Neutral Citation Number: [2021] EWCA Civ 1909

Case No: C2/2020/1488

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 17 December 2021

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE MALES
and
SIR PATRICK ELIAS

- -

Between:

THE QUEEN ON THE APPLICATION OF AFZAL	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Zainul Jafferji & Arif Rehman (instructed by **Abbott Solicitors**) for the **Appellant**
Ben Keith (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 16 November 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII The date and time for hand-down is deemed to be 10.30 a.m. on Friday 17 December 2021

Sir Patrick Elias:

Introduction

1. The appellant, a national of Pakistan, initially came to the UK on 23 February 2010 as a student. On 28 February 2020 he made an application for Indefinite Leave to Remain ("ILR") on the basis that he had completed 10 years of continuous lawful residence qualifying him for ILR pursuant to paragraph 276B of the Immigration Rules. On 11 March 2020 the Secretary of State for the Home Department refused that application on the basis that there was a period when the appellant was not lawfully resident in the country with the consequence that the period of continuous lawful residence had been broken.

2. The appellant sought leave to bring proceedings for judicial review against that decision. That application was refused on paper by UTJ Canavan and was again refused, following an oral hearing, by UTJ Stephen Smith. He too considered that there was a period when the appellant was not lawfully present in the country, thereby breaking the period of continuous residence, although his analysis differed from the approach of both the SSHD and UTJ Canavan. This is an appeal against UTJ Stephen Smith's decision, permission having been given by Lady Justice Carr. Although the appeal is strictly against the refusal to grant leave to judicially review the Secretary of State's decision, the parties accepted that if leave were granted, the arguments for the full hearing would be no different to those advanced before us. Accordingly, the court stipulated that this should be a rolled-up hearing i.e. we would determine both the appeal against the refusal to grant leave and, if leave were granted, the merits of the appeal itself. The case raises issues of some difficulty and I would therefore unhesitatingly grant leave. This is in essence, therefore, the substantive determination of the judicial review application.

The chronology

3. The relevant chronology, omitting applications for leave which are immaterial to the issues in dispute, is as follows. The appellant was granted entry clearance as a student on 4 February 2010 with limited leave to remain until 14 April 2013. On 12 December 2012 he made a further application to remain as a Tier 1 entrepreneur and although this was initially refused, he was subsequently granted further leave to remain until 14 July 2017. On 6 July 2017, before his leave had expired, he applied for an extension of leave ("the July 2017 application"), but the application was rejected as invalid by a notice dated 22 January 2018. The reason for the rejection was that the appellant had not paid the Immigration Health Surcharge ("IHS"), one of the fees he was required to pay.

4. When the appellant lodged his July 2017 application, he also applied for a waiver of fees. There are two fees to pay, an application fee and the IHS, but they may be waived for certain specified reasons. The relevant procedure allows the application for waiver to be lodged together with the application to vary leave. By a letter dated 18 October 2017, the appellant was told that his fee waiver application had been refused and that the fees had to be paid within ten working days. He paid the application fee within that period but, for reasons which are obscure, he failed to pay the IHS. He was sent a further letter on 8 November 2017, which he claims not to have received, giving him yet further ten working days to pay the IHS. This meant that he had until 22 November to make the payment. He still failed to pay and was sent a letter dated 22 January 2018 informing

him that his application had been rejected as invalid for non-payment of that fee. He made no attempt to challenge that decision.

5. The appellant then made a fresh application on 2 February 2018 ("the February 2018 application") for further leave to remain, accompanied by the appropriate fees. This application was successful and on 5 September 2019 the appellant was given leave to remain until 4 March 2022. He was therefore lawfully in the country when he made his application for ILR on 28 February 2020.

6. In the period between 14 July 2017 and 5 September 2019 the appellant did not have formal leave to remain. One period of leave had ended on 14 July 2017 and there was a gap until further leave was granted on 5 September 2019. However, the law provides that there are periods when an applicant will be treated as having been lawfully in the country even after leave has formally expired. Section 3C of the Immigration Act 1971 specifically provides that in certain stipulated circumstances leave will be extended pending the determination of a fresh application for leave, provided that application was made prior to the previous period of leave coming to an end. In addition, paragraph 39E of the Immigration Rules provides that there may be periods when residence without leave – in other words, periods of overstaying - must be "disregarded". Where this rule applies, it is common ground that it will not break the period of continuous lawful residence, although it is a matter of dispute whether such periods will actively count as periods of lawful leave when calculating whether the period of ten years has been achieved. The scope of, and the inter-relationship between, these two provisions lie at the heart of this appeal.

The law

7. Paras. 276A-276D of the Immigration Rules are headed "Long Residence". Paragraph 276B sets out the requirements to be met in order to qualify for ILR on the grounds of long residence. The material part is as follows:

> "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) …
>
> (iii)…
>
> (iv)…
>
> (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."

8. Para. 276C provides that the Secretary of State may grant ILR if she is satisfied that each of these conditions is met; and para.276D provides that she must not grant it if she is not so satisfied.

9. Para. 276A, so far as is material to this appeal, defines continuous and lawful residence for the purposes of paras.276B to D:

> "continuous residence means residence in the United Kingdom for an unbroken period";
>
> "lawful residence means residence which is continuous residence pursuant to … existing leave to enter or remain".

It is pertinent to note that these definitions are relevant only for the purposes of determining long residence; they are not definitive of what constitutes continuous or lawful residence for all purposes.

Para. 39E is as follows:

> "39E. This paragraph applies where:"
>
> (1) the application was made within 14 days of the applicant's leave expiring and the Secretary of State considers that there was a good reason beyond the control of the applicant or their representative, provided in or with the application, why the application could not be made in-time; or
>
> (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; or
>
> (ii) the expiry of any leave extended by section 3C of the Immigration Act 1971; or
>
> (iii) the expiry of the time-limit for making an in-time application for administrative review or appeal (where applicable); or

(iv) any administrative review or appeal being concluded, withdrawn or abandoned or lapsing.

10. Section 3C of the 1971 Act provides for an automatic statutory extension of leave to remain in certain circumstances. At the material time it was as follows:

"3C Continuation of leave pending variation decision**.**

(1) This section applies if—

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,

(b) the application for variation is made before the leave expires, and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when—

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission),

(c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act), or

(d) an administrative review of the decision on the application for variation—

(i) could be sought, or

(ii) is pending.

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

> (5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).
>
> (6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section."

11. I make the following observations with respect to these provisions:

(1) A critical part of the analysis in this case involves a construction of the Immigration Rules. The classic description of how they should be construed was given by Lord Brown of Eaton-under-Heywood JSC in *Mahad v Entry Clearance Officer* [[2009] UKSC 16; [2010] 1 WLR 48, para.10:

> "The Rules are not to be construed with all the strictness applicable to the construction of a statute 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."

Lord Brown also observed in the same paragraph that the intention of the Secretary of State

> "…is to be discerned objectively from the language used, not divined by supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in the application of the rules".

(2) However, it is now generally accepted that notwithstanding Lord Brown's robust dismissal of the relevance of guidance to issues of construing the Immigration Rules, guidance can exceptionally be taken into account. If a public declaration is made by the Secretary of State, perhaps in the context of guidance, that a rule will be construed in a particular way, that may be taken into account when construing the rules provided that the rule itself is genuinely ambiguous and that the relevant declaration adopts a construction in favour of the applicant. If the guidance is adverse to the applicant, it is illegitimate to have regard to it since the Secretary of State cannot make the rules stricter without making formal amendments to the rules and laying them before Parliament: see the judgment of Jackson LJ in *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568;[2013] PTSR D4 paras. 42-43 where the justification for the principle, and its limits, are explained.

(3) When applying for ILR, the period of ten years' residence must be continuous. Continued residence as an overstayer after an immigrant's specified period of leave has come to an end is not in general a period when the applicant is lawfully in the country. It will therefore break the continuity of lawful residence so that if fresh leave is subsequently given, the period of continuous lawful residence will have to start again. However, this will not be so where these periods of overstaying can be brought within a provision which specifically provides otherwise. In this case that means either a period where leave has been extended pursuant to section 3C or,

following the Court of Appeal decision in *Hoque v Secretary of State for the Home Department* [2020] EWCA Civ 1357; [2020] 4 WLR 154, discussed below, where the period has to be "disregarded" because it falls within the scope of paragraph 39E. A potential difference between the effect of section 3C and para.39E is this: where section 3C is applicable, it has the effect of extending the period of leave and therefore the applicant remains resident pursuant to leave which necessarily brings him or her within the definition of lawful residence. That period therefore counts towards the assessment of the ten years period of continuous lawful residence. Whether a period falling within para.39E can also count towards the assessment of ten years is an issue in this appeal and turns on the meaning of "disregarded" in para. 276B(v).

(4) The proper construction of section 276B(v) was considered by the Court of Appeal in the *Hoque* case. A majority of the court (Underhill and Dingemans LJJ; McCombe LJ dissenting) held, following a careful analysis of the language, structure and history of the provision, that whilst the first sentence of subsection (v) is focused on the time when the decision on the application is made, the second sentence is really misplaced and should be considered as qualifying section 276B(i)(a). It is focusing upon past periods of overstaying which occurred between periods of lawful residence; as the court put it, they were periods of "book-ended overstaying" i.e. periods of overstaying which were book-ended by periods of lawful residence pursuant to leave. These contrast with open-ended periods of overstaying, caught by the first sentence in sub-para.(v), which typically occur when an application for ILR is refused so that there are not two separate and distinct periods of lawful residence pursuant to leave. The effect of reading the provisions in this way is that periods of historic overstaying must be disregarded when assessing whether the ten year period of continuous lawful residence has been satisfied, provided these periods of overstaying meet the conditions specified in para.39E. The observations of the Court to the effect that section 276B(i)(a) is qualified by the second sentence of subsection (v) were strictly *obiter*, since the *Hoque* case itself concerned the first sentence of subsection (v), but it has not been suggested that we should depart from its conclusion on this point. In any event, I find the reasoning on that issue convincing.

(5) What is very much in issue, however, is precisely what is meant by the period of overstaying being "disregarded". It is common ground that the effect of the disregard is at least that these periods of historic, book-ended overstaying will not break the period of continuous residence so that earlier periods of lawful residence can be taken into account when determining the relevant accumulated period. The court in *Hoque* went further, however, and held that para.39E periods of overstaying should positively count towards the period of continuous lawful residence. The Secretary of State submits that the court was wrong to do so.

(6) Both section 3C and para.39E(2) are only engaged where an application (in the case of para. 39E(1) the first application) is made before leave has expired. Section 3C says so in terms whereas the language of para.39E is that the first application must be made "in time", but that has, unsurprisingly, been held to mean before leave has expired. It does not

include an application made during the "grace period" of fourteen days: see *Secretary of State for the Home Department v Waqar Ali* [2021] EWCA Civ 1357. It follows that a second application made after leave has expired but within 14 days of that date will attract the protection of para.39E but it is not itself an application "in time" so as to allow subsequent applications to fall within the scope of the provision. It is not possible, therefore, for an applicant to make successive applications each of which (if made within the grace period) satisfies the conditions of para.39E with the consequence that successive periods of overstaying have to be "disregarded".

(7) The purpose of section 3C is clear. An applicant who puts in an application to vary leave before the current period of leave expires should not be treated as unlawfully resident until either that application has been finally determined (including any appeal or review), or, putting it broadly, until opportunities to challenge it have run their course without being pursued. Potential delays in handling an application should not be held against the applicant. Where section 3C extends leave, para.39E requires a fresh application to be made within 14 days of the expiry of extended leave; see para.39(2)(b)(ii). If a final determination is made before leave expires, however, section 3C never comes into play and the application must be made within 14 days of the date of the final decision i.e. following appeals or reviews, or until the opportunity to invoke them has run out of time: paras.39E(2)(b)(i),(iii) and (iv). An important issue raised in this case is whether para.39E may also be relied upon in situations where the final decision on an initial application made before the expiry of leave is not taken until after the stipulated period of leave has expired, and yet for some reason section 3C cannot be invoked to extend leave.

(8) It is a matter of real significance whether a person is lawfully resident in the country or not. There are numerous disadvantages which potentially face someone who, as an overstayer, is not lawfully present in the UK. They were summarised by Lord Wilson in the following terms in *Pathan v Secretary of State for the Home Department* [2020] UKSC 41; [2020] 1 WLR 4506, para.210. He said that the consequences for an overstayer were that:

> "…while he remained in the UK he (a) committed a criminal offence punishable with imprisonment; (b) became liable to detention pending forcible removal; (c) committed a criminal offence if he continued to work…; (d) ceased to be entitled to state benefits; (e) became disqualified from occupying rented accommodation; (f) became subject to NHS charging provisions; (g) became subject to the freezing of funds in his bank account; (h) became subject to revocation of his driving licence; and (i) [in certain circumstances] became subject to a ban on later re-entry into the UK."

12. These potentially draconian consequences would, in my view, justify otherwise ambiguous provisions being construed in favour of the potential overstayer.

The decision below

13. UTJ Stephen Smith held that he was "prepared to treat" the period from 14 July 2017 until the 22 January 2018 as falling within the scope of section 3C. This part of the decision rested upon his interpretation of the effect of the decision of the Supreme Court in *R* (*Mirza) v Secretary of State for the Home Department* [2016] UKSC 63; [2017] 1 WLR which I discuss below. However, he held that the subsequent period from 22 January 2018 until 5 September 2019 did not fall within the scope of para.39E. In so concluding the judge was following the decision of a two judge Court of Appeal in the case of *Masum Ahmed v Secretary of State for the Home Department* [2019] EWCA Civ 1070 which dismissed an appeal against a refusal to grant leave for judicial review. That case had held that section 276B(v) laid down a requirement wholly independent of sub-para.(i)(a) and therefore had no bearing on the question whether ten years continuous lawful residence could be established as required by that provision. However, *Masum Ahmed* was not followed by the Court of Appeal in the *Hoque* case (and it was not binding on the latter Court because it was only a decision granting leave to appeal). In the light of *Hoque*, the Secretary of State has conceded that if the judge was right, as the appellant contends he was, to hold that section 3C extended leave until 22 January, then para.39E applies and the period from that date until 5 September 2019 has to be disregarded so that it would not break continuity of residence (although she does not accept that it can count as part of the period of continuous lawful residence).

14. However, the Secretary of State has lodged a Respondent's Notice in which she alleges that UTJ Stephen Smith was wrong to find that section 3C extended leave to the 22 January. She asserts that leave was not extended at all because the application was invalid and as a consequence the February 2018 application did not satisfy the requirements of para.39E because it was not made within 14 days of the period of leave expiring. She also says that even if she is wrong about that, and both section 3C and para.39E were engaged with respect to each of the two periods, the second period from 22 January 2018 to 5 September 2019, as a period to be disregarded, could not positively count when calculating the period of ten years. Accordingly the appellant would not have acquired ten years continuous lawful residence by the date of the decision (although it is conceded that he would have just about done so by now).

15. The appellant submits that the judge was right in his analysis of section 3C in the light of the *Mirza* case; and that not only does para.39E then apply with the result that the para.39E period of overstaying did not break continuity, but that in the light of the majority in *Mirza*, it was positively to be treated as a period of lawful residence counting towards the accumulation of the ten year period of continuous lawful residence.

16. Furthermore, the appellant adopts a wider argument to the effect that the analysis of section 3C is not in fact critical to his argument succeeding. He contends that even if section 3C is not engaged because the second application was not made within 14 days of the expiry of the section 3C extended period of leave and does not satisfy the requirement of para.39E(b)(ii), nonetheless on a proper and purposive construction of para.39E, the decision on the initial application was not made until 22 January and the February 2018 application was lodged within 14 days of that decision thereby satisfying the requirement of para.39E(b)(i). Following *Hoque*, the whole of the book-ended period of overstaying between 14 July 2017 and 5 September 2019 therefore fell to be disregarded. Accordingly, on the assumption at least that the Court in *Hoque* was right to say that the para.39E period of overstaying should count towards the ten years, that

period of continuous lawful residence had already been achieved by the date when the ILR application was refused on the 11 March 2020. The refusal to grant ILR was therefore unlawful.

Discussion

17. There are various ways in which one might approach the issues in this appeal. As I have said, it is now common ground that if the judge below was right to treat the whole period from 17 July 2017 to 22 January 2018 as falling within the scope of section 3C, then, provided the disregarded period can count in the calculation of ten years, in the light of the conclusion in *Hoque* that the second sentence in para.276B(v) should be read as qualifying para.276B(i)(a), the appeal must succeed. This would suggest that the section 3C issue should be considered first. However, the appellant submits that he can succeed solely by reference to para.39E even if section 3C does not extend leave to the 22 January, because that was in any event the date when the decision on the initial application was taken. So, subject to what precisely "disregarded" means in that context, the proper scope and application of para.39E might be seen as the critical issue. However, the submission of Mr Keith, counsel for the Secretary of State, involves construing para.39E in the light of the way in which the Supreme Court analysed section 3C in the *Mirza* case. So on balance, I think it is preferable to deal with the latter provision first.

Did the period of overstay from 17 July 2017 to the 22 January 2018 fall within the scope of section 3C?

18. The appellant's submission, accepted by the judge below, was that the period falls within section 3C because the July 2017 application was made before leave had expired and was not determined until the applicant was formally notified that the February 2017 application had been rejected as invalid on the 22 January 2018. The Secretary of State submits that this is wrong. There never was a valid application made at all. The application was not refused; it was rejected as being a nullity because of the failure to pay the IHS. The resolution of this dispute requires an analysis both of the statutory provisions relating to the payment of the IHS and of the decision of the Supreme Court in the *Mirza* case.

19. The power to impose an Immigration Health Surcharge by order was conferred on the Secretary of State by section 38 of the Immigration Act 2014. The relevant order is the Immigration (Health Charge) Order 2015. Article 3 imposes the duty to pay and article 4, read with schedule 1, stipulates the amount. Article 5(1) deals with the time of payment:

> "(1) A person required by article 3 to pay a charge must pay the amount required when the person applies for entry clearance or leave to remain, as applicable."

20. Article 6 deals with the consequences of a failure to pay the charge and it allows a period of grace for the applicant to remedy any failure to make payment with the application:

> "(1) Where a person required by article 3 to pay a charge fails to pay the required amount in accordance with article 5, and the

> entry clearance or leave to remain, as applicable, has not yet been granted or refused, subject to paragraph (2)—
>
> (a) an entry clearance officer or the Secretary of State, as applicable, may request that the person pays the outstanding charge;
>
> (b) the person must pay the outstanding charge-
>
> (i) …
>
> (ii) in the case of an application for leave to remain, within 10 working days beginning with the date when the request for the payment under sub-paragraph (a) is sent in writing or made by telephone or in person;
>
> (c) if the outstanding charge is not paid within the time period mentioned in… sub-paragraph (b)(ii), the application for leave to remain must be treated as invalid by the Secretary of State…"

21. Article 7, read with schedule 2, sets out a variety of circumstances when a person is exempt from paying the fees. An application for exemption may be made at the same time as the application to vary leave. As I have said, the appellant unsuccessfully sought to claim exemption in this case.

The Mirza case

22. In view of the conflicting submissions on the effect of *Mirza*, it is necessary to consider the case in some detail.

23. The three applicants in that case applied to vary their periods of leave in the United Kingdom. Two of them, Mr Iqbal and Mr Mirza, were required to pay a fee in the manner required by the relevant rules but they failed to do so. (In Mr Mirza's case he made a payment of what he thought was the right fee but it was not enough because he had failed to appreciate that the fee had been recently increased). The third, Ms Ehsan, failed to provide biometric information which was, however, not sought by the Secretary of State until some time after the original application had been made. Unlike the application fee, therefore, it did not have to be submitted with the application.

24. The Secretary of State was given power by section 50 of the Immigration, Nationality and Asylum Act 2006 to prescribe the form which applications should take and the consequences of failing to comply; and by section 51 she was empowered to require an application to be accompanied by a specified application fee, to make regulations specifying the amount of the fee, and to make "provision about the consequences of failure to pay a fee" (section 51(3)(d)). As to consequences, the relevant regulations provided, so far as application fees were concerned, that

> "Where an application to which these Regulations refer is to be accompanied by a specified fee, the application is not validly made unless it has been accompanied by that fee."

25. There was at that time no rule - as there is now - providing for a grace period during which a defective application could be remedied. (The relevant provisions are now found in para.34B of the Immigration Rules, which provides essentially the same ten working days period adopted in para.6 of the Immigration (Health Charge) Order.)

26. The position with regard to Ms Ehsan was different. She had provided the relevant fees. However, she had been requested, after her initial application had been received, to arrange and attend an interview within 17 days to provide biometric information. She was told that if she failed to do so, or failed to provide a reasonable excuse for not doing so, her application would be treated as invalid. This was pursuant to a power in the relevant regulations to treat the applicant's application for leave to remain as invalid. Unlike the position with fees, where an application without the fee must be treated as not validly made, this was not the only sanction available to the Secretary of State for this particular breach of the biometric requirements. She could indeed treat the application as invalid but in addition she had the power to impose other sanctions, including simply refusing the application for leave to remain.

27. The appellants all contended that since they had made an application before their previous leave had expired, section 3C was engaged and had the effect of allowing their leave to continue until the application had been determined, and the determination was only made when they were told that their applications were rejected for non-compliance.

28. Lord Carnwath, with whose judgment Baroness Hale and Lords Wilson, Hughes and Hodge agreed, held that in the case of the two applicants who had failed to provide their fees, section 3C was never engaged. This was because the effect of the application being invalid was that in law it was no application at all, with the consequence that the requirement in section 3C that there should be an application before the leave expired had not been satisfied. A purported application was not an application within the meaning of the section. Lord Carnwath bemoaned the fact that there was no flexibility with regard to the payment of fees with the result that even bona fide applicants "could be unduly penalised for simple mistakes which could be readily corrected"(para.31), but the position in law was clear (para.33):

> "The issues have to be approached by the application of the ordinary principles of statutory interpretation. They start from the natural meaning of the words in their context. On that basis I have no doubt that, at least in respect of Mr Iqbal and Mr Mirza, the Court of Appeal reached the correct conclusion. There is no ambiguity in the words of regulation 37 of the 2011 Regulations. It provides in terms that if an application is not accompanied by the specified fee the application "is not validly made". In ordinary language an application which is not validly made can have no substantive effect. There is nothing in the regulation to exclude section 3C from its scope."

29. The position of Ms Ehsan was more nuanced, however, and Lord Carnwath considered that this required a different analysis from the position of the other two appellants (paras.36-37):

> "36. I find more difficulty with the case of Ms Ehsan...The obligation to pay the fee arises at the time of the application. There is no conceptual difficulty in providing that an application unaccompanied by a fee is invalid from the outset. The requirement to apply for biometric information arises only at a later stage, on receipt of a notice from the Secretary of State. Thus in Ms Ehsan's case the application was made in December 2011, but it was not until the following February that she was required to make an appointment. Even then it was accepted that there might be a reasonable explanation justifying further delay.
>
> 37. It is difficult to see any reason why a failure at that stage should be treated as retrospectively invalidating the application from the outset, and so nullifying the previous extension under section 3C of her leave to remain. There appears to be nothing in section 7 of the 2007 Act to support such retrospective effect. The revised version of regulation 23(2)(b) (which was in force at the time of the March decision to reject her application as invalid) does no more than give the Secretary of State power to "treat" the application as invalid. There might be some question as to how that wording relates to the terms of section 7(2), but as I have said there was no challenge to its validity. In any event there is no reason to read it as having retrospective effect. The natural reading, which is consistent with the statutory purpose, is to give power to invalidate the application as from the time of the decision, but not before…"

30. Mr Jafferji, counsel for the appellant in the present case, in an impressive submission, argued that the appellant's position is in essence on all fours with that of Ms Ehsan. For applicants who are seeking an exemption from the duty to pay the fees, the application is valid when submitted. The duty to pay the fees, like the obligation to provide biometric information, did not arise unless and until the application for relief from the duty to pay had been refused and an obligation to pay has been confirmed. It would be absurd to say that the application is invalid *ab initio* for failure to make a fee payment when there is a genuine question whether it is required at all. The fees were only due once the application for an exemption had been determined against the applicant, and even then the applicant had ten working days to make the payment. Just as Ms Ehsan's leave was held to extend under section 3C until the applicant had been notified that her application had been rejected, so it should be extended in a similar way for the appellant. This meant that the period of leave was properly extended until 22 January 2018 when he was notified of the invalidity.

31. Mr Keith argued that there was in fact a duty to pay the fees with the application and if they were not paid, the position was akin to the non-fee payers in *Mirza*. The application to be relieved of the duty to pay did not alter that basic requirement. Had the fee been paid it would have retrospectively validated the application, but it was not. There never was a valid application and section 3C was simply not engaged.

32. In my judgment neither of the positions adopted by the parties is correct. I would accept that if the obligation to pay the fee is not in dispute, and it is not paid with the application as it should be, that will invalidate the application *ab initio* unless the fee is paid within

the ten day period of grace which is now built into the process. If it is paid within that period, that will validate the application retrospectively. But in my view section 3C would not extend time until the end of the grace period if the fee were not paid, and it has not been suggested that it would. Given that the duty to pay arises as part of the application, it is not in my view possible to say, as it was with the failure to provide biometric information, that there is a valid application which is only later invalidated by the failure to pay the fee. Rather, in a case where there is no dispute that the fees are to be paid and should be paid with the application, the failure to do so renders it an invalid application which can be retrospectively validated by a later payment within the grace period. But if the opportunity to make a later payment within the specified period is not taken, the application remains invalid; it does not become invalid at that point in time.

33. In my judgment the position is different where the application to vary leave is combined with an application to be relieved of the payment of fees altogether. I do not think it can sensibly be said that the application for leave, when coupled with such a request, is invalid *ab initio* and only becomes validated if the relief is granted or when the fees are paid. In my view the application is conditionally valid, i.e. it is valid unless and until an obligation to pay the fee is imposed, following a refusal to grant relief, and the fee is not thereafter paid within the specified period of ten working days. At that point the position is akin to that in which the two appellants in *Mirza* found themselves when they failed to pay the fees in the specified manner. In *Mirza* the legislation provided that an application without payment of the requisite fee was "not validly made". Where there is a failure to pay the IHS, reg.6 provides that that the application "must be treated as invalid". I see no material distinction in the language used. In my judgment the invalidity would naturally be said to arise at the point where the applicant is no longer able to meet the condition which would ensure the continued validity of the application. It would be unjust to invalidate the application retrospectively, just as Lord Carnwath thought it was with respect to Ms Ehsan. It would have the unsatisfactory consequence that an applicant whose presence was lawful when the application was made might retrospectively be held to have been unlawfully present in the UK at that time. I would not so construe the rules unless compelled to do so.

34. In the case of Ms Ehsan, the Supreme Court found (para.37) that the Secretary of State had the power to invalidate the application from the date of the decision, not before. Under the provision in question (regulation 23(2) of the Immigration (Biometric Registration) Regulations 2008), the Secretary of State had a discretion to take any of four different courses of action, only one of which involved treating the application as invalid. Accordingly, there was no automatic sanction and an applicant would not know the consequences of failing to provide biometric data until notified. Here, there is no such uncertainty; the sanction for non-payment within the specified period is automatic.

35. I recognise that section 4 of the Immigration Act provides that a power to give leave to remain, or to vary any leave

> "shall be exercised by notice in writing given to the person affected…"

As Sullivan LJ succinctly observed in *Ahmadi v Secretary of State for the Home Department* [2013] UKUT 147 (IAC) para.25, in these circumstances there is no division between the making of the decision and its notification;

> "…the power to vary leave under section 3(3)(a) is exercised by notice in writing given to the person affected. Giving the notice does not follow the exercise of power; it is the manner in which the power is exercised."

36. But the fact that the application was a nullity means that there was no decision as such varying leave to remain or otherwise: the invalidity occurs independently of any decision by operation of law. The Secretary of State does not determine that the application is invalid; she has no discretion. That consequence flows from the application of the rules. The notification that the application is invalid is just that: a notice informing the applicant that no valid application has been made and that there is nothing for the Secretary of State to consider. There was a decision that the appellant would not be relieved from paying fees, but that is not the decision now in issue. There was no appeal against that ruling.

37. There is an obligation in Appendix SN to the Immigration Rules on the Secretary of State to notify an applicant that the application is invalid. The Appendix identifies how the notice should be given and establishes presumptions about the date of receipt of the notice. I see no basis for inferring, however, that this obligation in any way supports the argument that it is the notification which constitutes a decision rendering the application invalid.

38. For these reasons, I consider that there was a valid application to vary leave, albeit that its continuing validity was conditional on the applicant paying the relevant fees if it should be determined that the appellant was bound to pay them. That would entitle the appellant to rely upon section 3C until the point where the application ceased to be valid. That was when the ten working days had expired after the fee had been requested on 8 November. The relevant date was, therefore, 22 November 2017.

39. The February 2018 application was therefore not made within fourteen days of section 3C extended leave expiring. It follows that the appellant could not rely upon para.39E(b)(ii) in so far as he was seeking to contend that that second application was lodged within 14 days of the expiry of the section 3C period of extended leave. The question is whether the appellant could bring himself within para.39E(2)(b)(i), as he contends.

Was para.39E(2)(b)(i) engaged?

40. I turn to the alternative way in which the appeal is pursued. The argument is that even if section 3C is not engaged beyond 22 November (or 14 July if the Secretary of State's argument is right) it does not matter because the decision on the first application was made on 22 January and the second application was made within 14 days of that decision. The whole period of overstay satisfies the requirement of para.39E(b)(i). As such, it is to be disregarded pursuant to para.276B(v). The argument rests on the premise that whereas an invalid application does not constitute an application within the meaning of section 3C, nonetheless it is an application within the meaning and scope of para.39E. On this assumption, the analysis in *Mirza* has no relevance to the proper

construction of para.39E of the Immigration Rules. The submission is that an application falls within that provision even if it is a nullity; and a decision on the application is not made until the applicant is notified that it has been rejected, which in this case was on 22 January. This is a refusal of the application within the meaning of para.39E. Since the February 2018 application was made within 14 days of that date, para.39E was engaged and ensured that the whole of the book-ended period of overstaying, from the expiry of leave (whenever that was) until the decision to vary leave was taken on 5 September 2019, was a period which had to be "disregarded". Furthermore, the appellant submits that in the light of the decision of the court in *Hoque* on the meaning of "disregarded", the whole period of overstaying should count when assessing whether the ten year period of continuous lawful residence was satisfied. On that basis, the obligation to reside for ten years was met and the refusal to grant ILR was unlawful.

41. Mr Keith contended that essentially the same analysis should apply to para.39E as the Supreme Court adopted in *Mirza* in relation to section 3C. Here the application was, or at least became, invalid and therefore was a nullity from that point. Thereafter there was no valid application at all which was capable of attracting the protection of para.39E. He submitted that the language of para.39E is consistent with this approach; it does not talk about a rejection of an invalid application but the refusal of an application. That suggests that the application has been considered on its merits and refused, rather than not considered at all because the application was invalid.

42. I see the force of that approach; it is a perfectly cogent way of reading the provision. However, Mr Jafferji has put forward powerful arguments why it would be inappropriate for this Court to apply the same concept of what constitutes an application for the purposes of section 3C when construing para.39E. He submits that to do so would undermine the purpose of the provision and would be inconsistent with the way it has in practice always been applied. He contends that although the words could bear the narrower meaning, they are equally capable of carrying the wider meaning on which he relies, namely that an application includes what in law may be, or become, an invalid application; and that a refusal of the application includes the rejection of an invalid one.

43. I accept that submission, essentially for the following reasons advanced by Mr Jafferji.

44. First, the reason for many applications being made a second time once the first one is rejected is specifically to put right the defects in the original application which led to that rejection. Para.39E enables such an applicant to avoid being treated as unlawfully in the UK – which would defeat the application – provided certain requirements are met. One of these is that the original application must have been made before leave (including any extended leave) expired. That would not be possible if an invalid application was treated as a nullity and an important objective of the provision would be defeated. This factor admittedly has less force than it did given that the rules now generally allow for a grace period to put mistakes right before the initial application is determined, but it still carries some weight.

45. Second, contemporaneous documentation makes it clear beyond doubt that the policy behind the overstaying provisions was to treat invalid applications as applications within the meaning of this rule, notwithstanding that they would not be so treated for the purposes of section 3C. When the first of the overstaying provisions was brought

into the Immigration Rules in 2012 - then the 28 day grace period - the explanatory memorandum stated that it was to:

> "…introduce a consistent approach to dealing with applications for leave to remain from migrants whose previous period of leave has expired".

Distinguishing between valid and invalid applications, with fine distinctions which can make that exercise complex and uncertain, would not achieve consistency of approach. They would be difficult not only for applicants but also for immigration officers to understand.

46. Moreover, a summary of the policy changes which was included in the Statement of Changes made the intention explicit (para.7.18). It stated, specifically with respect to applications rejected as invalid after leave expires, that:

> "…the 28 day window in which the application may be submitted as an overstayer will start from the date on which the application was rejected rather than when leave expired".

This is plainly treating the invalid application as an application for the purposes of para.39E, and is treating the date of refusal as the date the application was rejected.

47. When the 28 day grace period was replaced in 2016 by the different scheme reflected in para.39E, with the lower 14 day grace period, there was no indication that the basic policy was intended to change. On the contrary, the Long Residence Policy Guidance expressly stated that the period of overstaying would be calculated from the latest of the following: the expiry of leave, or the expiry of extended leave, or

> "the point at which the migrant is deemed to have received a written notice of invalidity….in relation to an in-time application for further leave to remain".

48. This third period is only necessary to deal with applications treated as invalid. If they are valid applications, time runs either from the end of the period of leave (if the application is decided on its merits before the original stipulated period of leave expires) or the end of the extended period of leave (where the application is decided on its merits after leave has expired.)

49. Mr Keith contended that para.39E itself reflected a new policy, but that is wholly inconsistent with these considerations. Also, if the policy had changed, one would at the very least expect to see fresh guidance to that effect; there is none.

50. In my judgment, therefore, although the language in para.39E is potentially ambiguous, any ambiguity utterly dissolves in the light of the obvious purpose of the paragraph and the statements of policy relating to it. I have no doubt that construing the word "application" so as to include invalid applications, and interpreting the concept of "refusal" as including the rejection of an invalid application, reflects the intention of the Secretary of State in adopting the paragraph.

51. Accordingly, in my view the period of 14 days for the purposes of para.39E ran from the date when the appellant was notified that his application had been rejected as

invalid, as the Long Residence Policy Guidance indicates. That was on 22 January 2018. It follows that the February 2018 application fell within the scope of para.39E(2)(b)(i). Following *Hoque*, the whole of the book-ended period of overstaying between 17 July 2017 and 5 September 2019 must be disregarded when calculating whether there is the ten year requisite period of continuous lawful residence. This means that the period of overstaying did not break the continuity and require the period of lawful residence to be started again from scratch. The remaining question, to which I now turn, is whether the period or periods of overstaying can count as part of the ten year period. The period in question in this case is, in my view, from 22 November 2017 when the period of extended leave expired, until 5 September 2019 when fresh leave was granted. But if the period does count, it would not matter if it ran from the 14 July, as the Secretary of State submits.

Can disregarded periods of overstaying count towards the ten year requirement?

52. We were referred to a number of authorities where the concept of disregard has been considered. Before turning to those cases, I would make three preliminary observations bearing upon the proper way to approach the meaning of "continuous lawful residence" in para.276B(i)(a) and the related concept of what it means to say that periods of overstaying will be "disregarded" in para.276B(v).

53. First, it is in my view important to keep in mind the two definitions (in so far as they are material to this appeal) in para.276A: "continuous residence *means* residence in the UK for an unbroken period"; and "lawful residence *means* residence which is continuous residence pursuant to existing leave to enter or remain" (emphasis added). As Dyson LJ (as he then was) observed in *MD (Jamaica) v Secretary of State for the Home Department* [2010] EWCA Civ 213, para.25, the use of the term "means" rather than "includes" shows that these definitions were intended to be exhaustive. That does not, of course, preclude the possibility that these definitions may have been subsequently varied by later immigration rules (and para.39E was of course passed subsequent to *MD (Jamaica)* being decided). But in my view where an important concept such as the relevant period of long residence is concerned, the variation would have to arise either expressly or by necessary implication.

54. Second, para.276B(v) provides that where the conditions of para.39E are met, the period of overstaying is to be "disregarded". Following *Hoque*, this means that it is to be disregarded in the two contexts discussed above: first, where there is an open-ended period of overstaying because no subsequent leave is granted; and second, where there is a book-ended period of overstaying, because it occurs between two periods of leave.

55. On the face of it, I would expect the concept of periods being "disregarded" to have been intended to have the same meaning in both contexts, and would so treat it unless driven to a contrary conclusion. It is, after all, the same concept being employed in the same paragraph. It is true that the second sentence, focusing on book-ended periods, was introduced after the first sentence. Para.39E was added to the provision in 2016, whereas the first sentence, dealing with open-ended periods of overstaying, was introduced when the concept of a 28 day grace period for correcting invalid applications was introduced in 2012. But I would not expect that fact to alter the meaning of the concept, given that it was deliberately chosen at that time with knowledge that it was a term already in use in the paragraph.

56. Third, in my view the natural meaning of a period being "disregarded" is simply that one should not to have regard to it; it should be ignored. It is important to note that in para.276B(v) it is not the fact of overstaying which is to be ignored when para.39E is engaged; rather, it is the period of overstaying. That is so with respect to both open-ended and book-ended periods of overstaying.

57. I will first consider how the concept of "disregard" has been used in the case of an open-ended period of overstaying. For convenience, I will repeat the provision here. Section 276B(v) first sentence, states that:

> "the applicant must not be in the UK in breach of the immigration laws, except that, where paragraph 39E of these rules applies, any current period of overstaying will be disregarded".

58. This provision has been considered in two cases which were drawn to our attention. The first is the *Waqar Ali* case, to which I have referred. This was decided after the *Hoque* case although there is no reference to any of the discussion in *Hoque*; it seems that the case may not have been referred to the court. In *Waqar Ali* the question was whether an application lodged within the para.39E period of overstaying could be said to be "in time". The court held that it could not because this meant before leave or extended leave had expired. In that context Simler LJ held that an application made within the 14 day grace period conferred by para.39E was not made within a period of lawful residence (para.36):

> "On expiry of leave to remain, a person's residence in the UK becomes unlawful. The fact that such a person is permitted to make an application for leave to remain within a limited period of overstaying does not alter their residence status during that period or render it lawful. It simply means that the SSHD will not refuse such an application on the ground that the person is in the UK in breach of the immigration laws."

This is wholly inconsistent with the notion that the period of overstaying can, in the context of an open-ended period of overstaying at least, count as a period of lawful residence.

59. The court in *Hoque* also considered the meaning of "disregarded" in the context of an open-ended para.39E period of overstaying. Underhill LJ, with whose judgment on this point Dingemans LJ agreed, adopted essentially the same approach as was later adopted by the court in *Waqar Ali.* As a matter of construction, he held that the open-ended period of overstaying did not, unlike the book-ended periods, qualify in any way the calculation of ten years continuous lawful residence in para.276B(i)(a). Rather it allowed an application to be considered which would otherwise be rejected on the grounds that the applicant was in breach of the immigration rules as an overstayer, even where the applicant had accumulated ten years continuous lawful residence in the past. Underhill LJ said in terms (para.49) that there was "no room for ambiguity" about the meaning of the first sentence in para.276B(v) and that "on no possible reading can it be construed as qualifying the definition of continuous lawful residence". This was critical on the facts of that case. The applicants made an application out of time but satisfying the conditions of para.39E. They did not have ten years continuous residence when the

application was made, but they would have had by the time the application was refused if the para.39E period of overstay could count towards the ten years. They would then have been entitled to ILR (subject to satisfying the other conditions in para.276B).

60. McCombe LJ disagreed with the majority on this point. He thought that even in an open-ended period of overstaying the period should count towards lawful residence. The essence of the argument is contained in para.76:

> "In my judgment, for the purposes of para.276B, if one is not present in breach of the immigration laws because the period since the expiry of leave is disregarded (and therefore to be treated as present with leave – paragraph 6) it is odd to say that none the less one is not present lawfully in the UK for the purpose of calculating the ten year period under paragraph 276B(i)(a)."

61. This analysis is not only inconsistent with the views of the majority, but also with the analysis of Simler LJ in *Waqar Ali*. Those judges see the role of disregard, at least in an open-ended case, as being essentially a shield, not a sword. A person whose application attracts the protection of para.39E can counter a challenge that he or she is present in breach of the Immigration Rules by asserting that this cannot be so because the period of overstaying must be disregarded. McCombe LJ sees it as a sword; the applicant can assert that the period actually counts as a period when the applicant is lawfully present.

62. There are, I would respectfully suggest, three difficulties with McCombe LJ's approach. First, it does not logically follow that because the period of overstaying is ignored, it must be treated as a period of lawful presence. It is perfectly rational to treat its effect simply as a period to be ignored which therefore bars the Secretary of State from refusing to consider a fresh application on the grounds that the applicant is in breach of immigration law, provided it is lodged within the grace period conferred by para.39E. Second, McCombe LJ's analysis means that the first sentence of section 276B(v) is qualifying the concept of continuous lawful residence in sub-para.(i), yet for reasons given by the majority in *Hoque*, it is in my view impossible to treat it as having that effect. Third, it is difficult to see how it can be said that the period of overstaying is being disregarded when in fact it is being positively regarded and taken into account as a period of lawful residence.

63. I turn to analyse the meaning of "disregarded" in the second sentence of para.276B(v), where the period of overstaying is historic and is book-ended by periods of leave. Again, I set it out again here for convenience:

> "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."

64. The difference here, as the majority held in *Hoque*, is that since this provision interacts with para.276B(i)(a), the requirement that a para.39E period of overstay be disregarded must be intended to qualify the way in which continuous lawful residence would otherwise be calculated; if that were not so, there would be no purpose in the two provisions being linked together. The question is: in what way does disregarding historic periods of overstaying affect the calculation of lawful residence?

65. In *Hoque*, Underhill LJ concluded that the concept of a period of overstay being "disregarded" had to be given a different meaning than in the first sentence. Its effect was to enable the period of overstaying, when book-ended between two periods of leave, to count towards the period of continuous residence. He considered that there was a sensible rationale for allowing the period to count in book-ended periods of overstaying but not in open ended periods (para.50):

> "I should therefore also say that I do not regard it as unreasonable or disproportionate for the Secretary of State to treat book-ended and open-ended periods of overstaying differently. In the case of a book-ended gap the applicant has been granted further leave, and has attained ten years' residence, since the period of overstaying; and the only reason why the overstaying occurred was that they did not make in-time the ex hypothesi well grounded application which led to the grant of leave. It is in those circumstances unsurprising that the Secretary of State should think it right to allow the period between the expiry of the previous leave and the grant of the future leave to count as continuous lawful residence – assuming of course that the applicant can satisfy the requirements of para.39E."

66. I do not disagree that it would not have been irrational for the Secretary of State to have allowed the gaps in book-ended periods of overstaying to count. But nor is it irrational for the Secretary of State to take the view that they should not count and that it would not be appropriate to allow periods of overstaying in breach of the immigration rules to be treated for all purposes as if they were periods of lawful residence with the same status as section 3C periods. Underhill LJ appears to have made an assumption that the only way in which the second sentence of para.276B(v) could qualify the concept of continuous lawful residence was by permitting the period of overstaying to count. He does not appear to have considered the alternative possibility that the intended impact on the calculation of ten years' residence is simply to preclude para.39E periods of overstaying from breaking continuity which, but for para.39E, they would do.

67. The approach of the majority is inconsistent with each of the three preliminary observations which I suggested above should guide the construction of these provisions. First, it significantly distorts the natural meaning of a period being "disregarded" to allow it to count; far from disregarding it, this involves positively having regard to the period of overstaying and treating it for all the world as if it were a period of lawful residence.

68. Second, as Underhill LJ recognised, it is giving the concept of "disregarded" in the context of book-ended periods of overstaying a wholly different meaning from that adopted with respect to open-ended periods of overstaying. If this were a necessary implication, that would be justified. But in my view it is not: the concept of disregard

can be given the same meaning in both cases, namely that the period of overstaying is ignored. The significance of this in an open-ended period of overstaying is that the applicant is not to be treated as being resident in breach of the immigration laws. The significance of it in the case of book-ended periods is different because of the focus on past rather than present periods of overstaying; its effect is that when calculating whether there is a continuous period of ten years, a gap resulting from a para.39E period of overstaying will not break continuity. In both cases the period of overstaying is being ignored, but the implications are different in the two situations. This approach, giving the concept of disregard its natural meaning, still allows for a purpose in linking sub-paras. (i)(a) and (v) but it also means that there is no justification for treating the period of overstaying as counting towards the period of continuous residence.

69. Third, this approach re-writes the meaning of lawful residence to include periods not granted pursuant to leave in circumstances where in my view the extension of the definition is not a necessary implication arising out of the linking of the two provisions, as Underhill LJ seemed to assume.

70. We are not bound by the view of the court in *Hoque* on this point, and for the reasons I have given, I would respectfully not follow it. Whilst I accept that para.39E periods of overstaying do impact upon the question of continuous lawful residence, as the majority in *Hoque* thought, they do so because they ensure that such periods do not break continuity of residence. But for this provision, continuity would be broken. But it is not expressly stated that they should actively count towards the period of lawful residence, and in my view this is not a necessary implication. The concept of "disregard" in para.276B can be given a perfectly cogent meaning which in my view accords with its natural meaning and does not require the term being deemed to have two different meanings in the same paragraph.

Does the guidance dictate a different construction?

71. The appellant also relied upon a decision of the Upper Tribunal, *Muneeb Asif v Secretary of State for the Home Department* [2021] UKUT 00096, where UT Judge Blum, in a carefully reasoned decision, agreed with the analysis of the majority in *Hoque* and therefore concluded that the book-ended period of overstaying counted towards the ten year period.

72. However, in addition to the authorities, the judge also put weight on the version of the Long Residence Guidance published in October 2019 in support of his conclusion that para.39E periods of overstaying count. He construed the guidance as showing that the Secretary of State was in practice treating para.39E book-ended periods as periods which should count towards calculating the ten year period. He held that in so far as para.276B was ambiguous about the impact of para.39E periods of overstaying, the practice could properly be taken into account to favour a construction which was more favourable to the applicant, following the principle in *Pokhriyal*.

73. I do not in fact accept that, when properly analysed, there is any genuine ambiguity as to the proper construction of para.276B when read with para.39E. I do not, therefore, consider that it is legitimate to have regard to the guidance when construing the Immigration Rules. But even if I am wrong about that, and there is genuine ambiguity, I am not persuaded that the guidance itself does support the proposition that para.39E

periods of overstaying should be treated as counting towards the period of long residence. I will shortly state my reasons.

74. At page 9 of the Guidance it states that the time spent in the UK in accordance with section 3C leave should count, but says nothing about time spent as a para.39E overstayer also counting. If such periods were to count, in a similar way to section 3C, one might have expected this fact to have been identified in that section of the Guidance. Later, in a section headed "Gaps in Lawful Residence", the Guidance again refers to periods of overstaying where the conditions of para.39E are met. It is in my view pertinent to note that it does not refer to these as periods of lawful residence; on the contrary, they are described as gaps in lawful residence. As Underhill LJ observed, the Guidance does strongly support the conclusion that the second sentence of para.276B(v) must have been intended to qualify the calculation of lawful residence in para.276B(i). I entirely agree with that; but the issue is in what way it does so. As I have said, I think it requires the Secretary of State to ignore what would otherwise be gaps in lawful residence, which gaps would compel the clock assessing continuous residence to start again. I do not accept that it also means that the period should positively count as a period of lawful residence.

75. UT Judge Blum relied in favour of the latter approach on two examples given in the Guidance of situations where there are gaps in lawful residence but the Guidance states that the application for ILR should nonetheless be granted. The examples are in similar form and I will just cite the first of them:

> "An applicant has a single gap in their lawful residence due to submitting an application 17 days out of time. All other cases have been submitted in time throughout the ten year period.
>
> Question: Would you grant the application in this case?
>
> Answer: Grant the application as the rules allow for a period of overstaying of 28 days or less when the period ends before 24 November 2016".

The second example was of three gaps, each less than 28 days, when this was the grace period. Again, it was said that the application should be granted.

76. UT Judge Blum says that these examples demonstrate that the gaps were being counted. I do not accept that they do show that to be the case, and certainly not unambiguously so. These examples seem to me to be consistent with the notion that these gaps should not defeat the claim for ILR on the grounds that they broke the period of continuous residence so that it must start again. In order to show that the gaps were treated as periods of lawful residence, it would have to be clear that but for the gaps, the ten year period of lawful residence would not have been achieved. But the examples do not expressly say that and I do not think it is implicit in their description. The statement that the rules "allow for" these periods of overstaying is again ambiguous; it could mean that they "allow for them to be counted", or it could mean that they "allow for them to be disregarded" so as not to break the continuous period. In the context of the other parts of the Guidance which I have identified, I think the latter is in fact the more likely meaning.

77. On any view, in my judgment these examples lack a certain clarity. They come nowhere near a "public declaration" by the Secretary of State (the phrase used in *Pokyhiral*) that she is deliberately choosing a particular meaning of what are genuinely ambiguous rules.

78. Mr Jafferji also relied upon a concession by counsel in the *Hoque* case in her skeleton argument. I have doubts whether much weight can be placed on such material but I will deal with it. After accepting that the second sentence of para.276B(v) was intended to qualify the concept of continuous lawful residence, counsel said this:

> "Of course, that is consistent with the approach adopted by the SSHD in practice as the Appellants point out, the SSHD's published guidance to caseworkers has long reflected that approach and expressly provides that the "gaps" in lawful residence falling within the exceptions specified in the second part of para.276B(v) are not to be held against the applicant when calculating whether a 10 years lawful continuance residence has been accrued. *Indeed, it appears to have been the practice that where there are such gaps – i.e. periods of overstaying between periods of lawful leave – the SSHD has been more generous than required by the language of the Rules and has included them as counting towards the 10 years period of residence*."(Italics added).

79. The non-italicised part of that paragraph is entirely consistent with the notion that the concept of "disregard" acts as a shield rather than a sword: "the gaps are not to be held against the applicant". In other words, they do not break continuity. The italicised part says that it "appears" that the practice has been more generous than the Rules require because the gaps have been counted. I make three comments about this observation. First it is not suggested that any guidance requires this; the practice may be more generous than the guidance. If that is so, in my judgment it cannot constitute a public declaration from the Secretary of State. Second, it states that the practice is more generous than the Rules require. This does not suggest that the Immigration Rules themselves are ambiguous but that the practice goes beyond what can properly be required pursuant to the rules. Third, the use of the word "appears" suggests that there may be some doubt about how regular and widespread is the practice – again militating against it being a public declaration adopting a particular construction of a genuinely ambiguous provision.

80. More recent evidence casts further doubt about whether the Secretary of State did understand the Rules to allow para.39E periods of overstaying to be counted. We were shown at the hearing a recent Immigration Rules Appendix on Continuous Residence. It applies to certain categories of worker only. The explanatory memorandum says that it is not changing existing requirements but clarifying them. I will not set out all the relevant paragraphs, but in essence paras.C4.1 and C.4.3 provide that a para.39E period of overstaying will not break continuity of residence but nor will it count when calculating the continuous residence period. We did not hear argument about this document, and I do not put much weight on it. Suffice it to say that quite independently of it, I take the view that the rules do not allow the para.39E period of overstaying to

count when deciding whether the ten year period has accrued, and if my understanding of this Appendix is right, it appears to lend further support to my conclusion.

81. I should add that I am conscious that if the para.39E period of overstaying cannot count as lawful residence then it may be that it attracts all the disadvantages highlighted by Lord Wilson in the *Pathan* case. That is undoubtedly the case, however, for open-ended periods of overstaying, and in practice it is much less likely that past periods will be of interest to the authorities. However unsatisfactory it may be for this to be the effect of the construction I have adopted, I do not think that the alternative is a legitimate construction.

82. The only caveat I hesitatingly enter is that it is possible that para.39E periods of residence may be lawful for other purposes, notwithstanding that they do not meet the requirement for lawful residence in the Long Residence provisions. I note, for example, that the Appendix to which I have just referred also states that an applicant will not be regarded as lawfully present in the UK where, inter alia, he or she does not have permission "unless para.39E applies"(CR5.2). This would suggest that the fact that an applicant is not counted as lawfully present for the purposes of assessing continuous residence does not mean that he or she is not to be so treated lawfully for other purposes. That would, it seems to me, be a desirable outcome where the Immigration Rules require the period of overstaying to be disregarded so that a further application can be considered. However, I say no more about this because it did not arise for decision, we heard no argument about it, and there are doubtless other relevant provisions which might bear upon that question.

83. For these reasons, therefore, I do not consider that it can be said that the appellant had achieved ten years lawful residence by the date of the Secretary of State's refusal, even though he will have done so by now or in the very near future. It follows that I would dismiss the application for judicial review.

Two final grounds of appeal

84. There were two further grounds of appeal which are not relevant to the issues of construction as such but on which leave to appeal was given. First, the appellant alleged that the judge below erred in not agreeing to an application to adjourn the hearing pending the Court of Appeal giving judgment in the *Hoque* case. The contention is that the judge was told that *Hoque* raised issues which were highly relevant to the resolution of the case – as proved to be the position – and he ought to have adjourned the hearing until that decision was known.

85. I do not accept that this was an error of law. Courts are often understandably reluctant to adjourn late in the day; it is a case management decision on which judges have considerable leeway. As the judge pointed out, he had precious little detail about the *Hoque* case from the appellant save for emails between the appellant and the Secretary of State in which the latter stated that she did not believe that the outcome of *Hoque* would have any bearing on the case. I am not prepared to say that the Secretary of State deliberately misled the judge; and indeed, it is right to note that the discussion about the second sentence of section 276B(v), which has proved critical in this appeal, was in fact *obiter*. But even on the unjustified assumption that the judge was deliberately misled as to the potential relevance of *Hoque*, the judge had to act on the information before him and he made a decision to proceed which was in my view a perfectly proper

exercise of his discretion, even if with hindsight it can be seen that an adjournment might have been the better option. Moreover, the appellant has not been prejudiced in any way before us by the failure to adjourn; we can now determine the case in the light of *Hoque*, which is precisely what the appellant wanted the judge to do.

86. Second, it is said that the judge did not allow a late amendment to the grounds of the application and wrongly dealt with the application to amend as if the appellant was seeking relief from sanctions. I do not intend to engage with this ground. Mr Jafferji candidly admitted that in fact the judge dealt with all the arguments which he wished to advance. Whatever the formal position, the applicant was not in fact prejudiced in any way by the judge's rejection of his application to amend. It is a complaint of no moment.

Decision

87. For the above reasons, I would grant leave to challenge the decision by way of judicial review but would dismiss the application on the single ground that the appellant had not, by the date of the decision, completed ten years' continuous lawful residence. There was a gap between 22 November 2017 and 5 September 2019 which, whilst it did not break the period of lawful residence, could not in my view count towards the calculation of the requisite ten years continuous lawful residence. In fact the appellant will have built up that period by now and therefore he is not personally likely to be adversely affected by this decision. But that is not a matter for this court.

LORD JUSTICE MALES:

88. I agree.

LORD JUSTICE PETER JACKSON:

89. I also agree.