Neutral Citation Number: [2021] EWCA Civ 1076

Case No: C2/2020/0461

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE GILL
JR/6244/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 July 2021

Before:

LADY JUSTICE NICOLA DAVIES
LORD JUSTICE STUART-SMITH
and
SIR PATRICK ELIAS

- -

Between:

THE QUEEN (ON THE APPLICATION OF CHANDRA MUNGUR)

Appellant

- and –

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -
- -

Darryl Balroop (instructed by **Callistes Solicitors**) for the **Appellant**
Zane Malik QC (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 7 July 2021

- -

Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down will be deemed to be 10.30am on Thursday 15 July 2021.

- -

Approved Judgment

Lord Justice Stuart-Smith:

Introduction

1. The appellant appeals with permission granted by McCombe LJ against the judgment and decision of the Upper Tribunal (IAT) that were sent to the parties on 21 January 2020. By that judgment, UT Judge Gill ("the Judge") refused the appellant's application for permission to claim judicial review of the respondent's decision to refuse him indefinite leave to remain ("ILR") under Paragraph 276B of the Immigration Rules. The Judge certified the application to be totally without merit.

2. Put shortly, the appellant had applied for ILR on the grounds of 10 years continuous residence. The respondent refused that application on the grounds that (a) during the period relied upon by the appellant as continuous residence, he had "left the United Kingdom in circumstances in which he had no reasonable expectation at the time of leaving that he would lawfully be able to return" and therefore could not satisfy the requirements of Paragraph 276B(i)(a) of the Rules; and (b) he had been in the past an overstayer and therefore could not satisfy the requirements of Paragraph 276B(v) of the Rules. The appellant wishes to challenge the lawfulness of that refusal by bringing judicial review proceedings.

3. At the hearing of the appeal the appellant was represented by Mr Balroop and the respondent by Mr Malik QC. I am grateful to them both for the clarity of their submissions, both written and oral. Although the case comes to this court as an appeal against the refusal of permission, the Court heard full argument and decided to treat the hearing as a full hearing of the issues that would arise if permission were granted. I would therefore grant permission and the remainder of this judgment addresses the issues that arise on that basis.

The Factual Background

4. The appellant is a citizen of Mauritius. He obtained a visitor visa valid from 22 March 2001 to 22 September 2001, which was stated to be for multiple visits. On 16 April 2001 he entered the United Kingdom as a visitor. On 1 September 2001 he left the United Kingdom. It is said in his Grounds that he left the United Kingdom "to return to Mauritius to apply for Entry Clearance as a student". It is common ground that he had to leave the United Kingdom if he was to make an application for a student visa. His application to enter as a student was granted on 25 September 2001. It was valid until 25 September 2003 and he entered the United Kingdom once more on 5 October 2001.

5. By a succession of applications the appellant applied for and was granted further leave to remain successively as a student and, later, as a work permit holder so that he remained lawfully in the United Kingdom from 25 September 2003 to 13 July 2011. He then became an overstayer.

6. Nearly two years later, on 28 March 2013 he applied for leave to remain on human rights ground. That application was refused on 14 May 2013 with no right of appeal. On 17 December 2013 he was served with enforcement papers. On 13 March 2014 he challenged the refusal of his human rights application by judicial review proceedings. That resulted in a new decision dated 16 April 2014 with an in-country right of

appeal. He unsuccessfully appealed that decision. However, on 10 February 2016 he applied for further leave to remain on human rights grounds and, on 8 November 2016, that application was granted, with leave until 8 May 2019. It is common ground that the appellant was an overstayer for a period of 1,947 days from when his leave expired on 13 July 2011 until 10 February 2016.

7. On 30 May 2019 he applied for ILR. His application for ILR was therefore made 22 days after the expiry of his leave. No point is taken or arises from that period of 22 days. On 20 September 2019 the respondent refused the application for ILR on the grounds that the appellant's continuous residence started on 5 October 2001 (when he entered the United Kingdom with entry clearance as a student) not 16 April 2001 (when he had previously entered the United Kingdom as a visitor). The second reason given by the respondent was that the appellant had overstayed for a period of 1,947 days from July 2013 and was therefore unable to demonstrate that he met the requirements of Paragraph 276B of the Rules.

8. At the commencement of the hearing there were two issues for the court to consider. First, it is the appellant's case that, when he left the United Kingdom on 1 September 2001, he had a reasonable expectation that he would lawfully be able to return, which satisfied the requirements of Paragraph 276A(a)(iii) and that, therefore, his absence between 1 September and 5 October 2001 does not break the period of continuous residence which should be taken as starting on 16 April 2001. I shall call this "Issue 1".

9. Second, although he accepts that he was an overstayer from 13 July 2011, when his leave to remain expired, until 10 February 2016, it is the appellant's case that the respondent was wrong to decide that appellant does not meet the requirements of paragraph 276B(v) of the Immigration Rules. During the hearing, the respondent abandoned reliance on this issue, which I shall call "Issue 2". In my judgment that abandonment was right, for reasons that I shall outline briefly later.

The Legal Framework

10. The framework is largely provided by the relevant provisions of the Immigration Rules. I therefore highlight the passages that are of most immediate relevance.

11. Paragraph 276A provides:

> **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, but shall be considered to have been broken if the applicant:***

(i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or

(ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or

(iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; *or*

(iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or

(v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.

(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.

12. Paragraph 276B provides:

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.

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

> (a) age; and
>
> (b) strength of connections in the United Kingdom; and
>
> (c) personal history, including character, conduct, associations and employment record; and
>
> (d) domestic circumstances; and
>
> (e) compassionate circumstances; and
>
> (f) any representations received on the person's behalf; and
>
> (iii) the applicant does not fall for refusal under the general grounds for refusal.
>
> (iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
>
> ***(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.***

13. In the light of the respondent's abandonment of the issue based on Paragraph 276B(v), it is not necessary to set out the terms of paragraph 39E.

14. The phrase "breach of immigration laws" is defined in Paragraph 6 as follows:

> **"Breach of immigration laws"** - a person is in breach of immigration laws for the purpose of these rules ***where the person is an overstayer***; is an illegal entrant; is in breach of a condition of their permission; or used deception in relation to their most recent application for entry clearance or permission; and **"previously breached immigration laws"** – a person previously breached immigration laws ***if they overstayed*** or used deception in relation to a previous application for entry clearance or permission.

15. Article 4 of the Immigration (Leave to Enter and Remain) Order 2000 provided, at the material time:

> **Extent to which Entry Clearance is to be Leave to Enter**

> 4.—(1) A visit visa, during its period of validity, shall have effect as leave to enter the United Kingdom on an unlimited number of occasions, in accordance with paragraph (2).
>
> (2) On each occasion the holder arrives in the United Kingdom, he shall be treated for the purposes of the Immigration Acts as having been granted, before arrival, leave to enter the United Kingdom for a limited period beginning on the date of arrival, being:
>
> (a) six months if six months or more remain of the visa's period of validity; or
>
> (b) the visa's remaining period of validity, if less than six months.
>
> (3) In the case of any other form of entry clearance, it shall have effect as leave to enter the United Kingdom on one occasion during its period of validity; and, on arrival in the United Kingdom, the holder shall be treated for the purposes of the Immigration Acts as having been granted, before arrival, leave to enter the United Kingdom:
>
> (a)in the case of an entry clearance which is endorsed with a statement that it is to have effect as indefinite leave to enter the United Kingdom, for an indefinite period; or
>
> (b)in the case of an entry clearance which is endorsed with conditions, for a limited period, being the period beginning on the date on which the holder arrives in the United Kingdom and ending on the date of expiry of the entry clearance.
>
> (4) In this article "period of validity" means the period beginning on the day on which the entry clearance becomes effective and ending on the day on which it expires.

16. Paragraph 276B was the subject of a closely reasoned analysis by Underhill LJ and decision of this court (by a majority) in *Hoque v SSHD* [2020] EWCA Civ 1357. It would be idle to paraphrase the reasoning set out by Underhill LJ at [29]-[52] of *Hoque*. For present purposes it is sufficient to say that he subdivided Paragraph 276B(v) into three elements, as follows:

> "(v) [A] the applicant must not be in the UK in breach of immigration laws, [B] except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. [C] 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.

17. The decision of the Court of Appeal was that Elements [A] and [B] related to the position at the date of the decision whether to grant ILR: see [31]-[32]. They do not affect the question to be answered under Paragraph 276B(i)(a). Element [C] however, is to be read as a qualifying Paragraph 276B(i)(a), the Court's conclusion being that an error of drafting has occurred and it is in the wrong place: see [34]-[35]. "The only context in which previous periods of overstaying between periods of leave – and thus also a provision that they be disregarded - would matter is the requirement of ten years' continuous lawful residence, which would of course otherwise be broken by a period of overstaying between periods of leave."

18. Addressing the same point, namely that Elements [A] and [B] are addressing current overstaying and do not cover past overstaying, at [41] Underhill LJ said:

> "As I have already said, the requirement is framed in the present tense—"must not be in the UK in breach of immigration laws"—and the first disregard refers to "current overstaying". I do not think that it is possible to read it as meaning "must not at any time in the ten-year period relied on have been in the UK in breach of immigration laws"."

19. The other feature of the decision in *Hoque* that is relevant to the present case is the confirmation that a person may rely upon a past period of 10 years' continuous lawful residence to satisfy Paragraph 276B(i): the period does not need to be current or even in the immediate past, provided of course that the applicant can satisfy the other requirements of Rule 276B: see [33].

20. The respondent's guidance on long residence that was current at the relevant time included the following (with emphasis added):

> "10 years' continuous lawful residence
>
> This page tells you how to decide whether an applicant has been continually lawfully resident in the UK when considering long residence applications. ***Once an applicant has built up a period of 10 years' continuous lawful residence, there is no limit on the length of time afterwards when they can apply.*** This means they could leave the UK, re-enter on any lawful basis, and apply for settlement from within the UK based on a 10 year period of continuous lawful residence they built up in the past. There is also nothing to prevent a person relying on a 10 year period that they may have relied on in a previous application or grant."

And

> "***If the applicant had existing leave to enter or remain when they left and returned to the UK, the existing leave does not have to be in the same category on departure and return.*** For

> example, an applicant can leave the UK as a Tier 4 (General) student and return with leave as a spouse of a settled person. ***Continuous residence is not broken as the applicant had valid leave both when they left and returned to the UK***."

21. Neither party was able to identify any provision of the Rules or the respondent's guidance or any authority that either says or implies that the provisions and guidance I have set out above are not entirely general or that leave to enter on a visitor's visa or lawful presence in the United Kingdom with the benefit of a visitor's visa should be treated differently or excluded from their ambit and application. To the contrary, Mr Malik accepted that the provisions and guidance are framed in terms that cover clearance provided by a visitor's visa and presence in the United Kingdom with the benefit of his clearance. I agree. In addition, Mr Malik accepted on behalf of the respondent that time spent in the United Kingdom with the benefit of a visitor's visa counts as "residence" under the Rules, including for the purposes of calculating continuous residence.

22. Mr Malik, however, underpinned his submissions on Issue 1 by reference to the well established principles about how to approach the construction of the Immigration Rules. In summary, the court should look to the language of the rule, construed against the relevant background, which involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy. The Rules are not to be construed with all the strictness applicable to the construction of a statue or a statutory instrument but, instead, sensibly, according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The question is what the respondent intended. The rules are her rules. But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the respondent's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules: see *Mahad v Entry Clearance Officer* [2009] UKSC 16 at [10]. These principles are not controversial and I shall attempt to apply them faithfully.

Issue 1

23. The appellant's case on Issue 1 is that his presence in the United Kingdom in between 16 April 2001 and 16 April 2011 is all conceded to be "residence" for the purposes of Paragraph 276B(i) and that it was lawful, first by virtue of his visitor's visa and then by virtue of his student visa. Since he was not absent from the United Kingdom for 6 months or more at any time during that period, his residence was also continuous. He is not debarred by Paragraph 276A(iii) because, when he left on 1 September 2001, he had a reasonable expectation that he would be lawfully able to return as a student. The reasonableness of that expectation is shown by the fact that he satisfied the criteria for a student visa, which is demonstrated by his being successful in his application.

24. The respondent's case is that, although "residence" is conceded and the lawfulness of the appellant's residence when present between 16 April 2001 and 13 July 2011 is not disputed, he could have had no reasonable expectation of being able to return when he left on 1 September 2001. In written submissions, the respondent submits that "the

temporary nature of the residence as a visitor means that it falls to be excluded under Paragraph 276A(a)(iii) of the Immigration Rules." In a slightly different formulation, it is submitted that "visitors are allowed to enter the United Kingdom on a temporary basis and only if their intention is to leave the United Kingdom after a short visit. They are not allowed to remain in the United Kingdom in excess of 6 months. In this context, it is inconceivable that the Secretary of State, in formulating 276A(a)(iii) of the Immigration Rules, would have intended an outcome whereby a person is able to include his residence pursuant to a visitor visa in the calculation of 10 years residence to obtain indefinite leave to remain. Recognising that Paragraph 276A(a)(iii) of the Immigration Rules is a statement of the Secretary of State's administrative policy, and reading it in the proper context, shows that it is intended to avoid the inclusion of residence as a visitor."

25. In his oral submissions, Mr Malik submitted that there were four points that distinguished a visitor's visa from other forms of entry clearance. He submits that, first, a visitor must demonstrate an intention to return after a short visit and in any event after 6 months; second, a visitor must in fact leave after a short visit and in any event within 6 months; third, further extension of entry clearance is impossible - the visitor may make a fresh application but it must be made from outside the country; and, fourth, if a visitor comes for a holiday, they have no reasonable expectation that they may be able to return for another.

26. In her response to the PAP letter, the respondent had maintained that, as the appellant had been granted a visitor visa for 6 months or less, his visa would have lapsed when he left the United Kingdom on 1 September 2001. In the light of articles 4(1) and 4(2) of the Immigration (Leave to Enter and Remain) Order 2000, which I have set out above, and the fact that the appellant's visitor's visa was expressed to be for multiple visits during the 6 month period of its validity, that is an untenable assertion. Mr Malik rightly accepted that it was untenable, but he made other assertions about how entry clearance officers would respond in various circumstances if a visitor were to leave the United Kingdom and then seek to re-enter. In my judgment, discussion of these factual permutations is not ultimately of assistance when attempting to interpret Paragraph 276A(a)(iii) or 276B(i)(a). The salient facts are that his visitor's visa was expressed to be for multiple visits during the period of 6 months from 22 March to 22 September 2001. It did not "lapse" on 1 September 2001 as had been asserted in the response to the PAP letter.

27. I start by acknowledging an instinct that there is or may be a qualitative difference between the nature of a person's presence with the benefit of a visitor's visa and in other circumstances. In everyday language, I would not naturally refer to a person's presence in a country on a "visit" (or a succession of visits) as "residence" or as "living in" the country being visited. I would find it more natural to refer to "staying in" the country or simply "visiting" it. However, in view of the concession, this point was not explored before us. I therefore assume for the purposes of this appeal that a visitor lawfully present can be said to be "resident" within the meaning of the relevant rules.

28. In the light of the "residence" concession, it is necessary to return to the terms of the Rules, interpreted in the light of *Mahad* principles. Looking at the terms of the rules in isolation, they do not expressly or by implication exclude people who have been present on a visitor's visa from Paragraph 276A(a)(iii). The relevant background

upon which Mr Malik relies is the temporary nature of a visitor's visa. I am unable to see how that can justify reading (or writing) into the Rules that a person who has been present with the benefit of a visitor's visa cannot have a reasonable expectation that he would lawfully be able to return, particularly when it is not part of the respondent's case that it must be assumed that the application to return will be on the same basis as the previous residence. To the contrary, as the extract from the relevant guidance shows, the existing leave does *not* have to be in the same category on departure and return: see [20] above.

29. There are four reasons why the temporary nature of a visitor's visa cannot justify the conclusion for which the respondent contends. First, all visas short of ILR are, to a greater or lesser extent, temporary and require the person to leave the United Kingdom on their expiry. Second, this argument is an overt attempt to deflect the court from discerning the respondent's intention objectively from the language used and, instead, to persuade the court to divine it from supposed policy considerations. Third, the policy consideration being urged upon the court is that the respondent cannot have intended residence under a visitor's visa to count towards continuous residence for the purposes of obtaining ILR; or, expressed differently, that a visitor's expectation of being able to return with the benefit of a different form of clearance (in this case a student visa) cannot be reasonable. The short answer is that there is no sign of that policy consideration in the Rules. Fourth, Paragraph 276A(a)(iii) is concerned with the person's expectation for the future, not the nature of any past lawful residence. In that respect, there is nothing in the fact of his having prior clearance as a visitor that affects the reasonableness or otherwise of his expectation that he will satisfy the criteria for a student's visa. As events have shown, his expectation was objectively reasonable because he satisfied the criteria and was granted the student visa. There is nothing in the facts of this case to suggest that the granting of his student visa was an aberration or not reasonably to be expected.

30. Mr Malik's final argument was that Paragraph 276A(a)(iii) must have the effect of excluding persons whose first period of residence is pursuant to a visitor's visa because otherwise it is of no effect. I cannot accept that submission. First, it is not what the paragraph says. Second, it assumes a logic and coherence that is not apparent in the drafting of Paragraph 276A as a whole. For example, sub-paragraphs (a)(i) to (v) are drafted as exceptions to the first paragraph, which contemplates that a person who leaves and returns "has existing limited leave to enter or remain upon their departure and return." Yet the first exception is a person who has been removed or deported or who has been refused leave to enter or remain here, who would not fall within the first paragraph in the first place. Third, if the intended effect was to exclude periods of lawful residence pursuant to a visitor's visa from the calculation of continuous residence, seeking to achieve it by the words used in Paragraph 276A(a)(iii) is bizarre. Fourth, I do not accept the premise for the submission. Paragraph 276A(a)(iii) may apply where a person has left with the benefit of existing leave but having blotted their copybook (e.g by committing an offence of which they have not yet been convicted) in a way that (a) is not covered by other paragraphs but (b) has the effect of prejudicing their prospects of obtaining future leave.

31. The critical question for Issue 1 is whether the appellant had a reasonable expectation at the time of leaving that he would lawfully be able to return. The answer depends not upon the nature of his previous residence but on whether he had a reasonable

expectation of being granted leave to return. The respondent does not and could not submit that the fact of his having held a visitor's visa is of itself capable of prejudicing his application for a student's visa. Therefore, the only relevant information before the court is that the appellant was granted his student's visa, from which it may be deduced that he satisfied the criteria for that grant. He had to leave the United Kingdom in order to make his application for his student's visa; and there is no suggestion that his circumstances changed such that he would not have qualified for a student's visa on 1 September 2001 but did qualify when he made his application shortly after. On this basis, I conclude that his expectation on 1 September 2001 that he would be granted the student visa for which he was going to apply was reasonable.

32. I would therefore find in the appellant's favour on Issue 1

Issue 2

33. The respondent's abandoning of Issue 2 is correct in the light of the decision of this court in *Hoque*. The respondent's contention had been that the appellant's application for ILR was barred by his earlier overstaying. That contention was wrong because he was not a current overstayer. He was therefore not presently in the UK in breach of immigration laws and was not caught by Element A of Paragraph 276B(v). The respondent's reliance upon Element C was misconceived because there was no need for the appellant to plug any gaps between periods of leave in order to establish the 10 years continuous residence between 16 April 2001 and 16 April 2011.

Conclusion

34. For these reasons, I would allow the appeal and set aside the order of the respondent refusing the appellant ILR.

Sir Patrick Elias

35. I agree.

Lady Justice Nicola Davies:

36. I also agree.