



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/10433/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 12<sup>th</sup> April 2018

Decision & Reasons Promulgated  
On 16<sup>th</sup> May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS LATCHMIN DAVIS  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A Kanu (Legal Representative), League for Human Rights

For the Respondent: Mr I Jarvis (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge George, promulgated on 1<sup>st</sup> November 2017, following a hearing at Hatton Cross on 5<sup>th</sup> September 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## **The Appellant**

2. The Appellant is a female, a citizen of Jamaica, who was born on 23<sup>rd</sup> March 1956. She applied for indefinite leave to remain on the basis of her length of residence in the UK, which application was refused on 4<sup>th</sup> April 2016, whereupon the Appellant appealed that decision. The basis of the Appellant's claim is at paragraph 276B of HC 395, namely that she has had at least ten years' continuous lawful residence in the UK. She claimed that she had been absent from the UK during her residence here on three separate occasions, between August and September 2003, between December 2004 and January 2005, and between 21<sup>st</sup> August 2009 and 5<sup>th</sup> September 2009. On each occasion, she returned to Jamaica back on a holiday. She had never worked illegally in this country. As she had never entered illegally or used deception. All of this was accepted by the Respondent. On this basis, she argued that she complied with the long residence provisions of the Rules, she had established a private and family life in this country ever since 27<sup>th</sup> July 2002, and she no longer had any friendships in Jamaica or any ties. The Respondent Secretary of State, however, contested the assertion that the Appellant had been in the UK lawfully for ten years. Since 29<sup>th</sup> August 2012, her appeal rights in relation to an August 2011 application for leave to remain in the UK as a Tier 4 (General) Student, had been exhausted. Since then she had been in breach of the UK Immigration Rules.

## **The Judge's Findings**

3. The judge held that the Appellant had not been living in the UK for a continuous period of ten years. She had applied for leave to remain as a student after the determination of Judge Dineen on 15<sup>th</sup> August 2011 and she was appeal rights exhausted on 29<sup>th</sup> August 2012, when the Upper Tribunal refused leave to appeal against the determination of IJ Dineen. The Appellant's argument that she had been living lawfully in the UK from 27<sup>th</sup> July 2002 until 29<sup>th</sup> August 2012 was unsustainable.
4. This is because at the time of Judge Dineen's determination, which was promulgated on 3<sup>rd</sup> April 2012, the applicable Rule was Rule 24(2) of the 2005 Procedure Rules. This provided that the appeal had to be made within five days of the date on which the Appellant was deemed to have been served with the determination. Judge George did not have evidence as to when the out of time appeal was made.
5. Since the appeal against the determination of Judge Dineen was out of time,
 

"It is not possible to read the 20<sup>th</sup> September 2012 application as having asserted that the Appellant is applying for indefinite leave to remain on the ground of long residence. It is true that there is the statement that she had been in the UK for a continuous period of ten years. That is not the same as it being asserted on her behalf that she had acquired ten years' continuous lawful residence." (Paragraph 51).
6. The judge went on to say that in any event, the Appellant did not satisfy the provisions of paragraph 276B, not because she was not lawfully resident in the UK, but because at the time of the present application (5<sup>th</sup> September 2015), she was in the UK in breach of the Immigration Rules.

7. Accordingly, the only issue that remained was whether there would be insurmountable obstacles to the Appellant's integration into life in Jamaica, because she had no property there, and no guarantee that she would continue to receive the financial support of her family in Jamaica that she does here. However, the judge accepted that the Appellant had lived in Jamaica for the first 46 years of her life, had returned for three short holidays in the fifteen years since she had come to this country, and there would be no insurmountable obstacles (paragraph 55).
8. The appeal was dismissed.

### **Grounds of Application**

9. The grounds of application state first, that the judge ought to have considered the pre-9<sup>th</sup> July 2012 Immigration Rules because the Appellant's application of 20<sup>th</sup> September 2012 (see pages 125 to 132 of the Appellant's bundle as well as the skeleton argument at pages 4 to 5). The judge had erred materially in failing to rely on grounds outside the new Immigration Rules (as he did at paragraphs 49, 53 and 58). This was because the Appellant by that stage had already been for ten years in the UK lawfully (see pages 71 to 72 of the bundle). The judge was wrong to have stated that an assertion to the effect that the Appellant had been in the UK for a continuous period of ten years was not the same as her having acquired ten years' continuous lawful residence (see paragraphs 50 to 51).
10. On 2<sup>nd</sup> February 2018, the Upper Tribunal granted permission to appeal. However, the observation was made that, it is difficult to see how the Appellant can claim that an application made on 5<sup>th</sup> September 2015, which is based upon private life and residence in the UK, should be determined on the basis of Rules enforced before 5<sup>th</sup> July 2012. There is nothing in the Rules that points to a "transitional period".
11. Second, however, on the other hand, the judge had accepted (see paragraph 49) that as of 29<sup>th</sup> August 2012, the Appellant had acquired ten years' lawful residence in the UK.
12. Third, however, the Appellant could not now directly rely upon that, because she could not meet the requirements of paragraph 276B(v), but that was not to say that it was not relevant to her Article 8 claim.
13. Fourth, although there was some confusion about why the Appellant's ten year claim had not been pursued in an earlier appeal by her then legal representatives, Judge George in this appeal had come to the conclusion that this was on account of the "fault of her then solicitors" (paragraph 50), in which case this was a relevant factor in assessing the Appellant's claim outside the Immigration Rules (although not under paragraph 276ADE), and if this had been done, this would have been an issue directly to the proportionality of the Appellant's removal (which the judge did consider at paragraphs 63 to 65). Accordingly, there was an error of law.

## Submissions

14. At the hearing before me on 12<sup>th</sup> April 2018, Mr Kanu, appearing on behalf of the Appellant, relied upon the grounds of application, and particularly at paragraph 3, in order to maintain that the Respondent Secretary of State should have considered the Appellant's application on the basis of the pre-9<sup>th</sup> July 2012 Immigration Rules, when considering his application, made thereafter. This is despite the fact that permission to appeal had been granted to the Appellant on the basis that this argument was untenable, and that the better argument was that, the fact that the Appellant has lived in the UK lawfully for a period of ten years, but without making an application that she had acquired ten years' continuous lawful residence, went directly to the proportionality of the decision to remove her. Mr Kanu did, however, add as his second point, the argument that Article 8 should have been considered outside the Immigration Rules, so that even the Appellant failed under the 10-year Rule, so called, she could succeed under freestanding Article 8 jurisprudence.
15. For his part, Mr Jarvis submitted that the Appellant could not have succeeded in either case because not until 21<sup>st</sup> November 2015, did she produce a "Life in the UK Test certificate (see paragraph 26.3 of the determination), which was a requirement under HC 395 ever since 2007, which was long before the latest application was made, and where the Appellant complained the earlier pre-2012 Rules should have been applied. The fact was, submitted Mr Jarvis, that the Appellant was appeal rights exhausted by 29<sup>th</sup> August 2012, and thereafter became an overstayer, for the following two years, and up to the time of the hearing. The Appellant could never have succeeded for the following reasons.
16. First, Mr Jarvis submitted that the Appellant cannot rely upon any "near-miss" principle, on the basis that an application that could have been made at a time when she was lawfully in the UK for ten years, but had not been made, could now succeed, simply because her legal representatives had been negligent. Whatever may have been the position in the past in **Rhuppiah [2016] EWCA Civ 803**, Sales LJ confirmed that a "near-miss" argument could not succeed, and "this was not a factor entitled to be given weight in the proportionality assessment" (paragraph 26). The same applies in relation to any argument about whether, had the previous Immigration Rules applied, the deal would have succeeded. Here again, Sales LJ, in an application that was made on ILR grounds of long residence, stated that, "It may well be that her application could have succeeded, if the previous version of the Immigration Rules had continued to apply, but nothing turns on this" (paragraph 15). In short, submitted, Mr Jarvis, the failure to meet the current applicable Rules, cannot mean, that the ability to have been able to meet the previous Rules, can be a relevant factor. In fact, only in November 2015, did the Appellant provide evidence of sufficient knowledge of "Life in the UK Test", despite the fact that this had been a requirement under the Immigration Rules since 2007, with the result that in 2012, the Appellant could not show compliance with these provisions.
17. Second, Judge George does engage with the position outside the Immigration Rules. He observes how the Appellant argued that there would be "insurmountable

obstacles” to her integration into Jamaica. But the judge observes that she had lived there for 46 years, returned there three times for short holidays, and would not have lost touch with the customs of her country of origin. The judge’s analysis was correct that at an earlier appeal, Judge Dineen had held that the Appellant did not have a protected private life under Article 8, when the decision was made on 2<sup>nd</sup> April 2012, and since then the Appellant had spent a further five and a half years in the UK, during which time she was living here unlawfully.

18. It is against this background that the judge then did give proper consideration to the issue of “proportionality”, but the judge here observed that the Appellant did not answer the question about whether she had intended to return to Jamaica following her studies, in a straightforward way (referring to paragraph 32 of the determination) and that,

“In my view, little weight can be given to private or family life which was acquired when the Appellant was a student and must have intended to return to Jamaica or ought to have realised that her stay in the UK was going to be limited duration.” (Paragraph 64).

19. In fact, submitted Mr Jarvis, it did not end there because the judge went on to say that,

“Even if that were not the case, in my view, the Appellant has not shown very compelling circumstances why her desire to remain in this country, and the effect on her family and other relationships outweigh the public interest in enforcing immigration control.” (Paragraph 65).

20. The judge was entitled to come to that conclusion.

21. In reply, Mr Kanu submitted that, if the Appellant was required to have shown evidence of having undertaken a Life in the UK Test, then the Home Office should have written to her after 2007, but this was never brought to her attention. Her leave to remain would have been extended through Section 3C of the Immigration Act 1971.

### **Error of Law**

22. I am satisfied that the making of the decision by the judge involved the making of an error of law, such that I should set aside the decision, and remake the decision (see Section 12(1) of TCEA 2007). This is despite the fact that the judge’s determination is otherwise comprehensive and well-detailed. My reasons, however, are as follows.

23. First, the judge did accept that the Appellant had ten years’ continuous lawful residence up to 29<sup>th</sup> August 2012. This is clear from what the judge states at paragraph 49, namely, that:

“... The Respondent’s decision that from 4<sup>th</sup> April 2016 appears to accept that the Appellant’s appeal rights were exhausted on 29<sup>th</sup> August 2012. The Secretary of State did not challenge the Appellant’s assertion that her limited leave to remain in the UK was extended to that date by reason of Section 3C of the Immigration Act 1971. It therefore seems to me to be wrong to go behind that apparent concession. For the purpose of this appeal, therefore, I proceed on the basis that

the Appellant did have ten years' continuous lawful residence up to 29<sup>th</sup> August 2012".

24. Second, the question then arises as to why, if the Appellant did have ten years' continuous lawful residence up to 29<sup>th</sup> August 2012, her previous solicitors did not make an application for her to remain here on the basis of ten years' continuous lawful residence. The judge failed to make a finding as to whether, notwithstanding what was expressly asserted by the Appellant, her previous solicitors had been negligent in not making an application which should at that point in time have been made for ten years' continuous lawful residence.
25. Third, the relevance of both the first point and the second point above is not that the Appellant can thereby meet the requirement of the Rules under paragraph 276B(v) because she obviously cannot. The relevance is that these matters become highly relevant to the question of the "proportionality" of her removal when her position is considered outside the Immigration Rules on the basis of freestanding Article 8 ECHR. The judge did not assess proportionality expressly on the basis of these two matters, and in particular on the basis that the Secretary of State had not challenged the Appellant's assertion that her limited leave to remain in the UK was extended to 29<sup>th</sup> August 2012 by virtue of Section 3C of the Immigration Act 1971, such that she was lawfully in the United Kingdom. It cannot be overlooked, despite the extensive nature of the judge's determination, that when consideration is given "to the question of proportionality" (at paragraph 63) none of the two factors highlighted above are put into the equation (at paragraphs 64 to 65) and without that happening it is not possible to know which way the balance of considerations would have fallen in a case such as the present. That being so, I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge George at the first available opportunity. Those findings that are made in the Appellant's favour are to stand.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

14<sup>th</sup> May 2018