Press Summary

28 November 2023

R (on the application of Afzal) (Appellant) v Secretary of State for the Home Department (Respondent)

R (on the application of Iyieke) (Appellant) v Secretary of State for the Home Department (Respondent)

[2023] UKSC 46

On appeal from [2021] EWCA Civ 1909; and [2022] EWCA Civ 1147

Justices: Lord Reed (President), Lord Kitchin, Lord Sales, Lord Burrows, Lord Stephens

Background to the Appeal

Each of the appeals concerns the question whether the appellant, Mr Afzal and Mr Iyieke, respectively, is entitled to be granted indefinite leave to remain in the United Kingdom ("**ILR**").

The respondent, the Home Secretary, had granted Mr Afzal leave to remain until 14 July 2017. On 6 July 2017, Mr Afzal submitted an application for further leave to remain along with an application for waiver of the relevant fee. On 18 October 2017 the Home Secretary rejected Mr Afzal's application to waive the fee and notified him that he had to pay the applicable fee together with the Immigration Health Surcharge (the "**IHS**") payable under the Immigration (Health Charge) Order 2015 (SI 2015/792) (the "**2015 Order**"). Mr Afzal subsequently paid the application fee but omitted to pay the IHS as required. Since the IHS remained unpaid, on 22 January 2018 the Home Secretary rejected Mr Afzal's application. Mr Afzal did not challenge this decision. Instead, on 2 February 2018 Mr Afzal made a fresh application for further leave to remain, accompanied by the relevant fee and the IHS. On 5 September 2019, the Home Secretary granted leave to remain until 4 March 2022. On 28 February 2020, having resided in the United Kingdom for more than 10 years, Mr Afzal applied for ILR pursuant to para 276B of the Immigration Rules (Statement of Changes in Immigration Rules) (1994) (HC 395)) (the "**Immigration Rules**") on the ground of long residence, relying so far as necessary on section 3C of the Immigration Act 1971. Section 3C extends leave, in circumstances where an in-time application is made for variation of the leave, until the application is decided or withdrawn. The ILR application was refused on the

grounds that there was a gap in his continuous lawful residence in the period between 14 July 2017 and 5 September 2019 where his presence in the United Kingdom had been unlawful as being without leave to remain.

In respect of Mr Iyieke, the Home Secretary had granted him leave to remain until 9 August 2014. Mr Iyieke did not submit a further application to extend his leave beyond that date and became an overstayer on 10 August 2014. He then submitted an out of time application on 2 September 2014 for leave to remain on compassionate grounds which was refused. He then submitted an application for leave to remain on family and private life grounds on 26 February 2015 which was also refused, but the Upper Tribunal allowed his appeal. The Home Secretary therefore granted Mr Iyieke leave to remain until 11 February 2020, and then, on a further application by Mr Iyieke, until 30 July 2022. On 17 February 2021, having been resident for more than 10 years in the United Kingdom, Mr Iyieke applied for ILR pursuant to para 276B of the Immigration Rules. This application was refused.

Mr Afzal issued a judicial review claim to challenge the Home Secretary's decision against his ILR application. Permission to claim judicial review was refused by the Upper Tribunal. On appeal, the Court of Appeal granted permission but dismissed his claim on the merits: [2021] EWCA Civ 1909. Mr Iyieke also issued a judicial review claim to challenge the Home Secretary's decision against his ILR application. Permission to claim judicial review was refused by a differently constituted Upper Tribunal. On appeal, a differently constituted Court of Appeal granted permission but dismissed his claim on the merits: [2022] EWCA Civ 1147. Mr Afzal and Mr Iyieke now appeal to the Supreme Court.

Judgment

The Supreme Court unanimously dismisses each of the appeals. Lord Sales gives the only judgment, with which the other Justices agree.

Reasons for the Judgment

Mr Afzal's appeal

Mr Afzal's period of overstaying between 14 July 2017 and 5 September 2019 breaks his period of 10 years continuous lawful residence as required under para 276B(i)(a), meaning that he cannot satisfy the conditions for a grant of ILR, unless para 39E(2)(b)(ii) of the Immigration Rules applies. Under para 39E(2)(b)(ii), the period of overstaying is "disregarded" (under para 276B(v)) where the application was made within 14 days of the expiry of any leave extended by section 3C of the Immigration Act 1971 **[35]**.

By virtue of article 6(1) of the 2015 Order, where a person fails to comply with the requirement to pay the IHS in connection with their application the Home Secretary has a discretion to request the applicant to pay the outstanding charge. That discretion was exercised so Mr Afzal had to pay the outstanding IHS charge within 10 working days of the date (18 October 2017) when the request was sent. Upon his failure to do so, article 6 required the Home Secretary to treat his application for leave as invalid at that point (31 October 2017). Mr Afzal was entitled to rely on section 3C for an extension of his leave only until then **[58], [64]**. Mr Afzal's subsequent application on 2 February 2018 was therefore not made within 14 days of the expiry of that extension of his leave, with the result that he was not lawfully present between 14 July 2017 and 5 September 2019. This broke the period of continuous lawful residence for the purposes of his ILR application **[65]**.

If the period was not broken in this way, a second question arose as to the meaning of "disregarded" under para 276B(v) of the Immigration Rules because, in order to be able to establish at least 10 years of continuous lawful residence, Mr Afzal needs to be able to add

the period of overstaying, which he says falls to be "disregarded" under para 276B(v), to his periods of lawful residence either side of it **[38]**. Having regard in particular to the natural meaning of "disregarded", the Court holds that this period of overstaying cannot be added to the periods of lawful residence either side of it to make up a total of 10 years lawful residence **[70]-[71], [79]**.

Mr Iyieke's appeal

There was a gap of 111 days between the expiry of the first period of leave (9 August 2014) and the date of the commencement of Mr Iyieke's second period of leave to remain. The commencement date of this second period was backdated to 28 November 2014 for the purposes of counting continuous lawful residence following Mr Iyieke's successful appeal in the Upper Tribunal in respect of his application made on 26 February 2015 on family and private life grounds. If the resulting gap period falls to be disregarded under para 276B(v)(a), Mr Iyieke can establish that he has the necessary period of continuous lawful residence for a grant of ILR **[83]**. For the gap period to be disregarded, his (unsuccessful) application of 2 September 2014 for leave to remain must qualify as "the previous application" referred to in para 276B(v)(a) **[84]**. The Court holds that it does not so qualify. The use of the definite article in the phrase "the previous application" shows that only one particular application is being referred to, which must be the application which successfully resulted in the grant of the second period of leave and which marked the end of the period of overstaying **[86]**. To hold otherwise would have the perverse effect of making it more advantageous to submit an application out of time which it cannot reasonably be thought the drafter intended **[88]**.

References in square brackets are to paragraphs in the judgment.