



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 81

P313/19

OPINION OF LORD MALCOLM

In the petition of

IFEOMA GRACE MBOMSON

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

for judicial review of a decision dated 7 January 2019

**Petitioner: Winter; Drummond Miller LLP**  
**Respondent: Pirie; Office of the Advocate General**

24 October 2019

[1] This petition seeks judicial review of a decision of the Secretary of State for the Home Department (the respondent) rejecting the petitioner's application for indefinite leave to remain in the United Kingdom. It raises an issue recently decided by the Court of Appeal - see *R (Ahmed) v Secretary of State for the Home Department* [2019] EWCA Civ 1070. That judgment is not binding upon this court and I was asked not to follow it. Parties are agreed that if I accept the invitation the decision complained of should be reduced. On the other hand, if the approach of the Court of Appeal is adopted, the petition must be refused.

[2] The matter turns on the proper interpretation of paragraphs 276B(i)(a), 276B(v) and 39E of the Immigration Rules. In summary paragraph 39E allows overstayers to make an application out of time so long as it is made within 14 days of the expiry of an existing leave to remain. (Until recently the period was 28 days.) Paragraph 276B sets out the requirements for a grant of indefinite leave to remain on the ground of long residence in the UK. One of the requirements (paragraph 276B(i)(a)) is that the applicant must have had at least 10 years continuous lawful residence in the UK. Another (paragraph 276B(v)) is that the applicant must not be in the UK in breach of immigration rules, except that, where paragraph 39E applies, any current period of overstaying will be disregarded, as will any previous period of overstaying, all so long as the application is (or was) made within the allowed period of grace.

[3] The petitioner submits that the effect of these provisions is that, for the purpose of deciding whether an applicant has demonstrated at least 10 years continuous lawful residence in the UK, any period of overstaying is counted towards lawful residence so long as the period allowed by paragraph 39E has not been exceeded. It was said that this follows from the reference in paragraph 276B(v) to such periods being "disregarded". The petitioner's circumstances are such that it is only if this proposition is correct that she can demonstrate at least 10 years unbroken lawful residence in the UK.

[4] The submission for the respondent is that any gaps in lawful residence arising from applications being made by an overstayer must be taken into account when deciding whether the 10 years continuous lawful residence requirement is met. The disregard expressed in paragraph 276B(v) applies only in respect of the requirement that the applicant must not be in breach of immigration laws. It has no relevance to the separate requirement set out in 276B(i)(a).

[5] The Court of Appeal described the issue as follows: does paragraph 276B(v) operate to cure short “gaps” between periods of lawful residence so as to entitle an applicant to claim 10 years lawful continuous residence under paragraph 276B(i)(a)? For the reasons set out in paragraph 15 of its judgment, the court said no. The provisions in 276B(i)-(v) are separate, freestanding provisions, each of which must be met. Sub-paragraph (v) was not drafted as an exception to sub-paragraph (i)(a). It has a self-contained meaning. So long as paragraph 39E is in play, it simply allows any current or earlier period of overstaying to be overlooked in respect of satisfying the requirement not to be in breach of immigration laws.

“The critical point is that the disregarding of current or previous short periods of overstaying for the purposes of sub-paragraph (v) does not convert such periods into periods of lawful LTR; still less are such periods to be ‘disregarded’ when it comes to considering whether an applicant has fulfilled the separate requirement of establishing ‘10 years continuous lawful residence’ under sub-paragraph (i)(a).”

The court narrated further reasons in support of its decision - see paragraphs 15(5)-(8).

[6] While I have had regard to the submissions made on behalf of the petitioner to the effect that the Court of Appeal erred, I am nonetheless in full agreement with its decision and reasoning. Paragraph 39E has no relevance to or impact upon the operation of paragraph 276B(i)(a). It follows that the petition is refused.