Neutral Citation Number: [2022] EWCA Civ 1147

Case No: CA-2022-000223

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)
Upper Tribunal Judge Gleeson
Case No. JR-2021-LON-000912

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/08/2022

Before :

LORD JUSTICE ARNOLD
LORD JUSTICE DINGEMANS
and
LORD JUSTICE WARBY

- -

Between :

THE QUEEN (on the application of VICTORMILLS ONYEKACHI IYIEKE)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

Zainul Jafferji and **Arif Rehman** (instructed by **Direct Access**) for the **Appellant**
Ben Keith (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 20 July 2022

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 11 August 2022.

Lord Justice Dingemans:

Introduction and issues

1. This is the latest appeal to raise the issue of the proper construction of paragraph 276B of the Immigration Rules which relates to the grant of Indefinite Leave to Remain ("ILR") after "10 years continuous lawful residence". After the judgment in *Hoque v Secretary of State for the Home Department* [2020] EWCA Civ 1357; [2020] 4 WLR 154 the Supreme Court was informed, before it refused permission to appeal to the unsuccessful applicants for ILR, in December 2020 that "the Home Office are in the process of redrafting this section and attempting to simplify the rules overall". This has not yet occurred, and Mr Keith informed the Court that he did not know when the rule would be redrafted.

2. Since the judgment in *Hoque* the Court of Appeal has had to revisit paragraph 276B in *R(Akinola) v Upper Tribunal* [2021] EWCA Civ 1308; [2022] 1 WLR 1585; *Secretary of State for the Home Department v Ali* [2021] EWCA Civ 1357; [2021] 1 WLR 773; and *R(Afzal) v Secretary of State for the Home Department* [2021] EWCA Civ 1909; [2022] 4 WLR 21. All of this illustrates the fact that poorly drafted rules lead to avoidable litigation. This matters because the avoidable litigation: comes at a cost to the parties; requires the allocation of limited court resources as the courts attempt to deal fairly with the issues raised by the parties; and causes delay.

3. This is an appeal against the refusal of Upper Tribunal ("UT") Judge Gleeson ("the judge") to grant the appellant Victormills Onyekachi Iyieke ("Mr Iyieke") permission to apply for judicial review of the decision of the Secretary of State for the Home Department ("the Secretary of State") dated 13 June 2021 refusing to grant Mr Iyieke ILR on the basis of 10 years continuous lawful residence. Mr Iyieke currently has limited leave to remain on human rights grounds (and will be making a renewed application for further leave on human rights grounds if necessary) but contends that he should have been granted ILR.

4. Mr Jafferji and Mr Rehman on behalf of Mr Iyieke submit that Mr Iyieke ought to be granted permission to apply for judicial review, and submit that the decision of the Secretary of State refusing to grant Mr Iyieke ILR on 13 June 2021 should be quashed because he had 10 years continuous lawful residence at the date of the decision. They say that, although there was a period of Mr Iyieke's stay in the United Kingdom when he did not have leave, this was "book-ended" by periods of leave and so should count towards the 10 years continuous lawful residence pursuant to the provisions of paragraph 276B(v)(a) of the Immigration Rules. They also submit that the part of the judgment in *Afzal* which decided that book-ended leave did not count towards the 10 year period of continuous lawful residence was per incuriam because it had not considered other differing uses of the words "discounted", in particular at paragraph 276ADE of the Immigration Rules, instead of "disregarded" in the Immigration Rules. They submit that, alternatively, even if the period of residence without leave does not count towards the 10 years but is just ignored, Mr Iyieke had accrued 10 years continuous lawful residence by the date of the decision by the Secretary of State on 13 June 2021, and so he should have been granted ILR.

5. It is further submitted that the Secretary of State failed to consider the discretion provided to the Secretary of State under the guidance to Home Office staff set out in

the Home Office, Long Residence, Version 17, published on 11 May 2021 ("the Long Residence guidance") and grant Mr Iyieke ILR. Mr Jafferji and Mr Rehman also submit that the Secretary of State failed to engage with Mr Iyieke's request for ILR beyond the Immigration Rules. It does not appear that this was expressly argued on the renewed application for permission to apply for judicial review before the judge.

6. Mr Keith on behalf of the Secretary of State contends that, as at 13 June 2021, Mr Iyieke did not have 10 years continuous lawful residence and that permission to apply for judicial review was rightly refused. It is submitted that although Mr Iyieke's period of stay without leave was "book-ended" by periods of leave, he could not bring himself within the terms of paragraph 276B(v)(a) of the Immigration Rules because he did not have a qualifying "previous application". This meant that the period of leave was not "continuous". If this was not sufficiently addressed in the judgment below, Mr Keith sought permission to raise these points in a Respondent's Notice, which had been prepared out of time. Permission to serve the Notice out of time had not been pursued because the Secretary of State considered that the matters were covered by the judgment. Mr Keith submitted that there was no relevant discretion in the Long Residence guidance which could be exercised in favour of Mr Iyieke, and that the Secretary of State had been entitled to address the other points made by Mr Iyieke in support of the grant of leave under the separate grant of leave to remain on human rights grounds.

7. It was also common ground that paragraph 39E of the Immigration Rules, which is referred to in paragraph 276B(v)(b) of the Immigration Rules, is not engaged by the issues on this appeal, even though it had been wrongly referred to in earlier decisions and submissions. I am very grateful to Mr Jafferji and Mr Rehman, Mr Keith, and their respective legal teams for their helpful written and oral submissions.

Relevant factual background

8. Mr Iyieke entered the UK lawfully on 13 February 2011 and resided with leave to remain as a student until 30 November 2012. Mr Iyieke submitted an in time application for post study leave, which was later granted until 9 August 2014 when his leave expired.

9. Mr Iyieke then made an out of time application for leave to remain on compassionate grounds on 2 September 2014. That application was made within 24 days of the expiry of his post study leave. It was refused on 29 October 2014.

10. A letter challenging that refusal was sent on behalf of Mr Iyieke on 25 November 2014, and Mr Iyieke was then granted temporary admission on 28 November 2014. A period of temporary admission can, if leave is subsequently granted, count towards the 10 year period of continuous lawful residence.

11. There followed an exchange of pre-action protocol correspondence. Mr Iyieke submitted an out of time application for leave to remain on family and private life grounds on 26 February 2015. This was refused on 10 June 2015 with a right of appeal. An appeal was lodged to the First-tier Tribunal ("FTT") which was dismissed on 5 April 2016. Mr Iyieke was granted permission to appeal to the UT. The appeal was successful and Mr Iyieke was granted leave to remain on 11 August 2017 on human rights grounds outside the terms of the Immigration Rules until 11 February 2020. A

further in time application was made which was successful and Mr Iyieke was granted leave to remain until 30 July 2022. Mr Iyieke continues to benefit from leave to remain and the Court was informed that he would be making a further application for leave to remain on human rights grounds. This claim challenges the refusal of the SSHD to grant him ILR.

12. Mr Iyieke applied for ILR on 17 February 2021 on the grounds of 10 years continuous lawful residence. In that application he also referred to his human rights grounds. There was a covering letter dated 22 February 2021 which referred to the decision of the Court of Appeal in *Hoque* and which made it clear that Mr Iyieke contended that he had 10 years continuous lawful residence.

13. Mr Iyieke's application for ILR on the basis of 10 years continuous lawful residence was refused by the Secretary of State in an email dated 13 June 2021. The email contained reasons refusing the claim for ILR but accepting that Mr Iyieke currently had the right to remain in the UK and that leave remained in force. The email explained that there had been no rejection of the human rights grounds so that there was no appeal against that decision. The email stated that Mr Iyieke was not entitled to ILR on the basis of 10 years continuous lawful residence, but it was common ground that the reasoning in the email contained factual misstatements about leave under section 3C of the Immigration Act 1971, the effect of paragraph 39E of the Immigration Rules and relevant dates. It was recorded in the email that discretion could not be exercised because Mr Iyieke had not complied with the rules, and that discretion would have been exercised in his favour only if he had applied within 28 days of his leave expiring.

The judgment below

14. The judge stated that it was a renewed application for permission to apply for judicial review, and then set out material parts of the judgment of the Court of Appeal in *Afzal.* The judge set out her reasons for refusing permission to apply for judicial review saying: "The core factual matrix, however, is not distinguishable from that of the applicant in *Afzal*. There is, as Ms Brown has conceded, an 87-day gap in the applicant's residence which, applying Afzal guidance, cannot count towards continuous lawful residence. The requirements of paragraph 276B are not met, and paragraph 276B(v) does not avail him."

Grant of permission to apply for judicial review

15. In my judgment this is a case where permission to apply for judicial review ought to be granted. This is because the grounds relating to the proper construction of paragraph 276B are, in the particular circumstances of this case, arguable. This means that this Court will address the merits of the application for judicial review.

Appellant entitled to raise the issue of discretion

16. It does not appear that the points made on behalf of Mr Iyieke about the failure to exercise discretion in his favour were made in terms to the judge at the hearing of the renewed application for permission to apply for judicial review. The grounds were identified in the claim form drafted by Mr Iyieke, and as this application for judicial review is before this Court in my judgment it is appropriate to address the submissions about discretion.

No need for a Respondent's Notice

17. I accept that the reasons for the judgment below were expressed very summarily, but it is right to record that this was an extempore judgment in respect of a renewed application for permission to apply for judicial review. The judge set out that the requirements of paragraph 276B were not met, and that paragraph 276B(v) did not avail Mr Iyieke. In my judgment this was sufficient to cover all of the arguments which have been addressed to this Court, and I would not require the Secretary of State to file a Respondent's Notice.

Relevant provisions of the Immigration Rules and the Long Residence guidance

18. Paragraph 276B of the Immigration Rules provides:

> "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.
>
> (ii) …
>
> (iii)…
>
> (iv)…
>
> (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."

19. The Long Residence Guidance provides, among other guidance: (1) for the exercise of discretion to allow an applicant with temporary admission who meets all the other requirement of rule 276B, 6 months leave to remain to make an application (on page 6 of 45); (2) that the caseworker may grant the application if an applicant has short gaps in lawful residence through making previous applications out of time by no more than 28 days where those gaps end before 24 November 2016, although discretion might be exercised to grant late applications where exceptional circumstances such as serious illness, postal delays or inability to provide documents were present (pages 16-18 of 45); (3) that where an applicant has overstayed for over 28 days there may be exceptional circumstances as before that might justify discretion to ignore certain delays (pages 19-20 of 45).

20. The Secretary of State has wide discretion under the Immigration Act 1971 to grant leave to enter or remain where leave would not be granted under the Rules, see *R(Munir) v Secretary of State for the Home Department* [2012] UKSC 32; [2012] 1 WLR 2192. The fact that there was a discretion to exercise meant that the guidance

relating to that discretion was unlikely to be a rule (requiring to be laid before Parliament as part of the Immigration Rules), but that would depend on the terms of the guidance about the discretion.

Mr Iyieke did not have 10 years continuous lawful residence

21. Mr Iyieke had post study leave to remain which expired on 9 August 2014. He then made an application for leave to remain on 2 September 2014. The application on 2 September 2014 was made within 24 days of the expiry of his post study leave.

22. The application made on 2 September 2014 was refused on 29 October 2014. The refusal was challenged, and Mr Iyieke was then granted temporary admission on 28 November 2014 but the application made on 2 September 2014 was not successful.

23. Although it is common ground that, with the subsequent grant of leave to remain on human rights grounds, Mr Iyieke's temporary admission as from 28 November 2014 counts towards his period of 10 years continuous lawful residence, there is still the period from 9 August 2014 when Mr Iyieke's leave to remain expired, until 28 November 2014, from which his temporary admission counted towards leave. This means that there is a gap of 22 days in August, 30 days in September, 31 days in October and 28 days in November, making a total of 111 days. The parties below had incorrectly calculated the period from 2 September 2014 (when the unsuccessful application was made) until 28 November 2014 making a total of 87 days. This was the figure provided to the judge, but nothing turns on whether the relevant gap is 87 days or 111 days. I will refer, as the parties have done, to the gap as 111 days.

24. It is now established, following the judgment in *Hoque*, that the provisions of paragraph 276B(v) qualify paragraph 276B(i). As recorded above, it was also common ground that paragraph 39E of the Immigration Rules was not engaged. This means that the question is whether Mr Iyieke "has had at least 10 years continuous lawful residence in the United Kingdom" (paragraph 276B(i)(a)) because the gap of 111 days as a period of overstaying between periods of leave "will also be disregarded where the previous application was made before 24 November 2016 and within 28 days of the expiry of leave" (paragraph 276B(v)(a)).

25. Mr Jafferji and Mr Rehman submitted that Mr Iyieke satisfied the provisions of this rule because Mr Iyieke made his application dated 2 September 2014 within 28 days of the expiry of leave, and it was made before 24 November 2016. Mr Keith submitted that "the previous application" had to be a reference to the application which had resulted in the grant of leave which meant that the applicant could now make a further application for ILR on the basis of 10 years continuous lawful residence.

26. In my judgment "the previous application" cannot be a reference to any unsuccessful application made in a period of book-ended leave before 24 November 2016. This is because the reference is to "the" previous application and not "a" previous application. "The" previous application must have resulted in a period of leave because otherwise there will be other periods of overstaying which need to be disregarded. This is because lawful residence is defined by paragraph 276A(b) of the Immigration Rules to include: existing leave to enter or remain; temporary admission or immigration bail; or an exemption from immigration control. After 9 August 2014 Mr Iyieke did not have any

form of lawful residence until 28 November 2014 and there is nothing in paragraph 276B(v) which requires that to be overlooked.

27. Mr Iyieke did not therefore satisfy the requirements of 10 years continuous lawful residence as at 13 June 2021 and the Secretary of State was right to reject his application for ILR on the basis of 10 years continuous lawful residence by email dated 13 June 2021.

28. In these circumstances Mr Jafferji's point about the decision in *Afzal* being a decision made per incuriam does not arise. It might be thought that the submission that *Afzal* had been decided per incuriam, because the Court had not considered the express use of the word "discounted" in paragraph 276ADE of the Immigration Rules where that had been intended, where paragraph 276B(v) had used the word "disregarded", was based on a false proposition. This was that the Immigration Rules were drafted in one go as a coherent whole so that it would not readily be assumed that the drafter had used different words to convey the same meaning. It is necessary only to reflect on the way in which the Immigration Rules are numbered to see that the rules have been the product of many separate amendments made at different times by different persons.

No failure to consider discretion

29. I turn then to consider the submission that the Secretary of State failed to consider the discretion provided in the Long Residence guidance and disregard the 111 days. The short answer to this point is that the discretion provided in the guidance to waive compliance with the rules was, as appears from the text of the Long Residence guidance, parts of which are summarised in paragraph 19 above, is based on circumstances such as illness or postal failures. There is nothing of that sort in this case. This does not mean that the Long Residence guidance has become an "immigration rule", for the purposes of the decision in *R(Munir),* it simply means that Mr Iyieke's case is not one of those circumstances where discretion will be exercised to mitigate the effect of the Immigration Rules.

30. That leaves the fact that Mr Iyieke did refer to his human rights and other grounds in the application dated 25 February 2021 and the Secretary of State did not exercise discretion to grant leave outside the rules. Mr Jafferji and Mr Rehman are right that Mr Iyieke was encouraged by the terms of the application form to list any basis that he had for claiming leave to remain, and he cannot be criticised for taking that step. However the Secretary of State addressed those submissions, recorded that Mr Iyieke had outstanding leave, and that those matters would be dealt with in relation to that grant of leave to remain. There was nothing unlawful in taking that approach.

Conclusion

31. For the detailed reasons set out above I would grant permission to apply for judicial review, but dismiss the claim for judicial review. Mr Iyieke did not have 10 years continuous lawful residence as at 13 June 2021. The Secretary of State did not act unlawfully in failing to exercise discretion to grant ILR to Mr Iyieke.

Lord Justice Warby

32. I agree.

Lord Justice Arnold

33. I also agree.