Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/36726/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 8 September 2015	**On 5 November 2015**

Before

UPPER TRIBUNAL JUDGE GILL
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROSE MARIE MINNELL
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Miss A Holmes, Home Office Presenting Officer
For the Respondent: Mr M Murphy, of Counsel, instructed by Cleveland Law Ltd

DECISION AND REASONS

Introduction

1. Both members of the panel have contributed to this decision.

2. This appeal is against the decision promulgated on 31 March 2015 of First-tier Tribunal Judge Beach ("the judge") which allowed the respondent's appeal outside the Immigration Rules (hereafter the "Rules") on the basis of Article 8 of the 1950 European Convention on Human Rights ("ECHR").

3. The appellant is the Secretary of State. However, for convenience, we shall refer to her as the Secretary of State and to Ms Minnell as the claimant.

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Immigration history

4. The claimant, born on 29 September 1965, is a citizen of Jamaica. She came to the United Kingdom on 21 December 2001 with leave to enter valid until 21 June 2002 as a visitor. Her leave was extended as a student until 31 October 2003. A further application for leave to remain was refused on 17 November 2005. She has remained here illegally since 1 November 2003. Further applications for leave to remain were made on 23 August 2010, 8 April 2013, and 10 May 2013. They were all refused with no right of appeal.

5. The application that led to the appeal before the judge was made on 25 April 2014. It was refused on 3 September 2014 on the ground that refusal would not place the United Kingdom in breach of its obligations under the Human Rights Act 1998. On 3 September 2015, a decision was made to remove the claimant by way of directions under s.10 of the Immigration and Asylum Act 1999. The claimant appealed against this decision. This was the appeal that was before Judge Beach.

Relevant legal provisions

6. The judge considered para 276ADE(vi) of the Rules and s.117B of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"). She set out s.117B fully at paragraph 40 of her decision, relevant paragraphs of which we quote at our paragraph 9 below. In our assessment, we have referred to EX.1 (a) of Appendix FM. We will therefore now quote para 276ADE and EX.1(a):

> **Requirements to be met by an applicant for leave to remain on the grounds of private life**
>
> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) …; or
>
> (v) …; or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.
>
> **EX.1.** This paragraph applies if
>
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

The judge's decision

7. The judge considered whether the claimant satisfied the Rules at paragraphs 33-35 of her decision. Having concluded that the claimant did not satisfy the Rules, the judge considered the claimant's Article 8 claim outside the Rules, at paragraphs 36-45. She decided that the decision would be in breach of the claimant's rights under Article 8 and therefore allowed the appeal outside the Rules.

8. No application for permission to appeal against the judge's dismissal of the appeal under the Rules was made by the claimant. Accordingly, the judge's finding that the claimant did not satisfy para 276ADE of the Rules stands. In any event, it was not suggested to us that the claimant did satisfy para 276ADE.

9. We now quote paragraphs 33-45 (the underlining is ours):

> 33. The [claimant] left Jamaica in 2001 and has remained in the UK since that date. She has therefore lived in the UK for 14 years. She states that she has no family in Jamaica but I find that the [claimant] and her sister have sought to minimise the [claimant]'s connections to Jamaica. Both were evasive in answering questions about visits to Jamaica and were quick to explain that the family members only stayed for short periods of time. It is inevitable that the [claimant] will have stronger family ties to the UK given that 3 of her children, her grandchildren and siblings are all in the UK. It is likely too that she has little or no family in Jamaica given that many of her family members have emigrated from Jamaica and the [claimant]'s parents are dead. However, her family members have visited Jamaica and one of her daughters is married to a Jamaican national. The wedding took place in Jamaica and there are therefore some family connections with Jamaica. The [claimant] spent her formative years in Jamaica. Her family members in the UK work. They are a close family and I do not find it credible that they would not seek to assist the [claimant] in whatever way possible if she had to relocate to Jamaica including providing whatever financial help they are able to provide.
>
> 34. The [claimant] states in her witness statement that she was the victim of domestic abuse in Jamaica. This is the first time that she has mentioned this. Indeed, in her application form the [claimant] stated that she had taken full responsibility for her youngest daughter because the father of her youngest daughter disappeared following her birth. The [claimant] sought to explain this comment by stating that he returned when her youngest daughter was 18 months old but this is not stated in the application form where the [claimant] gives the distinct impression that the father of her daughter disappeared and did not return. Either the [claimant] was being evasive in her application form to give the impression that she was the only one who had cared for her daughter or she was being dishonest about her relationship in Jamaica. The [claimant] provided some photographs which she said showed injuries which were caused by her ex-partner. There was no accompanying medical report so it is left to me to assess the evidence before me in making findings with regard to this issue. The [claimant] gave an explanation of how each injury was caused which was given in a manner which appeared to be an open manner. The explanation for the injuries was quite specific and the [claimant]'s explanation of how they were caused was unusual in some respects. I find that there is a real likelihood that the [claimant] was in an abusive relationship at some point, possibly in Jamaica, but I find there is no evidence to suggest that she would be at risk in Jamaica now as a result of this relationship.

35. It would of course be difficult for the [claimant] to relocate to Jamaica having spent a considerable period of time in the UK and having never worked in Jamaica and with only few friendship or familial ties to Jamaica. However, I find that the [claimant] has not shown that these circumstances amount to very significant obstacles in reintegrating into Jamaica. I therefore find that she would not face very significant obstacles if she returned to Jamaica.

36. The [claimant] cannot fulfil the requirements of Paragraph 276ADE I must also consider whether there are compelling circumstances that mean it would be appropriate to grant leave to remain outside the Immigration Rules. The [claimant] has lived in the UK for a number of years. She does not fall within the provisions of the Immigration Rules but has strong family ties to the UK which should be considered. I find that there remain sufficiently compelling circumstances such that it is appropriate to consider whether leave to remain should be granted outside the Immigration Rules.

37. …

38. The [claimant] arrived in the UK in 2001. She has studied and worked in the UK. The [claimant]'s 3 children and a number of grandchildren all live in the UK as do the [claimant]'s siblings and nieces and nephews. There is clearly a strong family network in the UK. The [claimant]'s evidence (which was not significantly challenged) was that she plays an integral part in the lives of her children and grandchildren and that some of her grandchildren spend a considerable period of time with her each week. Of course, it is not unusual for grandparents to be involved with their grandchildren's daily lives but the [claimant] is involved with them to a significant degree. She collects some grandchildren from school and looks after them for a number of hours. She also has her grandchildren to stay with her every weekend. There is a degree of family ties within this setup which I find is more than the normal family ties between such relatives. The family are clearly a close knit family and the [claimant] has significant input into her grandchildren's lives. I find that the [claimant] has established a family and private life in the UK. Even if I am wrong about the family life I find that the [claimant]'s relationships with her family members are a significant part of the [claimant]'s private life. If the [claimant] were removed from the UK I find that this would cause an interference of sufficient gravity as to engage Article 8.

39. The [claimant] cannot fulfil the requirements of the Immigration Rules. The interference with her private life is therefore in accordance with the law and necessary for the purposes of democratic society.

40. I therefore consider the proportionality of the decision. I have taken account of the statutory public interest when considering the [claimant's] application. Section 19 of the Immigration Act 2014 amends section 117 of the Nationality, Immigration and Asylum Act 2002. Section 117B states:

    (1) The maintenance of effective immigration controls is in the public interest.
    (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

        (a) are less of a burden on taxpayers, and
        (b) are better able to integrate into society.

    (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or
(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

41. The [claimant] has lived in the UK for 14 years having arrived here in 2001. Much of that time has been without leave and so any private life formed in that time must be given little weight. The [claimant] was aware that her status in the UK was limited because she had been given leave to remain as a student. The [claimant] has a strong family network in the UK and she clearly assists her family with many aspects of their lives including childcare. It has been said that it would be difficult for the [claimant]'s children to continue with their employment if the [claimant] were not here because of childcare issues but this is something which many parents have to manage. It cannot be a reason for saying that a person should be allowed to remain in the UK when they are not otherwise entitled to be here.

42. However, the [claimant] does have a strong relationship with her children and grandchildren and under section 55 of Borders, Citizenship and Immigration Act 2009 I must take account of the best interests of the children as a (but not the) primary consideration. I therefore consider the effect on the grandchildren if the [claimant] were removed from the UK. Despite the fact that I suspect there was some exaggeration of the role the [claimant] played in her grandchildren's lives, the [claimant] was specific about what times she saw the grandchildren and spoke about them with warmth. There were numerous letters and witness statements before me supporting the [claimant] and mentioning her involvement in her grandchildren's lives. The family members attended the hearing to support the [claimant]. I find, therefore, that the [claimant] plays a strong and significant part in her grandchildren's lives and that they have regular contact with them. If the [claimant] were not in the UK then the grandchildren's close relationship with their grandmother will be severed. Contact visa *[sic]* email, Skype and occasional visits cannot replace the current strong relationship between the [claimant] and her grandchildren and would not be in the grandchildren's best interests given the importance of their relationship with the [claimant] to them.

43. The [claimant]'s daughter applied for leave to remain at the same time as the [claimant] and was granted discretionary leave to remain as a reflection of the years she had spent in the UK. It seems likely that the [claimant]'s daughter would have fallen within the Immigration Rules given that she had spent more than half her life in the UK but even still it is a relevant factor in that it recognised the potential difficulties that would be faced by the [claimant]'s daughter in returning to Jamaica having spent so long in the UK. The [claimant] has spent more years in Jamaica prior to coming to the UK and so is more aware of life in Jamaica but even still she has been outside her home country for 14 years which is a significant period of time. The [claimant] has made applications at

various time during her time in the UK although it is also true to say that there were periods of time when they were no outstanding applications with the Respondent and the [claimant] did not have leave to remain.

44. It will be difficult for the [claimant] (sic) tor e-establish herself in Jamaica. Although I have found that she will have some support from contacts in Jamaica and from her family in the UK it must be recognised that the [claimant] has been away from Jamaica for 14 years and is now at a time in her life when it is harder to re-establish oneself. I have not found that these are very significant obstacles but this is not the test in respect of Article 8 where I must make a proportionality assessment and where a lesser degree of hardship remains relevant in assessing proportionality.

45. The [claimant] has a wide family network in the UK and has worked and studied in the UK. If granted leave to remain in the UK it is likely that she would be financially independent. She speaks English. The removal of the [claimant] from the UK would cause a great wrench to that family life. I was informed that the [claimant]'s niece relies heavily on the [claimant] because of her mental health but I was not provided with any real substantive evidence regarding this and I have placed little weight on this factor. However, what is clear is the strength of the relationship between the [claimant] and her family members in particular her grandchildren who would be adversely affected if the [claimant] were removed from the UK. This is a finely balanced case but I find that these strong relationships coupled with the likely hardships in attempting to re-establishing herself in Jamaica as well as the [claimant]'s length of residence in the UK making her ties with Jamaica weaker outweigh the public interest in maintaining effective immigration control. I therefore find, taking account of all of the evidence including relevant case law such as **Beoku-Betts**, **Shahzad** and **Gulshan**, that it would not be proportionate to remove the [claimant] from the UK.

The Secretary of State's grounds:

10. There were three grounds in support of the application for permission to appeal. However, ground 2 in fact comprises of two limbs and ground 3 comprises of three limbs.

11. Ground 1 was that the judge had failed to adequately explain why she found that the claimant had established family life, given the evidence that the claimant's children had established their own families. It was contended that, in the absence of such an adequate explanation, the Secretary of State was prevented from understanding the nature of any interference.

12. Ground 2 was as follows:

    (1) Although the judge noted that s.117B(4) of the 2002 Act required that little weight be given to private life that is formed at a time when an individual has no valid leave, she in fact failed to give little weight to the claimant's private life, private life which it was contended had been formed whilst the claimant had no leave. The target of this ground was the claimant's relationship with her grandchildren.

    (2) The judge erred in finding and taking into account that the claimant *was likely* to be financially independent. This is because s.117B(3)

requires that those seeking leave to remain *are* financially independent.

13. Ground 3 was as follows:

(1) The judge had erred in failing to take into account the Secretary of State's policy as evidenced by, and what she was trying to achieve through, the Rules by reference to Appendix FM.

(2) The judge had erred in failing to take into account the Secretary of State's policy as evidenced by, and what she was trying to achieve through, the Rules by reference to para 276ADE.

In relation to grounds 3(1) and 3(2), the Secretary of State relies upon PG (USA) v Secretary of State for the Home Department [2015] EWCA Civ 118 at paragraph 28, which reads:

> It is clear that under the versions of the Rules in force at the time of the decisions on 20 June 2012 (the application for entry clearance) and 20 March 2013 (the application for leave to remain), the Government's consistent approach was that migrant workers should not be able to bring a wide group of relatives or dependents to the UK to live for an extended period or to settle in this country. This was, potentially, an important consideration when assessing the proportionality of an interference with the appellant's Article 8 rights outside the Rules. In the instant case, the Immigration Rules do not provide a "*complete code*" and although "*the proportionality test* (was) *more at large"* (*MM (Lebanon) and others v SSHD* [135]), the Rules nonetheless help illuminate the regulatory and policy context which the judge needed to take into account, along with a range of other factors. The First Tier Tribunal judge did not analyse what, in this sense, is said to be the legitimate end the respondent was seeking to achieve. The expression by the judge at [39] of his Decision that the interference may not have been justified **at all** appears to indicate that he did not take account of the respondent's policy to restrict the category of relatives of migrant workers who are able to join the person who is temporarily living in the United Kingdom and to limit the circumstances in which someone in the appellant's position can qualify as a dependent. I stress that the existence of this policy was not in any sense necessarily determinative, but it should have formed part of the judge's reasoning on the issue of proportionality.

(3) Whilst it was accepted that the proportionality assessment was "*more at large outside the Rules*", it was contended that the judge had erred in stating at paragraph 44 of her decision that "*a lesser degree of hardship remains relevant in assessing proportionality"* when compared to para 276ADE(vi).

14. First-tier Tribunal Judge Saffer granted permission to appeal on all grounds, although stating, in particular, that it was arguable that the judge had misapplied s117B of the 2002 Act in ascribing the future earnings potential of the claimant as a relevant factor.

Submissions on the error of law issue

15. In relation to ground 1, Miss Holmes submitted that it was unclear from paragraph 45 of the judge's decision whether the family life found by the judge to have been established was family life with her adult children, or her minor grandchildren, or both. In any event, the judge inadequately explained why she found that family life existed. In addition, there was a contradiction between the evidence recorded at paragraph 10 of the judge's decision, that the claimant *"has the older two grandchildren most weekends on Saturday and Sunday*", and the finding the judge made at paragraph 38, that "*She also has her grandchildren to stay with her every weekend."*

16. In relation to ground 2(1), Miss Holmes submitted that the judge failed to attach little weight to the claimant's private life and she erred in treating as family life what is usually regarded as private life, i.e. the claimant's relationship with her adult children and her grandchildren.

17. In relation to ground 2(2), Miss Holmes submitted that the judge erred at paragraph 45 in finding that the claimant would be financially independent. She submitted that s.117B(3) does not extend to the future prospects of the claimant obtaining employment because the relevant phrase in s.117B(3) is expressed in the present tense ("*are financially independent*").

18. In relation to grounds 3(1) and 3(2), Miss Holmes submitted that, applying PG (USA) by analogy or extension, the judge failed to factor into her balancing exercise in relation to proportionality the Secretary of State's policy as evidenced by the Rules and her intention as to what she was trying to achieve through the Rules, contrary to PG (USA).

19. We asked Mr Murphy to address us on the question whether the judge had speculated in making the finding that the claimant would be able to obtain employment and be financially independent since it was difficult to see what evidence was before the judge in this respect.

20. Mr Murphy submitted that there was nothing wrong with the judge's decision.

21. In relation to ground 1, Mr Murphy drew our attention to the fact that the judge had followed the five-step approach explained at paragraph 17 of the judgment of the House of Lords in Razgar [2004] UKHL 7. There was no significant challenge to the evidence that this was a close-knit family into which the claimant has a significant input. The ties were more that normal family ties. There is a rich tapestry of family life. The judge properly considered s117B of the 2002 Act at paragraphs 40-41 and s55 of the Borders, Citizenship, and Immigration Act 2009 at paragraph 42. The claimant's daughter came to the UK when she was 7 years old. The judge found at paragraph 43 that the daughter would succeed under the Rules. Mr Murphy submitted that the judge was entitled to find that family life existed. The judge found both dependency and the existence of a family life as per Gurung & Others v Secretary of State for the Home Department [2013] EWCA Civ 8 at [45]. The judge explained adequately why family life existed.

22. In relation to ground 2(1), Mr Murphy submitted that s.117B(4) only applies to private life, whereas the judge found that the claimant had established family life as to which, in his submission, the judge had made no material error of law.

23. In relation to ground 2(2), Mr Murphy submitted that with regards to s117B, it would be extraordinary if a judge could not take account of future earnings. If, for example, a claimant was a doctor, he submitted that the Tribunal would be entitled to take into account that the claimant would be able to obtain a job, given the shortage of doctors in the UK. Parliament could not have intended that the possibility of employment being obtained once leave is granted could not be taken into account. Such a proposition would be irrational.

24. Mr Murphy submitted that the Secretary of State's challenge to the judge's finding that it was likely that the claimant would be financially independent was a rationality challenge. He submitted that the claimant could find work. We asked what evidence was before the judge that the claimant would be able to obtain employment. Mr Murphy said that the claimant was able bodied and could find work. It was not irrational for the judge to have found that it was likely that the claimant would be financially independent, although another judge might have reached a different finding.

25. We asked what evidence there was before the judge that the claimant had worked in the UK. Mr Murphy took instructions and then informed us that the claimant said she had worked in a care home from 2003 to 2007 (*cf* her oral evidence before us in the re-making of the decision on the appeal, paragraph 61 below). There were payslips in the bundle before the judge that only covered a period of four months, from 12 April 2010 to 12 August 2010. Mr Murphy submitted that, if the claimant is granted leave to remain, she would be able to obtain work.

26. Mr Murphy did not address us on grounds 3(1) and 3(2). In relation to ground 3(3), he submitted that VW (Uganda) v SSHD; AB (Somalia) v Secretary of State for the Home Department [2009] EWCA Civ 5 is relevant. The test for Article 8 purposes is not that of whether there were very significant obstacles but reasonableness which is a less onerous test. He submitted that, even if (by analogy) the gap between whether there are insurmountable obstacles to family life continuing outside the UK and whether it is reasonable to do so is small in cases where family life has been established at a time when the immigration status of the claimant in question was precarious (R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) at paragraph 43), there was nevertheless a gap and thus a difference in the tests to be applied. Thus, he submitted that this was all the judge meant in saying in the final sentence of paragraph 44 of her decision that there was "*a lesser degree of hardship … relevant in assessing proportionality*" outside the Rules.

Discussion and decision on the error of law issue

27. We start with ground 1. Although we accept Ms Holmes' submission that the position of grandparents is not to be aligned with the position of biological parents, especially if the children involved are actually living with their parents who remain their primary carers and who remain responsible for their care and overall needs, this does not mean (and we did not understand Ms Holmes to suggest) that grandparents cannot establish family life with their grandchildren. The question whether a grandparent enjoys family life with a grandchild is a fact specific issue, depending on all of the circumstances in each case.

28. We accept that the judge did not say, in terms, whether she found that family life had been established between the claimant and her children or the claimant and her grandchildren or both. The judge did not mention any evidence of any dependency between the claimant and her children, nor was there any discussion in her decision as to whether the nature of the relationship between the claimant and her children amounted to family life. We are therefore satisfied that, if she made a finding that the claimant had established family life (and we are satisfied that she did), the finding concerned the claimant's relationship with her grandchildren. It did not concern her relationship with her children.

29. At paragraph 38 of her decision, the judge referred to the evidence of the contact between the claimant and her grandchildren and then said: "*There is a degree of family ties within this setup which I find is more than the normal family life ties between such relatives."* In the final sentence of paragraph 38, the judge said: "*Even if I am wrong about the family life …"*. It is clear from this sentence that the judge did find that family life had been established. We are equally clear, as we have said, that she did not make a finding that family life was being enjoyed between the claimant and her adult children. Whilst the phrase: "…*a degree of family life ties…"* falls short of the clarity one expects, we are nevertheless satisfied, when the paragraph is considered as a whole, that the judge did find that the claimant enjoyed family life with her grandchildren.

30. The next question in relation to ground 1 is whether the judge had adequately explained why she found that family life was enjoyed between the claimant and her grandchildren.

31. In our judgement, the judge gave adequate reasons for finding that the relationship that the claimant had with her grandchildren went beyond that normally existing between a grandparent and her grandchildren. The evidence before the judge was that the claimant provided care and support on a daily basis for one or other of her (then) four grandchildren whilst the parents went to work for many hours. The judge found at paragraph 38 that "*she plays an integral part in the lives of her children and grandchildren…some of her grandchildren spend a considerable period of time with her each week…the [claimant] is involved with them to a significant degree. She collects some grandchildren from school and looks after them for a number of hours. She also has her grandchildren to stay with her every*

weekend. … The family are clearly a close knit family and the [claimant] has significant input into her grandchildren's lives."

32. In our judgement, the judge was entitled to make those findings on the evidence that was before her, although it is true to say that another judge may have found otherwise, given that all the evidence showed that the parents of the children remained responsible for the children and that the children were living with their parents.

33. There is no material discrepancy between the evidence recorded at paragraph 10 of the judge's decision, that the claimant said she "*has the older two children most weekends on Saturday and Sunday*", and her finding at paragraph 38 which records that she said: "*She also has her grandchildren to stay with her every weekend."* At most, this was a small discrepancy which was not material to her finding that family life had been established, given the other reasons she gave for her finding.

34. We are therefore satisfied that ground 1 is not established.

35. Ground 2(1) is not established either. We have concluded that the judge did not err in law in making her finding that the claimant had established family life with her grandchildren. The target of ground 2(1) was the claimant's relationship with her grandchildren which we have concluded the judge found amounted to family life whereas s117B(4) applies to private life that is established by a person at a time when he or she is in the UK unlawfully.

36. We are satisfied that ground 2(2) is established. There was no evidence before the judge that the claimant had any firm offer of employment. The judge did not have any up-to-date evidence of the claimant's qualifications. All she had were four payslips for a period of four months, from 12 April 2010 to 12 August 2010, in the total period of the claimant's residence of 14 years and the documents referred to in the refusal letter, summarised at our paragraph 65 below, from which it can be seen that three of the five qualifications that the claimant had obtained during her studies were no longer valid. The judge did not have any evidence of the claimant's likely income if she did obtain a job nor did she have any evidence of the claimant's outgoings. Given the evidence that was before the judge, we have no hesitation in concluding that the judge erred by speculating when she made her finding that it is likely that the claimant will be financially independent.

37. We turn to ground 3(1), that the judge erred in failing to take into account the Secretary of State's policy as evidenced by, and what she was trying to achieve through, the Rules by reference to Appendix FM. The Secretary of State relies upon paragraph 28 of PG (USA) which we have quoted at paragraph 13 above.

38. For the purposes of this decision, it is only necessary to give a brief summary of the background facts in PG (USA). The applicant, who was independently wealthy and thus financially independent and who had health insurance to cover any period of infirmity, wished to live with her daughter and son-in-law

in the UK during the period when the son-in-law had leave to remain in the UK as a Minister of Religion under Tier 2 of the Points Based System. The daughter and son-in-law hoped to live in the UK indefinitely. A judge of the First-tier Tribunal allowed the applicant's Article 8 claim outside the Rules. The applicant could not bring herself within the categories of relatives who could join migrant relatives who were lawfully in the UK as Tier 2 migrants because eligibility was limited to spouses, partners and children of the migrant who was admitted as a Tier 2 migrant.

39. The Court of Appeal held that, whilst the Secretary of State's policy in restricting the category of relatives who are able to join a Tier 2 migrant who is living temporarily in the UK "*was not necessarily determinative*", the judge had nevertheless failed to take into account the policy, that migrant workers should not be able to bring a wide group of relatives or dependents to the UK to live for an extended period or settle in the UK, which the court said "*was, potentially, an important consideration when assessing the proportionality of an interference with the appellant's article rights outside the Rules*".

40. Of course, the policy of limiting the category of relatives who could join individuals living temporarily in the UK as Tier 2 migrants is not of relevance in the instant case. However, it does not follow that the Rules do not provide the legislative and policy context in which the proportionality exercise is to be carried out. The proper legislative and policy context is to be understood by examining whether the Rules do provide coverage for the Article 8 claim in question and, if so, understanding why the claimant does not qualify under the rule or rules in question: Secretary of State for the Home Department v SS (Congo) and Others [2015] EWCA Civ 387 at paragraphs 44 and 48.

41. In this particular case, the claimant relies upon her family life with her grandchildren. Whilst Ms Holmes addressed us on PG (USA), she assumed that the penultimate sentence of paragraph 28 of the judgment was directly applicable without further analysis, whereas, as we have said above, the policy of limiting the category of relatives who could join individuals living temporarily in the UK as Tier 2 migrants is not relevant in the instant case. As we said at paragraph 26 above, Mr Murphy did not address us the applicability or otherwise of PG (USA), and whether, if the penultimate sentence was not relevant, there was coverage for the claimant's Article 8 claim within the Rules. Ms Holmes drew our attention to EX.1 of Appendix FM under which parental responsibility for the child in question must be shown for an individual to succeed. We raised para 317 of the IRs.

42. It is possible to take the view that the Rules do provide coverage for an Article 8 claim based on family life between a grandparent and a grandchild. It is also possible to take the view that they do not. It is possible to justify both views, as follows:

    i) First, in support of the proposition that the Rules do provide such coverage, one can point to the following:

        a) the fact that para 317 of the Rules makes provision for a grandparent who is wholly or mainly dependent on the

grandchild and who can be accommodated and maintained adequately without recourse to public funds; and

b) the fact that EX.1(a) of Appendix FM makes provision for adults, including grandparents, who have parental responsibility for the grandchild or grandchildren,

as demonstrating that Parliament has decided that a grandparent will only succeed under the Rules if either para 317 or EX.1 is satisfied.

ii) In support of the alternative view, it is possible to say that:

a) para 317 of the Rules does not assist because, whilst it provides a route for grandparents to settle in the UK, it is not listed in Appendix FM which is the part of the Rules in which the Secretary of State has set out the requirements for leave to be granted under the Rules on the basis of Article 8 and, furthermore, para 317 may apply even if family life is not being enjoyed; and

b) EX.1(a) of Appendix FM does not provide such coverage because EX.1(a) requires it to be shown that there is a parental relationship between the child and the adult in question, whereas family life can be enjoyed between a grandparent and a grandchild without the grandparent having a parental relationship with the child.

43. We did not hear argument on these opposing views. In these circumstances, we decided to apply the view that is more generous to the claimant, i.e. the second view.

44. On this basis, we concluded that ground 3(1), which contends that the judge had erred in failing to take into account the Secretary of State's policy as evidenced by and what she was trying to achieve through the Rules by reference to Appendix FM, is not established. Applying the second of the opposing views explained above, the legislative and policy context in relation to EX.1 is not relevant. The position is otherwise in relation to ground 3(2) which is better dealt with after a discussion of ground 3(3).

45. We turn to consider ground 3(3).

46. At the hearing, we did not consider it necessary to give our decision on whether ground 3(3) was established. We will now deal with ground 3(3) which contends that the judge erred in stating at paragraph 44 that "*a lesser degree of hardship remains relevant in assessing proportionality"* when compared to para 276ADE(vi).

47. In cases where the issue is whether family life can be enjoyed in a claimant's home country, the test for the purposes of EX.1. of Appendix FM is whether there are insurmountable obstacles to family life being enjoyed in that

country. It is now established that the gap between the test of "*insurmountable obstacles*" in relation to EX.1. and whether it is reasonable for family life to be enjoyed in the home country is small where family life has been established when the immigration status of the claimant is precarious: Sales J (as he then was) in Nagre at paragraph 43.

48. This was approved by the Court of Appeal in R (Agyarko) and others v Secretary of State for the Home Department [2015] EWCA Civ 440, where, at paragraph 30, the Court said:

> Thus it is possible that a case might be found to be exceptional for the purposes of the relevant test under Article 8 in relation to precarious family life even where there are no insurmountable obstacles to continuing family life overseas. This means that there is a gap between section EX.1 of Appendix FM and what Article 8 might require in some cases: see *Nagre*, paras. [41]-[48]. But this does not mean that the issue whether there are or are not insurmountable obstacles to relocation drops out of the picture where there is reliance on Article 8. It is a material factor to be taken into account: see *Nagre*, paras. [41] and [47]; *Rodrigues da Silva and Hoogkamer v Netherlands*, para. [39]; and *Jeunesse v Netherlands*, paras. [107] and [117]. In relation to precarious family life cases, as I observed in *Nagre* at para. [43], the gap between section EX.1 and the requirements of Article 8 is likely to be small.

49. We are satisfied that, in saying: "*a lesser degree of hardship remains relevant in assessing proportionality"* outside the Rules when compared to the requirement to show "*very significant obstacles*" to the claimant's reintegration in Jamaica in para 276ADE(vi), the judge fell into material error, for the reasons given at paragraphs 50-52.

50. Firstly, by making a comparison between two concepts which could not legitimately be compared. The requirement to show very significant obstacles focuses only on the obstacles to reintegration. The nature and quality of private life established in the UK plays no part in that assessment, whereas the question whether it is reasonable for a person to enjoy his/her private life in the country to which they would have to go in the assessment of proportionality outside the Rules (if the question of reasonableness is relevant in any individual case) will involve considering the nature and quality of private life enjoyed in the UK and whether it is reasonable to expect the individual to enjoy his/her private life in all in its essential aspects in the country. In other words, the judge was not comparing like for like.

51. Secondly, and in any event, we do not accept Mr Murphy's submission that the phrase *"very significant obstacles"* sets a higher threshold than is applied in assessing Article 8 claims outside the Rules. Where an individual has established his or her private life in the UK during a period when his or her immigration status is precarious or unlawful, the phrase *"very significant obstacles"* sets the appropriate threshold which takes account of the weight to be given to the state's interests in the balancing exercise. The weight to be given to the public interest does not reduce when one is considering the claim outside the Rules because the individual does not satisfy the requirements of a Rule that provides coverage for his/her Article 8 claim. That is the reason why it is necessary for the individual to show compelling circumstances. In saying (at paragraph 44) that "*a lesser degree of hardship*

remains relevant in assessing proportionality" outside the Rules when compared to para 276ADE(vi), the judge reduced the weight given to the state's interest when she considered the private life aspect of the Article 8 claim outside the Rules because she ignored the policy behind para 276ADE. The judge considered the private life aspect of the claimant's case outside the Rules in a freestanding way instead of considering whether there were compelling circumstances, a formulation which takes into account the policy behind para 276ADE.

52. We are therefore satisfied that the judge did err in law when she said at paragraph 44 that "*a lesser degree of hardship remains relevant in assessing proportionality*" outside the Rules when compared to para 276ADE(vi).

53. For these reasons, we are satisfied that ground 3(2) is established.

54. For the same reasons, we are satisfied that ground 3(3) is established.

55. In summary, therefore, we are satisfied that the judge made three errors of law, as follows:

    i) (Ground 2(2)) The judge erred in finding and taking into account that the claimant was likely to be financially independent.

    ii) (Ground 3(2)) The judge erred in failing to take into account the Secretary of State's policy as evidenced by, and what she was trying to achieve through, the Rules by reference to para 276ADE.

    iii) (Ground 3(3)) The judge erred in law when she said at paragraph 44 that "*a lesser degree of hardship remains relevant in assessing proportionality*" outside the Rules when compared to para 276ADE(vi).

56. We are also satisfied that each of these errors were material to the judge's decision to allow the appeal outside the Rules, given that the judge said at paragraph 45 of her decision, that "*This is a finely balanced case*".

57. At the hearing, we announced our decision that grounds 2(2), 3(1) and 3(2) were established and that each of these errors were material. We did not consider it necessary to reach a decision on ground 3(3). We then informed the parties that we set aside the decision of the judge to allow the appeal outside the IRs and the findings that we considered should be preserved. We proceeded to hear the parties on the re-making of the decision on the claimant's appeal, limited to considering the Article 8 claim outside the Rules.

58. Having reflected on the issue, we have now decided that ground 3(1) is not established. We have reached a decision on ground 3(3) and concluded that it is established. We considered whether it was necessary to recall the parties and decided that it was not. Neither party is prejudiced because we are still satisfied that each of grounds 2(2) and 3(2) are established, as the parties were informed at the hearing.

Re-making the decision: The evidence

59. The judge summarised the evidence before her at paras 10-20 of her decision. We heard evidence from the claimant as to her current position. Members of her family waited outside whilst the claimant gave evidence in case Mr Murphy wished to call them. In the event he chose not to do so.

60. We note from the file that the claimant's daughter Dacia (born on 8 July 1981) has a daughter, D (born in May 2009), and L, who is 4 months old. The claimant is also the mother of Darion (born on 8 July 1986) who is the father of R1 (born in July 2011), R2 (born in February 2006), and T (born in November 2005). The claimant's other child is Dana (born on 22 February 1993). All of the claimant's children are adults with the youngest being 22 years old.

61. In evidence, the claimant said that she worked as a care assistant in 2010 and could do so in the future as she has certificates and training. She has been to various homes working via an agency. She confirmed that she had only worked for a period of 4 months, i.e. the period to which the payslips from 12 April 2010 to 12 August 2010 relate. She has qualifications in handling and lifting, and giving medication to residents from Veridian in 2010. She could earn £950 per month plus overtime if her job was permanent. She could live on this. She could earn a further £250 per month from overtime.

62. The claimant said she lives with her cousin. She does not pay rent. She did not pay rent while she worked illegally. She paid £10 to £20 for electricity, £10 for gas, and £50 for food per week.

63. The claimant said she looks after D, R1 and L. She leaves home every day at 7am to take D to school and has been doing this since Easter 2015. She drops her off at 8 a.m. She then goes and cares for L until she either takes R1 to school or picks D up from school. On a Thursday and Friday she leaves home at 11am to take R1 to school for midday after which she returns to care for L. She leaves home at 2.45pm to pick D up from school. She brings her home and makes sure she has something to eat until Dacia gets home by 4pm or 4.30pm. She then leaves to collect R1 at 5pm to take him to Darion at 6pm or 6.30pm. She has been doing this since September 2014. She sees R2 and T every other weekend, but if she is not with them, she is with D, R1 and L. This is likely to continue.

64. The claimant said that, if she gets a job, she can change her care routine for the grandchildren and help after school. If she has to work she will. She would do shift work to enable her to continue to help with the grandchildren. She would work it out and try and arrange shifts around her family commitments. If the job is available she would ask her children to sort out the grandchildren. She would have to take whatever was available.

65. The Secretary of State's refusal letter states that she had previously submitted certificates in Emergency First Aid valid for 1 year (16 February 2005), Infection Control valid for 2 years (9 March 2005), Moving/Handling and Transferring of Patients valid for 1 year (25 July 2005), Health & Safety

at Work (25 August 2005), and Food Hygiene (12 September 2005). These documents were submitted to us under cover of a letter dated 9 September 2015 from the claimant's representatives.

66. The refusal letter also states that she has been registered at Spring Park Medical Practice since 14 June 2002, payslips and bank statements had been produced to establish work between 4 April 2010 and 8 August 2010, and there was evidence she had been a full time student from July 2002 to December 2005, and she had passed a Life in the UK test on 25 October 2008.

Re-making of the decision: Submissions

67. Miss Holmes submitted that the claimant is not financially independent now and that, as s117B(3) is in the present tense, given the words *"… are financially independent…",* the section precluded potential future earnings from being taken into account. Ms Holmes submitted that the claimant would not be self sufficient as she would not earn enough and that her complex child care regime would reduce her income. Ms Holmes submitted that no specific income level is prescribed for a person to be regarded as "*financially independent*". Ms Holmes submitted that, if she does work, this would adversely impact on the relationship she has with her grandchildren which she submitted was a relevant consideration in the balancing exercise given that it is her potential removal from the grandchildren that forms the basis of her Article 8 claim outside the Rules. It is also relevant to take into account in the balancing exercise the fact that she is not the primary carer of any of the grandchildren. She has family in Jamaica. Ms Holmes submitted that only an exceptional case will succeed outside the Rules and that there was nothing exceptional about any of the individual relationships.

68. Mr Murphy submitted that there is a rich tapestry of family life. Dana has lived with her for years. Dana currently does not have permanent status but she should qualify under para 276ADE. The claimant is dependent on her family in the UK. She is less of a burden on the taxpayer than many others in similar circumstances because she has strong family support. It is accepted that she does not contribute to public services such as the police, defence forces, NHS, or local authorities. Mr Thomas submitted that she is fully integrated into society and that, if allowed to remain in the UK, she would be financially independent. He submitted that potential earnings fall within s.117B and therefore that s.117B(3) is in the claimant's favour.

Re-making of the decision: Assessment

69. We have underlined the findings of the judge that we have preserved at paragraph 9 above. Given these findings, it is not necessary for us to conduct a full five-step analysis of the Article 8 claim of the claimant outside the Rules. The only issue for us to consider is proportionality.

70. We consider the following in turn:

i) The approach to be followed in deciding the weight to be given to the public interest in the instant case.

ii) The parties' submissions on the interpretation of the phrase "*are financially independent*" in s.117B(3).

iii) Consideration of the evidence and proportionality in the claimant's specific case.

i) The approach to be followed in deciding the weight to be given to the public interest

71. As the Court of Appeal explained in SS (Congo), the first step is to identify whether there are any relevant Rules in order to assess the force of the public interest that is given expression in those Rules. This will identify the degree of weight to be given to the expression of public policy in the substantive part of the Rules in the particular context in question (SS (Congo) at paragraph 48).

72. In relation to non-entry clearance cases, the Court of Appeal explained, inter alia (at paragraphs 28-33 of the judgment), that:

a) In cases involving deportation of foreign criminals, the Rules set out a test of *"exceptional circumstances"* which must be shown for the state's interests in the deportation of the foreign criminal to be outweighed. The Court of Appeal in SS (Congo) referred (at paragraph 30) to the fact that the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 held that *"very compelling reasons"* would be required to outweigh the public interest in deportation of foreign criminals whose cases did not fall within the substantive provisions in paras 399 and 399A.

We observe that para 398 of the Rules has been amended so that it now states, in terms, that *"very compelling circumstances"* over and above those described in paras 399 and 399A are required to outweigh the state's interests.

b) In cases not involving children where family life has been established whilst the immigration status of one party to the relationship was precarious, it will be necessary to show that there are *"exceptional circumstances"* for the state's interests to be outweighed outside the Rules (paragraph 31).

c) In other cases, *if* (our emphasis) the Secretary of State has sought to formulate Rules to reflect a fair balance of interests under Article 8 in the general run of cases falling within their scope, the general position is that "*compelling circumstances"* will need to be identified to support a claim for grant of leave to remain outside the new Rules in Appendix FM (paragraphs 32 and 33).

73. The Court of Appeal did not say, in terms, what the approach should be if a particular case does not fall within the scope of any particular Rule, although it was accepted by Sales J in Nagre and by the Court of Appeal in R (MM (Lebanon)) v Secretary of State for the Home Department [2014] EWCA Civ 985 that the Rules do not provide coverage for all possible cases.

74. In our view, the approach to be followed in non-entry clearance cases is as follows. If a non-deportation case does not fall within the scope of any Rule, it must be considered outside the Rules following the step-by-step approach explained at paragraph 17 of the judgment of Lord Bingham in Razgar. In such a case, there is no applicable Rule that provides the legislative and policy context "*in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it*" (Beatson LJ in Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558 at paragraph 40). Put another way, there is no substantive Rule that assists in assessing the force of the public interest and therefore the weight to be attached to the expression of public policy in the Rule in question (SS (Congo) at paragraphs 44 and 48). This means that it will be for a decision maker or judge to decide the weight to be given to the public interest, which will vary from case to case depending on the circumstances, and decide whether, in all of the circumstances, the decision brings about a disproportionate interference with rights protected by Article 8. Needless to say, it will always be necessary to consider not only factors in an individual's favour but engage with the factors against the individual as being in the public interest. It will also be necessary to apply the public interest considerations in s.117B wherever its provisions are applicable. For example, s.117B(3) will always apply. In addition, it should be remembered that, pursuant to s.117A, the considerations listed in s.117B are not exhaustive. This means, for example, it will be necessary to take into account criminal conduct which does not bring the person within the definition of "*foreign criminal*" in s.32 of the UK Borders Act 2007 or s.117D of the 2002 Act and also conduct such as gaining entry to the UK on a false passport, if found to be the case, even if not prosecuted.

75. Accordingly, insofar as the claimant relies upon her right to private life, para 72. c) above applies because para 276ADE provides coverage for the right to private life. The claimant will therefore need to show that there are "*compelling circumstances*" to succeed outside the Rules on the basis of her right to private life.

76. Insofar as the claimant relies upon her right to family life with her grandchildren, we have explained at paragraph 42 that there are two opposing views as to whether the Rules provide coverage for a family life claim between a grandparent and a grandchild or grandchildren. If the first view is correct, that the Rules do provide coverage for an Article 8 claim based on family life between a grandparent and a grandchild, then the fact that a grandparent does not satisfy the requirements of para 317 or EX.1 of Appendix FM provides the policy context in which a judge or decision maker should carry out the balancing exercise in the consideration of proportionality outside the Rules. This means that, pursuant to paragraphs 32 and 33 of SS

(Congo), the applicant would need to show that there are compelling circumstances to succeed outside the Rules on the basis of Article 8.

77. If, on the other hand, the opposing view is correct, that the Rules do not provide coverage for an Article 8 claim based on family life between a grandparent and a grandchild, the approach explained at paragraph 74 above applies in assessing the Article 8 claim based on such family life outside the Rules.

78. Given that we did not hear submissions on these opposing views, we will apply the view that is more generous to the claimant, i.e. the approach explained at paragraph 74 above. Accordingly, in carrying out the proportionality exercise outside the Rules, it will be for us to decide the weight that is to be given to the public interest, applying where relevant, the public interest considerations in s.117B of the 2002 Act.

ii) The parties' submissions on the interpretation of the phrase "*are financially independent*" in s.117B(3).

79. Ms Holmes and Mr Murphy made submissions in writing on whether the Rules make provision for the level of income that must be shown for an individual to be considered financially independent for the purposes of s.117B(3).

80. Ms Holmes informed us that she saw nothing in the Rules which might assist us, with the exception of para 266 which relates to '*Retired persons of independent means*'. Para 266(ii)(a) provides that such a person must have "*under his control and disposable in the UK an income of his own of not less than £25,000 per annum"*. Further, para 266(ii)(b) requires the individual to be "*able and willing to maintain and accommodate himself and any dependents indefinitely in the United Kingdom from his own resources with no assistance from any other person and without taking employment or having recourse to public funds"*.

81. Mr Murphy submitted that the submission of Ms Holmes that para 266 may be a useful aid in the interpretation of s.117B(3) was unsustainable, given that the claimant's case is not a retirement case and that the claimant is a long way from retirement. Accordingly, he submitted that the analogy was wide off the mark.

82. At the hearing, we also asked the parties to address us in writing on the question whether the income threshold of £18,600 for a couple that is applicable in the case of applications considered under the partner route in Appendix FM may be of assistance. Ms Holmes did not address this point in her written submissions. Mr Murphy referred us to the fact that the income threshold of £18,600 was considered by Parliament to be sufficient for the support of a couple, whereas this case concerns only the claimant. He submitted that the claimant's oral evidence was that, if granted leave and allowed to work, she would be able to earn approximately £15,000 to £16,000. He submitted that an income at this level would be sufficient for the claimant to show that she is financially independent for the purposes of s.117B(3).

83. We make the observation that it would have been open to the Secretary of State to make specific provision in the Rules for the income threshold that must be satisfied for a person to be regarded as financially independent for the purposes of s.117B(3) but she did not do so. Given that she did not do so, we agree with Mr Murphy that it would be inappropriate to draw an analogy with para 266 of the Rules which concerns retired persons of independent means, nor for that matter do we consider it appropriate for us to embark upon an adjustment of the figure set as the minimum income threshold for a couple of £18,600 to reflect the fact that this case concerns a single person. The process of making such adjustments would raise obvious difficulties such as, what principles are to be brought to bear and how does one ensure that there is some consistency in application in different scenarios so as to ensure that the decisions in particular cases are not made in a way that is seen to be arbitrary. It is not appropriate for the Tribunal to be engaged in setting an income threshold or even adjusting the income threshold of £18,600 to reflect the fact that this case concerns a single person.

84. We therefore conclude that, on the question of the quantum of resources that must be shown, the cases that provided guidance prior to the amendments of the Rules by HC 194 on 9 July 2012 as to the adequacy of maintenance and accommodation without recourse to public funds continue to be of assistance since the Rules do not make specific provision for the minimum income threshold that must be demonstrated in this particular case. Accordingly, the following cases (to which we referred at the hearing), amongst others, continue to apply:

    i) In KA and others (Adequacy of maintenance) Pakistan [2006] UKAIT 00065, the Asylum and Immigration Tribunal held that the level of income and other benefits that would be available if the individual/family were drawing income support is the yardstick by which it is to be decided that the individual/family would be adequately accommodated and maintained without recourse to public funds.

    ii) In French v Entry Clearance Officer (Kingston) [2011] EWCA Civ 35, the Court of Appeal said that as explained in KA, the amount payable by way of income support could be accepted as representing the Government's assessment of the sum required for adequate maintenance and was an appropriate benchmark for assessing whether parties could maintain themselves and their dependants adequately.

85. The next question is whether third party support is precluded for a person to be "*financially independent*" for the purposes of s.117B(3). In our view, the independence that s.117B(3) refers to is independence of the state. It follows that third party support of the type that was accepted in cases decided prior to 9 July 2012 will not preclude an individual from being found to be financially independent for the purposes of s.117B(3).

86. The next question is whether future earnings can be taken into account to decide whether a person is financially independent for the purposes of

s.117B(3). It may be that the phrase "*are financially independent"* does not mean that future earnings are to be left out of account. Mr Murphy asked us to consider the example of a claimant who is a fully qualified doctor. He submitted that it could not be the case that the fact that there is a shortage of doctors in the UK must be ignored simply because the individual does not have a job offer. We can see the attraction of his argument.

87. Nevertheless, it seems to us that the use of the word "*are*" in the phrase "*are financially independent"* is important. The word *"are"* means that the evidence must be such that it must be possible to say that the individual or individuals concerned is or are financially independent. In our view, the word *"are"* indicates the strength and cogency of the evidence required for s.117B(3) to be a positive factor in favour of an individual in the balancing exercising. For s.117B(3) to assist a claimant, he/she would need to produce clear evidence that, if granted leave to remain, he/she *will* secure resources which *will* be such that he/she will be financially independent. Evidence of outgoings will be needed. It is otherwise difficult to see how it can be said that such persons "*are financially independent*".

88. In his oral submissions, Mr Murphy submitted that, if an individual satisfies (a) and (b) of s.117B(3), then s.117B(3) should be applied in his/ her favour. He submitted that the claimant is not a burden on taxpayers because she is supported by her cousin with whom she is living and who pays for all of her outgoings. The claimant also receives money from her children. She does not claim benefits. He submitted that she is fully integrated into society. Thus, she fulfils s.117B(3)(a) and (b) and, accordingly, s.117B(3) should be applied in her favour even if we find that the claimant would be unable to obtain employment or earn sufficient to be financially independent.

89. We have no hesitation in rejecting this submission. The focus of s.117B(3) is financial independence. Even if it is possible for an individual to show that he/she is not a burden on taxpayers in that they have not had recourse to public funds or is fully integrated into society notwithstanding that he/she is not financially independent, s.117B(3) will not avail them precisely because the focus of s.117B(3) is financial independence.

iii) Consideration of the evidence and proportionality in the claimant's specific case

90. We do not accept the claimant's evidence that, if allowed to remain in the UK, she would be able to obtain a job. We find that there is no realistic prospect of the claimant obtaining employment, for the following reasons :

i) As is clear from paragraph 65 above, three of the claimant's qualifications have now lapsed. There can be no guarantee that she will pass these tests if she took them again simply because she passed them 10 years ago.

ii) It was clear from her evidence to us that she had not made any formal enquiries from any nursing homes for possible vacancies for someone with her educational background and work experience. Her evidence as to what work she thought she would be able to

obtain and her possible earnings was wholly unsupported and, we find, entirely speculative.

iii) In relation to her work experience, the evidence before the judge was that the claimant had not worked in Jamaica. Although she has lived in the UK for 14 years, she confirmed in oral evidence before us that she was only employed in the UK for a period of 4 months, from April 2010 until August 2010. Accordingly, as at the date of the hearing before us, she was nearly 50 years old, with only 4 months of work experience.

91. For these reasons, we find that the likelihood of the claimant obtaining employment which will make her financially independent is little more than fanciful, at best.

92. Mr Murphy submitted that the claimant has been maintained and accommodated without recourse to public funds. He relied upon her oral evidence in that respect. However, no evidence was submitted to us to show that she will have resources sufficient to enable her to be maintained and accommodated without recourse to public funds pursuant to KA and others and French v Entry Clearance Officer (Kingston) and thus make her financially independent for the purposes of s.117B(3). Applying paragraphs 83 to 87 above, we reject her unsupported oral evidence as being manifestly insufficient to show that she *is* financially independent.

93. Accordingly, s.117B(3) does not assist the claimant. We find that it has not been shown that she is financially independent.

94. In any event, given that the claimant has only worked in the UK for a period of 4 months, we do not accept that she is fully integrated into society notwithstanding that she speaks English fluently. Although we accept, of course, that the fact that she speaks English fluently means that she is better integrated into society than if she did not speak English, there was no evidence before us that she is integrated into society. Furthermore, given our finding that the likelihood of the claimant obtaining employment which will make her financially independent is fanciful and that there was no cogent evidence to show that she will have access to resources to make her independent of the state, she will be a burden on taxpayers if allowed to remain in the UK. There is a strong likelihood that, if allowed to remain in the UK, she will need to access services, such as, for example, medical services, at some point in the future. Accordingly, we do not accept that, if allowed to remain, the claimant will not be a burden on taxpayers.

95. The judge found that, although there are no very significant obstacles to reintegration in Jamaica, it will be difficult for the claimant to relocate to Jamaica because she is now at a time of her life when it is harder to re-establish oneself (paragraph 44 of her decision), she has spent a considerable period of time in the UK, she never worked in Jamaica and she has only a few friendship or familial ties in Jamaica (paragraph 35 of the judge's decision).

96. These findings went in the claimant's favour because the judge considered that a lesser degree of hardship was relevant in assessing proportionality outside the Rules than is needed to show "*very significant obstacles*" in order to succeed under para 276ADE(vi). We have explained at paragraphs 50 to 52 above that the judge erred in this regard. There is nothing about the claimant's circumstances which shows that any difficulties she may experience in reintegrating in Jamaica are compelling, given that the claimant lived in Jamaica for 36 years of her life and the judge's findings (which are preserved) that:

    i) The claimant sought to minimise to the Tribunal her connections to Jamaica. She has some family connections in Jamaica albeit that she has little or no family in Jamaica (paragraph 33).

    ii) It was not credible that her family members in the UK would not seek to assist her in whatever way possible if she had to relocate to Jamaica including providing whatever financial help they are able to provide (paragraph 33).

97. As we have said above, the judge did not find that the claimant enjoyed family life with her adult children. Although the claimant does not enjoy family life with her children, her ties with them are part of her private life. We take into account that the judge found that the claimant's relationships with her family members are a significant part of her private life (paragraph 38). This aspect of her private life claim is not fully addressed in the context of para 276ADE. It falls for consideration outside the Rules.

98. The claimant does not live with Dacia or Darion. Both Dacia and Darion have formed their own independent families.

99. The claimant came to the UK with her daughter, Dana, who is now 22 years old. At paragraph 43 of her decision, the judge said that Dana had been granted discretionary leave to remain as a reflection of the number of years she had spent in the UK. The mere fact that Dana qualified for discretionary leave whereas the claimant did not satisfy para 276ADE does not, of itself, mean that removal would be disproportionate, given that the Rules have to draw a line somewhere and it is inevitable that there will be many cases of individuals within the same family who fall on different sides of the line. Separation in those circumstances, where family life is not being enjoyed between those who may otherwise be separated, will not of itself be enough to render removal disproportionate notwithstanding that proportionality will be more at large outside the Rules in this respect. We find that Dana must inevitably have her own daily routine as it has not been suggested at any stage that she assists the claimant with her child care duties.

100. The claimant came to the UK 14 years ago lawfully. Her status was precarious until 31 October 2003. She made an application for extension of her leave which as refused on 17 November 2005 since which time her status was unlawful. Her private life ties with Dacia and Darion have been formed whilst her immigration status was precarious and unlawful. When the claimant and Dana arrived in the UK, Dana was a minor, from which it must follow that the claimant and Dana enjoyed family life with each other then. At

some point, on the judge's findings, they ceased to enjoy family life with each other, their relationship comprising part of their respective private lives. The claimant's private life in the UK (including her private life with her adult children) has therefore been largely (in relation to her relationship with Dacia and Darion) developed in the knowledge of her precarious and unlawful immigration status to which we give little weight pursuant to s.117B(4) and (5).

101. Turning to the claimant's family life with her grandchildren, the judge found that the claimant's removal would cause a great wrench to the family life being enjoyed with her grandchildren (paragraph 45). She found that the claimant plays a strong and significant part in her grandchildren's lives and that they have regular contact with them. If the claimant were not in the UK, then the grandchildren's close relationship with their grandmother will be severed as their close personal relationship with her will not be replaced adequately via email, Skype and occasional visits. She found that it would not be in the grandchildren's best interests for the claimant to be removed given the importance of their relationship with the claimant to them. These findings are preserved. There was nothing in the evidence we heard which leads us to make findings which are any different. We make the same findings.

102. The best interests of the claimant's grandchildren are a primary consideration. They are not paramount and not determinative.

103. The claimant is not the primary carer of any of the grandchildren. She is not in a parental relationship with them. Although the claimant's removal would cause a great wrench to the family life being enjoyed with her grandchildren, the children will continue to live with their biological parents whilst, at the same time, remaining part of the extended family comprising of the siblings of their parents and their cousins. This extended family will provide mutual support to all, including the grandchildren. It is not suggested that the grandchildren's parents lack the skill in helping them come to terms with the claimant leaving their daily lives, or that they lack the ability to find alternative support with childcare if it was required either from amongst themselves through their closely knit family unit or externally. It is not suggested that any of the grandchildren will leave the care of their parents or that it would be in their best interests to do so in order to be with the claimant.

104. If she returns to Jamaica, the claimant will be relieved of her childcare responsibilities and will have time to work in employment which is commensurate with such qualifications as she now has. Her family can visit Jamaica as they have in the past. They can use modern means of communication to remain in contact, albeit that we take into account that this cannot by any measure replace the close daily contact and family life with her grandchildren as currently enjoyed.

105. We give such weight as we consider appropriate to each of the circumstances in the claimant's favour.

106. There is a legitimate public interest in maintaining the economic well being of the country and maintaining immigration control. The claimant has

lived in the UK unlawfully since 1 November 2003. She made no attempt to regularise her status until 23 August 2010, nearly seven years later. She then made four applications each of which were refused. She did not leave the UK as she was obliged to do. For the reasons given above, we have found that, if allowed to remain, the claimant will be a burden on taxpayers. In addition, the claimant worked when she did not have permission to do so for 4 months in 2010. In these circumstances, we decided to place considerable weight on the public interest in immigration control.

107. In all of the circumstances and having taken all relevant matters into account (whether or not expressly referred to above), we have concluded that removal would be proportionate and not in breach of the rights of the claimant or any member of her family including the grandchildren under Article 8. The decision to remove the claimant is a proportionate response to the need to maintain immigration control and for the economic well being of the country.

108. We make the point that we would have reached the same conclusion even if a lesser degree of hardship is relevant in assessing proportionality outside the Rules than is needed to show "*very significant obstacles*" in order to succeed under para 276ADE and even if the claimant did not need to show compelling circumstances in order to succeed outside the Rules in respect of her private life established in the UK. We would still have found that it is reasonable to expect her to relocate to Jamaica and enjoy her private life there, for the reasons given at paragraph 95.i) and ii) above. We would still have found that removal was proportionate and not in breach of Article 8. In this regard, we draw attention to the fact that, notwithstanding that the judge materially erred in law in speculating that, if allowed to remain in the UK, the claimant would be financially independent, she said that this was a "*finely balanced case*".

109. We therefore dismiss the claimant's appeal in relation to Article 8.

Decision:

The making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law. We have set it aside the decision. The Secretary of State's appeal to the Upper Tribunal therefore succeeds.

We have re-made the decision on the claimant's appeal. We dismiss her appeal against the decision of the Secretary of State on immigration grounds and on human rights grounds (Article 8).

Signed Date: 3 November 2015
Upper Tribunal Judge Gill