OUTER HOUSE, COURT OF SESSION

2020 CSOH 32

P349/19

OPINION OF LORD BRAILSFORD

in the Petition of

MD SADDIK MD AB SOWDAGER (AP)

Petitioner

for

Judicial Review

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

11 March 2020

[1] The petitioner is a citizen of Bangladesh. He arrived in the United Kingdom on 5 November 2007. In the present petition he seeks to judicially review a decision of the Upper Tribunal (Immigration and Asylum Chamber)("UT") to refuse to grant him permission to appeal against a decision of the First-tier Tribunal ("FTT") in terms of which he was refused leave to appeal against a decision refusing him right to remain in the UK on article 8 ECHR grounds. The respondent is the Advocate General for Scotland as the appropriate law officer in Scotland in relation to proceedings raised against the Secretary of State for the Home Department.

[2] Following arrival in the UK the petitioner was granted Leave to Remain until 13 December 2009. It is not disputed that after that date the petitioner was lawfully resident

in the UK until 25 April 2017, the date on which an application for Indefinite Leave to Remain was refused with no right of appeal.

[3] Subsequent to 25 April 2017 on 8 May 2017 the petitioner submitted another Leave to Remain application which was refused on 5 July 2018. At a subsequent hearing before the FTT counsel for the petitioner conceded that he could not succeed in an application for Leave to Remain under the Immigration Rules ("IR")[1]. The petitioner's application was thereafter considered and determined under reference only to his article 8 rights. In the present petition it was argued on behalf of the petitioner that the concession made before the FTT should not have been made and the fact that it was meant that the petitioner did not have a fair hearing. In turn the concession and consequent decision of the FTT was said to impugn the decision of the UT which is the subject of the present petition. The respondent's position in relation to this state of affairs is narrated in paragraph 19 of the answers.

The Immigration Rules

[4] Determination of the issues raised in this petition require consideration of a number of rules set forth in the IR. Rule 276B sets out requirements for Indefinite Leave to Remain on the ground of long residence in the United Kingdom. Insofar as relevant to this petition this rules provides:

> "276B. The requirements to be met by an applicant for indefinite leave to remain on the grounds of long residence in the United Kingdom are that:
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> (i)(a) he has had at least 10 years continuous lawful residence in the United Kingdom.
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> …
>
> (iii) the applicant does not fall for refusal under the general grounds for refusal.
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> …

[1] Published 25 February 2016.

> (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 –
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> (a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or
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> (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied."

[5] Rule 276A(b)(i) of the IR defines "lawful residence" in Rule 276B(i)(a) as " … continuous residence pursuant to (i) existing leave to enter or remain".

[6] Rule 39E of the IR applies where an application for Leave to Remain was made within 14 days of the refusal of an earlier application timeously made. Rule 276C of the IR provides that the Secretary of State will grant Indefinite Leave to Remain if he " … is satisfied that each of the requirements of paragraph 276B is met." Rule 276D of the IR provides that Indefinite Leave to Remain will not be granted if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met.

[7] The "general grounds" for refusal referred to in Rule 276B are found in part 9 of the IR. These include Rule 322 which provides, *inter alia;*

> " … the following provisions apply in relation to the refusal of an application for leave to remain, …
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> (1C) where the person is seeking indefinite leave to enter or remain:
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> …
>
> (iv) they have, within 24 months prior to the date on which the application is decided, been convicted of or admitted an offence for which they received a non-custodial sentence or other out of court disposal that is recorded on their criminal record."

Issues

[8] On the basis of the argument advanced on behalf of the petitioner the issues arising out of this petition were: (i) whether a period of overstaying that falls within IR 39E is disregarded in assessing if an applicant has continuous lawful residence for the purpose of

IR 276B; (ii) whether, in respect of the general rule that prevents Indefinite Leave to Remain being granted to an offender who has offended within the past two years, the disregarded time commences with the date of conviction or the date of the offence and (iii) whether the UT erred in refusing the petitioner permission to appeal to itself.

[9] The respondent framed the issues in a slightly different way. In essence the argument was that the petitioner did not ask the FTT or the UT to construe IR 276B(i)(a) in the way those provisions are construed in paragraph 20 of the petition, that the petitioner did not ask the FTT to construe IR 322(1C)(iv) in the way he sought to construe those provisions in paragraphs 21 and 22 of the petition and that the construction of those provisions advanced in those paragraphs is wrong.

[10] Although expressed differently the substance of both arguments is the issue of construction of the Rules I have adverted to.

Petitioner's submissions

[11] The first submission concerned the petitioner's change of position, essentially seeking to meet the respondent's propositions outlined in the issues for determination as narrated in paragraph [9] hereof. Counsel for the petitioner accepted that there had been a position change since the matter was before the FTT and the UT. Counsel submitted he was entitled to do so relying on the authority of *R* v *Secretary of State for the Home Department, Ex parte Robinson*[2], to the effect that an alteration in position is permissible where the point is a "readily discernible … obvious point of Convention law" where "obvious" means that the point has "strong prospects of success if argued". Counsel accepted that *Ex parte Robinson* (*supra*) concerned the application of the refugee convention but submitted that the principle

[2] [1998] QB 929 at pp 945G-946D.

enunciated applied equally to cases where a right arose from the Human Rights Convention. In the context of the application of this principle my attention was drawn to *R* v *Immigration Appeal Tribunal Ex parte Shen*[3] where it was observed that a matter could initially appear obscure but might become "obvious" only after detailed argument in submission and that such matters could be dealt with at any stage of proceedings.

[12] Counsel then addressed the issue of the interpretation and application of the IR. He drew my attention to the fact that the IR are a statement of the Secretary of State's policy in relation to when persons should be granted leave to enter or remain in the UK. These are not statutory provisions but the product of House of Commons papers presented to Parliament by way of the negative resolution procedure. It followed that they should not be construed as a statute would, although I note that the submission was not developed to suggest how the IR should be construed.

[13] Counsel then drew my attention to the provisions of IR 276A, which I have already quoted. In particular my attention was drawn to the definitions of "continuous residence", "lawful residence", "lived continuously" and "living continuously". The requirements for indefinite leave to remain on the grounds of long residence in the United Kingdom under Rule 276B of the IR were then adverted to.

[14] The submission then proceeded by reference to two recent authorities where the rules of the IR with which this petition is concerned have been interpreted. The first case is a decision of the Court of Appeal of England and Wales, *R(Ahmed)* v *Secretary of State for the Home Department*[4]. The second is a decision in the Outer House of the Court of Session,

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[3] [2000] INLR 389 at 27-32.

[4] [2019] EWCA Civ 1070 at paragraphs 14-17 and 19.

Mbomson v *Secretary of State for the Home Department*[5]. Counsel for the petitioner, acknowledging that the construction he placed upon the relevant rules of the IR was different from that in either of the cases to which my attention was drawn, advanced the stark proposition that both those cases were wrongly decided. He further submitted that the Lord Ordinary in *Mbomson* (*supra*) had simply adopted the findings and reasoning of the Court of Appeal in *R(Ahmed)* (*supra*).

[15] The submission was developed by advancing the proposition that in *Mbomson (supra)* and *R(Ahmed) (supra)* the court treated the structure of IR 276B as consisting of a series of hurdles each of which requires to be independently surmounted. In particular Rule 276B(v) stood entirely separate from Rule 276B(a). It was submitted that there was what was characterised as a "simple and straightforward difficulty" with that analysis because if it was correct everyone who might benefit from the "concession" made in Rule 276B(v) would fall foul of the provision in Rule 276B(a). It was said that Rule 276B(v) must be for the benefit of someone but on the analysis of the Court of Appeal in *R(Ahmed)* (*supra*) and adopted by the Lord Ordinary in *Mbombson* (*supra*) no one would benefit from subparagraph (5) of Rule 276B.

[16] The reason for the foregoing argument was said to be that IR 39E permits applicants who apply in time for an extension of leave, that is before the previous leave expired, but have that application rejected because of some defect in the form submitted or the fee paid, may resubmit their application within 14 days without the fact that they have become an overstaying stayer being held against them. It is an "entry qualification" to benefit from IR 39E that the person concerned is an overstayer. It was submitted that there would be no point in having Rule 276B(v) if it did not also remedy the failure to meet IR 276B(a).

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[5] [2019] CSOH 81 at paragraphs 5-6.

IR 276B(v) must, it was submitted, cure a breach of IR 276B(a) because if it did not it would be superfluous.

[17] The last chapter of counsel's submissions concerned the application of IR 322(1). This related to the appropriate start date for the assessment of whether or not an applicant's past criminal conduct should bring about the refusal of an application. The issue is whether the appropriate start date for the purposes of IR 322(1) was the date the offence occurred or the date of conviction. It was observed by counsel that the date of conviction may bear limited relation to the date of offending. It was accepted by counsel that if an offence involved a course of conduct then the appropriate start date for the 2 year period in IR 322(1) is the end date of that course of conduct as libelled.

[18] In the context of the present case the petitioner offended more than 2 years prior to the decision being taken in his case but was convicted within 2 years of the decision under challenge. The submission was that properly interpreted and in accordance with the jurisprudence of the European Court of Human Rights (ECHR) the start date for the "clean period" is the date of the offending and not the date of conviction. It was said to be well established in the jurisprudence of the ECHR that the conduct of an individual since the date of the offence and not the date of the conviction is the relevant date.[6]

Respondent's submissions

[19] Counsel for the respondent advanced five reasons for the refusal of the prayer of the petition. He characterised each of these reasons as fatal to the petitioner's case.

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[6] *Maslov* v *Austria* [2009] INLR 47.

[20] The first reason started from the undisputed proposition that the petitioner did not ask the FTT to construe IR 276B(i)(a) in the way which this court was asked to construe that provision. Counsel submitted that this was a petition for judicial review of a decision of the UT. The UT's appellate jurisdiction was restricted to errors in law in a decision of the FTT.[7] It was submitted that subject to one exception the FTT did not err in law in failing to decide in an appellant's favour on a point that the appellant did not make before it. The exception was that the point was a "readily discernible … obvious point of Convention law", obvious meaning a point that had "strong prospects of success if argued".[8]

[21] In the context of the present petition the construction of IR 276B(i)(a) that was now advanced on behalf of the petitioner was not readily discernible to the FTT and that because it was contrary to an express concession on the part of counsel then representing the petitioner. Further, it was not a point of convention law. Lastly it was submitted that the point did not in any event have strong prospects of success if argued. It followed that the UT could not rationally have given the petitioner permission to appeal.

[22] The second argument was that the petitioner did not ask the FTT to construe IR 322C(1C)(iv) in the way that he now asked the court to construe it. The same arguments were advanced as I have noted in the immediately preceding paragraph relative to IR 276B(i)(a).

[23] The third argument advanced was a development of the argument I have noted in paragraph [20] hereof. Save for where there is an *Ex parte Robinson* (*supra*) point, a petition for judicial review of a decision by the UT not to give permission to appeal puts in issue the

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[7] Tribunals, Courts and Enforcement Act 2007, sections 11-12.

[8] *R* v *Secretary of State for the Home Department, Ex parte Robinson* [1998] QB 929 at pages 945G-946D.

legality of refusal of permission on the specific grounds on which it was sought.[9] The construction of IR 276B(i)(a) that the petitioner now advances is not an *Ex parte Robinson* (*supra*) point and therefore for the reasons advanced in paragraph [20] hereof permission could not have been granted.

[24] The fourth argument advanced by counsel for the respondent addressed the petitioner's construction of IR 276(B)(i)(a). The construction contended for on behalf of the petitioner was said to be wrong and that for two reasons. The first, and most straightforward, was because there was construction of the provision inconsistent with that now advanced for the petitioner. That was the construction favoured in the two cases already mentioned, *R(Ahmed)* (*supra*) and *Mbomson* (*supra*) which counsel for the petitioner had conceded were against him but submitted were wrongly decided. By contrast counsel for the respondent submitted these cases were correctly decided.

[25] The fifth argument concerned the approach to construction of the IR. The correct construction was to construe the rules "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".[10] It was said there was nothing in the background to the IR as the Home Secretary's statement of policy that bears on the construction of IR 276B(i)(a). The natural and ordinary meaning of the words used, the exception in IR 276B(v) "where paragraph 39E of these rules applies" has no bearing on the question of whether IR 276(i)(a) is satisfied because (i) reading it with IR 276C and 276D, 276B sets five necessary conditions for Indefinite Leave to Remain and the exception is expressed only to the condition in IR 276B(v); (ii) there is no cross reference between subparagraphs (i) and (v) of IR 276B and

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[9] See *HH* v *Secretary of State for the Home Department* [2015] SC 613 at paragraphs 14-15.

[10] *Mahad* v *Entry Clearance Officer* [2010] 1 WLR 48 at paragraph 10.

(iii) the phrase "lawful residence" in IR 276B(i)(a) is expressly defined somewhere other than IR 276B(v).

Analysis and decision

(i) petitioner's alteration of position

[26] It is common ground between the parties that the petitioner seeks to alter his position from that advanced before the FTT and the UT. Counsel for the petitioner's submission was, essentially, that he satisfied the criteria set forth in *Ex parte Robinson* (*supra*) and was thereby entitled to advance an argument expressly conceded before the tribunals below. Counsel for the respondent, drawing attention to the criteria set forth in *Ex parte Robinson* (*supra*) submitted that these were not met in the present petition.

[27] The first of these criteria was the consideration that *Ex parte Robinson* (*supra*) was concerned not with the Human Rights Convention but with the Refugee Convention. Neither of the counsel appearing before me sought to analyse these conventions nor did they advance propositions as to why on the one hand they could be equiparated or on the other they fell to be treated as different and giving rise to different consequences in relation to the argument with which the present point is concerned. In these circumstances beyond noting that *Ex parte Robinson* (*supra*) is technically distinguishable on this point I am not inclined to place much weight on the fact that two different conventions are involved.

[28] More important, in my opinion, are the other criteria, that is that the construction of IR 276B was "obvious", and that if argued there were "strong prospects of success". I am not satisfied that either of these criterion is necessarily met in the circumstances of the present case. The first, and most obvious, point is that, as was accepted by counsel for the petitioner at the hearing before me, counsel who represented the petitioner before the FTT,

where the concession was made, was an experienced practitioner in the area of immigration law. That of itself is suggestive that the concession was made after consideration of the relevant law. In my view it seems unlikely that if the point had been obvious it would have been conceded. That view is, however, strengthened by consideration of observations made in authority cited to me in this petition, admittedly in another context, in relation to the construction of IR 276B; *Ahmed* v *Secretary of State for the Home Department* (*supra*). That case was a decision of the Court of Appeal in England and Wales on appeal from a decision of the UT. The issue before the Court of Appeal was the construction of IR 276B, the pertinent issue in the present petition. I observe that, in conclusion, after having construed the rule, a matter I will deal with subsequently in this opinion, the court stated as follows:

> "18. For the above reasons, this appeal does not have a real prospect of success. Permission to appeal is refused.
>
> 19. In view of the fact that there are numerous appeals to this court which advance the argument with which we have dealt, we direct that this judgment be published, and may be cited notwithstanding that it is a decision on PTA."

I acknowledge, of course, that the decision in *Ahmed* v *Secretary of State for the Home Department* (*supra*) post-dates the relevant decision in the present case. Notwithstanding that I note that the court states that there were "numerous appeals" in relation to the argument with which that court, and this court and this petition, are concerned. Again this factor is strongly suggestive to me that counsel with experience of immigration law would not have conceded a point in his favour of which it was "obvious". Going further the same considerations apply in relation to a concession made if counsel had thought there were "strong prospects of success".

[29] For the foregoing reasons I am not satisfied that the petitioner has satisfied the criteria set forth in *Ex parte Robinson* (*supra*) which would entitle him to advance a different argument from that which was presented before the tribunals below.

[30] The issue of whether the argument which counsel for the petitioner now seeks to advance should be permitted does not, however, rest at that point. Counsel for the respondent submitted, based on statutory provision, that the UT's appellate jurisdiction was restricted to errors in law in a decision of the FTT. The argument was that the UT could not be said to err in law in failing to decide in an appellant's favour on a point that the appellant did not make before it. I consider the reasoning of counsel for the respondent to be correct in this argument. This view is supported by consideration of the further argument for the respondent to the effect that, save for where there is an *Ex parte Robinson* (*supra*) point, a petition for judicial review of a decision by the UT not to give permission to appeal puts in issue the legality of refusal of permission on the specific grounds on which it was sought. As was submitted by counsel the construction of IR 276B which is now sought to be advanced by the petitioner does not fall into that category. In my view these considerations support the view I have expressed in paragraphs [26]-[28] hereof.

Construction of IR 276B

[31] Counsel for the petitioner recognised and acknowledged that there was authority in both Scotland and England contrary to the construction he advanced in respect of IR 276B. I should make some general observations in relation to counsel's submissions in relation to these authorities before turning to the direct point of construction of IR 276B.

[32] Counsel correctly pointed out that the Scottish decision[11] post-dated the decision in the Court of Appeal in England and Wales.[12] His submission was that the Scottish decision simply followed that in England. That may be broadly correct but I consider it must be borne in mind that the Lord Ordinary (Malcolm) required to give weight to the views expressed by the Court of Appeal in an area where the law of Scotland and England and Wales are the same. Moreover the Lord Ordinary did not, in my view, simply follow or adopt what was said in the Court of Appeal. He explained his reasoning for doing so carefully in paragraphs [5] and [6] of the opinion.

[33] Turning to the point of construction given that counsel for the petitioner submits that the reasoning of the Court of Appeal in *Ahmed* v *Secretary of State for the Home Department* (*supra*) is wrong it is necessary to quote the relevant passages in that decision.[13] These are as follows:

> "14. The point which arises is a short point of construction. The issue on this application for PTA is whether it is arguable that paragraph 276B(v) operates so as to cure short 'gaps' between periods of LTR so as to entitle persons such as the Applicant in the present case to claim '10 years continuous lawful residence' under paragraph 276B(i)(a).
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> 15. In our view, the wording of paragraph 276B is clear:
>
> (1) First, the provision of paragraph 276B(i)-(v) are separate, freestanding provisions each of which has to be met in order to for an applicant to be entitled claim '10 years continuous lawful residence' under paragraph 276B (see paragraph 276C).
>
> (2) Second, sub-paragraph (v) is not drafted as an exception to sub-paragraph (i)(a) and makes no reference to it. There are no words which cross-refer or link sub-paragraph (v) to sub-paragraph (i)(a), or vice-versa, whether expressly or inferentially.

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[11] *Mbomson* (*supra*).

[12] *Ahmed* v *Secretary of State for the Home Department* (*supra*).

[13] *Ahmed* v *Secretary of State for the Home Department* (*supra*).

(3) Third, there is no difficulty in giving sub-paragraph (v) a self-contained meaning. It makes use of the provisions of paragraph 39E of the Rules. Paragraph 39E is the 'exceptions for overstayers provision' which, in effect, grants a 14-day period of 'grace' in respect of the lodging of LTR applications in certain circumstances. Under sub-paragraph (v), where paragraph 39E applies, any *current* period of overstaying as well as any *previous* period of overstaying after the advent of the amendment to the rules on 24th November 2016 will be '*disregarded*'. In addition, periods of overstaying of less than 28 days before that date are also disregarded. The reference to the previous periods means that, in requiring that the applicant should not *'be in the United Kingdom in breach of immigration laws'*, the sub-paragraph is not looking simply at the applicant's status at the date of the application, but also looks back in time to his previous immigration status. Mr Sarker confirmed that the sub-paragraph referred to all previous periods of overstaying. This is, of course, subject to the SSHD's residual discretion.

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

(5) Fourth, there is a marked contrast in the drafting of the definitions of '*continuous residence*' and '*lawful residence*' in paragraph 276A sub-paragraphs (a) and (b) respectively. In respect of continuous residence, in addition to defining it as an unbroken period, the sub-paragraph goes on to deem that '*it shall not be considered to be broken'* by certain periods of absence from the UK. Lawful residence, on the other hand, is simply required to be continuous residence (*i.e*. unbroken) pursuant to certain types of leave, temporary admission, immigration bail or exemption from immigration control. Unlike sub-paragraph (a), in sub-paragraph (b) there is no corresponding provision which allows residence which is not continuously lawful to be deemed unbroken. It is here that one would expect to find the saving which the Applicant incorrectly contends is created by paragraph 276B(v), and one does not. We consider that to be a clear indication that the lawfulness of continuous residence must be unbroken.

(6) Fifth, by contract, there are examples elsewhere in the Rules expressly providing that '*continuous periods'* of lawful residence in the UK shall be considered '*unbroken*', notwithstanding periods of overstaying, where paragraph 39E applies. There are to be found in specific areas where such an exception was clearly intended, *e.g*. Appendix ECAA relating to ECAA Nationals and settlement and *e.g.* Part 6A of the Rules in relation to the Points Based System. Part 6A provides as follows (emphasis added):

'***Part 6A***

Points-based system

25AAA. General requirements for indefinite leave to remain

The following rules apply to all requirements for indefinite leave to remain in Part 6A and Appendix A:

(a) References to a 'continuous period' 'lawfully in the UK' means, subject to paragraph (e), residence in the UK for an unbroken period with valid leave, and for these purposes a period shall be considered unbroken where:

…

(iv) the applicant has any previous period of overstaying between periods of leave disregarded where: the further application was made before 24 November 2016 and within 28 days of the expiry of leave; or the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied. …" (emphasis added)

(7) Sixth, applying ordinary rules of statutory construction and the presumption of ideal, rational legislation, these differences in drafting should be read as accidental or unintended (*c.f.* Bennion on *Statutory Construction*, section 9.3).

(8) If and insofar as reliance is placed on the SSHD's '*Long Residence*' Guidance (Version 15.0) published on 3rd April 2017, this does not avail the Appellant. We note that '*Example 1*' and '*Example 2*' on page 16 of the Guidance say that '*gaps of lawful residence*' can be disregarded because '*the rules allow for a period of overstaying of 28 days or less when that periods ends before 24 November 2016*.'. This does not accord with the true construction of paragraph 276B as set out above, although it may reflect a policy adopted by the SSHD. However, it is axiomatic that the intention of the Rules is to be discerned '*objectively from the language used*' not from *e.g.* guidance documents (*per* Lord Brown in *Mahad* (*Ethiopia v. Entry Clearance Officer* [2010] 1 WLR 48 (2009) at paragraph 10). The SSHD may wish to look again at the Guidance to ensure that it does not go any further than a statement of policy.

16. It will be apparent, therefore, that we agree with the decision and reasoning of Sweeney J in *Juned Ahmed* (*supra*). As Sweeney J correctly held, paragraph 276B(v) involves a freestanding and additional requirement over and above the requirements in paragraph 276B(i)(a).

> 17. In summary, it is clear as a matter of construction of the Immigration Rules that an applicant cannot rely on paragraph 276B(v) to argue that any period of overstaying should be disregarded for the purposes of establishing '*10 years continuous lawful residence*' under paragraph 276B(i)(a)."

[34] Counsel's argument as to why the approach of the Court of Appeal to construction is incorrect is to submit that IR 276B(v) stands entirely separate from IR 276B(i)(a). It is submitted that this creates a difficulty with the Court of Appeal's analysis which, if correct, means that everyone who might benefit from what is characterised as the "concession" in IR 2765B(v) would fall foul of the provision in IR 276B(i)(a). I consider counsel's construction to be artificial and fallacious. As was submitted by counsel for the respondent the IR must be construed "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".[14] No challenge was made by counsel for the petitioner to this approach of the construction of the IR. Nothing was submitted on behalf of the petitioner in relation to the background to the IR as the Home Secretary's statement of policy that bears on the construction of IR 276B(i)(a). Moreover, as a matter of plain English and on the natural and ordinary meaning of the words used the exception in IR 276B(v) "where paragraph 39E of these rules applies" has no bearing on the question of whether IR 276(i)(a) is satisfied and that because reading it with IR 276C-276D, and 276B sets five necessary conditions for Indefinite Leave to Remain and the exception is expressed to apply only to the condition in IR 276B(v). Further there is no cross reference between sub-paragraphs (1) and (v) of IR 276B. Lastly the phrase "lawful residence" in IR 276B(i)(e) is expressly defined somewhere other than IR 276B(v). In my view all these considerations apply and render the construction of IR 276B as set forth by the Court of Appeal in *Ahmed* v *Secretary of State for the*

[14] *Mahad* v *Entry Clearance Officer* [2010] 1 WLR 48 at paragraph 10.

Home Department (*supra*) explicable and understandable. Having regard to these considerations I find myself in agreement with that decision.

(iii) construction of IR 322

[35] The only point at issue in relation to this argument is whether, in calculating time in relation to previous criminal conduct, the date commences with the commission of the offence or, in the alternative, from the date of conviction. Counsel for the petitioner submitted that the rule requires to be construed in accordance with article 8 EHCR and, as explained in *Maslov* (*supra*) that would require calculation to begin with the date of the commission of the offence.

[36] In my opinion that approach is incorrect. IR are not construed in accordance with convention rights. The duty on the Secretary of State in considering and applying the IR is more general and less prescriptive and requires him not to act in a manner which is incompatible with a person's convention rights. As was stated in the Supreme Court in *R(MM (Lebanon))* v *Home Secretary*[15]:

> "Compliance in an individual case does not necessarily depend on the Rules. As Laws LJ has said *(AM (Ethiopia)* v *Entry Clearance Officer*:
>
> > 'The immigrant's article 8 rights will (must be) protected by the Secretary of State and the court whether or not that is done through the medium of the immigration rules. It follows that the Rules are not of themselves required to guarantee compliance with the article'"

Further, and in any event, the decision of the European Court of Human Rights relied upon by the petitioner[16] is not of as wide import as submitted by counsel. That case did no more than provide criteria to be used in order to determine whether an expulsion measure was

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[15] [2017] 1 WLR 1260 at paragraph 57.

[16] *Maslov* v *Austria* (*supra*)

necessary and proportionate to the legitimate aim pursued. In that regard the criteria desiderated in relation to offending was the time elapsed since the offence was committed and the applicant's conduct during that period. In my view that is a wider and more case specific consideration than the characterisation given to it by counsel for the petitioner.

(iv) conclusion

[37] Having regard to the foregoing I do not consider that the UT materially erred in law in reaching the decision challenged. I shall accordingly dismiss the petition.