



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

Appeal Number: HU/13372/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18 March 2019**

**Decision & Reasons Promulgated  
On 3 April 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN**

**Between**

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

Appellant

**and**

**MISS MAXINE JOY SMITH  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Home Office Presenting Officer

For the Respondent: Miss C Bexson, Counsel instructed by Mordi & Co Solicitors

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were referred to in the First-tier Tribunal.
2. The appellant is a citizen of Jamaica born on 9 December 1961. She entered the UK in November 1999 as a visitor and remained as a student until December 2005. Since then she has been in the UK unlawfully.
3. On 12 June 2017 the appellant applied for leave to remain in the UK on the basis of her private life. She submitted that because she no longer has friends, family or the means to support herself in Jamaica there would be

very significant obstacles to her reintegration, such that paragraph 276ADE(1)(vi) of the Immigration Rules was satisfied. She also maintained that her removal from the UK would be contrary to Article 8 ECHR even if the requirements of the Immigration Rules are not met.

4. On 11 June 2018 the appellant's application was refused. She appealed to the First-tier Tribunal where her appeal was heard by Judge of the First-tier Tribunal Herbert OBE. In a decision promulgated on 15 January 2019 the judge allowed the appeal. The Secretary of State is now appealing against that decision.

### **Decision of the First-tier Tribunal**

5. The judge firstly considered the "very significant obstacles" test under paragraph 276ADE(1)(vi) of the Immigration Rules. The judge stated at paragraph 43 that this was a finely balanced case. On the one hand, he found that the appellant no longer has a home or family in Jamaica and that her daughter was murdered in tragic circumstances in Kingston such that removal to the city would be detrimental to her mental health. On the other hand, the judge found that the appellant speaks the language and is familiar with the culture in Jamaica. At paragraph 45 the judge concluded:

"I therefore find that it could just about be said that there are insurmountable obstacles because of her [sic] linguistic and cultural ties to Jamaica would still remain to some extent."

6. The judge then proceeded to consider Article 8 outside the Rules. He set out a number of factors which, in his view, weighed in favour of the appellant. These include that:
  - (a) She has a very close relationship with two friends, one of whom she provides support to;
  - (b) She would be destitute, unemployed and without family support in Jamaica;
  - (c) Her mental health would suffer because of her daughter's murder in Jamaica;
  - (d) She is elderly and vulnerable;
  - (e) She is part of the Windrush generation and "the contribution of many of the appellant's and her friend's generation should not be underestimated";
  - (f) She would lose contact with her close circle of friends, all of whom would suffer because of her leaving;
  - (g) She has been in the UK for a long period of time (almost eighteen years).
7. The judge briefly considered Section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). This analysis is contained in paragraph 56 of the decision where it is stated:

“I also take into account Rule 117(1) to (6) [sic]when considering @ 8 [sic] matters, to the extent that any private and family life should be discounted if it arose when the appellant was hear [sic] unlawfully e.g. by overstaying and/or where her immigration status was precarious. I have taken those matters on board and therefore discount periods when the appellant had overstayed and her immigration status could be described as “precarious”. Nevertheless I do find that the appellant speaks English and has been an asset to the United Kingdom economy. Also she performs an important role as [a] carer herself. She has clearly integrated into life in the UK since her arrival.”

8. The judge concluded that the circumstances were exceptional given the age, isolation and vulnerability of the appellant, and the damage that could result from her removal to her small circle of friends. At paragraph 59 the judge stated:

“I find on the peculiar facts of this case, the circumstances are exceptional given the age and isolation and vulnerability of the appellant and the fact that she has an interdependent relationship with her small circle of friends.”

### **Grounds of Appeal and Submissions**

9. Two grounds of appeal were advanced by the Secretary of State. The first ground contends that the judge’s conclusion that there will be very significant obstacles to the appellant integrating in Jamaica was inconsistent with his finding that the appellant would be able to adjust to life in Jamaica. It is also contended that the wording of paragraph 45 only makes sense if the judge intended to find that there were not very significant obstacles.
10. The second ground of appeal argues that the judge’s assessment of Article 8 outside the Immigration Rules is inadequate and unclear, and that it fails to identify features that can be said to be exceptional. Particular issue is taken with the wording in paragraph 53(i) of the decision where reference is made to “cogent evidence that the relationships that the appellant has with her friends, particularly Mrs Evelyn Clarke are themselves above and beyond that [sic]private life enjoyed between adults.” The grounds argue that it is unclear what this means and that it appears to be a finding about family life, which is not how the case was advanced in the First-tier Tribunal.
11. The grounds also maintain that the analysis of Section 117B is flawed given that the appellant’s status in the UK has always been precarious and that the ability to speak English is neutral at best.
12. Ms Isherwood elaborated upon the grounds. She argued that the conclusion that there are “very significant obstacles” is confusing and does not fit with the analysis undertaken by the judge, given in particular the finding that the appellant would be able to adjust to life in Jamaica. She argued that it must be that the word “not” has been omitted by mistake from paragraph 45.

13. Ms Isherwood was also critical of the reliance placed by the judge on the appellant's relationships with friends. She highlighted that the appellant's case had always been based on her private life in the UK, not family life; and she maintained that the judge failed to explain why the friendships enjoyed by the appellant make the case exceptional. She also observed that the judge appears to have counted in the appellant's favour that she was working until two years ago when any work at that time would have been illegal and therefore should have weighed against, not for, the appellant in the Article 8 assessment.
14. Ms Bexson submitted that the judge was unambiguous in finding that the very significant obstacles test was satisfied. She did not accept that the judge had inadvertently missed out the word "not". She also argued that the judge gave clear reasons to support his conclusion about very significant obstacles. She drew attention to the finding that the appellant would be alone, without support and traumatised in Jamaica.
15. She also argued that the judge assessed the Article 8 claim outside the Rules carefully and was entitled to give weight to the appellant's deep friendships, length of residence in the UK and the difficulties she would face upon being removed to Jamaica where she would have no home or family support. She maintained that the judge's approach was balanced and sustainable.

## **Analysis**

16. The judge correctly identified at paragraph 39 of the decision that it was necessary to consider whether the appellant would face very significant obstacles reintegrating into Jamaica. At paragraphs 40-44 he set out factors pointing in both directions (commenting at paragraph 43 that this was a finely balanced case). At paragraph 45 the judge set out his conclusion that:

"It could just about be said that there are insurmountable obstacles because of her linguistic and cultural ties to Jamaica [sic] would still remain to some extent."
17. Although not raised before me, there is an obvious mistake in paragraph 45, which is the reference to "insurmountable obstacles". The test under paragraph 276ADE(1)(vi) is whether there are "very significant obstacles"; not, as stated by the judge, "insurmountable obstacles". This error, taken alone, is not material as reading the decision as a whole it is apparent that the judge was aware, and had in mind, the correct test of "very significant obstacles".
18. A more significant concern with paragraph 45 is the one raised by Ms Isherwood; that it appears from the way the paragraph is written that the word "not" has been inadvertently omitted. This is because the reason given for finding that, on balance, there are "insurmountable obstacles" was that the appellant still has linguistic and cultural ties to Jamaica.

These, however, are reasons pointing in the direction of there not being very significant (or insurmountable) obstacles.

19. Moreover, at paragraph 46 the judge stated that he would “therefore go on to consider Article 8.” This wording is a further indication that the word “not” was left out, inadvertently, of paragraph 45. This is because if the judge had found there to be very significant obstacles that would have been determinative in the proportionality assessment under Article 8. Accordingly, at paragraph 46, rather than say he would “therefore” turn to Article 8, the judge would instead either have set out his conclusion or looked at Article 8 outside the Rules in the alternative (i.e. in case he was wrong in finding paragraph 276ADE (1)(vi) was satisfied). The way paragraph 46 is written supports the view that the word “not” has been inadvertently omitted from paragraph 45. Reading paragraphs 45 and 46 together I am left uncertain whether or not the judge found the “very significant obstacles” test under paragraph 276ADE(1)(vi) was met.
20. I also find that the judge’s approach to Article 8 outside the Rules contains errors of law.
21. The judge attached substantial weight to the appellant’s relationships with her friends Mrs Clarke and Ms Watts, as well as to her “small circle of friends”. This is apparent from paragraph 53(i) (where the judge stated that the dislocation of the relationship with one of the friends would be excessive); paragraph 53(vi) (where the judge referred to the appellant’s removal as denying her contact with her small circle of friends, the effect of which “cannot be under-estimated” and would have “grave consequence”); paragraph 57 (where the judge referred to “irreparable and irreversible harm to those significant friendships”); paragraph 59 (where the judge highlighted the appellant’s “inter-dependent relationship with her small circle of friends”); paragraph 60 (where the judge referred to the depth and quality of the appellant’s friendships and the hardship of these being abandoned); and paragraph 61 (where the judge referred to the damage that would be done to the appellant’s small circle of friends).
22. Section 117B(4) of the 2002 Act stipulates that little weight should be given to a private life established when a person in the UK unlawfully. It is clear from the judge’s findings of fact (as well as from the evidence that was before the judge) that the relationships the appellant has with her close circle of friends (including in particular the two individuals that are discussed by the judge in the decision) were formed at a time when she was in the UK unlawfully. Therefore Section 117B(4) is applicable to this aspect of her private life.
23. Despite acknowledging the applicability of section 117B(4) (the judge stated that he was “discounting” periods when the appellant overstayed), the judge has in fact placed very considerable weight on the appellant’s relationships with her friends that were formed whilst she was in the UK unlawfully. There is scope, when there are particularly strong features of a private life, to override the little weight provisions in Section 117B(4)

(see paragraph 49 of *Rhuppiah* 2018 UKSC 58). However, the judge has not explained why this appeal is such a case. Accordingly, I am satisfied that the judge erred by failing to follow Section 117B(4) of the 2002 Act. This is a material error of law which is, of itself, a sufficient reason to set aside the decision. However, for completeness I will mention two further errors.

24. In the Article 8 proportionality assessment the judge treated as a factor weighing in the appellant's favour that she had been working until two years before the hearing. However, the judge did not make any reference to the fact that the appellant was working unlawfully. The fact that the appellant had been working illegally for a lengthy period of time should have weighed against, not for, her in the Article 8 proportionality assessment.
25. The Article 8 assessment is also undermined by the judge's reference at paragraph 53(ix) to the appellant being from "the Windrush generation" and that the "contribution of many of the appellant's and her friends' generation should not be underestimated." That some people from Jamaica of a similar age to the appellant have suffered an injustice is irrelevant to the appellant's case, which must be decided on its own facts. Although the judge, after discussing the "historic injustice" to the "Windrush generation", said it had no bearing on the case, he then stated that it is the "context with which it will be viewed both here and abroad". Reading paragraph 53(ix) as a whole, I am left with the impression that in the Article 8 proportionality assessment the judge weighed in the appellant's favour a factor (that some members of the Windrush generation have suffered an injustice) that is immaterial.
26. In the light of the above described errors of law, the decision is set aside. Given the extent of further fact-finding that the remaking of the decision will require, I have decided that the appeal should be remitted to the First-tier Tribunal to be heard afresh.

### **Notice of decision**

27. The appeal is allowed.
28. The decision contains a material error of law and is set aside.
29. The appeal is remitted to the First-tier Tribunal to be heard afresh before a different judge

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 2 April 2019

