Upper Tribunal
(Immigration and Asylum Chamber)

Chang (paragraph 276A(a)(v); 18 months?) [2021] UKUT 00065 (IAC)

THE IMMIGRATION ACTS

Decided under Rule 34 Without a Hearing

At Field House

On 10 December 2020

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MONA CHANG

(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

In paragraph 276A(a) (v) the reference to “18 months” must be interpreted as meaning 548 days.

DECISION AND REASONS

1.
How long is 18 months? Or, more precisely, how many days are there in 18 months? Whether the appellant meets the requirement of paragraph 276A (a)(v) of the Immigration Rules turns on the answer to that deceptively simple question.

2.
The appellant first arrived in the United Kingdom in January 2009 at the age of 10. She has undertaken all her secondary and tertiary education here, but has, understandably, returned to Hong Kong to visit her parents and has travelled during her education, spending in total 543 days outside the United Kingdom between 12 January 2009 and her application for indefinite leave to remain on long residence grounds made on 13 June 2019.

3.
In her letter of 12 September 2019 refusing the application, the respondent took the view that, following the long residence guidance, 18 months is to be considered as 540 days, and so her

continuous residence had been broken. On that basis, the appellant did not meet the requirements of paragraph 276B (with reference to paragraph 276A (a) (v)) of the Immigration Rules as and so was not entitled to Indefinite Leave to Remain.

4.
On appeal, the appellant explained that she had made an error in the schedule of her absences, overlooking the fact that she had travelled first to Thailand on 30 March 2016 and only then to Hong Kong on 4 April 2016 before returning to the United Kingdom on 11 April 2016 and so had omitted 30 March to 4 April 2016 from her calculations.

5.
The judge found at paragraph 7 that:

The respondent's Long Residence guidance states clearly that for the purposes of calculating time spent outside the UK a month constitutes 30 calendar days. The period is longer than the statutory definition of a month meaning calendar month (i.e. 28 days) to be found in Schedule 1 to the Interpretation Act 1978

6.
The judge then went on to dismiss the appeal on the basis that her removal was proportionate.

7.
The appellant sought permission to appeal on the grounds that the judge had erred:

(a)
In failing to give any reasons for rejecting or even engaging with the appellant's submissions on how 18 months should be interpreted;

(b)
In misdirecting herself that a calendar month is 28 days;

(c)
In failing to follow R (Alvi) v SSHD [2012] UKSC 33 in concluding that the respondent's guidance, imposing a shorter period than 18 months was impermissible;

8.
On 7 May 2020 First-tier Tribunal Judge O'Brien granted permission. Subsequent to that, Upper Tribunal Judge Rimington issued directions on 13 July 2020 which provided that it would in this case be appropriate to determine without a hearing whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so whether that decision should be set aside. Those directions also included a timetable within which any objections and submissions were to be made.

9.
The appellant made further submissions on 23 July 2020. The respondent replied on 20 August 2020 and the appellant made further submissions in reply on 2 September 2020.

10.
In deciding whether or not to make a decision without a hearing, I have borne in mind Rule 34 and the judgment of Fordham J in JCWI v President of the Upper Tribunal [2020] EWHC 3103 as well as the order made in that case.

11.
The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. Given that no objection to this course of action has been raised, and bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly, I am satisfied that in the particular circumstances of this case where there has been no objection to a decision being made in the absence of a hearing that it would be right to do so.

12.
The Immigration Rules provide, so far as is relevant:

276A. For the purposes of paragraphs 276B to 276D and 276ADE (1).

(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:

…

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

…

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

276B. 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

13.
For the avoidance of doubt, it is not the respondent’s case that the applicant had been present in the United Kingdom otherwise than with leave, or had overstayed at any point.

14.

As a starting point, it is not in dispute that “month” is not defined in the Immigration Rules. That was noted in FB and Others (HC 395 para 284: "six months") Bangladesh [2006] UKAIT 00030 where the AIT had to consider the meaning of “six months” in paragraph 284 of the Immigration Rules as then in force.

15.
The respondent in her submissions accepts that “month” must mean a calendar month in line with the Interpretation Act 1978 at Schedule 1. That, as the AIT noted in FB & Others was a provision designed to exclude it from being a lunar month. It follows therefore, that seeking to limit a month to 28 days is wrong in law although it needs to be recalled that section 5 of the Interpretation Act provides:

5. Definitions. In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule.

16.
It is self-evident that not all calendar months are of the same length. In Migotti v Colvill (1879) 4 CPD 233, 238 Brett LJ held:

"The term a calendar month is a legal and technical term … . The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one."

Bramwell and Cotton LJJ agreed with him.

17.
It follows from that that where, for example “6 months leave” is specified, that the end date can be determined precisely, even though the exact number of days in that period will vary. That is not a problem when a continuous period is so defined; but it is problematic when, as here, the rules are intending to set a maximum period of absence, made up from smaller, shorter periods because the number of days in a period of months will vary depending on when the day on the year on which the count is started.

18.
As a matter of arithmetic, if a period of 18 months were consecutive, it would always be at least 547 days if it incorporated two non-leap year Februarys. But it can and does vary, and the exact number of days in a period of 18 months cannot be properly ascertained unless the start or finish date of that period is known. Using a period of months to calculate accumulated absences (as opposed to a single period) is for that reason inappropriate and leads to a lack of certainty.

19.
As an aside, that may well be why the permissible absences for the purposes of naturalisation in Schedule 1 to the British Nationality Act are specified in days.

20.
It would, therefore, appear that Immigration Rules do not specify a specific number of days that can be spent outside the United Kingdom, and that thus the meaning of 18 months is unclear.

21.

But the Immigration Rules are not statutes and are to be interpreted in a common sense manner. In everyday usage, 18 months means a year and a half, rather than a collection of months selected at random. Any year has either 365 or 366 days. Similarly, any half-year has either 182.5 or 183 days. As leap-years cannot follow each other, then a year and a half is either 547.5, 548 or 548.5 days.

22.
While that might be open to the objection that the law does not reckon fractions of days, and is still not certain, the convention when rounding numbers to the nearest whole number is, when rounding 0.5, to round up (or down) to the nearest even number. Applying that convention, that the number of days in a common-sense interpretation of 18 months would be 548 days reached by rounding 547.5 up or 548.5 down.

23.
That is, however, different from the guidance issued by the respondent which equates 18 months to 540 days. That would appear to be based on an assumption of months being, on average 30 days, a figure only achieved by rounding down 30.4167 to 30 in accordance with the convention noted above.

24.
But suppose a hypothetical applicant spent 18 separate months outside the United Kingdom. A month is readily calculable, and those 18 months could total a widely different number of days spread over a 10 year period if, say, the months involved only February (on ten occasions) and eight 30 days months spent outside the United Kingdom, leading to only 522 days, or 18 periods of 31 days were spent outside the United Kingdom those 18 months would be 558 days.

25.
Thus, the respondent’s interpretation of 18 months being 540 days is predicated on 18 notional months. But those “months” are not defined in the rules or in statute and that interpretation is predicated on “month” having a different meaning from when it is used to delimit a specific period of leave which has been granted. In neither case is there a sufficient basis under section 5 of the Interpretation Act for construing month other than as a calendar month.

26.
As the AIT noted in FB & Others when calculating 6 months, it was based on calendar months and so the number of days within that period will vary and so will the number of days in any period of leave granted for 6 months.

27.
The respondent’s case is that any ambiguity or difficulty in interpretation is resolved by the guidance. There are, however, difficulties in using guidance as a means to interpret the rules, as was noted in Hoque & Ors v SSHD [2020] EWCA Civ 1357 at [39] (Underhill LJ):

39. I should acknowledge in connection with the previous paragraph that there may be a question whether it is legitimate to refer to the Guidance as an aid to construction. At paras. 10-11 of his judgment in Mahad (Ethiopia) v Entry Clearance Officer [2009] UKSC 16 , [2010] 1 WLR 48 , Lord Brown disapproved the use of IDIs (the predecessor to Guidance documents) for this purpose; and para. 23 of the judgment of Dyson LJ in MD (Jamaica) v Secretary of State for the Home Department [2010] EWCA Civ 213 is to the same effect. At para. 15 (7) of its judgment in Masood Ahmed the Court referred to Lord Brown's observations in the context of this very issue. However at para. 42 of his judgment in Pokhriyal v Secretary of State for the Home Department [2013] EWCA Civ 1568 Jackson LJ noted a qualification to that approach in cases where a rule is ambiguous and the Secretary of

State has in her published guidance adopted the interpretation more favourable to applicants. The intended scope of element [C] is certainly ambiguous, given the mismatch between its terms and its placing within the paragraph, and the interpretation that I believe to be correct is more favourable to applicants. In any event, however, the terms of the Guidance are not essential to my conclusion.

28.
Similarly, McCombe LJ at [91]:

91. Finally, I would add a few words about the Secretary of State's Guidance issued to caseworkers for the purposes of helping them to decide applications for ILR submitted on the basis of long residence. No counsel took us to the detail of this material, which is included in the bundles before us for the appeal. Rightly, they did not focus on this in their arguments on construction of the Rules because, as Lord Brown made clear in Mahad , the Secretary of State's intention in formulating the Rules is not to be discovered from these. However, there is a qualification to this, noted by Jackson LJ (with whom Longmore LJ and Vos LJ (as he then was)) agreed in Pokhriyal v SSHD [2013] EWCA Civ 1568 . Jackson LJ said:

"42 If there is ambiguity in Immigration Rules and the Secretary of State publicly declares that he/she will adopt the more lenient interpretation, then tribunals and courts may hold the Secretary of State to that assurance. This is exemplified by the Court of Appeal's decision in Adeyodin v Secretary of State for the Home Department [2010] EWCA Civ 773 ... At paragraph 70 Rix LJ said that in a situation of genuine ambiguity, it was legitimate to derive assistance from the executive's formally published guidance, including IDIs

43. I would respectfully agree with paragraph 70 of Rix LJ's judgment in Adeyodin . I would, however, add this comment. I do not think it is possible for the Secretary of State to rely upon extraneous material in order to persuade a court or tribunal to construe the rules more harshly or to resolve an ambiguity in the Government's favour. The Secretary of State holds all the cards. The Secretary of State drafts the rules; the Secretary of State issues the IDIs and guidance statements; the Secretary of State authorises the public statements made by his/her officials. The Secretary of State cannot toughen up the rules otherwise than by making formal amendments and laying them before Parliament. That follows from the Supreme Court's reasoning in R (Alvi) v Secretary of State for the Home Department [2012] UKSC 33 ..."

29.
Given that 18 months can, for the reasons set out above, mean a longer period than 540 days, the ambiguity in the rules ought to be resolved in an appellant’s favour.

30.
Further, as the appellant argues, the effect of the interpretation as set out in the guidance has the effect, if the respondent is correct, to establish a rule.

31.
In Alvi [2012] UKSC 33 Lord Hope said this

57. The problem that Mr Alvi's case reveals, however, is that the Codes contain material which is not just guidance. They contain detailed information the application of which will determine whether or not the applicant will qualify. I agree with Lord Dyson (see para 94, below) that any requirement which, if not satisfied, will lead to an application for leave to enter or to remain being refused is a rule within the meaning of section 3(2) . A provision which is of that character is a rule within the ordinary

meaning of that word. So a fair reading of section 3(2) requires that it be laid before Parliament. The problem is how to apply that simple test to the material that is before us in this case.

Lord Dyson said this at [83]:

83. Nevertheless, section 3(2) raises a difficult question of interpretation. What is a rule “as to the practice to be followed in the administration” of the 1971 Act? Parliament drew a distinction between rules within the meaning of section 3(2) and “instructions (not inconsistent with the immigration rules)” given to immigration officers by the Secretary of State within the meaning of para 1(3) of Part 1 to Schedule 2 to the 1971 Act. Rules cannot, therefore, encompass the instructions and guidance issued to case-workers and other staff to assist them with processing applications, although in a sense these documents describe some of the practice followed in the administration of the 1971 Act. But the statute itself recognises that instructions to immigration officers as to how they are to apply the rules are different from the rules themselves. The recognition that the 1971 Act distinguishes between rules and instructions to immigration officers does not, however, shed light on where the statute draws the line between them. Various attempts have been made in recent cases to define rules. Lord Hope has referred to a number of the cases at paras 43 to 52 above.

And at [94]:

94. In my view, the solution which best achieves these objects is that a rule is any requirement which a migrant must satisfy as a condition of being given leave to enter or leave to remain, as well as any provision “as to the period for which leave is to be given and the conditions to be attached in different circumstances” (there can be no doubt about the latter since it is expressly provided for in section 3(2)). I would exclude from the definition any procedural requirements which do not have to be satisfied as a condition of the grant of leave to enter or remain. But it seems to me that any requirement which, if not satisfied by the migrant, will lead to an application for leave to enter or remain being refused is a rule within the meaning of section 3(2) . That is what Parliament was interested in when it enacted section 3(2) . It wanted to have a say in the rules which set out the basis on which these applications were to be determined.

32.
Applying Alvi to this case, I consider that what the guidance is seeking t o do when defining 18 months as 540 days is the creation of a rule, and thus is not permissible.

33.
Drawing these strands together, I conclude that on a proper construction of “18 months” within paragraph 276A (a) (v) must be interpreted as 548 days. Accordingly, the judge misdirected herself in law in a material way, and her decision must be set aside.

34.
In consequence, I am satisfied also that the judge’s decision with respect to article 8 is also flawed, as it is predicated on that same error of law.

35.
Having reached that conclusion, I issued a decision to that effect to the parties, indicating that on a correct construction of the Immigration Rules, the appellant meets the requirement of paragraph 276A (a) (v), and so meets the requirements of paragraph 276B (i) as it was not suggested that any of the factors set out in paragraph 276B (ii) apply to her such that she should not be granted indefinite leave, or that paragraphs 276B (iii) to (v) are not met.

36.
I gave directions that it was my view that, in consequence, there appears to be no public interest in removing the appellant, and thus that her appeal should be allowed without the need for a further hearing and inviting the parties to make comments on the proposed course of action.

37.
On 17 December 2020, the appellant's solicitors wrote to the Upper Tribunal agreeing to the proposed course of action; on 7 January 2021, the respondent wrote to the Upper Tribunal conceding the appeal, and stating she was content for it to be allowed.

38.
I am satisfied that on a proper construction of the Immigration Rules, the appellant has acquired 10 years continuous residence in the United Kingdom and meets all the relevant requirements of the Immigration Rules, in particular paragraph 276B. It follows that there is no public interest in removal (see OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 65 (IAC) at paragraphs [27] and [28]), and I am satisfied by the evidence before me and in the light of the respondent's concession, that the appellant's removal would be in breach of her protected article 8 rights. I therefore allow the appeal on that basis.

39.
The appellant has met the requirements of the Immigration Rules, and given the lapse of time since this appeal was lodged, she has not spent more than 548 days outside the United Kingdom in the last 10 years. In the circumstances, it would be appropriate for her now to be granted Indefinite Leave to Remain.

Notice of Decision & Directions

1
The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

2
I remake the decision by allowing the appeal on human rights grounds.

Signed Date 10 February 2021

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul