R (on the application of RN v Secretary of State for the Home Department (paragraph 245AAA) [2017] UKUT 00076(IAC)

IN THE UPPER TRIBUNAL

Field House
London

Heard on: 11 November 2016

BEFORE

UPPER TRIBUNAL JUDGE ALLEN

Between

THE QUEEN
(on the application of RN)

Applicant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr T Buley, instructed by Spring Solicitors appeared on behalf of the Applicant.

Mr A Wagner, instructed by the Government Legal Department appeared on behalf of the Respondent.

(i) On a proper construction of paragraph 245AAA(a)(i) of HC 395, an absence from the United Kingdom for a period of more than 180 days in one of the relevant 12 month periods will entail a failure to satisfy the requirements of paragraph 245CD.

(ii) The term 'residence' in paragraph 245AAA(a) is to be equated to presence.

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APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

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JUDGE ALLEN: I have made an anonymity direction in respect of the applicant. Unless and until a Tribunal or court directs otherwise, the applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies to both the applicant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. This application for judicial review is brought with the permission of McCloskey J and May J following an oral permission hearing on 21 July 2016. In her application the applicant challenges the lawfulness of the respondent's decision of 13 January 2016 refusing to grant her indefinite leave to remain, and the decision of 15 February 2016 which is an administrative review of the first decision. There is also a supplementary decision of 20 April 2016 which I shall have to address separately.

2. There are three grounds of challenge in this case. The ground to which I will refer as it has been by the representatives as the construction ground was raised as a consequence of a successful application to amend the grounds to incorporate that point. Permission to amend the grounds to include that matter was granted by Mr Justice McCloskey and Mrs Justice Cheema-Grubb on 14 October 2016. I mention that because as a matter of convenience the original two grounds, grounds 1 and 2, have continued to be referred to under those numbers and I shall continue to refer to them in that way although technically they are now grounds 2 and 3.

3. The background history to this case is that the applicant was granted leave to enter on 12 January 2011 and duly entered the United Kingdom on 17 February of that year. Her leave was originally for two years, to 12 January 2013 and was later extended to 12 January 2016. At the time of her entry and up until 13 December 2012 the relevant Immigration Rule

governing the acquisition of leave to remain in the United Kingdom after five years' lawful residence was paragraph 245CD. This Rule required a person to have spent a continuous period of five years lawfully in the United Kingdom and did not specify any maximum period of absence. The relevant policy at the time made it clear that periods of absence abroad, including for holidays and business trips, would not break continuity: "provided that the applicant has clearly continued to be based [in the United Kingdom]".

4. A new Rule, paragraph 245AAA, was inserted into the Rules from 13 December 2012. The relevant provisions of that Rule state as follows:

> "245AAA General requirements for indefinite leave to remain:
>
> For the purposes of references in this Part to requirements for indefinite leave to remain, except for those in paragraphs 245BF, 245DF and 245EF:
>
> (a) 'continuous period of five years lawfully in the UK' means, [subject to paragraphs 245CE, 245GF and 245HF] residence in the United Kingdom for an unbroken period with valid leave, and for these purposes a period shall not be considered to have been broken where:
>
> (i) the applicant has been absent from the UK for a period of 180 days or less in any of the five consecutive twelve month periods preceding the date of the application for leave to remain;
>
> ...".

5. On 9 April 2015 a new policy came into being which indicated circumstances in which discretion outside the Rules would be exercised when continuous leave is broken in the case of "serious or compelling circumstances". It will be necessary to say a little more about the policy in due course.

6. It is common ground that as regards the five one year periods that are relevant for the purposes of this case, during the first period, from 31 December 2010 to 30 December 2011, the applicant was absent from the United Kingdom for a total of 215 days. During the second period, from 31 December 2011 to 30 December 2012, she was absent from the United Kingdom for a total of 284 days. I need say no more about the other three periods since none of them exceeded the 180 day period referred to at paragraph 245AAA(a)(i).

7. The applicant applied for indefinite leave to remain in the Tier 1 (General) Migrant category on 30 December 2015. She made clear the periods of absence that I have set out above as well as the periods of absence for the other three periods. With regard to the period of absence from 31 December 2010 to 30 December 2011, she said that this was because of, first legitimate needs to travel abroad for the purposes of her business exporting goods from the United Kingdom to Nigeria and relocating and reordering the focus of her business, and secondly attending to her children's schooling at boarding school in Nigeria. With regard to the second period she said that this arose at least in part from the circumstances of her mother having been kidnapped in Nigeria on 4 March 2012 as a result of which she had to spend additional time in Nigeria, inter alia providing support for her father who was frail. She provided a police report in relation to this. She also made it clear that some of the absences during that period were due to business.

8. The respondent refused her application on the basis that as she had been absent from the United Kingdom for over 180 days in two out of the five years it was considered that she did not meet the requirements of paragraph 245CD with reference to paragraph 245AAA as she had not completed a continuous period of five years lawfully in the United Kingdom. She went on to say that due to the total number and nature of the absences which were mainly for work, discretion could not be shown. That latter point was by reference to the provision in the policy which tells the case worker about the exceptional circumstances in which they can

grant an applicant indefinite leave to remain outside the Rules when their continuous leave is broken. It is said that in such circumstances the grant of indefinite leave to remain outside the Rules may be considered if the applicant provides evidence to show the excessive absence was due to serious or compelling reasons. It is said that the applicant must provide evidence in the form of a letter which sets out full details of the compelling reason in the absence of supporting documents. The guidance goes on to say that serious or compelling reasons will vary but can include a serious illness of the applicant or a close relative, a conflict, a natural disaster, for example volcanic eruption or tsunami. The guidance then goes on to say that absence in more than 180 days in any twelve month period for employment or economic activity reasons are not considered exceptional. That latter point seems to tie in with the reason for not exercising discretion as set out in the decision letter. There was however no reference to the issue of the applicant's mother's kidnapping.

9. This was however addressed in the administrative review which maintained the earlier decision. As regards the first period it is said that it had been claimed that the trips she carried out during that period outside the United Kingdom were of compelling necessity as they brought about the financial support required for her upkeep. It was said that this reason had been considered and it was not thought to be compelling enough to overturn the decision. As regards the issue of her mother being the victim of a kidnap in Nigeria and the fact that she as a consequence had to make frequent travel to Nigeria, this was considered and it was said that from her application she had provided no direct proof of this kidnap and as a result discretion could not be exercised.

The Applicant's Submissions

The Construction Ground

10. In essence Mr Buley's argument under this heading is that the respondent misconstrued paragraph 245AAA(a) and as a consequence the decisions should be quashed. He referred to a decision of the Upper Tribunal in BD

[2010] UKUT 418 (IAC) where the Tribunal was required to construe the phrase "spent a continuous period of five years lawfully in the United Kingdom", which was required by paragraph 134 of the Immigration Rules in order to obtain indefinite leave to remain as a work permit holder. The Tribunal noted that there was no guidance on the proper interpretation of paragraph 134(i). The Tribunal concluded that the paragraph was not meant to be taken literally since if it were so taken anyone who wanted to qualify for indefinite leave to remain after five years would be unable to take even a day trip to France or visit his own country on family matters. As a literal construction made no sense, the Rule had to be construed sensibly. It was considered that it clearly imported a discretion and of relevance would be the reason for the absence and the strength of the person's ties to the United Kingdom as shown in other ways. On the particular facts of the case the appellant's absences had been required of him by his employer, a British company, and he had at all times retained his base in the United Kingdom where he was domiciled for tax purposes and appeared to have established a domicile of choice for other purposes. It was considered that he had clearly made this country his home. In those circumstances it was concluded that he did meet all the requirements of paragraph 134.

11. Mr Buley went on to argue that where paragraph 245AAA(a) referred to "residence" in the United Kingdom it did not say that in fact it meant "presence". "Residence" was an ordinary word. One was resident in a place if it was one's home. Mr Buley referred to the decision of the House of Lords in R v London Borough of Barnet ex parte Shah [1993] 2 AC 309. This case was concerned with the meaning of the phrase "ordinary residence" in the context of eligibility for a local authority educational award. Lord Scarman made the point at page 340 that ordinary residence is not a term of art in English law. He referred to different contexts in which it was employed including income tax, family law, and various twentieth century statutes including the one with which that appeal was concerned. In two tax cases in 1928 the House of Lords had considered

that the words “ordinary residence” involved seeking the natural ordinary meaning of the words. Lord Scarman agreed with what had been said by Lord Denning MR in the Court of Appeal that the natural and ordinary meaning of the words “ordinary residence” meant “that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration”. He also said, at page 343:

> “Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that “ordinarily resident” refers to a man’s abode in the particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.”

Mr Buley accepted of course that the instant case was not strictly concerned with “ordinary” residence, but he argued that the presence of that additional qualification in that case did not alter the relevance of the approach adopted by the House of Lords in Shah to the present case. He argued that the literal and legal meaning of residence was not such as to require it to be equated with continual presence.

12. Mr Buley argued further that the Rule, though it said that a period should not be considered to have been broken where the applicant had been absent from the United Kingdom for a period of 180 days or less, did not mean and did not say, that a period would be considered to have been broken where there had been an absence for more than 180 days. To interpret it in that way would cut across the definition of residence being defined as Mr Buley had argued it should be. There was no frustration of the purposes of the Rules. An example might be taken of a pilot who would be out of the country regularly through work and it would be very odd if such a person would automatically be defeated under the Rules. It could not be said that a period of absence of over 180 days made

compliance with the Rule impossible. That could have been done if drafted clearly enough but that was not the case.

13. Mr Buley accepted that it was difficult to see how a person who through work was out of the country for the entire five year period could satisfy the requirements of the Rule despite being based in the United Kingdom for employment and tax and domicile purposes. It was a matter of an exercise of judgment as to where the line was drawn, as could be seen from the decision in BD. The question was whether the person maintained their home in the United Kingdom. A person would not be ordinarily resident just because they had leave to remain and had their home in the United Kingdom. They had to have a base and use it as their home. It was the kind of exercise of judgment the authorities had to make all the time. The fact that the current guidance differed from what was argued by Mr Buley was by the way. The Rule could not be construed by reference to the guidance.

14. Mr Buley argued that if his view on construction was correct then the respondent had erred in law since she had not considered the circumstances of the case in the way which had been done by the Upper Tribunal in BD, which would entail taking a view on the evidence as a whole as to whether the applicant was resident or not. That had not been done and hence there was an error of law. All the respondent had done was to take the fact that she was absent for more than 180 days during each of the two first periods as being decisive.

Ground 1

15. Mr Buley argued that the respondent erred by failing to treat as a relevant circumstance for the entirety of the first and second periods, when the applicant was out of the United Kingdom, the respondent's published policy which indicated that certain kinds of absence, including legitimate business absence, would not be treated as breaking continuity of residence. He argued that this failed to give effect to the applicant's legitimate expectation that the policy then in force would apply to her

case and failed to recognise that the compelling circumstances in such a case are not found merely in the fact that the absences were pursuant to legitimate business activity. This ground arose in respect of the Secretary of State's exercise of her discretion. He argued that the policy could not fetter the respondent's discretion so as to consider only compassionate matters. She could therefore not exclude business absences. The applicant would not have known during those first two years that going a little over the 180 day period would lead to her failure in her subsequent application. Compassionate elements were not just a matter of business absences but also arose since at the time when she thought she was working towards success under the five year Rule, the Rule had changed.

Ground 2

16. Here it was argued on behalf of the applicant that the refusal decision failed to address a relevant issue altogether and was therefore flawed. The second letter of the administrative refusal dealt with the kidnap only on the basis that the applicant had failed to supply "direct proof". On the applicant's behalf it was argued that this was wrong in that she had supplied direct proof both in the form of her own evidence and by providing a police report concerning the incident. The fact that the report did no more than record the reporting of the incident did not detract from the fact that it amounted to direct proof. In addition the evidence provided had been done in precisely the form required by the current guidance which required that evidence must be provided in the form of a letter setting out full details of the compelling reason for the absence and supporting documents. It was appropriate to require no more than evidence which should be or was capable of being believed. In the alternative the respondent should have given the applicant the opportunity to provide additional documents insofar as the original ones were considered to be inadequate, in line with the evidential flexibility policy that had been extant at the time.

The Respondent's Submissions

17. In his submissions Mr Wagner argued that with regard to the construction ground there was a clear and ordinary meaning apparent from the face of the Rules. There was no need to make an equation with the term "ordinary residence" but it was simply necessary to read the Rules. The decision in BD showed what the old Rules said and how they had been dealt with in that situation. There was no guidance or further definition in that case as opposed to the instant case. As there was no guidance concerning the meaning of the Rule the Tribunal had to make its own interpretation which it did so, perfectly reasonably, at paragraph 10. Mr Wagner would have had no argument if the Rule had not been changed but the scheme of the Rule had changed. There had been no definition before but there was now a definition at paragraph 245CD(c) and paragraph 245AAA. The latter required an unbroken period with valid leave. It was sensible for residence to be given its ordinary meaning. The provision of an unbroken period with valid leave was not in the original Rule but it was clear, and then there was a definition of what was meant by "broken" and "unbroken". If the Rule had stopped there then it would not necessarily take matters beyond what was decided in BD, but it went on to provide at subparagraph (a)(i) the provision about when a period should not be considered to have been broken, where the applicant had been absent from the United Kingdom for a period of 180 days or less in any of the five consecutive twelve month periods. This was a very specific provision, and was to do with presence. For all the period to remain unbroken a person could not have been absent from the United Kingdom for more than 180 days. This tied that definition very specifically to a person's presence in the United Kingdom and a cut-off point was provided. 180 days was the critical cut-off. If the period was greater than that then the person did not succeed.

18. Mr Wagner argued that Mr Buley's attempt to define the term went against the ordinary language. It was a strained interpretation to say that if a person were absent for 180 days or less then the period would not have been broken whereas if it was more than 180 days then all the

factors set out in BD would have to be considered. This imported an entirely different way of looking at the question of an unbroken period of residence as meaning there was no mention of that anywhere in the scheme. If that had been Parliament's intention it would have said so. It was very specific as to what could not be considered a broken period and that could not be clearer. It was defined as presence in the United Kingdom. There was no conflict with what had been decided in BD. It would have been absurd if the Rule had been given a literal meaning there, and that was a reasonable conclusion. With regard to the example of the pilot there would always be hard cases where there was a clear Rule and that could be such a case. This was why the policy retained a discretion outside the Rules and it could be that the pilot would come within that. The definition was clear and it was not necessary to go into the reasoning behind it.

19. As regards the argument by analogy from Shah it was argued that that was totally irrelevant mainly because the wording was different. That case was concerned with "three years' ordinary residence". It was clear that "ordinary residence" was not a term of art so it could mean different things in different contexts. The word "ordinary" was really the key. "Residence" could mean a variety of things. "Ordinary" had some sort of temporal connotation and the position would be affected by absences. It was key to note the first two lines in the paragraph quoted at page 343 referring to cases where it could be shown that the statutory framework or the legal context in which the words were used required a different meaning. That was the case here, even if one were just looking at the term "residence". It was clear what was meant by "broken" and hence it was the case that "unbroken" was clear also. It followed very obviously from paragraph 245AAA(a)(i) that it was not necessary for it to be spelt out. If the wider meaning of connection to the United Kingdom had it been intended then it would have said so.

20. In sum therefore BD was irrelevant, and there was a definition of the Rules now and a reference only to broken and unbroken periods of residence but

that in effect defined continuous residence as presence in the United Kingdom.

21. With regard to ground 1, this was governed by what had been decided by the House of Lords in Odelola [2009] UKHL 25. It was clear that the Rules would apply to the decision of the respondent made until such time as she promulgated different Rules after which she would decide according to the new Rules. There was no obligation on the respondent to consider or apply old guidance when new guidance had later been provided unless this was required by transitional provisions.

22. With regard to ground 2, Mr Wagner noted that further information had been provided concerning the kidnap and there was the supplementary decision as a consequence. This was dated 20 April 2016 and addressed in particular the issue of the kidnap of the applicant's mother but also dealt with various points concerning work-related absences. It was for the applicant to make out her claim. The letter made it clear that the kidnap period had been for a maximum of eight days and evidence concerning the health conditions of the applicant's parents thereafter was considered at paragraph 7 of that letter. Paragraph 9 did not exclude business matters as being a compelling reason, but asked where the evidence was. In any event the policy said that business reasons would not be considered as exceptional, and that was reasonable. As regards evidential flexibility, the applicant had been given the opportunity of administrative review and a further opportunity as further documents had been considered in that later letter. There had been no unfair treatment.

Discussion

The Construction Ground

23. In BD the Tribunal construed the phrase "continuous period of five years' lawfully in the UK" which is of course the same phrase as that appearing at paragraph 245AAA(a). Mr Buley made the point in passing that that is not exactly the phrase to be found in paragraph 245CD but he did not seek to

attach any significance to it. There was no definition in the phrase in the version of the Immigration Rules considered by the Upper Tribunal in BD, but we have now the definition in paragraph 245AAA, as set out above. Given that we now have that definition, I consider that limited assistance at best can be derived from BD. To an extent though it may be said that paragraph 245AAA(a) must take its colour from paragraph 245CD, which is in many respects a parent provision, and that refers at (c) to the requirement that the applicant must have spent a continuous period as specified in (d) which then takes one on to the definition in 245AAA(a). That might be said to hint that what is in issue at least in part is time spent in the United Kingdom, in a particular category as set out in sub-paragraphs to 245CD(c).

24. Mr Buley argued that the word "residence" has to be taken in its ordinary meaning as being a person's home or base. I do not think much if any assistance can be derived from Shah. It was concerned with the meaning of the term "ordinary residence" in the context, as noted above, of local education authority education awards. There is the obiter remark by Lord Warrington in Levene [1928] AC 217232, quoted by Lord Scarman in Shah that if ordinary residence had any definite meaning it meant according to the way in which a man's life was usually ordered. Lord Scarman's agreement with what had been said by Lord Denning MR as to the meaning of the phrase, at page 342 in Shah, seems to me again to be a definition taking into account both words of the phrase.

25. In any event I think there is force in the argument that Mr Wagner makes that the statutory framework or the legal context, as referred to by Lord Scarman at page 343 has to be taken into account. In this regard I see force in the point made by Mr Wagner that there is significance in the definition of when a period shall not be considered to have been broken, in paragraph 245AAA(a)(i). It is clearly a reference to a period of absence from the United Kingdom the effect of which is to state that if a person has not been in the United Kingdom for 180 days or less their period of residence will not be considered to have been broken. If residence is not

to be equated with presence then it is difficult to see what the point of the provision is. Residence cannot mean different things for different purposes in the context of one Rule. If the applicant can point to an absence of 180 days or less during the particular twelve month period then his period of residence will not be regarded as being unbroken. It seems to me that one can only interpret the term "residence" in (a) on the basis that it equates to presence for the rest of the provision to make sense. As such accordingly I agree with Mr Wagner that residence for the purposes of the Rule must in effect be equated to presence to be sensibly interpreted. The Rule provides a straightforward and clear solution to the problem created by the uncertainty of the previous provision. It was only necessary for the Tribunal in BD to go into the question of what was meant by continuous period of five years lawfully in the United Kingdom because it had no further definition to assist it. We now have a definition however and in my view the proper interpretation of the term "residence" is as set out above. One would be left otherwise with the uncertainty as shown in the discussion with Mr Buley about the person who seeks ILR and has a home and pays taxes in the United Kingdom but who for the whole of the five year period is away from the United Kingdom for work reasons. In my view the Rule is designed to get around the uncertainties and the need for the kind of decision-making to which Mr Buley adverted.

26. In many ways the point concerning the proper interpretation of the implications of 245AAA(i) for a period of absence of more than 180 days follows from that. Mr Buley's argument is, in effect, that the respondent chose not to say in specific terms how a person who had been absent for more than 180 days should be regarded but that it was a matter for interpretation by the decision-maker and potentially, ultimately, the court. But it seems to me to follow ineluctably from the statement that a period shall not be considered to have been broken when the applicant has been absent from the United Kingdom for a period of 180 days or less in any of the five periods, that a period will be considered to have been broken where there has been an absence for more than 180 days. After all, the

requirement, going back to paragraph 245CD(c) is that the applicant must have spent a continuous period as specified in (d) lawfully in the United Kingdom and, though a person is given the generous exemption of a period of 180 days or less in which they may be absent from the United Kingdom, I think it must follow that that is as far as the exemption goes, and that a period of absence for a lengthier period is one that leads to disqualification under the Rule.

27. It follows that the applicant's argument under the construction ground fails.

Ground 1

28. The short point made by Mr Wagner in relation to this is that as a consequence of the decision in Odelola, the respondent is not obliged to consider or apply old guidance when new guidance has subsequently been provided, unless this is required by transitional provisions. The point is made in the detailed grounds of defence that if the applicant were correct in her argument in this respect the respondent's officials would be required to have ongoing consideration to previous guidance which had been in force for a number of years prior to the date on which the decision is made, which would impermissibly undermine the certainly and predictability required for the operation of a fair and effective immigration system. It is also argued that to require officials to have regard to archived guidance would inevitably result in a fettering of their discretion, at least in some cases and that it might involve them departing from more recent published policy in giving consideration to and applying previous guidance.

29. Mr Buley's point was in essence that it was not so much a question of requiring the respondent to apply old Rules or guidance but rather in the exercise of her discretion outside the Rules, to bear in mind that there was an old Rule and that different Rules and policies applied during the two periods in question.

30. I have set out above what the respondent said in her decision letter about the exercise of discretion in this case. I do not consider that she was bound to take into account previous Rules and policies which were in existence at the time of the two periods in question. The respondent has chosen to create a policy in which in exceptional circumstances indefinite leave to remain can be granted where continuous leave is broken. In my view the policy is a perfectly rational one. To allow for evidence showing that the excessive absence was due to serious or compelling reasons is in my view a perfectly proper basis for the exercise of discretion in such a case. The examples given of serious or compelling reasons are helpful. The respondent gave consideration to the reasons why the applicant had been out of the country for more than 180 days in the first period for business reasons, and concluded that they did not amount to exceptional reasons. That decision was properly open to her. As a consequence I do not consider that ground 1 is made out.

Ground 2

31. It must follow from what I have said above that this application is refused. I have not found in the applicant's favour on the construction ground, nor in relation to the first period of exceeding 180 days. I have found that the respondent's exercise of that discretion was lawful.

32. It is the case that only one period of broken continuous residence in the five year period is enough for the application to be unsuccessful. However, for the sake of completeness, it is right that I address the reasoning of the respondent in relation to the second period. I do not consider that what was said in the April 2016 supplementary decision can be taken into account. As Mr Buley pointed out, the challenge is to the January and February decisions. What was said in this regard in relation to the exercise of discretion was in my view inadequate. There was evidence of the kidnap, and I should say that I consider that kidnap of a parent would inevitably amount to a serious or compelling reason. It may be that on fuller consideration the respondent would have come out with the kind

of points in the April 2016 letter in any event, but as matters stood at the dates of the decisions, I consider that the very limited reasoning given for not exercising discretion in relation to the second period was inadequate. There was the evidence of the applicant herself and there was the police report. The respondent did not chose to point out the limitations in these but dismissed them summarily and that in my view was a matter of inadequate reasoning. I therefore consider that the exercise of discretion in relation to the second period was unlawful.

33. However for the reasons given, I consider that the application must fail on the basis that the respondent's decision was a lawful one under the Rules and also that her exercise of discretion in respect to the first period of exceeding 180 days outside the United Kingdom was a lawful exercise of her discretion. The application is therefore dismissed. I will hear the parties on costs and any ancillary matters when the judgment is handed down. ~~~~*0*~~~~