



IAC-FH-AR-V1

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

Appeal Number: IA/45284/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 9 December 2015**

**Decision & Reasons Promulgated  
On 6 January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

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

Appellant

**and**

**CAROL PAMELA HEMANS  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr N Bramble, Home Office Presenting Officer

For the Respondent: Mr R Layne, Counsel, instructed by Malani Fernando

**DECISION AND REASONS**

**Introduction**

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Bart-Stewart (Judge Bart-Stewart) promulgated on 4 June 2015, in which she allowed the appeal of Miss Hemans (hereafter the claimant). The appeal was allowed on Article 8 grounds outside of the Rules only. The claimant's appeal to the First-tier Tribunal arose from the decision of the Secretary of State dated 6 November 2014, giving

directions for her removal by way of Section 10 of the Immigration and Asylum Act 1999.

2. Judge Bart-Stewart set out the claimant's immigration history in this country and thereafter the evidence given by her son, Mr Powell, her daughter, Miss Dixon, and her niece Miss Heymans. Having done that the judge went on to consider the Article 8 claim within the Rules. She concluded that the claimant could not satisfy the requirements of Appendix FM. In respect of paragraph 276ADE of the Rules the judge found that in relation to subparagraph (vi) of that provision there were no "very significant obstacles" to the claimant reintegrating into life in Jamaica. Therefore the claimant failed to meet the Rules in this regard as well.
3. Judge Bart-Stewart then went on to consider the Article 8 claim outside of the Rules. She directed herself to the well-known case of Razgar, and then made reference to the mandatory considerations set out in Section 117B of the Nationality, Immigration and Asylum Act 2002, as amended.
4. The judge took into account the fact that the Secretary of State, despite having made adverse decisions in respect of the claimant over the course of time, had failed to in fact remove her. The inaction, which was described by the judge as being "extreme", was obviously the significant factor in her ultimate conclusion that removal now would be unjustifiably harsh and therefore disproportionate. In light of that conclusion, as I have mentioned already, the appeal was allowed under Article 8 outside of the Rules.
5. The Secretary of State sought permission to appeal on two grounds: first, that the judge had failed to take account of the fact that the claimant had failed to meet the Rules; second, that the judge had failed to consider the issue of delay properly, and in particular in light of the decision of the Supreme Court in Patel [2013] UKSC 72. Permission was granted by First-tier Tribunal Judge Colyer on 20 August 2015.

### **The Hearing Before Me**

6. Representing the Secretary of State, Mr Bramble relied on the grounds. For the claimant, Mr Layne asked me to look in particular at paragraph 26 of the judge's decision in which the public interest had in fact been referred to. He did, very fairly in my view, accept that there was no express consideration of the failure of the claimant to meet the Rules. At this stage I indicated to Mr Layne that there was in my view a clear error of law by Judge Bart-Stewart in respect of her consideration of the Article 8 claim outside of the Rules.
7. On the current state of the law it is clear that where an individual cannot meet the Rules insofar as they relate to Article 8, this constitutes more than simply a starting point for consideration of Article 8 outside of the Rules: it is a very significant factor weighing against the individual. This much is clear from the decision of the Court of Appeal in Haleemudeen

[2014] EWCA Civ 558 at paragraph 47, observations that were subsequently approved by the Court of Appeal in SS (Congo) [2015] EWCA Civ 387. Having considered Judge Bart-Stewart's decision with care, nowhere therein does she refer to this very important factor. In addition, there is nothing by way of substance to indicate that she took this matter adequately into account, or indeed at all, when considering Article 8 outside of the Rules.

8. The error of law was in my view clearly material to the outcome of the appeal and the contrary position has not been asserted by Mr Layne.
9. In respect of the second ground of appeal, there is strictly speaking no need for me to deal with it at this stage because I have found an error in respect of the first ground, and that renders the whole of the judge's conclusion on Article 8 unsound. For the sake of completeness, I do however find that Judge Bart-Stewart erred in her approach to the delay issue. The Secretary of State's inaction was a relevant factor. Yet so was her legitimate position that those with no right to remain in the United Kingdom and are told to leave should in fact do so. This is the point made by the Supreme Court in Patel and in several other decisions from the Court of Appeal. The judge did not take this countervailing factor into account.
10. In light of the foregoing, I set aside the decision of Judge Bart-Stewart.

### **Disposal**

11. Both representatives were agreed that I could remake the decision in this appeal based upon the evidence before me, and in light of the findings of fact made by Judge Bart-Stewart, none of which having been challenged by the claimant.
12. By way of submissions in terms of the remake decision, Mr Bramble accepted that the claimant would have private life and asked me to consider whether or not there was also family life in light of the well-known decision of Kugathas [2003] EWCA Civ 31, given that the claimant's children in this country have been adults at all material times.
13. It was accepted that removal would constitute an interference with the private life.
14. In respect of proportionality, he emphasised the fact that the claimant had not met the Rules, that I must consider all of the relevant factors under Section 117B of the 2002 Act, and that the claimant had been an overstayer since 1999. In respect of the delay issue, it was accepted that there had been a failure to remove the claimant over the course of time but reference was made to Patel and of the Upper Tribunal in R (on the application of) Xu (IJR) [2014] UKUT 375. In short, Mr Bramble submitted, the claimant herself should have left the United Kingdom when required to.

15. In respect of the decision of the House of Lords in EB (Kosovo) [2008] UKHL 41, it was difficult in this case to see what the claimant had missed out on in terms of the Secretary of State's failure to remove her earlier.
16. Mr Layne submitted that this case was really all about proportionality and delay or perhaps more accurately, inaction by the Secretary of State. The claimant had not been removed when she could have been. Removal directions were in fact set in 2012 but were cancelled for no discernible reason. The claimant was allowed to remain in this country and the delay or the inaction of the Secretary of State was described as being inordinate.
17. The reasoning in EB (Kosovo) was said to apply to the present appeal. I was referred to paragraph 15 of the judgment. There had been many years of inaction in this appeal and this was a factor that needed to be accounted for in the proportionality exercise.
18. In addition there was a close family unit in the United Kingdom and this too was relevant.

### **Decision on the Remaking of the Article 8 claim**

19. In re-making the decision in this case I have considered the Appellant's bundle, paginated 1-51, together with the findings of fact made by Judge Bart-Stewart.
20. I accept that the claimant has established a private life over the course of her time in the United Kingdom. This is perhaps hardly surprising given that she has been here for many years and has family in this country. The family relationships with her two adult children and her grandson form important aspects of that private life.
21. In respect of family life, whilst this is not perhaps of the greatest importance, I do not accept that the threshold in Kugathas has been met in respect of the claimant's relationships with her two adult children, there being no sufficient evidence before me as to ties going beyond normal emotional ties between a parent and their adult children.
22. In terms of interference, there would clearly be a sufficiently serious interference with private life if the claimant's removal were to be affected by the Secretary of State.
23. The core issue in this appeal is, as has been expressed by the representatives, that of proportionality. In conducting the proportionality exercise I take the following matters into account.
24. First and foremost, and in light of Section 117B(1) of the 2002 Act, there is the public interest. That is a very significant factor in the Secretary of State's favour and against the Appellant. In this case the Appellant came as a visitor with very limited leave and has been an overstayer since late 1999. She has made a number of applications to the Secretary of State over the course of time but has never been granted leave after the initial

short period. Therefore the public interest in maintaining effective immigration control remains a powerful factor in this particular case.

25. Second, there is the fact that the claimant fails to meet the provisions of the Rules as they relate to Article 8. Judge Bart-Stewart's conclusion on this has not been challenged at any stage, and in any event I would have concluded that on the evidence before me the claimant could not succeed. This factor is also a very significant matter weighing in the Secretary of State's favour and against the claimant. The decisions of Haleemudeen and SS (Congo) referred to previously make it very clear that a failure to meet the Rules is something significantly greater than simply a starting point when looking at Article 8 claims outside of the Rules.
26. Third, the claimant's private life in this country has been established at all times whilst her status here has been either precarious (in respect of the initial period of leave) or unlawful (at all times thereafter), and therefore I attribute little weight to that private life in light of Section 117B(4) of the 2002 Act.
27. Fourth, it is right that the Secretary of State could and probably should have acted earlier in actually removing the claimant from the United Kingdom. There is no indication that the claimant hid herself away from the authorities at any time. It is true that the claimant became 'appeal rights exhausted' back in October 2004, and that removal directions were set and then cancelled in 2012. In addition, it did take the Secretary of State some two years to decide the final human rights application. To this extent, the Secretary of State's inaction/delay is a factor in the claimant's favour.
28. However, this factor is in reality of only limited assistance to the claimant. The indisputable fact is that she has had no right to be in this country since 1999. She has known this to be so at all times. There has been no attempt by her whatsoever to leave this country. This inaction on her part is a very forceful counter-weight to the Secretary of State's conduct in this case. It is clear from the case-law (including Patel) that people without status are legitimately expected to leave of their own accord. In addition, an effect of primary legislation (in the form of Section 117B(4)) is to reduce the ability of a person unlawfully in the United Kingdom to rely on inaction by the Secretary of State in enforcing removal. In respect of EB (Kosovo), the only delay in actually making a decision upon an application was that between 2012 and 2014: this is not an extreme or even an inordinate period. In terms of the inaction on removal, EB (Kosovo) does not in fact expressly consider this particular scenario. However, there is certainly no suggestion in the judgment that the refusal of an individual to leave once all avenues have been exhausted could amount to a basis for success under Article 8 on that ground alone. Furthermore, this decision, like all others, must be read in light of Part 5A of the 2002 Act.
29. It is clear to me that the Secretary of State's inaction/delay in this case comes nowhere near to constituting a compelling circumstance. Nor, with

respect, does the relationship the claimant has with her children and grandchild. There are no health issues here, and by virtue of her inability to satisfy the Rules, she will not face very significant obstacles in reintegrating into Jamaican society.

30. The removal of the claimant would be proportionate. The appeal therefore fails both within the Rules and without them.

**Notice of Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**I set aside the decision of the First-tier Tribunal.**

**I re-make the decision by dismissing the appeal under the Immigration Rules and on human rights grounds.**

No anonymity direction is made.

Signed

Date: 30 December 2015

Deputy Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**  
**FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 30 December 2015

Deputy Upper Tribunal Judge Norton-Taylor