means, subject to paragraph (e), residence in the UK for an unbroken period with valid leave, and for these purposes a period shall be considered unbroken where:*

...

*(iv) the applicant has any previous period of overstaying between periods of leave disregarded where: the further application was made before 24 November 2016 and within 28 days of the expiry of leave; or the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied. ...* (emphasis added)

- (7) Sixth, applying ordinary rules of statutory construction and the presumption of ideal, rational legislation, these differences in drafting should not be read as accidental or unintended (*c.f.* Bennion on *Statutory Construction*, section 9.3).
- (8) If and insofar as reliance is placed on the SSHD’s “*Long Residence*” Guidance (Version 15.0) published on 3<sup>rd</sup> April 2017, this does not avail the Appellant. We note that “*Example 1*” and “*Example 2*” on page 16 of the Guidance say that “*gaps in lawful residence*” can be disregarded because “*the rules allow for a period of overstaying of 28 days or less when that period ends before 24 November 2016*”. This does not accord with the true construction of paragraph 276B as set out above, although it may reflect a policy adopted by the SSHD. However, it is axiomatic that the intention of the Rules is to be discerned “*objectively from the language*

*used*” not from *e.g.* guidance documents (*per* Lord Brown in *Mahad (Ethiopia) v. Entry Clearance Officer* [2010] 1 WLR 48 (2009) at paragraph 10). The SSHD may wish to look again at the Guidance to ensure that it does not go any further than a statement of policy.

16. It will be apparent, therefore, that we agree with the decision and reasoning of Sweeney J in *Juned Ahmed (supra)*. As Sweeney J correctly held, paragraph 276B(v) involves a freestanding and additional requirement over and above the requirements of paragraph 276B(i)(a).
17. In summary, it is clear as a matter of construction of the Immigration Rules that an applicant cannot rely on paragraph 276B(v) to argue that any period of overstaying should be disregarded for the purposes of establishing “*10 years continuous lawful residence*” under paragraph 276B(i)(a).
18. For the above reasons, this appeal does not have a real prospect of success. Permission to appeal is refused.
19. In view of the fact that there are numerous appeals to this court which advance the argument with which we have dealt, we direct that this judgment be published, and may be cited notwithstanding that it is a decision on PTA.