



IAC-AH-PC-V1

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

Appeal Number: IA/39470/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 5 November 2014**

**Decision & Reasons
Promulgated
On 11 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MS ZODIANN SHANTILOU SHANTILOU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ben Hawkins, Counsel instructed by Arlington Crown Solicitors

For the Respondent: Mr T Melvin, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal to dismiss her appeal against a decision by the Secretary of State to remove her as a person subject to administrative removal under Section 10 of the Immigration and Asylum Act 1999, her human

rights claim under Article 8 having been refused. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is required for these proceedings in the Upper Tribunal.

2. The appellant is a national of Jamaica, whose date of birth is 8 November 1993. She entered the United Kingdom on 6 June 2007 on a visit visa, which was valid from 21 May 2007 until 21 November 2007. According to Home Office records she came to join her mother, Mrs Nelson. Although this may have been the actual reason, it was not the ostensible reason as her mother was present in the UK illegally. The ostensible reason was to visit her brother. The family who she joined in the United Kingdom in 2007 did not arrange for her to return to Jamaica before the expiry of her visit visa. Instead, she was put into school and she remained here. On 6 April 2011 she applied for leave to remain outside the Rules on compassionate grounds as a dependant of her mother. This application was rejected on 13 July 2011. The appellant made a further application as a dependant of her mother for leave to remain outside the Rules on compassionate grounds on 4 November 2011, and this was refused with no right of appeal on 21 February 2012. On 6 March 2012 her solicitors submitted a request for reconsideration, and on 13 September 2012 further information was provided pursuant to requests by the Home Office.
3. On 13 June 2013 the appellant was served with a form IS151A informing her of her immigration status and her liability to detention and removal. On 10 September 2013 the Secretary of State gave her reasons for being satisfied that the appellant's removal did not breach Article 8 ECHR. As had been previously stated, the appellant was now over the age of 18. So she could not be dealt with as a dependant on her mother's claim. She was treated as having made an application in her own right. She had arrived in the United Kingdom on 6 June 2007 aged 13 years old. At the date of application she was 18 years old, and as such had spent nearly five years in the United Kingdom. But she did not meet the requirements of Rule 276ADE(v) as she had spent less than half her life in the United Kingdom. She had also spent the first thirteen years of her life in Jamaica, and spoke the language which is spoken in Jamaica. So she had not demonstrated that she had not ties to Jamaica.
4. The respondent decided to remove the appellant's mother at the same time, and both of them appealed to the First-tier Tribunal. The appellant's mother had entered the UK on 7 February 2001 as a visitor for two weeks. She applied for further leave to remain as a visitor on 18 February 2001, but this had been refused on 30 November 2001. Ms Nelson overstayed, and did not seek to regularise her status until applying for further leave to remain on compassionate grounds on 6 April 2011.
5. In her grounds of appeal, the appellant contended that the Secretary of State had not properly exercised discretion in reaching her decision. She had arrived in the UK when she was just 13 years old. She had spent her formative years here. She had attended school and college, and she

had established strong and significant ties. She had excelled in her GCSEs and if given the opportunity would make a significant contribution to society. She wished to pursue a career in nursing or midwifery. All her family members resided in the UK. She considered the UK her home, and wished to be given the opportunity to continue her life with her family members around her.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. The appeals of mother and daughter came before Judge Callender-Smith sitting in the First-tier Tribunal at Taylor House on 5 August 2014. The judge received oral evidence from both appellants, and from Peta-Gay Annemarie Linton and Kevin Carlton Weller. Ms Linton was another daughter of Mrs Nelson. She had discretionary leave to be in the UK until October 2015 as the parent of a British citizen child. Kevin Weller was the appellant's older brother. He had first arrived in the UK on 4 October 2001 as a visitor, and had remained here ever since.
7. In his subsequent determination, Judge Callender-Smith held at paragraph 60 that family and private life were engaged in the appellant's case because of the length of time that she had been in this country and the fact that her other siblings were here and had lawful status. Removing her to Jamaica would clearly interfere with her private and family life and the consequences were sufficiently grave to require full consideration of those rights.
8. On the issue of proportionality, the judge said at paragraph [61] that he did not impute any blame to the appellant for her presence in the UK or anything that had occurred while she was under the age of 18. Until her 18th birthday she was a minor and it was her mother who was clearly making all the important decisions in relation to her life.
9. The judge continued in paragraph [62] as follows:

In terms of her private life, however, the interference of her removal to Jamaica would be proportionate in a democratic society. The respect to be given to the maintenance of effective immigration control is clearly something that is in the public interest. She is now a well-educated young woman who is in a position to work and train for the career she wants in Jamaica. She has the advantage of thirteen GCSEs and a BTEC national diploma in health and social care. The private life that she has acquired in the UK has always been under the shadow of the fact that she has had no status here. She did not realise that as a child but she must certainly appreciate that now she is an adult.
10. The judge went on in paragraph [63] to address the impact of the appellant's removal on the family life which she enjoyed with family members in this country. At paragraph [66] he said: "There is, however, the background reality that these are two adult appellants who - on return to Jamaica - will be able to co-support each other as mother and daughter

as they have in the past.” The judge dismissed both appeals under the Rules and under Article 8 ECHR.

The Application for Permission to Appeal

11. Mr Hawkins settled applications for permission to appeal on behalf of both appellants. The main ground of appeal was that the judge had erred in law in applying Sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002, which had come into force on 28 July 2014. His reasoning was that as the decisions had been made long before these provisions had come into force, the appellants had a legitimate expectation that they would not apply in their appeals. But if that was wrong, Sections 117A to 117D were unlawful in that they infringed the separation of powers between Parliament and the judiciary, in purporting to require courts and tribunals determining Article 8 appeals to take into account certain factors.
12. Ground 3 was that the judge’s determination of the appeal of the daughter was flawed for a number of reasons. Firstly, the judge had applied Section 117B, and had determined the appeal only by reference to the factors in that Section. Secondly, the judge’s consideration of her case was brief and superficial in the extreme. Thirdly, the judge had not confronted the issue of what was fair to the daughter in these particular circumstances. Fourthly, there was no proper or meaningful consideration of her family ties with her sister Ms Linton, her brother Kevin Weller, who was a British citizen, and her three nephews and nieces. Fifthly, the judge had failed to consider that the appellant’s thirteen GCSEs and her BTEC national diploma in health and social care was strong evidence of her undoubted integration and had failed to ask himself whether this thereby lessened the public interest in her removal, particularly given that she had lived in the UK from the age of 13 to the age of 21.

The Limited Grant of Permission to Appeal

13. On 7 October 2014 Designated Judge Zucker granted permission to appeal on ground 3 only:

As to the grounds dealing specifically with the second appellant, it is submitted in essence that insufficient consideration has been given to the eight years that this appellant has spent in the United Kingdom, of which about five were during her minority. The ground is arguable. The grounds point to a material error of law in respect of the second appellant only.

The Hearing in the Upper Tribunal

14. At the hearing before me, Mr Hawkins developed the arguments advanced by him in ground 3. In reply, Mr Melvin submitted that the

challenge was in essence no more than an expression of disagreement with findings that were reasonably open to the judge.

Discussion

15. The judge set out the five point **Razgar** test at paragraph [5] of his determination. Mr Hawkins submitted that the judge's assessment of the appellant's Article 8 claim outside the Rules was not properly structured in accordance with the five point **Razgar** test. But on analysis, in paragraph [60] the judge is answering questions 1 to 4 of the **Razgar** test, and in the remaining paragraphs he is addressing proportionality.
16. Mr Hawkins complained about the first sentence of paragraph [62]. He submitted that this showed that the judge had reached a conclusion on the proportionality of the interference with the appellant's private life without having weighed in the balance the relevant factors. But this criticism does not stand up to scrutiny. What the judge is doing in the remainder of paragraph [62] is explaining why he has reached the conclusion set out in the first sentence. It is true that in the explanation given in paragraph [62] the judge does not reiterate the fact that the appellant arrived as a young teenager, and spent five years as a minor in the UK; nor that she has spent eight years in the United Kingdom altogether. But the judge has alluded to these matters in paragraph [61], and so it cannot reasonably be contended that the judge has failed to take these matters into account when assessing proportionality.
17. Mr Hawkins takes issue with the final sentence of paragraph [62], submitting that it is unclear what the judge means by saying that the appellant must now appreciate her lack of status; and submitting that the judge has asked himself the wrong question. What he should have been asking himself was whether, now that she had been schooled and become integrated into this country, it would be disproportionate for her to be removed.
18. I consider that the judge's observation in the final sentence of paragraph [62] is entirely legitimate and relevant to the assessment of proportionality. As an adult, the appellant can be expected to appreciate that her status here is precarious, by virtue of the fact that she is an overstayer.
19. While, as the judge acknowledged, she was not personally to blame for the fact that she was an overstayer, this did not change the fact that she was present in the country illegally. Accordingly, as she now knew or ought to know (being an adult), she had no legitimate expectation of being allowed to stay here, rather than being required to return to her home country where she would have her mother's company and where she had spent the first thirteen years of her life.
20. Earlier in his determination, the judge set out at some length the evidence of the various witnesses, and at paragraphs [48] to [59] he made

detailed findings on the Article 8 claim of the appellant's mother. While the appellant said in her oral evidence that they were a close-knit family, who depended heavily upon each other, it was not her case that her relationship with other members of her family went beyond normal emotional ties, or that her removal would impact adversely on the best interests of minor children. In contrast, this was the case which was advanced on behalf of her mother, and which was dismissed by the judge for reasons which are adequate and sustainable. Hence the mother's application for permission to appeal was rejected.

21. Against this background, I consider that the judge's brief discussion of the family life issues *pertaining specifically to the appellant* (as distinct from her mother) was adequate, and no error of law is disclosed.
22. Viewed holistically, the judge's finding on proportionality is entirely in line with the current jurisprudence. The appellant had not accrued seven years' residence as a child in the United Kingdom, and therefore could not benefit from the seven year policy concession formerly known as DP5/96, and now codified in Rule 276ADE. The appellant was a long way short of satisfying the fourteen year Rule that was applicable prior to the introduction of the new Rules in 2012, and following **Gulshan** there were no compelling or compassionate factors which gave her an arguably good claim outside the Rules.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson

5 November 2014