



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

Appeal Numbers: HU/01592/2019
HU/01598/2019
HU/01599/2019

THE IMMIGRATION ACTS

**Heard at Royal Courts of Justice
On 24 February 2020**

**Decision & Reasons Promulgated
On 17 March 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

**FLOYD GEORGE CURRIE
FAY MARIE EDWARDS
TYRESE RUSHON CURRIE
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr. P. Singh, Senior Presenting Officer

For the Respondents: Ms. R Moffat, Counsel, instructed by Irvine Thanvi Natas
Solicitors

DECISION AND REASONS

Introduction

1. This is the Secretary of State's appeal against a decision of Judge of the First-tier Tribunal Rai ('the Judge') promulgated on 1 October 2019 in which she allowed the appellants' human rights appeals against the decision of the respondent dated 15 January 2019 to refuse their applications for leave to remain on human rights (article 8) grounds.
2. The appellant in this matter is referred to as the Secretary of State. The respondents are individually named.
3. Judge of the First-tier Tribunal Saffer granted permission to appeal on the two grounds advanced by the Secretary of State.

Anonymity

4. The Judge did not issue an anonymity direction. The parties did not seek a direction before me.

Background

5. The respondents are Jamaican citizens. Mr Floyd Currie ('Mr Currie') and Ms Edwards are in a long-term relationship. Mr Tyrese Currie ('Tyrese') is their son and is presently aged 20.
6. Mr Currie was born in 1965. He entered the United Kingdom as a visitor on 6 August 2000 and in November 2000 he applied for a student visa which was granted until 4 September 2002. He overstayed and was served with an IS151A in November 2005. Sixteen days later he applied for indefinite leave to remain on article 8 grounds. The Secretary of State refused this application some seven years later, in January 2013. The First-tier Tribunal allowed Mr Currie's appeal by way of a decision dated 25 April 2013. Mr Currie was granted limited leave to remain from 19 March 2014 to 16 September 2016 along with Tyrese, who was dependent upon his father's application.
7. Mr Currie applied for further leave to remain on 12 September 2016 and the Secretary of State refused the application by way of a decision dated 15 January 2019 observing as to suitability under Section S-LTR of the Immigration Rules that Mr Currie had failed to disclose material facts, namely his conviction for battery on 3 January 2014 for which he was ordered to complete a twelve-month unpaid work requirement of 180 hours. The Secretary of State further observed that Mr. Currie had failed to disclose two cautions. The first for possession of a class B drug on 7 November 2005 and the second for common assault on 19 March 2008. The Secretary of State further determined for the purpose of paragraph 276ADE(1) of the Immigration Rules that there were no very significant obstacles to Mr Currie's integration upon return to Jamaica and that he could continue his family life in that country.

8. Ms Edwards was born in 1960. She entered the United Kingdom after Mr Currie's entry. An application was made in 2002 for leave to remain as a student. It was rejected by the Secretary of State as Ms Edwards failed to provide her passport. Ms. Edwards was served with an IS151A notice in September 2006. In 2014 she applied for leave to remain on article 8 grounds. This application was refused on 10 January 2015 with no right of appeal. She made a further application for leave to remain on article 8 grounds in September 2015 based upon her partner and son having been granted limited leave to remain in this country. She was granted leave to remain from 13 October 2015 to 18 September 2016. The Secretary of State refused her application for further leave to remain on 15 January 2019. It was observed that Ms. Edwards was unable to satisfy the requirements of paragraph 276ADE(1) of the Rules as there were no very significant obstacles to her integration upon return to Jamaica and she could continue her family life in that country.
9. Tyrese was born in Jamaica and entered the United Kingdom on 1 December 2001, when aged 18 months. He was dependent upon his father's application for indefinite leave to remain in 2003 and his circumstances were considered by the First-tier Tribunal in 2013. Judge of the First-tier Tribunal Morgan determined:

"I find that the appellant and his family (the family) have private life in the United Kingdom. The respondent's position is that this is not a family life case because the respondent would remove the family as a single unit. I accept this submission and find that the best interests of the child are to live with and be brought up by the appellant (the father) and his mother (the partner). I find that the key factor weighing in favour of the family is the fact that the son is now 13 years old and has spent over 11 years in the United Kingdom. He joined his parents in the United Kingdom in December 2001. He attends Gladesmore Community School in Tottenham and is in year 8. I find that the son is well integrated into the British educational system and in this respect, I note the son's witness statement and the certificates from his school. I note the best interests of the child jurisprudence, see above, and in particular the guidance that I need to consider the impact on the son's educational development, progress and opportunities in the broader sense. I find that the son's residence, and the fact that he has spent his formative early years in the United Kingdom well integrated within the education system enables, justifies and necessitates a finding that his removal would be disproportionate.

There are other factors that weigh in the family's favour in the balancing exercise that I must undertake in respect of article 8. However, I am not persuaded that these factors would outweigh the respondent's legitimate rights to exercise effective immigration control. I have given considerable weight to the respondent's legitimate right to exercise immigration control however, on the particular facts of this case, I find that this does not outweigh the best interests of the child. In summary, having considered all of the factors in the round, I find that expecting the appellants to return to

Jamaica is disproportionate because the appellant's son has spent his formative early years in the United Kingdom. I further note and accept Miss Physsas's submission that if the son were to make an application in his own right under the current Immigration Rules dealing with article 8 it is difficult to see how this would not be successful.

In summary I find that the Appellant has satisfied me that the decision to remove the appellant and his family is so serious a breach of the fundamental right protected by Article 8 as to cause the United Kingdom to be in breach of its obligations under the ECHR. I therefore allow the appeal."

10. Tyrese's application for further leave to remain was refused by the Secretary of State on 15 January 2019. The Secretary of State concluded that the application fell for refusal on grounds of suitability under Section S-LTR as Tyrese's presence in this country was not conducive to the public good consequent to his having been sentenced to a nine-month referral order on 29 December 2016 for robbery. It was also observed that Tyrese had been sentenced on 17 October 2018 for possession of a class B drug. The Secretary of State further noted that Tyrese had also accumulated four police cautions between 2017 and 2018.

Hearing Before the FTT

11. The appeal came before the Judge sitting at Taylor House on 16 July 2019. At the hearing she was informed that Tyrese had received a further conviction for possession of cannabis on 2 May 2019.
12. Mr Currie's position before the Judge was that his failure to disclose his previous convictions was not intentional. The Judge considered this issue, at [50]-[53]:

"The first appellant's account was that the application form had been completed by a lawyer called Mr Rushan. He said that Mr Rushan was his lawyer when he was granted leave to remain in 2014. He had not kept in touch with Mr Rushan over the years until he needed to submit this application dated 12 September 2016. Mr Rushan read parts of the form back to the first appellant and he duly signed it. He was specifically asked by Ms Khan *'when he completed the application, did you read it?'* He replied, *'he read bits out to me'*. He was also asked *'did he read the whole application to you?'* He replied, *'No, only certain bits.'* Then he was asked *'You then signed the form, did you read it first?'* and he replied, *'he read it to me, and I signed it.'* The appellant was consistent in his evidence that he had been read parts of the form back by Mr Rushan and then signed it. As he was previous representative, he believed he had all the basic factors available to him.

The first appellant was shown a copy of his application form and ask to confirm his signature on the form. With all due respect to the appellant, I got the impression that he may not be the most

competent reader as he navigated his way through the form but may not have disclosed this previously. This impression was consistent with the appellant's account throughout that Mr Rushan had completed the form and read parts back to him.

The second appellant confirmed that the handwriting on the application form was not her husband's or son's. She confirmed it was the solicitor who completed it for them. Her evidence was not vigorously challenged by Ms Khan.

Having had the benefit of seeing and hearing from the first appellant and the second appellant and considering the character references provided, I am satisfied that he has provided a credible explanation for why he failed to disclose his previous convictions and cautions which on balance, was not done with intent to deceive or be dishonest."

13. The Judge noted Tyrese's evidence as to his convictions and cautions, at [44]-[48]:

"It is accepted the appellant came into the UK aged about 18 months. He has lived in the UK ever since. He has never been to Jamaica and all his ties are to the UK. It was previously considered unreasonable for him to leave the UK on the basis that he has been in the UK for over 14 years at the time and was at an important part of his education and as such was granted limited leave to remain.

The third appellant accepted he had received three convictions and two cautions. He explained that the robbery was of someone he knew, which occurred after a dispute. The appellant, a youth at the time, was given a referral order. The appellant's evidence was that he was caught with the cannabis and smoked it as a form of stress relief. He described his main stresses since leaving school had been his uncertain immigration status, which meant he could not obtain a national insurance number and has not been able to work. This has caused frustration, especially having seen his mother and father work long hours on minimum pay. He said that he still lived at home with his parents and was financially supported by them and friends. He described his passion for boxing and sport and how that keeps him positive and out of trouble, but he would like to be able to give back to the community and help children here. He also expressed remorse for the robbery. I note he has not been convicted of any further offence involving violence.

The evidence of the third appellant was not substantially challenged by Ms Khan, she asked the appellant what he had done to address his issues, as his last conviction was for possession of cannabis earlier this year. The appellant said he had tried talking to his mother about it, but there was too much uncertainty and stress in the family.

I found the appellant consistent and credible in his evidence. The family live in an area which is well reported for violence and gang crime, the parents are unfortunately in manual skilled, low paying employment, coupled with years of uncertainty over their immigration status, is in my judgment an understandable context for

his offending. He has expressed a real desire to turn his life around and I take that into account with great care, because as an adult now, any further convictions would result in a custodial sentence. The appellants assert the respondent is seeking to deport them through the back door by relying on the suitability provisions, but should the appellant find himself convicted in circumstances that put him in breach of the Rules, it may not be deportation through the back door. It is accepted the appellant's brother was deported from the UK in February 2016.

Overall, I am satisfied on balance that at the time of the application the appellant was under 18, but that even today aged 19, he is still both emotionally and financially dependent on his parents. I remind myself there is no bright line and quite often, in cases such as these where the appellant has not been able to form his own independent life, the dependency on his parents still exists which is more than normal emotional ties as per Kugathas v SSHD [2003] EWCA Civ 31. I therefore find family life still exists between the third appellant and his parents."

14. The Judge considered as to whether it was undesirable for Tyrese to remain in the United Kingdom, at [57]-[61]:

"The respondent refused the third appellant's application under S-LTR.1.6, which is a mandatory refusal. This means the decision maker must refuse on suitability grounds, unless the appellant can challenge the facts on which the decision was made.

The Court of Appeal have considered the issue of undesirability in the recent case of Balajigari v SSHD [2019] EWCA Civ 673. Though that case was in relation to refusals under paragraph 322(5) covering discrepancy of earning cases, paragraph S-LTR.1.6 under Appendix FM applies in the same way. They both cover suitability issues, and both suggest the applicant, who because of their conduct, character, associations or other reasons make it undesirable for him to remain in the UK.

The question is whether the third appellant's convictions and cautions amount to sufficiency reprehensible conduct which having taken into account all relevant circumstances, both positive and negative, make his presence undesirable.

I have already found that the appellant has two convictions from 2016-2018 for robbery and possession of cannabis and four cautions between 2017-2018. While these are serious offences, the respondent's own guidance states that convictions in themselves do not always warrant exclusion from the suitability requirements - IDI Family Migration: Appendix FM section 1.0b, February 2018.

I have also found that he has shown a credible desire to conduct his life in accordance with the laws of the UK in the future, but time will tell if that is the case. I accept he has been hampered in seeking employment or further education by the uncertainty of his immigration status which is no fault of his. He has shown remorse and insight into his offending such that overall, I am satisfied

according to S-LTR1.6 that it is not undesirable for the third appellant to remain in the UK.”

15. The Judge concluded at [68]-[71] that though Tyrese did not meet the requirements of paragraph 276ADE(1) the family could succeed on article 8 grounds outside of the Rules:

“In the appellants favour I consider the exceptional delay that was taken by the respondent in making the decision originally. It was in the region of 8 years. This is an unconscionable delay. I have regard to (EB (Kosovo)) which sets out the consequences of such a delay. The appellants have established closer personal ties with friends and the community as can be seen from the letters of support provided. The nature of the appellant’s family life would naturally have strengthened. The application in the decision before me was made in time and has taken a further 3 years for the respondent to make a decision, which if made earlier could have resulted in the third appellant continuing with his education and obtaining employment while under the age of 18 rather than have a precarious immigration status hanging over him.

In considering the public interest factors under s.117 of the 2002 Act I note firstly neither the first or third appellant are subject to s.117C; neither are foreign criminals and the respondent is not seeking to deport them. I am still required to consider the factors in s. 117B; all the appellant’s speak fluent English and the family do not rely on public funds. The third appellant would be in a position in the near future to find gainful employment and form an independent life of his own. I note the unconscionable delay in the respondent determining the appellants application in 2014 and again in 2016, which has contributed to a cycle of frustration on the third appellant’s part as he would have acquired status at an earlier time as a qualifying child under s.117B(6). In any event had the first and third appellant not fallen for refusal under the suitability provisions in this application, there did not appear to be any further matters in issue either. The first and second appellant were parents of a child, who had lived continuously in the UK for more than 7 years and based on the previous finding it was unreasonable for him to leave, the position if anything would have strengthened. I find this reduces the public interest significantly.

The first and second appellant both continue to enjoy a family life with the third appellant and have been in the UK for almost 20 years, some of which has been through a grant of leave to remain in 2014 and 2015. They have worked in the UK and built up their family life in valid circumstances, to the extent they now have grandchildren in the UK. I have regard to the phrase ‘little weight’ used in Kaur [2017] UKUT 00014 which does not mean ‘no weight’.

In weighing up the pros and cons, I find the balance tips in favour of the appellants and removal of the appellants in circumstances where they would have met the Rules but for the delay on the part of the respondent, would result in unjustifiably harsh consequences for the appellants, such that their removal would be a disproportionate interference of their family and private life under Article 8.”

Grounds of Appeal

16. The Secretary of State relies upon two grounds of appeal. The first asserts that the Judge erred in her consideration as to whether Mr Currie's former solicitor had acted negligently in completing the application and failing to provide details as to his earlier conviction and caution. The second ground concerns both Mr Currie and Tyrese, asserting that the Judge failed to resolve a material matter by failing to take into account the criminality of both men in the proportionality balancing exercise.
17. In granting permission to appeal by a decision dated 16 January 2020 JFtT Saffer observed:

"It is arguable that the Judge has materially erred in not applying BT (Nepal) [2004] UKIAT 00311 or Mansur [2018] UKUT 00274 (IAC) regarding the former Solicitor's conduct, or adequately considered the First and Third Appellants criminality or non-disclosure of offences within the Article 8 assessment."
18. No Rule 24 response was filed by the appellants.

Decision on Error of Law

19. At the hearing Mr. Singh candidly accepted that ground 2 was drafted on the basis that the Judge had simply 'failed' to 'take into account or factor in the criminality of the first and third appellants [Mr. Currie and Tyrese] in the proportionality balancing exercise' and consequently it was not possible to advance this ground because it was abundantly clear that the Judge had considered the criminal convictions and cautions for the purpose of the proportionality exercise. He observed that both men were not foreign criminals for the purpose of section 117C of the Nationality, Immigration and Asylum Act 2002 and that neither man has been sentenced to a term of imprisonment; the criminal behaviour primarily being addressed by cautions, fines, an unpaid work requirement or a referral order. Mr. Singh accepted that he could therefore not appropriately advance ground 2 and so the Secretary of State's challenge to the Judge's decision as to Tyrese should be dismissed.
20. In the circumstances, with no challenge to the Judge's finding that Tyrese remained dependent upon his parents, so enabling family life to continue existing between the three appellants, Mr. Singh accepted that the challenge at paragraph 1(f) of the grounds of appeal as to such family life continuing for Ms. Edwards in Jamaica fell away as her son would remain in this country and separation of mother and son would be disproportionate on the findings of fact made by the Judge.
21. Mr. Singh pursued ground 1 in relation to the Judge's consideration as to whether Mr. Currie intentionally failed to declare his criminal convictions when applying for further leave, but accepted that if the decision as to

Mr. Currie's appeal were to be set aside I would have to remake the decision in circumstances where the Secretary of State accepted that her appeal against the Judge's decision in relation to Tyrese and Ms. Edwards should be dismissed.

22. Ground 1 details, in its material parts:

'At [49]-[53] of the determination, the FTTJ accepts the appellant's account that his acting solicitor at the time completed the form and did not raise this question with the appellant. Therefore, absolving the first appellant of any blame for the failure to disclose his previous convictions and accepting that his solicitor was negligent.

It is submitted that the finding fails to take into account the guidance provided by the Upper Tribunal in BT (Former Solicitors' alleged misconduct) Nepal [2004] UKIAT 00311, the head note of which states:

'If an appeal is based in whole or in part on allegations about the conduct of former representatives, there must be evidence that those allegations have been put to the former representative, and the Tribunal must be shown either the response or correspondence indicating that there has been no response.'

It is argued that without this allegation of negligence being put to the previous solicitor and the opportunity for them to respond, it is not open to the FTTJ to accept that the first appellant had not failed to disclose this information on his application for further leave to remain. It is argued that it is the first appellant's responsibility to ensure that all information included in the application form is correct. It is submitted that he cannot blame his former solicitor for this omission, without evidence to show that this has been put to the solicitor and they have had the opportunity to respond.

Similarly, following the findings of the Upper Tribunal in Mansur (Immigration adviser's failings: article 8) Bangladesh [2018] UKUT 00274 (IAC), there has been no complaint made to the regulatory body and no findings made regarding any negligence on behalf of the first appellant's former solicitor. Therefore, without this finding by the regulatory body, it is argued that the FTTJ has erred in accepting that the former solicitor is to blame for the failure of the first appellant to disclose his previous convictions. As the FTTJ has found that the first appellant did not act dishonestly, it is argued that this finding materially affected the outcome of the proportionality balance and ultimately the outcome of the appeal.'

23. Paragraphs S-LTR.4.1 and 4.3 of Appendix FM to the Immigration Rules are discretionary in nature and provide:

'S-LTR.4.1. The applicant may be refused on grounds of suitability if any of paragraphs S-LTR.4.2. to S-LTR.4.5. apply.'

'S-LTR.4.3. The applicant has previously made false representations or failed to disclose material facts for the purpose of obtaining a document from the Secretary of State that indicates that he or she has a right to reside in the United Kingdom.'

24. Ms. Moffat informed me that she had not advanced before the First-tier Tribunal the argument that Mr. Currie's legal representative had been negligent. Rather, Mr. Currie's position was that there had been innocent non-disclosure. I accept that this may have been the position Mr. Currie wished to be advanced before the Judge, but the evidence presented was that the application form had been completed by the legal representative and only 'parts' were read back to Mr. Currie. The oral evidence of Mr. Currie and Ms. Edwards detailed that section 6.1 of the application form, where a question is expressly asked as to whether an applicant or any dependent has 'been convicted of any criminal offence in the UK or any other country', was not read to Mr. Currie and he did not personally tick the box detailing the answer 'No'. The same position is adopted for the ticking of the 'No' box in relation to the question at section 6.3 as to whether the applicant has received a caution in this country. In substance, the complaint can only be successful if a tribunal accepts that the legal representative failed to meet the professional standards expected of a lawyer specialising in immigration law in not reading this section of the form to the applicant, failing to ask relevant questions of Mr. Currie and ticking two boxes without clear instruction as to the veracity of the purported answers. Mr. Currie's appeal clearly falls into the category of case where a legal representative must be given the opportunity to respond as serious allegations are made as to professional care and conduct. No evidence was placed before the First-tier Tribunal that such allegations had been put to Mr. Rushan and consequent to the oral evidence presented at the hearing no request for an adjournment was made on behalf of the family so that the allegation could be put to him: *BT (Nepal)* [2004] UKIAT 00311. The Judge therefore materially erred in accepting the evidence of Mr. Currie and Ms. Edwards as to the actions of his former legal representative in circumstances where Mr. Rushan had not been given the opportunity to respond to the serious allegation made against him.
25. The decision of the First-tier Tribunal relating to the appeal of Floyd George Currie is set aside.
26. The decision of the First-tier Tribunal stands in respect of Fay Marie Edwards and Tyrese Rushon Currie.

Remaking the decision of Floyd George Currie

27. Ms. Moffatt did not request that upon a material error of law being found, the remaking of this matter should proceed to a further oral hearing, and no rule 15(2A) application has been made under the Tribunal Procedure (Upper Tribunal) Rules 2008 seeking to rely upon correspondence with Mr. Rushan as to the allegation of inadequate professional care and conduct.

28. I therefore proceed to remake the decision on the evidence that was before the First-tier Tribunal, and consequent to Ms. Edwards and Tyrese having been successful as to their appeals.
29. Mr. Currie contends that a professional lawyer, experienced in immigration law, took the step of not reading all sections of an application form to him, before completing the form without appropriate instructions. The question of innocent non-disclosure rests upon the professional lawyer adopting this unsatisfactory approach. Without Mr. Rushan having been asked to address this allegation as to poor professional care and conduct, the Tribunal cannot appropriately find that he acted in such manner. As Mr. Currie does not advance an alternative as to his non-disclosure of his convictions and cautions, I am satisfied that Mr. Currie intentionally failed to disclose his previous conviction and cautions. He is therefore unable to succeed under Appendix FM to the Immigration Rules. Nor can he satisfy the requirements of paragraph 276ADE of the Rules.
30. Mr. Currie can appropriately rely upon the Judge's finding, following a fact-sensitive consideration, that family life exists between mother, father and son and that at the present time Tyrese remains dependent on his parents: *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31; [2003] I.N.L.R. 170. The uncontested findings of fact at [68]-[71] remain applicable to Mr. Currie. By being successful on appeal, mother and son have established that a requirement that they leave this country and relocate to Jamaica would be a disproportionate interference in their protected family and private life rights. I am satisfied to the required standard that a decision to remove Mr. Currie in such circumstances, and to separate him from his son who remains dependent upon him, as well as separate him from his partner, would be so serious a breach of his protected article 8 rights as to amount to such disproportionate interference outweighing the public interest in his removal. I therefore find that Mr. Currie succeeds on article 8 grounds, outside of the Immigration Rules.

Notice of Decision

31. In respect of Fay Marie Edwards and Tyrese Rushon Currie the making of the decision by the First-tier Tribunal did not involve the making of a material error of law and the decision allowing their appeals on human rights (article 8) grounds is upheld. The Secretary of State's appeal in relation to these two appellants is dismissed.
32. The First-tier Tribunal erred materially in respect of Mr. Floyd George Currie for the reasons identified and the decision of the First-tier Tribunal in respect of Mr. Currie, dated 1 October 2019, is set aside.

33. Upon remaking the decision, the appeal of Mr. Floyd George Currie against the decision of the Secretary of State for the Home Department dated 19 January 2019 is allowed on human rights (article 8) grounds.
34. No anonymity direction is made.

Signed: D. O'Callaghan

Upper Tribunal Judge O'Callaghan

Dated: 9 March 2020

TO THE RESPONDENT
FEE AWARD

The First-tier Tribunal decided, having allowed the appellant's appeals, that no fee award was to be made, as the respondent's decision was reasonable at the date of decision.

No representations were made to the contrary on behalf of the appellants before me.

No fee award is made.

Signed: D. O'Callaghan

Upper Tribunal Judge O'Callaghan

Dated: 9 March 2020