



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/46712/2014**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 1 February 2016**

**Decision & Reasons
Promulgated
On 16 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**PAUL OLASINBO AKINOLA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Appiah, Counsel, instructed by JF Law Solicitors
For the Respondent: Ms S Sreeraman, 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 Hodgkinson (the judge), promulgated on 4 June 2015, in which he dismissed the Appellant's appeal on Article 8 grounds. The appeal to the First-tier Tribunal was in turn against the decision of the Respondent, dated 7 November 2014, to remove him from the United Kingdom by way of directions under section 10 of the Immigration and Asylum Act 1999.

2. The Appellant's Article 8 claim was based upon his relationship with his partner (who had limited leave to remain in the United Kingdom), their own biological child and his three step-children.

Decision of the Judge

3. The judge concluded that the Appellant could not satisfy the requirements of either paragraph 276ADE of the Immigration Rules (the Rules) (paragraphs 23 to 25 of his decision) or Appendix FM to the Rules (paragraph 26).
4. He then went on to consider the Article 8 claim outside the Rules. Having regard to the ages of the Appellant's three stepchildren and the length of time that they had resided in the United Kingdom, the judge found that it would not be reasonable for these older children to leave the United Kingdom. He found that the Appellant's departure from this country would have a material effect upon his partner and the children.
5. In paragraph 33 the judge made reference to section 117B(6) of the Nationality, Immigration and Asylum Act 2002, as amended (the 2002 Act). He states in clear terms that the Appellant had a genuine and subsisting parental relationship with his stepchildren, that they were qualifying children with reference to section 117D of the 2002 Act, and that it would not be reasonable for those older children to leave this country. He then concluded that the Appellant's own younger son did not fall into that category insofar as it would be reasonable for this child to leave the United Kingdom.
6. At paragraph 34 the judge considered that it was in the best interests of the children for them to continue residing in the household of their mother and the Appellant. The judge made it very clear that it would not be in the best interests of any of the children for them to go and live in Nigeria.
7. The judge goes on to consider the Appellant's poor immigration history, stating, at paragraph 36 that he had been an overstayer for a number of years. This being the case little weight was attached to the Appellant's family life with his partner. The judge directed himself to relevant case-law including Beoku-Betts [2008] UKHL 39, MM [2014] EWCA Civ 985, Huang [2007] UKHL 11, and Nagre [2013] EWHC 720 Admin.
8. In paragraph 43 the judge states:

“...there are no properly arguable, or sustainable, grounds for giving consideration to the issue of the grant of leave to remain to the Appellant under Article 8 outside the Rules, on the basis of the particular circumstances applicable, which circumstances include, but are not limited to, the duration of the relationships affected by the Respondent's decisions.”
9. At paragraph 44 the judge says this:

“The importance of maintaining effective immigration control, whilst not a factor outweighing the interests of the children, is nevertheless, I find, still a very important factor for consideration, which factor is not, I find, outweighed in the present instance by the interests of the children based upon all the facts applicable to this appeal and to the Appellant.”

10. At paragraph 45 the judge makes reference to the Appellant’s potential ability to maintain communications with his family in this country through modern means. He also refers to the possibility of the Appellant making an entry clearance application from Nigeria in due course to rejoin his family in the United Kingdom.
11. Finally, at paragraph 46 he concludes that there are no compelling or exceptional circumstances to render the Respondent’s decision disproportionate. Therefore the appeal was dismissed.

The grounds of appeal and grant of permission

12. The Appellant sought permission to appeal on three grounds relating to Appendix FM, section 55 of the Borders, Citizenship and Immigration Act 2009, and an alleged misdirection as to section 117B(6) of the 2002 Act.
13. Permission was granted by Upper Tribunal Judge Bruce on 5 October 2015. She concluded that grounds 1 and 2 were misconceived but granted permission on ground 3 (that relating to section 117B(6) of the 2002 Act).

The hearing before me

14. There was (quite rightly) no attempt by Ms Appiah to resurrect grounds 1 and 2. Her core submission was that in light of the judge’s findings on the Appellant’s relationship with the children and the unreasonableness of them leaving the United Kingdom he should then have concluded that section 117B(6) was in effect determinative of the Article 8 claim outside of the Rules. In saying this she relied on the decision in Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC), a decision of the President postdating the hearing before the First-tier Tribunal but one which nonetheless, in her submission, simply clarifies the law as it has always been.
15. Ms Sreeraman submitted that Treebhawon is not a binding authority but is of persuasive value only. It is the Respondent’s position that section 117B(6) is simply one factor amongst others to be considered and weighed in the balance when considering Article 8 claims outside of the Rules. She further submitted that in this case there were no compelling circumstances, that the judge had in fact conducted an overall balancing exercise and had reached sustainable conclusions.

16. I pointed out to both representatives the apparent contradiction within paragraph 44 of the judge's decision. Ms Sreeraman submitted that when one looked at the ultimate conclusions of the judge, paragraph 44, whilst perhaps unfortunately worded, nonetheless did not represent a material error of law. Ms Appiah submitted that there was a true contradiction within this paragraph.

Decision on error of law

17. In my view there is a material error of law in the judge's decision.
18. Contrary to Ms Sreeraman's submissions I find that the decision in Treebhawon does represent an accurate statement of the law as regards Section 117B(6) of the 2002 Act. In clear terms the President finds that where the three constituent elements of this provision are met, there is no longer a public interest in the removal of the individual concerned. With reference to paragraphs 14 to 24 of Treebhawon, I rely on the President's analysis of the relevant provisions and his conclusions thereon.
19. In my view there is no material inconsistency or tension as between Treebhawon and SS (Congo) [2015] EWCA Civ 387, as was implied by Ms Sreeraman's submissions. First, the Court of Appeal was not concerned with Part 5A of the 2002 Act. Their focus on claims outside of the Immigration Rules did not encompass the 'regulating factors' set out in sections 117A-D of the 2002 Act. Second, the Court was not laying down a legal test of "exceptionality" or "compelling circumstances": it was describing the character of successful outcome decisions. Third, in any event it seems to me quite possible to regard section 117B(6) as representing a statutory example of an "exceptional case" or a "compelling circumstance".
20. Applying Treebhawon to the appeal before me it is clear that on the judge's unchallenged findings, particularly at paragraph 33, the three constituent parts relevant to section 117B(6) have been met by this Appellant: first, that he had a genuine and subsisting relationship with the children; second, that the children were qualifying children; third, that it would not be reasonable for the qualifying children to leave the United Kingdom. This being the case, the public interest element under section 117B(1) fell away. The judge's attribution of weight to the public interest at paragraphs 35 and (on a fair reading) paragraph 44 was therefore erroneous. This clearly had a material effect on his decision as a whole.
21. As indicated above, paragraph 44 does not in fact contain a genuine contradiction. In view of the judge's ultimate conclusion on the appeal, I am satisfied that the use of the first "not" in that passage was simply an infelicitous slip when seeking to describe the children's best interests as a primary consideration. There is no error of law here.
22. In light of the above I set aside the decision of the judge on the basis that he misdirected himself as to the effect of section 117B(6) of the 2002 Act.

Re-making the Decision

23. None of the judge's findings of fact have been challenged by the Respondent and they are preserved for the purposes of the re-making of the decision. Relying on the findings, in particular those contained within paragraphs 32, 33 and 34, the requirements of section 117B(6) of the 2002 Act have been met by this Appellant.
24. Applying Treebhawon, I conclude that the otherwise very weighty public interest consideration in this appeal falls away.
25. The factors in section 117B(4) and (5) have no application to the family life enjoyed with the qualifying children.
26. It follows in my view that the appeal must succeed on Article 8 grounds outside of the Rules.
27. If it transpires that Treebhawon is incorrect, I would nonetheless conclude that removal of this Appellant from the United Kingdom would be disproportionate in all the circumstances.
28. There is certainly no dispute that family life exists between the relevant individuals in this case and that removal would constitute a very significant interference with the family life. In respect of proportionality the public interest would be a very significant factor in the Respondent's favour and against the Appellant. It is of course very significant that the Appellant could not meet the requirements of the Immigration Rules themselves. This is on the basis of the status of his partner and the relevant children but for no other reason. I factor in the Appellant's status or lack thereof whilst in the United Kingdom and therefore little weight is to be given to the development of the family life with the partner. There is no dispute relating to the Appellant's ability to have maintained himself and to speak English.
29. As mentioned already, the three elements of section 117B(6) are met. In addition, I find that it would not be reasonable for the youngest child to leave the United Kingdom. His mother would remain in this country because of the three step-children, and there has never been a suggestion he should be separated from her. Further, as the judge found, it would be contrary to all of the children's best interests to leave the United Kingdom. I agree.
30. The Appellant's removal would therefore entail a complete separation in terms of direct contact between him, his partner and the children. This too would be contrary to the children's best interests (again, I am in agreement with the judge on this).
31. The ultimate question is whether the public interest in this case justifies outweighing the best interests of the children and the separation of the Appellant from his stepchildren and his own biological son. In balancing out all the relevant matters, I conclude that the following factors go to outweigh the public interest: the best interests of all the children in remaining in the United Kingdom; the best interests of all the children in

remaining in the same household of the Appellant; the satisfaction of section 117B(6).

32. For all of these reasons I conclude that removal would be disproportionate.

Notice of Decision

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

I set aside the decision of the First-tier Tribunal.

I re-make the decision by allowing the appeal on human rights grounds.

No anonymity direction is made.

Signed

Date: 11 February 2016

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 11 February 2016

Deputy Upper Tribunal Judge Norton-Taylor