Michaelmas Term
[2023] UKSC 46
On appeal from: [2021] EWCA Civ 1909; and
[2022] EWCA Civ 1147

JUDGMENT

R (on the application of Afzal) (Appellant) v Secretary of State for the Home Department (Respondent)

R (on the application of Iyieke) (Appellant) v Secretary of State for the Home Department (Respondent)

before

Lord Reed, President
Lord Kitchin
Lord Sales
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
28 November 2023

Heard on 7 and 8 June 2023

Appellants
Zainul Jafferji
Arif Rehman
Huzefa Broachwalla
Sheraaz Hingora
(Instructed by Abbotts Solicitors (Luton))

Respondent
Lisa Giovannetti KC
Ben Keith
(Instructed by Government Legal Department (Immigration))

LORD SALES (with whom Lord Reed, Lord Kitchin, Lord Burrows and Lord Stephens agree):

1. Introduction

1. There are two appeals before the court. In each case the appeal concerns the question whether the appellant (Mr Afzal and Mr Iyieke, respectively) is entitled to be granted indefinite leave to remain in the United Kingdom ("ILR") by virtue of section 3C of the Immigration Act 1971 ("section 3C"), para 276B of the Immigration Rules (Statement of Changes in Immigration Rules (1994) (HC 395)) ("para 276B") and the respondent Secretary of State's Long Residence Policy Guidance (2016) ("the Guidance").

2. In order to provide an answer in Mr Afzal's case it is necessary to consider the effect of the judgment of this court in *R (Mirza) v Secretary of State for the Home Department* [2016] UKSC 63; [2017] 1 WLR 85 ("*Mirza*") and the Immigration (Health Charge) Order 2015 (SI 2015/792) ("the 2015 Order"). The answer in Mr Iyieke's case depends upon the proper interpretation of para 276B(v)(a).

2. The factual background in Mr Afzal's case

3. Mr Afzal is a national of Pakistan, born on 12 June 1986. He first entered the United Kingdom on 24 February 2010 with leave as a Tier 4 (student) which was valid until 14 April 2013.

4. On 12 December 2012, before the expiry of his leave, Mr Afzal applied for further leave to remain as a Tier 1 (Highly Skilled Migrant). On 17 April 2013 that application was refused with an in-country right of appeal. Mr Afzal appealed to the First-tier Tribunal and his appeal was allowed on human rights grounds on 19 November 2013. By a fresh decision dated 14 July 2014 the Secretary of State granted him leave to remain until 14 July 2017.

5. On 6 July 2017, before the expiry of that leave, Mr Afzal submitted an application for further leave to remain along with an application for waiver of the relevant fee. On 18 October 2017 the Secretary of State rejected Mr Afzal's application to waive the fee and notified him that he had to pay the applicable fee together with the Immigration Health Surcharge ("the IHS") payable pursuant to the 2015 Order. The IHS is a sum payable in respect of having access to healthcare services in the United Kingdom for the period during which the applicant is expected to remain here.

6. At the hearing Mr Zainul Jafferji, for Mr Afzal, sought to contend that Mr Afzal had not received the notice sent on 18 October 2017 requiring him to pay the fee and the IHS. However, this was not disputed in the proceedings below and the agreed statement of facts and issues for this court indicated that he had indeed been notified on 18 October 2017 that he had to pay the fee and the IHS. It is not for this court to go behind the agreed statement of facts and issues, nor is it appropriate for this court to resolve disputes on issues of fact which are raised for the first time on an appeal. Accordingly, the appeal has proceeded on the basis as set out in the agreed statement of facts and issues.

7. On 1 November 2017 Mr Afzal paid the fee for his application for leave to remain, but he omitted to pay the IHS as required. On 8 November 2017 the Secretary of State wrote to him to remind him to pay the IHS within 10 days. Mr Afzal maintains that he did not receive this letter. The Secretary of State does not accept this. But, as explained below, this has no legal significance and it is not necessary for the court to resolve this dispute.

8. Since the IHS remained unpaid, on 22 January 2018 the Secretary of State wrote to Mr Afzal to give him notice that his application for further leave to remain had been rejected. Mr Afzal accepted this and took no steps to bring proceedings to challenge this decision.

9. Instead, on 2 February 2018 (that is, after his extant leave to remain had expired on 14 July 2017) Mr Afzal made a fresh application for further leave to remain, accompanied by payment of the relevant fee and the IHS. On 5 September 2019 the Secretary of State granted this application, with leave to remain until 4 March 2022.

10. On 28 February 2020, having resided in the United Kingdom for more than 10 years, Mr Afzal applied for ILR pursuant to para 276B on the ground of long residence here, relying so far as necessary on section 3C. On 11 March 2020 the Secretary of State refused his application on the grounds that there was a gap in his continuous lawful residence in the United Kingdom by reason of him over-staying the leave granted to him on 14 July 2014, which had expired on 14 July 2017, and only being granted fresh leave to remain on 5 September 2019. His presence in the United Kingdom between 14 July 2017 and 5 September 2019 had been unlawful as being without leave to remain. After a review, on 5 June 2020 the Secretary of State confirmed her decision. This is the decision under challenge in the proceedings in Mr Afzal's case.

11. On 11 June 2020 Mr Afzal issued a judicial review claim to challenge the Secretary of State's decision. Permission to claim judicial review was refused by the Upper Tribunal. Mr Afzal appealed to the Court of Appeal (Peter Jackson and Males LJJ and Sir Patrick Elias) which granted him permission to apply for judicial review but

dismissed his claim on the merits: [2021] EWCA Civ 1909; [2022] 4 WLR 21. Mr Afzal now appeals to this court.

3. The factual background in Mr Iyieke's case

12. Mr Iyieke is a national of Nigeria, born on 7 June 1983. He first entered the United Kingdom on 13 February 2011 with leave to enter as a Tier 4 (General) Student until 30 November 2012. Before the expiry of that leave he submitted an application for further leave to remain which was granted until 9 August 2014. Mr Iyieke did not submit a further application to extend his leave beyond that date and thus became an overstayer on 10 August 2014.

13. On 2 September 2014 Mr Iyieke submitted an out of time application for leave to remain on compassionate grounds. The application was submitted within the grace period of 28 days permitted at that time by the Immigration Rules for applications by overstayers to regularise their position. The application was refused on 29 October 2014 without any right of appeal.

14. On 26 February 2015 Mr Iyieke submitted an application for leave to remain on family and private life grounds. His application was refused on 10 June 2015 with a right of appeal to the First-tier Tribunal. His appeal to the First-tier Tribunal was dismissed but his further appeal to the Upper Tribunal was allowed.

15. In the light of this, on 11 August 2017 the Secretary of State granted Mr Iyieke leave to remain outside the Immigration Rules until 11 February 2020. Before the expiry of that leave he made an application for further leave to remain which was granted until 30 July 2022.

16. On 17 February 2021, having been resident for more than 10 years in the United Kingdom, Mr Iyieke applied for ILR pursuant to para 276B(v). On 13 June 2021 the Secretary of State refused his application. This is the decision under challenge in the proceedings in Mr Iyieke's appeal.

17. On 10 September 2021 Mr Iyieke commenced a claim for judicial review to challenge the Secretary of State's decision. Permission to apply for judicial review was refused at first instance by the Upper Tribunal. On appeal, the Court of Appeal (Arnold, Dingemans and Warby LJJ) granted such permission, but dismissed the claim on the merits: [2022] EWCA Civ 1147. Mr Iyieke now appeals to this court.

4. The Immigration Rules

18. At the material times, the Immigration Rules made provision in relevant part for the grant of ILR on the ground of long residence in the United Kingdom as follows. The Immigration Rules dealt with the topic of the grant of leave to remain on the ground of long residence in a chapter comprising paras 276A-276D. An applicant for leave to remain on the ground of long residence had to meet each of the requirements in para 276B(i)-(ii) and (v) (para 276A1). An extension of leave on the ground of long residence was to be refused if the Secretary of State was not satisfied that the requirement in para 276A1 was met (para 276A4). Para 276C stated that ILR could be granted provided that the Secretary of State was satisfied that each of the requirements of para 276B was met. Para 276D provided that she should not grant ILR if she was not so satisfied.

19. Para 276A set out relevant definitions. These include the following:

> "(a) 'continuous residence' means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant:
>
> > (i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or
> >
> > (ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or
> >
> > (iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or
> >
> > (iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison

(including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or

(v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.

(b) 'lawful residence' means residence which is continuous residence pursuant to:

(i) existing leave to enter or remain; or

(ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or

(iii) an exemption from immigration control, including where an exemption ceases to apply if it is immediately followed by a grant of leave to enter or remain.

(c) 'lived continuously' and 'living continuously' mean 'continuous residence', except that paragraph 276A(a)(iv) shall not apply."

20. Para 276B provided 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) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(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."

21. Para 39E of the Immigration Rules ("para 39E") stated:

"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."

22. Para 34 of the Immigration Rules stated that an application was valid when the requirements set out in that paragraph were met. Those requirements included, at subparagraph (4), that where an applicant was required to pay the IHS, it had to be paid in accordance with the process set out on the relevant pages of the government website.

23. Para 34A of the Immigration Rules stated that, subject to para 34B, where an application for leave to remain did not meet the requirements of para 34, "it is invalid and will not be considered". Para 34B made provision for the Secretary of State to notify an applicant, who had not met the requirements of para 34, to give them one opportunity to do so within 10 working days. Failure to pay within that time would mean that "the application is invalid and will not be considered" (para 34B(3)), but this was subject to para 34B(4) which provided that the Secretary of State "may exercise discretion to treat an invalid application as valid as long as the requirements of paragraph 34(3), (5) and (10) have been met." Para 34B(5) provided that "Notice of invalidity will be given in writing and served in accordance with Appendix SN of these Rules".

24. Appendix SN to the Immigration Rules ("Appendix SN") deals with the service of notices under the Rules. Paras SN1.2-SN1.11 set out how notices, including a notice in writing that an application for leave to remain is invalid, may be given and various presumptions about when a notice sent by post is deemed to have been received "unless the contrary is proved" (para SN1.9).

5. Section 3C of the Immigration Act 1971

25. Section 3C was added to the 1971 Act by amendment by the Nationality, Immigration and Asylum Act 2002. So far as is relevant, it provides:

> "**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 …"

6. The 2015 Order

26. The 2015 Order governs the requirement to pay an IHS charge. Article 3(1) provides that a person who applies for certain forms of entry clearance under the Immigration Act 2014 or for leave to remain in the United Kingdom for a limited period "must pay a charge to the Secretary of State, subject to article 7." In this context, entry clearance means leave to enter the United Kingdom granted by an entry clearance officer on an application made from outside the United Kingdom and leave to remain means leave to remain granted by the Secretary of State on an application made within the United Kingdom.

27. Article 4 gives effect to Schedule 1 to the Order, which sets out the amount of IHS payable in respect of each application for entry clearance or for leave to remain. Article 5 states when an IHS charge must be paid:

> "**5. When a charge must be paid**
>
> (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.
>
> (2) A charge is only paid as required by paragraph (1) where the person does not cancel or otherwise reclaim that payment subsequently, and provided the charge has not been wholly refunded under article 8."

28. Article 7 makes provision for certain exemptions from the requirement to pay the IHS. They are not relevant on these appeals. Article 8, headed "Reduction, waiver or refund", states: "The Secretary of State has discretion to reduce, waive or refund all or part of a charge" (ie the IHS).

29. Article 6 is of particular significance for the purposes of the appeal in Mr Afzal's case. So far as relevant, it provides:

> "**6. Consequences of a failure to pay a charge**

(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) in the case of an application for entry clearance, within 7 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, or

(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—

(i) sub-paragraph (b)(i), the application for entry clearance must be refused by an entry clearance officer, or

(ii) sub-paragraph (b)(ii), the application for leave to remain must be treated as invalid by the Secretary of State, as applicable.

(2) Where a person makes an application for entry clearance or leave to remain and, before the application has been granted or refused, cancels or otherwise reclaims the amount of the charge, the application for entry clearance or leave to remain, as applicable, must be refused by the entry clearance officer or the Secretary of State. …"

30. The 2015 Order was placed before Parliament, accompanied by an Explanatory Memorandum. Under the heading "Consequences of a failure to pay the charge", para 7.9 of the Explanatory Memorandum stated:

> "Payment of the charge will be a mandatory requirement for affected migrants. Where an applicant fails to pay the right amount of charge, they will be given the opportunity to rectify their payment within a specified time frame. If the outstanding charge is not paid within that specified period, however, the application will be refused or treated as invalid as appropriate, in accordance with established practice where the person does not pay the correct visa fee."

31. The difference between an application being refused and an application being treated as invalid, as referred to in article 6(1)(c), was a feature of established practice in 2015. The validity requirements under para 34 of the Immigration Rules for a valid application for leave to remain in the United Kingdom did not apply to applications made overseas seeking entry clearance. For the latter type of application, eligibility requirements were applicable and if not satisfied the appropriate response was that the application would be refused by an entry clearance officer located abroad rather than treated as invalid. If the relevant charge was paid at the time of the application but was then cancelled, as had been experienced in relation to payment of other visa fees by use of credit cards (as explained in para 7.10 of the Explanatory Memorandum), then article 6(2) provided that both where the application was for entry clearance and when it was for leave to remain the response was that it had to be refused. So far as concerns an application for entry clearance, this was on the basis that in such a case the application itself was valid but fell to be refused.

32. However, in the opening part of article 6(1) a different formulation is used to define the period in which an entry clearance officer or the Secretary of State has a discretion to request a person who has not paid the IHS to do so. The formulation there refers to "the entry clearance or leave to remain, as applicable" – not an *application* for entry clearance or for leave to remain - not yet having been "granted or refused". Refusal in that context simply means denied and covers both the situation where an application for entry clearance has been refused (so that entry clearance is denied) and where an application for leave to remain has been treated as invalid (so that leave to remain is denied).

7. The Guidance

33. The Guidance refers to section 3C, para 276B and para 39E to explain their effect and provides some practical worked examples to illustrate their operation. However, as

explained below, it does not assist with the exercise of interpretation of the rules required to decide the appeals and it is not necessary to set it out.

8. Mr Afzal's appeal

34. Two issues arise on Mr Afzal's appeal: (i) does section 3C apply in a case where an application for leave to remain (Mr Afzal's application dated 6 July 2017) is said to be invalid by reason of the failure to pay the IHS at the proper time, so that leave is extended by that provision until the application is decided or withdrawn? and (ii) what is the meaning of the word "disregarded" in the second sentence of para 276B?

35. The first issue is important for this reason. Section 3C provides that in certain circumstances leave to remain in the United Kingdom is extended for a period. For the purposes of his application for ILR, Mr Afzal had to be able to establish that he had at least 10 years continuous lawful residence in the United Kingdom (para 276B(i)(a)). The period when he was present in the United Kingdom where he had over-stayed after the expiry on 14 July 2017 of the leave granted to him in 2014 would break the period of his continuous lawful residence, meaning that he could not satisfy the conditions for a grant of ILR, unless he could rely on the second sentence of para 276B(v) by showing that his case was covered by subpara (b) on the basis that para 39E(2) applied.

36. Mr Afzal's contention is that the period of his over-staying is covered by para 39E(2) on the basis that he was only notified on 22 January 2018 that his application of 6 July 2017 had failed and he submitted a fresh application for leave to remain on 2 February 2018, which was later granted. That latter application satisfied the requirements of para 39E(2), submits Mr Afzal, because it was made following the refusal of a previous application for leave (that of 6 July 2017) which was made in time (that is, before the existing grant of leave to him expired on 14 July 2017) and within 14 days of the expiry of an extension of leave under section 3C, taking 22 January 2018 as the date when that previous application was decided.

37. This argument depends upon the effect which section 3C has, according to its proper interpretation. The Secretary of State submits that section 3C does not apply in Mr Afzal's case, with the result that para 39E also does not apply. She contends, relying on *Mirza*, that section 3C only applies where a valid application for leave to remain has been made, and does not assist in a case where the application for leave to remain is invalid, as Mr Afzal's application of 6 July 2017 was.

38. The second issue is significant because, in order to be able to establish that he had 10 years continuous lawful residence in the United Kingdom so as to satisfy para 276B(i)(a), Mr Afzal needed to be able to add the period of overstaying which he says falls to be "disregarded" under the second part of para 276B(v) to his periods of lawful

residence on either side of it. The Secretary of State, on the other hand, submits that the word "disregarded" in para 276B(v) means only that the period of overstaying which is to be disregarded will not be treated as breaking continuity between the periods of lawful residence between which it is book-ended, but does not positively count towards the required 10 years. On this interpretation, an applicant for ILR needs to be able to show that the period of lawful residence before the period of overstaying and the period of lawful residence after the period of overstaying add up to 10 years, in order to show that the requirement of 10 years continuous lawful residence in para 276B(i)(a) is satisfied.

39. Sir Patrick Elias gave the main judgment in the Court of Appeal, with which Peter Jackson and Males LJJ agreed.

40. Sir Patrick Elias addressed the section 3C issue first. He considered *Mirza* with care (*Mirza* is analysed below). Mr Jafferji's submission was that Mr Afzal's position was in essence on all fours with that of Ms Ehsan, one of the three appellants in *Mirza*, who had not complied with an obligation to provide biometric information with her application for ILR. This court held that her application was not invalid ab initio and so, submitted Mr Jafferji, Mr Afzal's application was likewise to be treated as a valid application and section 3C had the effect that his leave was extended until he had been notified that his application had been rejected, which occurred on 22 January 2018. Against this, counsel for the Secretary of State argued that there was a duty to pay the IHS with the application and, since Mr Afzal did not pay it, his application was invalid in the same way as the applications of the other two appellants in *Mirza* had been held to be invalid; so section 3C was not engaged. If the IHS charge had been paid within the grace period allowed by the 2015 Order, that would have retrospectively validated the application, but that had not happened.

41. According to Sir Patrick Elias, however, neither of these submissions was entirely correct. He rejected the analogy with the position regarding the non-provision of biometric information, on the basis that the obligation to pay the IHS arises as part of the application (unlike an obligation to provide biometric information, which arises after an application has been made), observing at para 32 that "in a case where there is no dispute that the fees [in respect of the application, which include the IHS] 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" (failing which, it remains invalid). But where an application for leave is combined with an application to be relieved of the payment of fees altogether (as Mr Afzal's application for ILR had been), the application for leave is conditionally valid, ie it is valid unless and until an obligation to pay the fee is imposed, following a refusal to grant relief from payment, and the fee is not thereafter paid within the specified grace period of 10 working days. If it is not paid, article 6 of the 2015 Order has the effect that the application "must be treated as invalid", and the applicant is in the same position as the two appellants in *Mirza* who had failed to pay the fees and whose applications were

for that reason treated as invalid, with the consequence that section 3C did not apply. This was the position of Mr Afzal, so on this analysis section 3C did not assist him.

42. As regards the issue concerning the meaning of "disregarded", Sir Patrick Elias accepted the submission of the Secretary of State that in context it means only that a period of overstaying book-ended by two periods of lawful residence does not break continuity, and so allows the two book-end periods to be added together for the purposes of computing the 10 year period required by para 276B(i)(a); it does not mean that the period of overstaying which is to be disregarded is to be counted towards that computation as well.

9. Analysis

(i) Section 3C

43. The effect of section 3C was addressed by this court in *Mirza*. The three appellants in that case had leave to remain in the United Kingdom and, before it expired, applied for further leave to remain. Their applications were rejected as invalid after expiry of their original leave. They submitted further applications which were refused on the basis that they had become overstayers by reason of that expiry, which meant that different and less favourable policies applied for consideration of their further applications. They sought to rely on section 3C, arguing that they had made the first applications before their leave expired and that section 3C had the effect of allowing their leave to continue until those applications had been determined, which occurred when the applications were rejected for non-compliance. This court held that, on its proper construction, section 3C only applies to extend leave if a valid application is made to vary that leave before it expires.

44. Two of the appellants, Mr Iqbal and Mr Mirza, were required by the relevant rules to pay a fee but they failed to do so. The third, Ms Ehsan, paid the relevant fee but failed to provide biometric information as she was required to do. The biometric information was not sought by the Secretary of State until some time after the original application had been made. Unlike the application fee it did not have to be submitted with the application.

45. 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." (See regulation 37 of the Immigration and Nationality (Fees) Regulations 2011 (SI 2011/1005))

46. There was at that time no rule equivalent to that now applicable providing for a grace period during which a defective application could be remedied. (See now para 34B of the Immigration Rules and article 6 of the 2015 Order, paras 23 and 29 above.)

47. Ms Ehsan had been requested, after her initial application had been received, to arrange and attend an interview within 17 days to provide biometric information. The power to require biometric information was derived from the Immigration (Biometric Registration) Regulations 2008 (SI No 2008/3048) ("the Biometric Regulations") made under the UK Borders Act 2007. Regulation 23 (as amended) provided that in certain cases of failure to comply with an obligation to provide biometric information the Secretary of State had a discretion to take any of four actions specified in regulation 23(2), including to treat the application for leave to remain as invalid (subpara (b)) or to refuse the application (subpara (c)). Therefore, assuming that regulation 23 applied to Ms Ehsan's case in this way, while the Secretary of State was empowered to treat the application as invalid she also had the power to impose other sanctions, including simply refusing the application. This was in contrast to the position with respect to fees, where an application without the fee was required to be treated as not validly made.

48. Lord Carnwath (with whose judgment the other members of the court agreed) held that in the case of Mr Iqbal and Mr Mirza, who had failed to pay the fees, section 3C was never engaged. This was because the effect of an application being invalid for non-payment of the fee 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 original leave expired had not been satisfied. A purported application was not an application within the meaning of the section. Lord Carnwath criticised the law for being inflexible 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."

49. Although the Court of Appeal in that case and the parties in their submissions drew no distinction between the three cases, Lord Carnwath considered that the position of Ms Ehsan required a different analysis. He said:

> "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) … 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…"

50. In the present appeal the court's attention was drawn to regulation 3 and regulation 23(3) of the Biometric Regulations. As provided by regulation 23(1), in certain cases involving failure to provide biometric information, as required by regulation 3, regulation 23(2) is not applicable and instead regulation 23(3)(b) provides that the Secretary of State "must treat the person's application for leave to remain as invalid", having no discretion in that regard. Lord Carnwath's attention was not drawn to this provision by the parties in *Mirza* and no argument was addressed to the court to

the effect that it was regulation 23(3)(b), not the options set out in regulation 23(2), which applied in Ms Ehsan's case, as might in fact have been the position. Such oversight, if that is what it was, does not undermine the force of Lord Carnwath's reasoning in *Mirza* nor its relevance for the purposes of the present appeals.

51. According to Lord Carnwath's analysis in Ms Ehsan's case, since her initial application was a valid application which was not automatically rendered invalid by her later failure to comply with the biometric information requirements, section 3C applied to extend her original leave to remain until that application was decided. In the event, this did not assist Ms Ehsan in her appeal, because her further application had been made after that date: paras 37-38.

52. The question which now arises is how this analysis and interpretation of section 3C bears on Mr Afzal's case. That depends on the effect of the 2015 Order.

53. As decided in *Mirza*, section 3C only applies if a valid application for variation of leave to remain is made. No such application had been made by Mr Iqbal and Mr Mirza. On the other hand, as the analysis of Ms Ehsan's case showed, an application may be valid for the purposes of application of section 3C even if the Secretary of State has a discretion later on to treat it as invalid. In such circumstances, the application calls for the Secretary of State to make a decision about how to treat it, and in order to provide the basis for her decision-making exercise it must have validity; at any rate, it has sufficient validity so as to fall within the meaning of "application" in section 3C.

54. Further, I observe that under section 3C(2)(a) it is only during any period when "the application for variation is neither decided nor withdrawn" that an existing grant of leave is extended. It is implicit in this that section 3C only operates to effect such an extension of leave where the application is one which is capable of being decided or withdrawn.

55. Article 3 of the 2015 Order provides that, subject to article 7, a person who applies for certain forms of entry clearance or for leave to remain in the United Kingdom must pay a charge. Article 4 makes provision to stipulate the amount of the charge due. Article 5 provides that the charge must be paid when the person applies for entry clearance or leave to remain. Article 8 gives the Secretary of State a discretion to waive the charge.

56. Article 6, set out at para 29 above, is the critical provision. By virtue of article 6(1), where a person fails to comply with the requirement to pay the IHS charge with their application, the entry clearance officer (in the case of an application for entry clearance made from outside the United Kingdom) or the Secretary of State (acting by her officials, in the case of an application for leave to remain) has a discretion to request

("may request") the applicant to pay the outstanding charge. That discretion is exercisable in the window between the filing of the application and the time when entry clearance or leave to remain has been granted or refused. There may be a grant of entry clearance or leave to remain without payment of the charge, because the Secretary of State has discretion under article 8 to waive the charge. The fact that there may be a refusal of leave to remain where an application is made without payment of the charge does not imply that such an application is valid: the refusal of such leave may simply be in recognition of the fact that the application is invalid.

57. Although the point does not arise for decision in this case, it may well be that the discretion of an entry clearance officer or the Secretary of State to request payment of the outstanding charge is quite limited. The power to make such a request has been conferred essentially for the benefit of the applicant, so that they should be given the opportunity to correct a defect in their application. Absent good reason for the entry clearance officer or the Secretary of State to omit to make such a request, it would defeat the object of article 6 and would not be rational for them to fail to exercise their discretion so as to afford the applicant such an opportunity. Mr Afzal was requested to pay the IHS charge and so was given that opportunity.

58. Article 6(1)(b) stipulates that Mr Afzal had to pay the outstanding IHS charge within 10 working days beginning with the date when the request was sent in writing, that is on 18 October 2017. He failed to do so. This meant that article 6(1)(c)(ii) took effect, so that the Secretary of State was obliged to treat Mr Afzal's application for leave as invalid ("must be treated as invalid"). She had no choice in the matter. The 2015 Order is mandatory and excludes any discretion which might otherwise have arisen under para 34B of the Immigration Rules, so it is not necessary to consider what effect (if any) para 34B might have upon the *Mirza* analysis in other cases. The fact that a reminder to pay was sent on 8 November 2017 does not affect the position.

59. It may be observed, however, that even if the 10 day period ran from when the letter of 8 November 2017 was sent, Mr Afzal still failed to comply within that time. Sir Patrick Elias seems to have thought (para 38) that the clock was set running by the letter of 8 November rather than on 18 October, but nothing turns on this. No doubt to avoid factual disputes of the kind which Mr Afzal has sought to raise about whether the letter of 8 November was received or not, and to achieve administrative certainty, the period within which payment is required to be made is not calculated from the date of receipt but from the day a request in writing is sent.

60. There is an obligation in Appendix SN 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. However, as Sir Patrick Elias correctly pointed out (para 37), this obligation does not support the

argument by Mr Afzal that it is the notification which constitutes a decision rendering the application invalid.

61. On the contrary, under article 6(1)(c)(ii) of the 2015 Order the Secretary of State was required by law to treat the application as invalid regardless of any question of notification. This distinguishes a case involving the application of article 6 from Ms Ehsan's case as analysed by Lord Carnwath in *Mirza*, involving the non-provision of biometric information and the application of regulation 23(2) of the Biometric Regulations. Sir Patrick Elias correctly emphasised this point at paras 34-37. As he said (para 36), the fact that an application has to be treated as invalid ("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".

62. Subject to the point above about when the time period under article 6 began to run, I would endorse the analysis of Sir Patrick Elias at paras 32-38. If an applicant for leave fails to pay the fee (including the IHS charge) and does not seek to have that requirement waived, the application is invalid ab initio but can be retrospectively validated by a later payment within the 10 day grace period created by a request for payment pursuant to article 6(1)(a): para 32. As Sir Patrick Elias says there, "[g]iven that the duty to pay arises as part of the application, it is not … 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, absent payment during the grace period, the application remains invalid throughout.

63. However, where the application for leave is combined with an application for waiver of the fee (as in Mr Afzal's case), it is not invalid ab initio, because it is not at that stage known whether the payment of the fee is in fact required. As Sir Patrick Elias explains at para 33, the application is "conditionally valid", meaning it is valid unless and until the obligation to pay the fee is confirmed, following a refusal to grant the waiver asked for so that the applicant is requested to pay it, and the fee is not thereafter paid within the period of 10 working days specified in article 6. In other words, the validity of the application is subject to a condition subsequent: if that condition fails, the application becomes invalid. This is what happened in Mr Afzal's case. At that point, the applicant is in the same position as Mr Iqbal and Mr Mirza in the *Mirza* case. The Secretary of State is required to treat his application as invalid. I agree with the observations Sir Patrick Elias went on to make in para 33:

> "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, regulation 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."

64. Therefore, as Sir Patrick Elias explained (para 38), Mr Afzal's application for leave was valid, but its continuing validity was conditional on him paying the relevant fees when it was determined that he should pay them. He was entitled to rely upon section 3C until the point where his application ceased to be valid. Taking the commencement date as 18 October 2017 rather than 8 November 2017, the date when Mr Afzal's application ceased to be valid was 31 October 2017.

65. Mr Afzal's appeal must therefore be dismissed. His further application in February 2018 for leave to remain was not made within 14 days of the expiry of the extension of his original leave under section 3C. The result is that he cannot rely upon para 39E(2)(b)(ii) as he seeks to do for the purposes of his argument based on para 276B(v).

(ii) Para 276B(v): can "disregarded" periods of overstaying count towards the 10 year continuous lawful residence requirement?

66. In the Court of Appeal there was a dispute about whether para 39E(2)(b)(i) was engaged in Mr Afzal's case. The court followed its decision in *Hoque v Secretary of State for the Home Department* [2020] EWCA Civ 1357; [2020] 4 WLR 154 ("*Hoque*") and resolved this issue in Mr Afzal's favour: paras 40-51. The court held that his application of 6 July 2017 qualified as an application for leave within the meaning of that provision, so that the period of 14 days specified there ran from the date when Mr Afzal was notified that this application had been refused, on 22 January 2018. His further application of 2 February 2018 was made within 14 days of that date. This means that although Mr Afzal was an overstayer without leave to remain in the period between 17 July 2017, when his original leave to remain expired, and 5 September 2019, when he was granted fresh leave to remain, the whole of that period of overstaying book-ended between periods when he had leave to remain must be "disregarded" under the second part of para 276B(v) when calculating whether Mr Afzal has 10 years continuous lawful residence under para 276B(a)(i). The Secretary of State has not appealed on this point and now accepts that the Court of Appeal was right to hold that para 39E(2)(b)(i) was engaged in Mr Afzal's case.

67. The question that remains, however, is what the word "disregarded" means in para 276B(v). Mr Afzal submits that it means that the book-ended period of overstaying in his case should be treated as if it were a period when he was lawfully present in the United Kingdom with leave to be here, and so should be added on to the other periods of residence with leave before and after it for the purpose of calculating whether he satisfies the 10 year period of continuous lawful residence required by para 276B(i)(a). The Secretary of State submits that the Court of Appeal was correct to interpret the word "disregarded" to mean only that a book-ended period of overstaying does not break continuity between the periods of residence with leave before and after it, so that they may be added together in calculating the 10 year period, but without that period of overstaying being counted as an addition for the purposes of that calculation.

68. In my view, the Court of Appeal's interpretation is correct.

69. In *Hoque* the Court of Appeal analysed para 276B(v) with care. It pointed out that it has two parts which operate in different ways. The first limb states a distinct requirement to be satisfied by an applicant for ILR on the grounds of long residence in the United Kingdom alongside those specified in subparas (i)-(iv). The second limb ("Any previous period [etc]") does not state a requirement of that character, but instead qualifies the requirement of 10 years continuous lawful residence in subpara (i)(a). The first limb deals with a situation where there is an open-ended period of overstaying because no subsequent leave is granted. The second limb deals with a situation where there is a book-ended period of overstaying, which occurs between two periods of leave. The parties agree with this analysis of the provision.

70. The concepts of continuous residence and of lawful residence are defined in para 276A of the Immigration Rules to mean, respectively, "residence in the UK for an unbroken period" and "residence which is continuous residence pursuant to existing leave to enter or remain". Where there is a period of overstaying without leave which is book-ended between two periods with leave, it clearly does not itself qualify as a period of residence pursuant to existing leave. Para 276B(v) and para 39E are both expressed in terms which recognise this. Both limbs of para 276B(v) refer to the relevant period as a "period of overstaying" and para 39E(2) is predicated on there being a break between periods of leave. I agree with Sir Patrick Elias (para 53) that had it been intended that there was to be any departure from such a fundamental requirement as that in para 276B(i)(a) of 10 years continuous lawful residence, this would have been indicated very clearly by express words or by plain necessary implication. But this has not been done.

71. Mr Jafferji relies on the word "disregarded" in the second limb of para 276B(v). But this is not a positive statement that a period without leave to remain should count as if it were a period with leave to remain. As Sir Patrick Elias points out (para 56), the natural meaning of a period being "disregarded" is simply that "one should not have regard to it; it should be ignored". As he also emphasised, what has to be "disregarded"

in both limbs of para 276B(v) is not the *fact* of overstaying (so as to treat it as if it were not overstaying at all), but the *period* of overstaying.

72. Therefore, far from indicating with clarity that a period of overstaying is to qualify (contrary to the fact) as a period of residence with leave, the structure of this part of the Immigration Rules and the language in which para 276B(v) is expressed indicates that a period of overstaying does not so qualify. Mr Jafferji's submission does not give proper value to the word "disregarded". His contention comes to this: the period of overstaying should not be disregarded (ignored) when calculating whether there has been 10 years continuous lawful residence under para 276B(i)(a), but positively brought into account as though it was itself a period of lawful residence. It clearly is not that and the relevant rules do not describe it as such.

73. Reading the word "disregarded" according to its natural meaning, the sense of both limbs of para 276B(v) is clear. In each limb, the paragraph provides that in the circumstances specified a period of overstaying without leave shall not prevent an applicant from relying on an overall 10 year period when he or she *was* present with leave. The period of overstaying is indeed "disregarded", that is ignored, in such a case. The word carries no other meaning.

74. So far as the first limb of para 276B(v) is concerned, this reading has the effect that although the general requirement stated there is that the applicant must not be in the UK in breach of immigration laws (that is, without leave) when they make their application for ILR on the ground of long residence, that requirement is relaxed ("any current period of overstaying will be disregarded") if para 39E applies at that time. The first limb of para 276B(v) does not convert a period of overstaying into a period of presence with leave.

75. Such an interpretation of this limb of para 276B(v) is supported by decisions of the Court of Appeal in two other cases. In *Secretary of State for the Home Department v Waqar Ali* [2021] EWCA Civ 1357; [2022] 1 WLR 773 the question arose whether an application lodged within the para 39E period of overstaying was "in time", meaning before leave (including extended leave under section 3C) had expired. The court held that an application made within the 14 day grace period under para 39E was not made "in time" in this sense; the effect of the relevant rules is simply that the Secretary of State will not refuse the application on the ground that the person is in the UK in breach of the immigration laws: see para 36, per Simler LJ.

76. In *Hoque*, a majority of the court held that the period of overstaying referred to in the first limb of para 276B(v) does not count towards the calculation of the 10 year period of continuous lawful residence in para 276(i)(a); instead, the qualification in the first limb means that an application for ILR on the grounds of long residence will not be

rejected on the grounds that the applicant is in breach of the immigration rules as an overstayer, where the applicant can show that they had accumulated 10 years continuous lawful residence in the past: see para 49, per Underhill LJ, with whose judgment on this point Dingemans LJ agreed. Although, In *Hoque*, McCombe LJ disagreed with this interpretation, I consider that Sir Patrick Elias in the present case gives convincing reasons (paras 61-62), reflected in the analysis above, why his view cannot be supported.

77. For similar reasons, and again giving the word "disregarded" its natural meaning, the second limb of para 276B(v) has the effect that a book-ended period of overstaying which is covered by that provision will be ignored and as a result will not break the continuity of the periods of lawful residence (ie with leave) on either side of it. This means that an applicant is entitled to add together those book-end periods of leave in order to establish that they have the requisite 10 years of continuous lawful residence.

78. As Sir Patrick Elias explains, the disregard under each limb of para 276B(v) operates as a shield for the applicant, not a sword. It prevents the Secretary of State from dismissing an application because the applicant is present in the UK in breach of immigration laws (first limb) or because there has been a break in the continuous lawful residence required by para 276B(i)(a) (second limb).

79. It is true that in *Hoque* Underhill LJ concluded that the word "disregarded" in the second limb of para 276B(v) has a different meaning than in the first limb, with the result that in his view the period of overstaying referred to in the second limb does count towards the required 10 year period of continuous lawful residence under para 276B(i)(a). However, this was not part of the ratio of the court's decision and in the present case Sir Patrick Elias explained convincingly why this view is not correct. There is no warrant for giving the word "disregarded" anything other than its natural meaning in both limbs of para 276B(v). There is no warrant for reading the second limb as though it were a provision which deemed a period of overstaying to be a period of lawful residence, as a departure from the definition of "lawful residence" in para 276A.

80. In *Muneeb Asif v Secretary of State for the Home Department* [2021] UKUT 00096 Upper Tribunal Judge Blum agreed with Underhill LJ's view of the second limb of para 276B(v) in *Hoque*. Judge Blum considered that this view was also supported by the Guidance. It is not necessary to examine the Guidance in detail in this judgment, because I agree with Sir Patrick Elias (para 73) that on proper analysis para 276B(v) is not ambiguous; therefore it is not necessary or appropriate to refer to the Guidance to interpret that rule. I would add that Sir Patrick Elias also gave reasons why, even if it were relevant to refer to it, the Guidance does not support the submission for Mr Afzal. But it is not necessary to elaborate upon these in this judgment.

(iii) Conclusion in Mr Afzal's case

81. For the reasons given above, I would affirm the Court of Appeal's decision regarding the application of section 3C and the meaning of "disregarded" in para 276B(v) and accordingly would dismiss Mr Afzal's appeal.

10. Mr Iyieke's appeal

82. Mr Iyieke's appeal gives rise to a separate issue under the second limb of para 276B(v), in relation to subpara (a) of that provision (set out at para 20 above). The question is how the phrase "the previous application" in subpara (a) should be interpreted.

83. Mr Iyieke had post study leave which expired on 9 August 2014. It is common ground that, with the subsequent grant of leave to remain on human rights grounds, Mr Iyieke's temporary admission as from 28 November 2014 counts towards the period of continuous lawful residence for the purposes of para 276B(i)(a). However, there was a gap of 111 days between the expiry of the first period of leave and the commencement of his second period of leave on 28 November 2014. Mr Iyieke was an overstayer in that period. If that gap period falls to be disregarded under para 276B(v)(a), Mr Iyieke is able to establish that he has the necessary period of continuous lawful residence to satisfy the requirement in para 276B(i)(a).

84. Mr Jafferji submits that Mr Iyieke satisfies para 276B(v)(a) because he made his (unsuccessful) application dated 2 September 2014, ie before 24 November 2016, within 28 days of the expiry of his post study leave on 9 August 2014. The question, therefore, is whether the application of 2 September 2014 qualifies as "the previous application" referred to in para 276B(v)(a), which would have the result that his period of overstaying would be disregarded.

85. The Court of Appeal held that it does not. Dingemans LJ (with whose judgment Warby and Arnold LJJ agreed) said (para 26):

> "In my judgment 'the previous application' cannot be a reference to any unsuccessful application made in a period of book-ended leave before 24 November 2016. This is because the reference is to 'the' previous application and not 'a' previous application. 'The' previous application must have resulted in a period of leave because otherwise there will be other periods of overstaying which need to be disregarded. This is because lawful residence is defined by paragraph

> 276A(b) of the Immigration Rules to include: existing leave to enter or remain; temporary admission or immigration bail; or an exemption from immigration control. After 9 August 2014 Mr Iyieke did not have any form of lawful residence until 28 November 2014 and there is nothing in paragraph 276B(v) which requires that to be overlooked."

86. In my view, this is correct. The wording of the rule is infelicitous, but Dingemans LJ was right to focus on the use of the definite article. The rule does not refer to *any* previous application for leave which a person might have happened to have made, even if unsuccessful, which falls within the period of overstaying which is to be disregarded according to the rule. In my view, "*the* previous application" referred to is the application which resulted in the second leave being granted. The use of the definite article shows that one particular application is being referred to, and the only application which could rationally be said to be significant in the context of the second limb of para 276B(v) is the application which resulted in the grant of the second period of leave which book-ends the period of overstaying referred to in that limb.

87. The first "previous" in the second limb of para 276B(v) is used to contrast the period of overstaying with which that limb is concerned (ie one which is book-ended between periods of leave) with the period of overstaying with which the first limb is concerned (ie a period of overstaying which is current at the time the application for ILR is made). The phrase "the previous application" in subpara (a) uses the word in a similar sense to refer to the application which resulted in the grant of leave which brought the relevant "previous period" of overstaying to an end. The repetition of "previous" ties the application and that period together.

88. Further, the interpretation of the rule urged by Mr Jafferji would have perverse effects which it cannot reasonably be thought the drafter intended. It would mean that a person who made a hopeless application for leave within 28 days of the expiry of leave, which is refused, who happens to make a later application for leave (perhaps very much later) which is successful (on a completely different basis) would be in a better position than someone who made a successful application which was just out of time. Moreover, if the application for further leave was made in time, section 3C would extend the original period of leave until the determination of the application, and any appeal or administrative review of a refusal, but unless the application was ultimately successful the clock would then re-set. But if Mr Jafferji's proposed construction is correct, it would mean that it would be more advantageous to make an application out of time. It cannot be supposed that the drafter of the rule intended that the making of out of time applications should be incentivised in this way, nor that the rule should produce such unfair results as between different applicants.

89. Counsel for the Secretary of State provided the court with worked examples to make this point good:

> (i) Suppose in the first case A is granted 2 years leave on 2 January 2012, expiring on 1 January 2014. He applies, in time, on 31 December 2013 for a further period of leave. That application is refused on 1 January 2015 and A does not seek administrative review of the refusal by the 15 January 2015 deadline to do so. On 1 January 2016 A applies out of time for leave on a different basis. That application is granted on 1 March 2016 and leave is subsequently extended. Section 3C operates to extend A's initial leave until the expiry of the period for seeking administrative review, but after that he would be an overstayer until 1 March 2016. The 1 January 2016 application was more than 28 days after the expiry of his leave so there is no period of overstaying which falls to be disregarded under para 276B(v)(a) and his continuous lawful residence is broken when his section 3C leave comes to an end. The clock is re-set and A would not be eligible for ILR on grounds of 10 years continuous lawful residence until 1 March 2026.
>
> (ii) Now suppose that in the second case B is also granted 2 years leave on 2 January 2012, expiring on 1 January 2014. He does not apply for further leave in time, but does so within 28 days, on 10 January 2014. That application is refused on 1 January 2015, and B does not seek administrative review of the refusal. On 1 January 2016 B makes a further out of time application for leave on a different basis. That out of time application is granted on 1 March 2016, and subsequently extended. B has not had any form of leave and has been an overstayer between 1 January 2014 and 1 March 2016. On Mr Jafferji's construction of the rule, that entire period falls to be disregarded because he made an application within 28 days of the expiry of leave and the period is bookended between two periods of leave. The clock is not re-set and B is entitled to aggregate his initial 2 years of leave with the leave subsequently granted, and becomes eligible for ILR on grounds of 10 years continuous lawful residence on 1 March 2024.

90. For these reasons, I would dismiss Mr Iyieke's appeal.

11. A final comment on the Immigration Rules

91. A final comment is in order. In cases dealing with this part of the Immigration Rules, judges have repeatedly commented on their poor drafting. Poor drafting needlessly creates difficulties and uncertainties which lead to expensive litigation. It is highly desirable that the project to redraft the Immigration Rules to make them clearer should be carried forward to completion.