**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/12765/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 17 July 2015** | **On 22 July 2015** |

**Before**
**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**
**DEPUTY UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**MISS SHAMEIKA CHANTAL BENNETT**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Unrepresented
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Devittie (Judge Devittie), promulgated on 3 November 2014, in which he dismissed the Appellant's appeal. That appeal was against the Respondent's decision, dated 21 February 2014, to refuse to vary her leave to remain and to remove her from the United Kingdom under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Permission to appeal was granted by First-tier Tribunal Judge Levin on 6 January 2015.

**Anonymity**

3. No direction has been made previously, and we see no reason for one now.

**Background**

4. Appellant is a national of Jamaica, born on 12 December 1991. She came to the United Kingdom on 6 August 2000 as a visitor and has been here ever since. On 5 February 2010 she was granted Discretionary Leave to Remain as a dependent on her mother, Ms Charmaine Scott. In February 2013, prior to the expiry of that leave, the Appellant applied for an extension. This application was based on Article 8 grounds. The Respondent refused the application on the basis that in 2012 the Appellant had been convicted of travelling on the railway without paying a fare and in 2014 she was convicted of criminal damage. In addition, she had failed to disclose the 2012 conviction in her 2013 application form. Therefore, when considering Paragraph 276ADE of the Immigration Rules, the Appellant failed to satisfy the suitability requirements and so did not meet sub-paragraph (i) of Paragraph 276ADE. Other than this, the Appellant would have satisfied Paragraph 276ADE(v).

5. The Appellant appealed to the First-tier Tribunal.

**The hearing before Judge Devittie**

6. The judge found that the Appellant had in fact arrived in the United Kingdom in 2000 at the age of eight. He found that she was well integrated into life here. He also found that she has family members in Jamaica (see paragraph 16). In paragraph 17 the judge concluded that the Appellant's criminality itself did not justify a conclusion that her presence in the United Kingdom was not conducive to the public good.

7. In paragraph 10 Judge Devittie did not believe that the Appellant had not known about her 2012 conviction when completing the application form in 2013. As a result, he concluded that the Appellant could not succeed under Paragraph 276ADE(v) because of the suitability requirement in Paragraph 276ADE(i). Relying on his finding in paragraph 10, the judge went on in paragraph 18 to conclude that the Appellant's deception in concealing the conviction weighed so heavily against her that it tipped the scales in the Respondent's favour when assessing proportionality outside of the Immigration Rules.

**The grounds of appeal**

8. In essence, the grounds argue that the judge placed excessive weight on the 2012 conviction issue and failed to take proper account of the fact that in all other respects the Appellant satisfied Paragraph 276ADE.

**Procedural history of the appeal in the Upper Tribunal**

9. The appeal was initially listed before Deputy Upper Tribunal Judge Zucker on 17 April 2015. He heard some evidence and submissions on the error of law issue but then adjourned the matter for further information to be obtained. On 12 June 2015 he again adjourned the case, it seems for the same reason as previously. On 17 July Judge Zucker was unable to hear the appeal due to unforeseen circumstances. We obtained a transfer order from the Resident Upper Tribunal Judge (on file), and could therefore proceed to hear the case ourselves. There was no objection to this from Ms Fijiwala.

**The hearing before us**

10. The Appellant was unrepresented at the hearing before us. The nature of the proceedings and the issues were all explained to the Appellant and her mother at the outset.

11. Ms Fijiwala provided the Appellant and us with a print out from the Police National Computer (on file). The Appellant was given an opportunity to look through this, but she was content to proceed without a break.

12. There was no dispute that the 2014 conviction for criminal damage had been overturned on 30 October 2014 (evidence of this is on file).

13. Ms Fijiwala accepted that there was a material error of law in the judge's decision. This was because he had failed to have adequate regard to the Appellant's explanation as to the non-disclosure of the 2012 conviction. Paragraph 4 of the decision stated that the explanation emanated from a witness statement when in fact it had been included in grounds of appeal. Paragraph 4 also stated that the explanation was that the Appellant was unaware of the 2012 conviction until the Respondent's decision on her 2013 application was received. This too was wrong. In fact the Appellant had stated that she only became aware of it during proceedings for criminal damage in January 2014.

**Decision on error of law**

14. It is clear to us that Judge Devittie erred in his consideration of the Appellant's evidence. Ms Fijiwala has quite rightly recognised this. In making findings on the core issue of the non-disclosure of the 2012 conviction, the judge firstly stated that there had been no explanation offered by the Appellant at all (paragraph 10). This is of course wrong; she had done so in the grounds of appeal to the First-tier Tribunal. Second, and in apparent contradiction to what he later said in paragraph 10, at paragraph 4 the judge stated tat there was an explanation, but wrongly attributed this to a witness statement when in fact it came from the grounds. Third, the judge then failed to accurately state what the explanation was. On such a core matter (being in fact the sole issue on which the appeal turned), these inaccuracies amount to an error of law, and this error is obviously material to the outcome of the appeal.

15. We therefore set aside Judge Devittie's decision.

**Re-make decision**

16. It was appropriate for us to go and re-make the decision without adjourning the appeal yet again. Neither party sought to suggest otherwise.

*The evidence*

17. We have an appeal bundle from the Respondent, including: the 2013 application form; statements from the Appellant and her mother; passport extracts; and the reasons for refusal letter. The notice of appeal is on file. We have the PNC print out provided to us My Ms Fijiwala. We have also taken account of the note of hearing taken by Judge Zucker on 17 April 2015.

18. We heard oral evidence from the Appellant. She told us, as she had Judge Zucker on 17 April, that she was unaware of the 2012 conviction when the 2013 application form was completed by her then representatives. They had read out questions from the form to her and she had given truthful answers. She was first aware of the 2012 conviction during the prosecution for criminal damage in January 2014. She had not paid a fine of £140. The 2012 conviction was being challenged. The Appellant had been living at her mother's house throughout the relevant period.

19. The Appellant's mother also told us that no fine had been paid.

20. There were no questions from Ms Fijiwala.

*Submissions*

21. Ms Fijiwala relied on the original reasons for refusal letter. She submitted that because the PNC print out did not show a subsequent conviction for a failure to pay the £140 fine for the fare evasion, the Appellant must have paid that fine. It followed, she submitted, that the Appellant was aware of the conviction at the time of the 2013 application. There was no evidence of a challenge to the 2012 conviction. Judge Devittie had found that the Appellant had ties in Jamaica, and these findings were relied on. We should take the 2012 conviction into account as well as the failure to disclose it. The decisions in SS (Congo) [2015] EWCA Civ 387 and AM (s117B) Malawi [2015] UKUT 0260 (IAC) were relied on. The pending prosecutions stated in the PNC document were relevant.

22. The Appellant's mother responded on her daughter's behalf by saying that there were no ties with the father, that the Appellant had been abused in Jamaica, and that there are emotional ties here.

*Burden and standard of proof*

23. The burden of proving facts relied on in respect of the suitability requirements under Section S-LTR of Appendix FM rests with the Respondent. In respect of all other

matters the burden lies with the Appellant. The standard of proof in all matters is that of a balance of probabilities.

*Findings of fact*

24. There has never been a dispute about when the Appellant arrived in the United Kingdom and we find that she in fact came here on 6 August 2000. In absence of any evidence or suggestion to the contrary, we also find that she has remained here ever since.

25. We find that the Appellant was in fact unaware of the 2012 conviction when the 2013 application form was completed. First, we found the Appellant to be a credible witness. Her explanation of being ignorant of the conviction has been consistently provided in written and oral evidence, beginning with the grounds of appeal to the First-tier Tribunal, through the witness statements, and in oral evidence to Judge Zucker and then before us. The Appellant was not cross-examined by Ms Fijiwala.

26. Second, it is not inherently improbable that the Appellant would not have known about the conviction. Administrative inefficiencies or the non-receipt or delivery of post are possible explanations. Whist this is speculation, the fact of ignorance of the conviction is not: it is direct evidence from the Appellant.

27. Third, the absence of any subsequent conviction for non-payment of the £140 fine (which we accept was imposed) does not lead by way of sufficiently strong inference to the conclusion that the fine must have been paid and therefore the Appellant was always aware of the conviction itself. There is no positive evidence from the Respondent that a fine was in fact paid. It is well-known that payment of fines is not always followed up by the relevant agencies in a timely manner, or at all. We also take account of, and accept, the oral evidence from both the Appellant and her mother that no fine was ever paid. This oral evidence was not the subject of cross-examination.

28. In light of the above, we find that the Respondent has failed to prove the facts necessary to show that deception was practised by the Appellant in respect of the 2013 application form. We would have reached the same conclusion if the burden had rested with the Appellant.

29. We find that the conviction of fare evasion on 20 February 2012 does not constitute any form of serious offending behaviour by the Appellant. Indeed, it was very much at the lower end of the offending spectrum. We also accept that the Appellant's expression of remorse for the fare evasion is genuine. In light of the overturning of the conviction for criminal damage, there are no other convictions against the Appellant. We find that there is no material risk of re-offending or a risk to the public at large. We place no material weight on the evidence of pending prosecutions contained in the PNC print out, there being no additional evidence from the Respondent whatsoever to indicate the nature or background of the alleged offences.

30. On the evidence before us we find that the Appellant has significant ties in the United Kingdom, not least of which involve her mother. We accept that a close bond exists between them. Further, the Appellant has studied here and acquired skills which will assist her in finding employment.

*Conclusions on Paragraph 276ADE of the Immigration Rules*

31. As we have set aside Judge Devittie's decision, we are considering the Appellant's Article 8 claim afresh. In the first instance this of course entails an application of the facts to the Immigration Rules, and in particular Paragraph 276ADE.

32. The Respondent relies on the two factors in Section S-LTR.1.6 and 2.2 of Appendix FM. As at the date of decision these read:

> S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S- LTR.1.2. to 1.7. apply.
>
> …
>
> S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.
>
> S-LTR.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2. to 2.4. apply
>
> …
>
> S-LTR.2.2. Whether or not to the applicant's knowledge –
>
> (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or
>
> (b) there has been a failure to disclose material facts in relation to the application.

33. In respect of Section S-LTR.1.6, a mandatory ground, we conclude that in light of our findings of fact it has not been shown that the Appellant's presence on the United Kingdom is not conducive to the public good. This basis of refusal does not apply to the Appellant.

34. In respect of Section S-LTR.2.2, there was as a matter of fact a failure to disclose the 2012 conviction. However, this ground is a discretionary one, and we are entitled to substitute our own exercise of discretion for that of the Respondent.

35. We have found that the Appellant was unaware of the conviction when the application form was completed. There was no deception by the Appellant and this clearly counts significantly in her favour. In addition, we take account of the absence of any other convictions, the relatively minor nature of the 2012 offence, the genuine remorse in respect of that matter, and the very significant amount of time the

Appellant has spent in the United Kingdom, together with the ties that have flowed from this.

36. Taking all relevant matters into account, we conclude that in respect of S-LTR.2.2(a) and (b), discretion should be exercised in the Appellant's favour. We therefore substitute our discretion for that of the Respondent.

37. Finally, on the facts, sub-paragraph (v) of Paragraph 276ADE is clearly satisfied: the Appellant is aged between eighteen and twenty five and has lived continuously in this country for more than half of her life.

38. Therefore, the Appellant's appeal succeeds under Paragraph 267ADE of the Immigration Rules. There is no need to consider the Article 8 claim outside of the Rules.

**Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.**

**We set aside the decision of the First-tier Tribunal.**

**We re-make the decision by allowing the appeal under the Immigration Rules.**

Signed Date: 20 July 2015
H B Norton-Taylor
Deputy Judge of the Upper Tribunal

**TO THE RESPONDENT**
**FEE AWARD**

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make no award. Although the Appellant has succeeded in her appeal, the matter required further evidence and the exercise of discretion by the Upper Tribunal.

Signed Date: 20 July 2015

Judge H B Norton-Taylor
Deputy Judge of the Upper Tribunal