



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/02880/2015  
HU/04616/2015  
HU/04608/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28 June 2017**

**Decision & Reasons Promulgated  
On 6 July 2017**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT**

**Between**

**[CLIVE B.]  
[SHELLEY W.]  
[MESHA B.]**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr A Malik, instructed by Ansah Solicitors  
For the Respondent: Mr S Whitwell, Home Office Presenting Officer.

**DETERMINATION AND REASONS**

1. The appellants are nationals of Jamaica, husband, wife and their daughter, who was born in 2010. They appealed to the First-tier Tribunal on human rights grounds against the respondent's refusal to grant them leave. Judge

Rayner dismissed their appeals. The appellants have permission to appeal to this Tribunal on one ground, identified by Judge Allen in granting permission. It is that the judge erred in law in failing to take into account any applicable discretion when applying the Rules on long residence.

2. The appellants' applications were not made on the basis of long residence, but as I understand it, it was common ground before the First-tier Tribunal Judge that if they had qualified under the Rules, that was a matter to take into account in assessing the proportionality of the present refusal. Paragraph 276B of the Statement of Changes in Immigration Rules, HC395 (as amended) has, as the primary requirement for leave to remain on the grounds of long residence, that the applicant "has had at least ten years continuous lawful residence in the United Kingdom". It is also required by that paragraph that the applicant must not be in the United Kingdom in breach of immigration laws, except that any period of overstaying for a period of 28 days or less will be disregarded. Paragraph 276A provides, in part, as follows:

"For the purposes of [paragraph] 276B...

- (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 ...."

3. There is no doubt that the first and second appellants' leave expired in 2011. There is some confusion in the judge's calculations, because he appears to have thought that the 28 days condoned unlawful presence for which provision is made in paragraph 276B was to be regarded as lawful presence. That cannot, of course, be right: if it were lawful, it would not need to be condoned. The judge concluded that the first appellant's lawful residence in the United Kingdom expired on 12 November 2011, when the respondent refused an application he had made for leave outside the Rules. There has been no subsequent challenge to that conclusion. The second appellant's lawful presence in the United Kingdom ended on 28 March 2011, when a similar application by her was refused. The question in each case is whether, by the date of the expiry of their leave, either of them had achieved 10 years continuous lawful residence.
4. In the first appellant's case, it is simply impossible. His first entry to the United Kingdom was 8 October 2002, which is less than 10 years before his leave expired. The second appellant's case is more complex. At the hearing before me Mr Malik produced her passports, from which I was able to obtain detailed information on her movements which had not been available to Judge Rayner. She first entered the United Kingdom on 2 September 2000. She remained in the United Kingdom, lawfully, until 30 August 2001, when she returned to Jamaica. She applied for a new entry

clearance in Jamaica, which was granted on 18 February 2002. It was used on 1 March 2002, the date on which she last arrived in the United Kingdom. She was thus absent for a period of 183 days, beginning on 30 August 2001 and ending on 1 March 2002. That is a period of more than six months, because months means calendar months, and no period of six months beginning in August 2001 could end as late as any date in March 2002. Indeed, the appellants accept that the second appellant's absence was for longer than six months.

5. Staying for the moment with the express terms of the immigration rules, a difficulty arises in relation to the appropriate starting-point for the calculation of the second appellant's presence in the United Kingdom. The judge decided that it was 1 March 2002. At the hearing before me, Mr Malik complained that this was a mistake: it should have been 1 September 2000. This was not a point on which permission to appeal had been granted, but I heard his submission *de bene esse*. The reason for the judge's decision was that, because of the absence of more than six months, the period of lawful continuous presence was broken. Thus, that period, as calculated by reference to paragraph 276A, could only have begun on the second appellant's return on 1 March 2002. But the answer to the question posed by Mr Malik's complaint is essentially the same as that posed by the ground on which he did have permission: is there some basis upon which the second appellant's absence can or could be treated as an absence of less than six months?

6. Mr Malik relied on published guidance in the following terms:

"If the applicant has been absent from the UK for more than six months in one period and more than eighteen months in total, the application should normally be refused. However, it may be appropriate to exercise discretion over excess absences in compelling or compassionate circumstances, for example where the applicant was prevented from returning to the UK through unavoidable circumstances."

7. Mr Malik supported his grounds by reference to a number of decisions of the Tribunal in relation to the review of discretion and in relation to the application of the rules relating to long residence. The problem is, however, as I pointed out at the hearing, that the grounds of appeal available to an appellant have changed very considerably since those cases were decided in 2010, 2011 and 2012. Before the amendments to the appeal rights introduced by the Immigration Act 2014, an individual could appeal on the ground that the decision was contrary to the Immigration Rules; and could appeal also on the ground that the decision was not in accordance with the law, for example if the Secretary of State had failed to consider the exercise of any applicable discretion. Those grounds are no longer available. It is very difficult indeed to see how the exercise of the Secretary of State's discretion outside the Rules can fall for examination in a statutory appeal governed by the new appeals provisions.

8. Mr Malik's secondary position was that if the First-tier Tribunal Judge was going to consider the substance of the Rules at all, he ought also to consider the exercise of any applicable discretion. That cannot be right. The Secretary of State always has a discretion to depart from the Rules. The question in a human rights appeal of this nature is typically whether the application of generally human-rights-compliant rules to the appellant has resulted, exceptionally, in a decision which disproportionately interferes with Convention rights. That process is not readily capable of being informed by considering the circumstances in which there might have been departure from the Rules.
9. In any event, I do not understand that Judge Raynor was invited to take any notice of the guidance or of the discretion mentioned in it, nor that he was presented with any evidence that the length of the second appellant's stay in Jamaica was affected by any compelling or compassionate circumstances. On that basis it is very difficult to see how he could have erred in law by failing to take this issue into account.
10. The appellants did not meet the long residence requirements of the Rules. The judge did not err in his approach to applying the Rules. The appellants' appeals are dismissed.

C. M. G. OCKELTON  
VICE PRESIDENT OF THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER  
Date: 4 July 2017