OUTER HOUSE, COURT OF SESSION

[2021] CSOH 84

P251/21

OPINION OF LORD ERICHT

In the cause

TOTON MIAH

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: K Forrest; Drummond Miller LLP
Respondent: C Smith; Office of the Advocate General

17 August 2021

Introduction

[1] The petitioner submitted an application for leave to remain which was submitted before, but not decided by the respondent until after, the date at which the petitioner achieved 10 years' continuous residence in the United Kingdom. The respondent refused the application on the basis that it did not have the effect of extending the petitioner's lawful continuous residence. The petitioner brought judicial review proceedings seeking to reduce the decision on the ground of error of law. The issue was whether or not the petitioner's 10 year continuous residence was "lawful" within the meaning of Paragraph 276B(i)(a) of the Immigration Rules. That issue depended on whether the time spent by the petitioner in the

UK as an overstayer while awaiting the respondent's decision on the application counted as being "lawful" because of the disregards under Paragraph 276B(v), which in turn depended on whether the overstaying was "current" or "previous".

Provisions of the Immigration Rules

[2] Paragraph 276B of the Immigration Rules is as follows:

> **"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…
>
> (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied."

[3] Paragraph 39E provides:

> "**Exceptions for overstayers**
>
> 39E. This paragraph applies where: … (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;"

Petitioner's immigration history

[4] The petitioner entered the United Kingdom with a valid student visa on 27 October 2009. Various extensions were granted up until 13 January 2017. On 11 January 2017 the petitioner submitted an in-time asylum claim which was refused on 30 June 2017. On

11 July 2017 the petitioner lodged an in-time appeal which was dismissed on 20 January 2018. Application for permission to appeal to the First-tier Tribunal was refused on 28 February 2018 and to the Upper-tier Tribunal on 23 August 2018 and on 21 September 2018 the petitioner became appeal rights exhausted. Thereafter on 27 September 2018 the petitioner applied for leave to remain on human rights grounds (the "2018 Application"). The 2018 Application was made within the 14 day period permitted under Paragraph 39E. The petitioner varied the 2018 Application on 29 January 2019 when he submitted an application for indefinite leave to remain outside the immigration rules. The respondent did not make a decision on the application prior to the achievement by the petitioner of 10 years' continuous residence in October 2019. Accordingly on 5 March 2020, the petitioner varied his application so as to seek indefinite leave to remain on the basis of 10 years' continuous lawful residence. On 30 December 2020 the respondent refused the application.

Decision letter of 30 December 2020

[5] By letter of 30 December 2020, the respondent intimated to the petitioner that his application had been unsuccessful and set out the following reasons:

> "Careful consideration has been given to your application and in doing so it is acknowledged as detailed in your immigration history above that you entered the United Kingdom on 27 October 2009 with leave to enter as a tier 4 (General) student. It is accepted that following your first arrival you then held continuous lawful leave in the United Kingdom until 21 September 2018 when your appeal rights became exhausted following the dismissal of your appeal against the asylum refusal decision of 30 June 2017.
>
> It is therefore considered that on this date your lawful leave to remain in the United Kingdom which had continued under section 3C of the Immigration Act 1971 expired. It is considered that at this point you had completed a continuous and lawful period of residence of approximately eight years and eleven months in the UK.

> Whilst it is noted that you submitted an application for leave to remain in the United Kingdom on 27 September 2018 which was within the 14 day period allowed under Paragraph 39E and subsequently varied this application on further occasions to this current application, it is considered that these applications did not have the effect of extending your lawful continuous residence.
>
> In coming to this conclusion it is noted that under section 3C of the Immigration Act 1971, leave is statutorily extended where a person had leave when they made an application or claim and that leave expired prior to the Secretary of State making a decision on the application or claim. Leave is extended until any appeal against refusal is finally determined.
>
> Given the above it is therefore considered that your lawful continuous leave under Section 3C ceased when you became appeal rights exhausted and was not resurrected by the submission of your application of 27 September 2018. As such your period of continuous lawful residence expired on 21 September 2018 and you therefore cannot demonstrate ten years continuous lawful residence. It is concluded that you have failed to demonstrate that you can satisfy the requirements of Paragraph 276B(i)(a) of the Immigration Rules and as such your application falls for refusal.
>
> For the reasons outlined above, your application for indefinite leave to remain on the grounds of long residence is refused as you have failed to meet the requirements of the Immigration Rules under Paragraph 276D with reference to Paragraph 276B(i)(a) of HC395 (as amended)."

Submissions for the petitioner

[6] Counsel accepted that the law was as set out in the case of *Hoque and others* v *The Secretary of State for the Home Department* (2020) 4 WLR 154, that is that under Paragraph 276B(v) previous overstaying would count towards lawful residence but current overstaying would not. He submitted that the respondent had erred in law in that she had wrongly characterised the period from 21 September 2018 to 30 December 2020 as one of current and not previous overstaying. The correct characterisation was that it was a period of previous overstaying, in which case it counted as lawful residence.

[7] Counsel submitted that this was in accordance with the natural meaning of the words "current" and "previous". "Current" overstaying may mean that the applicant is an

overstayer at the time of the decision, but the difficulty with that interpretation was it took no account of whether an applicant had accrued 10 years' residence. If 10 years' residence had been accrued, the overstaying could be said to be previous since it pre-dated a decision by the Secretary of State. The natural meaning of "previous" overstaying was overstaying that had occurred before the relevant decision.

[8] Counsel submitted that the danger of abuse by the making of "serial" applications which concerned the court in *Hoque* did not apply here as there could be only one application under Paragraph 39E(2)(a).

[9] He further submitted that if the respondent reached a decision on an application before 10 years' continuous residence was achieved, it could not be said that the overstaying was current but if the respondent took so long to determine the application that the 10 years had elapsed, then the overstaying must be said to be previous and falls to be disregarded. Accordingly, the petitioner had acquired 10 years continuous lawful residence.

[10] Counsel also made reference to *Ahmed* v *SSHD* (2019) UK UT 10, *Masum Ahmed* v *SSHD* [2019] EWCA Civ 1070 and *Muneeb Asif* [2021] UK UT 96.

Submissions for the respondent

[11] Counsel for the respondent submitted that in order for the petitioner to succeed in his argument the court would require to depart from the interpretation of the Immigration Rules as set out in *Hoque.* The foundation of Paragraph 276B(v) is that it is lawful periods of leave that are being joined up. Had the petitioner's applications been successful, the petitioner would have been able to rely on that success to demonstrate that whilst his application was being considered he was lawfully in the UK: he would have been lawfully resident on the basis of the compassionate reasons and human rights grounds that allowed

his applications to be successful. This lawful residence could have then been joined up with his prior residency to get to the 10 years as the short gap of less than 2 weeks in September 2018 could be disregarded under Paragraph 39E. If the petitioner's interpretation of *Hoque* was correct, then a claimant could simply keep an application or a series of applications live until they got over the line of 10 years: the fact that the applications that kept that clock ticking were unmeritorious did not matter on the petitioner's argument. The petitioner's argument was a version of the "placemaker" applications identified in *Hoque* at paras [50] and [103].

Analysis and decision

[12] The nub of the issue in this case is whether the petitioner's overstaying from 21 September 2021 was, in terms of Paragraph 276B(v), a "current" period of overstaying or a "previous" period of overstaying. The significance of the difference is that, applying the decision in *Hoque*, a "current period of overstaying" does not count towards 10 years continuous lawful residence, but a "previous period of overstaying" does (*Hoque* para [42], [52]). I see no reason to depart from the reasoning of the majority in *Hoque* and indeed counsel for the petitioner did not invite me to do so.

[13] In order for this petition to succeed, I would require to be persuaded by the petitioner that this is a case involving a "previous" period of overstaying. I am not so persuaded, for the following reasons.

[14] Firstly the position of the petitioner in this case cannot be distinguished from that of Mr Hoque. Both Mr Hoque and the petitioner achieved their 10 years' residence while awaiting a decision of the Secretary of State. It was held in *Hoque* that Mr Hoque was a current overstayer and his case did not involve a "previous period of overstaying between

two periods of leave" (para [43]-[44]) and therefore the 10 years' residence was not lawful. As the petitioner is in exactly the same factual position as Mr Hoque, the petitioner too is a current overstayer and the same result should apply to him.

[15] Secondly, on the plain wording of Paragraph 276B(v) the disregard for "previous period of overstaying" cannot apply to someone in the position of the petitioner. The disregard applies to "any previous period of overstaying **between periods of leave**."(emphasis added). The period of overstaying which the petitioner seeks to count towards 10 years' lawful residence is not a period of overstaying between periods of leave. The petitioner's overstaying starts at the end of a period of leave, but does not cease at the start of a further period of leave. Accordingly it cannot be a period "between" periods of leave.

[16] Accordingly I find that the respondent did not err in law in finding that the period of overstaying was a current one and that the petitioner could not demonstrate 10 years' lawful residence.

[17] I am fortified in my decision by a consideration of the danger of abuse which is discussed in *Hoque* at paras [50] and [103]. In para [50] Underhill LJ warns that there is a danger of abuse:

> "since an applicant could in principle make a wholly unfounded application as he or she approached the end of the 10 year period and count on the time taken to determine it (perhaps prolonged by variation) in order to get to the point where an application under paragraph 276B could be made. The facts of the present cases illustrate how that could be done."

These comments are equally applicable to the facts of the petitioner's case. The petitioner's argument that the application could be made only once is misconceived: the abuse referred to in *Hoque* could occur on that one application, particularly if that one application was prolonged by variation.

Order

[18] I shall uphold the respondent's fourth plea in law, repel the petitioner's plea in law, and dismiss the petition. I reserve all questions of expenses in the meantime.