



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

Appeal Numbers: IA/12270/2014
IA/12271/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 5 June 2015**

**Determination Promulgated
On 11 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROMM

Between

**OMAR OLIVER ANDREWS (1)
AJANI DEMARIO ANDREWS (2)
(NO ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Vatish, Counsel

For the Respondent: Ms A Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Jamaica born on 29 December 1979 and 11 August 2011 respectively. They are father and son. They have appealed with the permission of the First-tier Tribunal against the decision of Judge of the First-tier Tribunal A W Khan dismissing their appeals against decisions of the respondent to remove them to Jamaica, having refused their applications for leave to remain on human rights grounds. The decisions were made on 20 February 2014.

2. The first appellant claimed to have entered the UK on 16 October 2002 as a visitor. He met his partner, Ms Shena Easton, in 2005 and they have lived together since 2007. On 12 September 2012 the first appellant applied for leave to remain with the second appellant as his dependant. The respondent decided the first appellant did not meet the requirements of Appendix FM or paragraph 276ADE of the rules and there were no compassionate circumstances demanding a grant of leave outside the rules. Detailed reasons were provided in a letter dated 19 February 2014.
3. At the beginning of the hearing before Judge Khan the appellants sought an adjournment due to the fact a decision was awaited on a similar application which had been made by Ms Easton on 15 September 2014. The judge refused the application because there was no realistic timescale for when a decision would be made in her case.
4. The judge heard oral evidence from the first appellant and Ms Easton. The first appellant said he had no family in Jamaica because his brothers had migrated to the USA. He did not know where his parents were and he had no extended family. He could not go to Jamaica because Ms Easton's children were born here and he would be unable to obtain work. In particular, Ms Easton's son, Tyrese, who was aged 12, would find it very difficult to adapt to life in Jamaica. Ms Easton said she came to the UK in 2000 with her grandmother as a visitor. She was then 17 years of age. She fell pregnant and gave birth to Tyrese. She had had two children with the appellant. All her three children were in the UK, having been born here. Her mother, brothers, aunts and uncles were in Jamaica. She had been in the UK 15 years and could not adapt to life in Jamaica. Tyrese had no contact with his natural father. He was British.
5. The judge found the first appellant could not succeed under the partner route in Appendix FM because Ms Easton was neither British nor settled in the UK. Nor could he succeed under the parent route because, although Tyrese was British, the appellant did not have sole responsibility for him and Ms Easton was neither British nor settled. The second appellant could not succeed under the child route because the first appellant had not succeeded.
6. Turning to paragraph 276ADE(1)(vi), the judge found the first appellant had not shown he had no ties (including social, cultural or family) with Jamaica. He did not accept the first appellant's evidence that he had severed all ties with Jamaica, even though he had lived in the UK since 2002. He found the real reason the appellant did not wish to return was that he would be in a worse state economically. However, he had skills in painting and decorating, computing and accounting and therefore he could reintegrate in Jamaica as far as his social and cultural life were concerned even if he had no family there.
7. On the question of whether there were exceptional circumstances existing outside the rules, the judge found there was no valid reason the

first appellant could not resume his life in Jamaica and the second appellant was still only 3 years of age. Ms Easton's status was still undetermined and the children, being young, could enter the Jamaican educational system without much difficulty as Jamaica is an English-speaking country.

8. In assessing article 8, the judge referred to the difficulty being Tyrese's situation. He is British and 12 years of age. The first appellant had undoubtedly taken on a parenting role with respect to him. In paragraph 30 the judge said he would have no difficulty in finding the first appellant, the two younger children and Ms Easton could all resume life in Jamaica with Ms Easton's extended family. With regard to Tyrese, his best interests lay in his joining his parents and the other children in Jamaica. In paragraph 32 the judge accepted there would be hardships in this but concluded it would not be "unduly harsh". The judge applied the same reasoning to his conclusion in paragraph 34 that it would not be unreasonable to expect Tyrese to leave the UK for purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. He found the decision proportionate and dismissed the appeal on article 8 grounds.
9. The grounds seeking permission to appeal made six points but permission to appeal was refused by Upper Tribunal Judge Deans, sitting as a Judge of the First-tier Tribunal, save on the point that the judge had arguably erred by applying a test of undue hardship in paragraph 32, which was a higher test than reasonableness.
10. On 10 December 2014, five days after Judge Khan's decision was promulgated, the respondent granted Ms Easton and her child, Kymani, born in 2009, discretionary leave to remain until 9 June 2017 due to the exceptional circumstances in their case. The reasons appear to have been the presence of Tyrese.
11. The respondent also filed a rule 24 response opposing the appeal. However, this was filed without having had sight of the full decision.
12. I heard submissions on the question of whether Judge Khan erred in law.
13. Ms Vatish essentially made two points. Firstly, she argued the judge erred by applying too high a test in paragraph 32 and, secondly, that the judge failed to give any reason for his finding in paragraph 34. She pointed out that Ms Easton now has leave, although that was not the case when the judge made his decision.
14. Ms Brocklesby-Weller argued that the decision as a whole showed the judge directed himself correctly. She suggested the reference to "unduly harsh" in paragraph 32 was intended as "unjustifiably harsh", which was the test formulated in *R (Nagre) v SSHD* [2013] EWHC 720 (Admin). She argued that the judge's conclusion about the impact on Tyrese was one which it was open to him to reach because having a

British child was not a 'trump card'.

15. Ms Vatish reminded me that the Supreme Court emphasized the significance of the child's nationality in *ZH (Tanzania)* [2011] UKSC 4.
16. Having heard submissions I reserved my decision on error of law.
17. I start by noting the decision is thorough, detailed and well-structured. Submissions were made to Judge Khan, which he recorded in paragraph 19, that Tyrese was not familiar with the culture and educational system in Jamaica and it would be exceptionally hard for him to be "removed" (*sic*). It would also be unjustifiably harsh to uproot the other two children. The judge gave reasons, which are not the subject of challenge, why the first appellant could not succeed under Appendix FM either as a partner or a parent. I pause to note, although it is not strictly relevant, that this position has been unaltered by the grant of discretionary leave to Ms Easton and Kymani.
18. The judge begins his consideration of whether the circumstances warrant examination of article 8 principles outside the rules in paragraph 26. Although he does not say so expressly, he plainly considered the position of Tyrese warranted such consideration. He highlights the salient facts concerning Tyrese in paragraph 29. In the following paragraphs he reminds himself that the best interests of a child are a primary consideration but not a 'trump card'. In paragraph 31 he cites the leading authorities on this area. His conclusion, stated in paragraph 30, is that Tyrese's best interests lie with joining his parents and siblings in Jamaica. In paragraph 32 he states that, taking into account all relevant matters, it would not be against Tyrese's best interests to go to Jamaica as part of the family unit. There would be no separation and, at the age of 12 and having Jamaican "heritage", it was reasonable to expect he would be able to integrate into Jamaica in the foreseeable future. His education could continue in Jamaica. He then said:

"I accept there would be a degree of hardship for a time but I do not find that this would constitute a situation whereby it would be unduly harsh to expect Tyrese to be able to go to Jamaica with his family."
19. As noted, it is the judge's use of the words "unduly harsh" which caused Upper Tribunal Judge Deans to grant permission to appeal. As Judge Deans explained, the correct test, as found in section 117B(6), is whether,

"(b) it would not be reasonable to expect the child to leave the United Kingdom."
20. It is clear that to apply a test of undue harshness in the context of section 117B(6)(b) would be a material misdirection because it is a more demanding test. However, in my judgment, reading the decision as a whole, Judge Khan was not applying too high a test. I reach that conclusion because Judge Khan introduces paragraph 34 by referring to

the section. After dealing with the earlier subsections, he states:

“Tyrese is a qualifying child under section 117B(6)(a) but it would not be unreasonable to expect him to leave the UK under section 117B(6)(b) for the reasons set out at paragraph 32.”

21. In the circumstances, it is sufficiently clear that the judge had the correct test in mind when conducting the proportionality balancing exercise and the reference in paragraph 32 to “unduly harsh” was not a material misdirection. I construe the reference there to undue harshness as the judge acknowledging the hardship which would be caused to Tyrese by expecting him to accompany his family to Jamaica but also indicating that it did not tip the scales in favour of the appellants.
22. The judge’s decision is adequately reasoned and it was a decision it was open to him to reach on the evidence. He dealt with the evidence with care and was careful to treat the children’s best interests as a primary consideration. I find there is no material error of law in the decision.

NOTICE OF DECISION

The First-tier Tribunal did not make a material error of law and its decision dismissing the appeals is confirmed.

No anonymity direction made.

**Signed
2015**

Date 8 June

**Judge Froom,
sitting as a Deputy Judge of the Upper
Tribunal**