OUTER HOUSE, COURT OF SESSION

[2020] CSOH 91

P310/20

OPINION OF LORD GLENNIE

in the petition of

RUTH AWA

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie; Drummond Miller LLP
Respondent: Maciver; Office of the Advocate General

30 October 2020

Introduction

[1] The petitioner is a Nigerian national. She arrived in the United Kingdom as a student in 2006 and has lived here ever since. In December 2019 she applied for Indefinite Leave to Remain ("ILR") on the grounds of 10 years continuous lawful residence in the UK. That application was refused by letters dated 15 and 28 January 2020. The reasons for refusal were (a) that there was a period between 25 March 2016 and 25 August 2017 when her presence in the UK had been unlawful, thus interrupting the period of lawful residence here, and (b) that there were no exceptional circumstances justifying the exercise of discretion in her favour. The petitioner challenges that decision. She does not dispute that

the period of her lawful residence in the UK was interrupted between March 2016 and August 2017; but she says that the Secretary of State failed properly to take into account the circumstances in which that interruption occurred - had she done so she would, or at least should, have exercised her discretion in favour of granting ILR outwith the rules. She seeks reduction of the Secretary of State's decision which, if granted, would have the practical effect of requiring the Secretary of State to reconsider the matter.

The relevant facts

[2] The background circumstances are not in dispute and can be set out relatively briefly. In September 2006 the petitioner entered the UK with entry clearance as a student valid until December 2007. She applied within that time for further leave to remain under the Fresh Talent - Working in Scotland Scheme and leave to remain on that basis was granted until July 2009. In October 2009 she applied out of time for further leave to remain as a Tier 4 General Student, and leave was granted, with effect from that date, until 31 January 2014. Further applications, in both cases made within time, resulted in leave to remain being granted on that same basis until 13 July 2014 and, subsequently, until 2 April 2015. She applied within that time for further leave to remain under the Tier 4 General Doctorate Extension Scheme and leave to remain was granted until 24 March 2016.

[3] What happened thereafter is important and requires to be set out in greater detail.

[4] On 16 March 2016, again within time, the petitioner applied for further limited leave to remain on the basis of her family and private life established in the UK since her arrival in 2006. Although it forms no part of this petition for judicial review, the petitioner has a husband in the UK and a son who was born here, and the application engaged Art 8 ECHR. The application itself was not before the court, but its content is clear from the other material

lodged in process. The application was made on behalf of the petitioner by Latta & Co, her solicitors.

[5] By letter dated 8 April 2016 the Home Office acknowledged receipt of the application. They commented that the application raised Convention issues which were complex in nature but they would make a decision on the case as quickly as possible. It was not in dispute that, had the application been granted, the grant of leave to remain would have dated back to the date of the application or some other appropriate date, so there would not have been a gap between the expiry of the previous leave to remain (24 March 2016) and the date when the new application was granted. In other words, the petitioner would not have been regarded as an "overstayer" during that period.

[6] On 18 May 2016 the Home Office sent a letter to the petitioner's solicitors, Latta & Co, pointing out that the application as submitted on behalf of the petitioner was not valid since certain mandatory sections had not been completed and the application had not been accompanied by the mandatory photographs. I have no reason to doubt that this letter was sent. But Latta & Co say that they never received it, and I have no reason to doubt this either. Indeed, at the hearing before me, Mr Maciver, who appeared on behalf of the respondent, very properly made it clear that he did not seek to challenge the statement by Latta & Co that they did not receive the letter. It is an unfortunate fact of life that letters do sometimes go astray. The position of Latta & Co is in any event supported by inferences to be drawn from later correspondence.

[7] The mistakes in completing the application form must, obviously, be laid at the door of the petitioner and/or her solicitors. But there is no reason to doubt that, had they received the letter of 18 May 2016, Latta & Co would have sent the missing material to the Home Office, thereby correcting the errors in the application. Nor is there any reason to doubt

that, had this been done, further limited leave to remain would have been granted on the basis of the corrected application, and that leave to remain would have been backdated as explained in para [5] above. Mr Maciver did not seek to suggest otherwise. That this is so is apparent from two matters. First, whether or not the Home Office has a practice of sending out a letter pointing out basic mistakes in the application, it is plain that they would not do so in a case where they considered that the application was likely to be refused once the missing material was provided and the defects in the application made good. There would be no point. Second, the fact is, as appears from para [12] below, that when a further application was made, on the same basis as the previous application, it was granted.

[8] Not having received the letter of 18 May 2016, Latta & Co did not respond to it and did not correct the defects in the application.

[9] On 5 July 2016, not having had a response to its letter of 18 May 2016, the Home Office wrote to the petitioner, c/o her solicitors, informing her that her application was rejected as invalid. The relevant part of that letter reads as follows:

> "Thank you for your attempted application for leave to remain in the United Kingdom.
>
> We wrote to you on 16 March 2016 to notify you that your application or claim was invalid. We told you the specific reasons for this and gave you the opportunity to provide the required fee, additional information or documentation. You have failed to do so within the specified timescale and, for the reasons set out below your application or claim is being rejected as invalid. …"

The letter then goes on to set out what needs to be done in order to make a valid application. This is all generic, clearly from a standard form letter. There is a reference to requiring the correct form to be used, with a short period allowed for use of the previous version where there has been a change. Three points are then made, with a box against each point which has been checked: any section of the form which is stated to be mandatory must be

completed as specified; the application must be accompanied by photographs which are described as mandatory in the form; and the photographs must be in the format specified. The letter then moves on to state the consequences of the decision that the application was invalid, referring to the possibility of removal from the UK.

[10] The letter from the Home Office of 5 July 2016 does not refer to the letter of 18 May in which it had pointed out the defects in the application. Instead, as appears from the above quotation, it refers to a letter of 16 March 2016. There was no such letter. This was a mistake by the Home Office - their intention must have been to refer to the 18 May letter - but the nature of that error was not realised by Latta & Co, who thought that the Home Office was referring to a letter (which they had not received) sent by them on 16 March, which letter appeared (from what was later said about it in the 5 July letter) to be focused on whether the petitioner's application had been made using the correct form, the prescribed form having changed at about that time. Ultimately this may not matter, but looking at the matter as a whole it would not be right to treat that 5 July letter from the Home Office as putting Latta & Co on notice that they had been told by the Home Office in May 2016 of the particular problems with the application submitted by them on behalf of the petitioner on 16 March.

[11] The response by Latta & Co was to submit a new application on behalf of the petitioner for further limited leave to remain on the same basis as before. This they did by letter of 22 July 2016. It is clear from this letter that, as explained in para [10] above, they then understood that the objection taken to the previous application related to the form on which the application had been made. Thus, they referred to the fact that the application form changed on 18 March 2016, after the application on behalf of the petitioner had been submitted, and they also referred to paragraph 341 of the Immigration Rules which provides

that the old form may be used for a period of 21 days after any change. In those circumstances they asserted that the decision to reject the application was unlawful and that the grant of leave to remain in response to the new application should be backdated to 17 March 2016, when the previous application would have been received by the Home Office:

> "The decision of 5th July 2016 is unlawful. A valid application was made on 15th March 2016 and received by you on 17th March 2016. Accordingly the date of client's application should be deemed to be 17th March 2016. Our client's period of valid leave should be backdated to this date and the application should be reconsidered in light of the relevant Immigration Rules and forms in use at the time the application was submitted (which the First Tier Tribunal would have regard to if the matter proceeded to appeal)."

[12] The Home Office took over 13 months to deal with this new application. Eventually, by letter of 25 August 2017 they granted the application, but only with effect from the date of their letter. That period of leave to remain lasted until 25 February 2020. The effect of not backdating the grant of leave to remain was that there was a period between 24 March 2016 (when the previous leave expired) and 25 August 2017 (when leave was again granted) during which the petitioner was in the UK unlawfully.

[13] On 25 December 2019 the petitioner applied for ILR on the basis, as noted above, of 10 years continuous lawful residence in the UK: Rule 276B(1)(a) of the Immigration Rules. The reason why she could not apply on this basis until late 2019 was because there was a brief interruption in her period of lawful residence back in 2009, when she applied out of time for limited leave to remain, which application was granted with effect only from the date on which it was granted: see para [2] above. A copy of the application of 25 December 2019 was not lodged in process, so it is not possible to see what, if anything, was said in it about the gap (between March 2016 and August 2017) when the petitioner was in the UK unlawfully.

[14] The application for ILR was refused. The decision is to be found in letters of 15 and 28 January 2020. Both are to the same general effect. In both letters it is pointed out that there was a break in the accrual of any period of continuous lawful residence because of the gap between the expiry of limited leave to remain in March 2016 and the new grant of limited leave to remain in August 2017. Reference was made in the letter of 15 January 2020 to the letter of 18 May 2016 pointing out the defects in the application, the fact that no reply was received to that letter, the fact that in the absence of any reply the application was refused and the fact that the subsequent new application on 22 July 2016 was made outside the period of 4 weeks allowed after the expiry of the petitioner's previous grant of leave to remain. In those circumstances there was no uninterrupted period of 10 years continuous lawful residence in the UK. The Home Office letter went on to say that the petitioner appeared to be eligible for a further grant of limited leave to remain, but I need not say anything further about this point.

[15] As far as can be seen from the papers lodged in process, this was the first explicit reference to the letter of 18 May 2016. In response to the letter of 15 January 2020, Latta & Co wrote to the Home Office saying that they had never received any such letter. The letter from Latta & Co is not before the court and it is not entirely clear what representations were made in it. However those representations were responded to in the Home Office letter of 28 January 2020 in the following terms:

> "You have provided representations which state that your representatives did not receive the invalidation letter dated 18th May 2016 regarding your incomplete application. Having further investigated your representations and consulted with senior caseworkers regarding whether discretion should be applied in this instance to permit indefinite leave to remain outside of the immigration rules on an exceptional basis, it has been considered that in these circumstances discretion is not able to be applied.

> As the notification letter of 18th May 2016 was sent to the correct address of your representatives, Latta & Co Solicitors, it is deemed that this letter has been served. In addition, it is considered that the onus is on you as the applicant to submit all the relevant and required information at the time of the application for it to be considered a valid application and to prevent any breach of the immigration rules. Therefore you attempted to apply in time but the application was incomplete and as such fell to be rejected."

[16] This correspondence was followed in March 2020 by a pre-action letter from Latta & Co emphasising that the letter of 18 May was never received by them, and a response to that pre-action letter by the respondent adhering to her position. It is unnecessary to set out the terms of those letters.

Submissions

[17] On behalf of the petitioner it was accepted that the respondent was entitled to form the view that the petitioner had failed to show a period of 10 years uninterrupted lawful residence in the UK. That part of her decision could not be criticised, though it was somewhat ungenerous of her to rely, as part of that period of interruption, on the year or more taken by the Home Office to deal with the renewed application made in July 2016. It could not be argued that the respondent had erred in law in arriving at that part of the decision; but in so far as the length of the interruption was a relevant factor in the exercise of discretion, only the shorter period, between March and July 2016, was attributable to the petitioner or those acting for her.

[18] The petitioner's argument focused on the respondent's exercise of her discretion when considering whether to grant ILR outwith the rules. The respondent had asked herself the right question, namely whether she should exercise her discretion to grant ILR outside the immigration rules on an exceptional basis, but she had failed to have regard to all the relevant circumstances. The starting point, it was submitted, was that this was an applicant

who had been granted limited leave to remain on each application until that of 16 March 2016. In respect of that application the respondent would have expected to have granted limited leave to remain - that was why she sent out the letter of 18 May 2016 (which the petitioner did not receive) anticipating that the defects in the application would easily be fixed. The grant of the petitioner's further application in the same form and on the same grounds in July 2016 confirms that there was no difficulty with the application on its merits. What went wrong was that the petitioner's agents made a mistake in submitting the application in March 2016, the Home Office recognised that there had been an error and sent a letter asking for error to be corrected, but that letter was not received by the petitioner or her agents. In those circumstances it was not good enough for the respondent simply to say that the letter was "deemed" served. The Home Office clearly thought it right that the applicant be given an opportunity of correcting her application. No such opportunity was in fact given - the letter of 18 May was not received, the application was therefore not corrected and because of that the application was refused. Any proper consideration of the application for ILR ought to have taken into account the fact that there had been a mishap which had resulted in the March 2016 application being refused when it would in the ordinary course of been granted.

[19] On behalf of the Secretary of State it was submitted that the petitioner's claim was barred by mora, taciturnity and acquiescence. Reference was made to *United Co-Operative Ltd* v *National Appeal Panel for Entry to the Pharmaceutical Lists* [2007] SLT 831. Although the decision under review was the decision by the respondent in January 2020 refusing the application for ILR - and it was accepted that the petition was made within the period of 3 months allowed by section 27A of the Court of Session Act 1988 - the substance of the argument was a challenge to what had happened in July 2016 (when the March 2016

application for limited leave to remain was refused) and August 2017 (when the renewed application for limited leave to remain was granted but not made retrospective). If there was any force in the petitioner's arguments, they would have provided a sound basis for challenging either or both of those decisions. But it was now too late; to allow these decisions to be opened up 3 or 4 years after they were made was inconsistent with sound administration.

[20] On the merits of the issue, it was submitted that the respondent was perfectly entitled to take the view that the letter of 18 May 2016 had been sent by her. She could not be concerned with the question of whether it had been received. As it was put in the respondent's written submissions, the respondent's focus was upon her own actions, not upon those of the petitioner's agents - it was reasonable for her to work on the basis that, having posted a letter to the correct address, she had served it.

[21] In answer to the submission on mora, taciturnity and acquiescence, Mr Caskie, who appeared for the petitioner, submitted that there was nothing that could reasonably have been done in response to the decisions taken in July 2016 (the decision to refuse the March 2016 application) and August 2017 (the grant of limited leave to remain but only as from the date of the decision). In the circumstances prevailing at the time it was difficult to see how those decisions could have been challenged. The March 2016 application was defective and the defect had not been corrected; it would have been difficult to argue that the Secretary of State was acting unlawfully in refusing it. The application in July 2016 was made significantly after the expiry of the previous grant of limited leave to remain. It would have been difficult to argue that the decision not to backdate the grant of leave to the date of the first application was unlawful. But in any event any proposed judicial review would have been met by the response on behalf of the Secretary of State that success would have no

practical effect, since the petitioner had been granted leave to remain on a limited basis. Any attempt to look forward to the impact of those decisions upon an application for ILR at the end of 2019 would have been dismissed as speculative. Those earlier decisions only came to matter when the application was made for ILR and was refused on the basis that, as a result of those decisions, there was a gap in the period relied upon as constituting 10 years continuous lawful residence.

Decision and reasons

[22] Though the factual background is somewhat complex, the point at issue is relatively straightforward.

[23] The petitioner in this case does not challenge the lawfulness of the decision in January 2020 that the petitioner's claim to have accrued 10 years continuous lawful residence had to be rejected because of the interruption of that lawful residence between 24 March 2016 and 25 August 2017. It does not matter whether the period between July 2016 and August 2017 is discounted as being due to delay on the part of the Home Office in dealing with the second application. The fact is that even without this delay there was an interruption of the 10 year period between 24 March 2016 (when the previous limited leave to remain expired) and 22 July 2016 (when the further application for limited leave to remain was made). That period of unlawful residence in the UK was sufficient to interrupt the period of 10 years continuous lawful residence.

[24] It is accepted on behalf of the respondent that there was a discretion to be exercised as to whether the application should be granted even though it did not comply with the rules. Although this is sometimes characterised as a search for exceptional circumstances justifying a grant of leave, exceptionality as such is not the test. The question is simply

whether in view of the particular circumstances applying to her case, the petitioner deserves to succeed outwith the relevant rules. That is the question which the Secretary of State asked herself in this case. In considering whether there were such circumstances it was incumbent on the Secretary of State to have regard to all relevant circumstances. These would include, in the present case, the fact that but for the mishap, the breakdown of communication, in May 2016, when the letter of 18 May 2016 pointing out errors in the application was sent but not received, the application would have been corrected and leave would have been granted backdated to the date of the application. The interruption to the petitioner's 10 years continuous lawful residence in the UK resulted from an unfortunate mishap. Those circumstances were known to the Secretary of State, at latest when the point was made to her after her initial rejection of the petitioner's application by letter of 15 January 2020. She had the opportunity at that stage to reconsider her decision. Instead of that she took a stand on the issue of the letter being "deemed" served on the petitioner. Her focus was, as explained in the written submissions lodged on her behalf, on justifying her own actions. That was not the right approach. What she ought to have been looking at was how the situation had arisen in which, by mischance, and through no fault of either party, steps were not taken back in May 2016 which would then have resulted in the petitioner being granted a further period of limited leave to remain and would ultimately have enabled the petitioner to make good her contention that she should be granted ILR on the basis of 10 years continuous lawful residence in the UK. Had she had that consideration in mind, it is difficult to envisage that she would have exercised her discretion in the manner in which she did.

[25] In my opinion the approach of the Secretary of State which I have described amounts to an error of law on traditional *Wednesbury* lines, namely taking into consideration

irrelevant matters (justifying her own actions in sending the letter and deeming it to be served) and/or failing to take into account relevant matters (the unfortunate circumstances in 2016/2017 in which the situation had arisen where the petitioner could not accrue 10 years continuous lawful residence in the UK).

[26] While I understand why the respondent raised the issue of mora, taciturnity and acquiescence, it seems to me that that plea misunderstands the crux of the petitioner's argument. Her argument proceeds on the basis that the decision which the Secretary of State had to take in January 2020 had to be taken against the background of what had happened in 2016 and 2017. There is no suggestion by the petitioner in this case that those decisions in 2016 and 2017 were wrong, either as a matter of law or as a matter of discretion. But whether or not they could have been challenged at the time they were made is neither here nor there. They were what they were. The relevant thing is that they formed an important, indeed critical, part of the background to the decision which the Secretary of State had to make on the petitioner's application for ILR. It does not seem to me that any question of mora arises.

Disposal

[27] For the above reasons I shall grant the petition and make an order reducing the decision of the Secretary of State in her letters of 15 and 28 January 2020 refusing the petitioner's application for Indefinite Leave to Remain.

[28] I shall reserve all questions of expenses.