



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07669/2017
HU/07671/2017
HU/07672/2017

THE IMMIGRATION ACTS

Heard at Manchester
On 19th September 2018

Decision & Reasons Promulgated
On 22nd October 2018

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**(1) TEMITAYO [S]
(2) W O
(3) F S**

**(ANONYMITY DIRECTION MADE IN RESPECT OF
SECOND AND THIRD APPELLANT ONLY)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss Hashmi of Counsel, instructed by Equity Law Chambers
For the Respondent: Mr Tan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, citizens of Nigeria, have permission to challenge the decision of Judge Maxwell of the First-tier Tribunal (FtT) dismissing their appeals against the decision of the respondent made on 23 June 2017 to remove the first appellant as an illegal entrant along with the other two as her dependants. The second and third appellants are aged 9 and 6 respectively. The second appellant was born in June 2009. They have different fathers and neither of them has any contact with their father. The first appellant had claimed asylum in August 2013 and her subsequent appeal was dismissed by the FtT on 4 December 2013. She was unsuccessful in seeking permission to appeal that decision.
2. The appellants' grounds maintain that the judge materially erred in law in (1) failing to apply the guidance given by the Upper Tribunal in **SF and Others** [2017] UKUT 00120 (IAC) and **Treebhawon** [2015] UKUT 00674 (IAC) by wrongly regarding it as supplanted by statutory public interest considerations; (2) wrongly applying **Devaseelan** principles by concluding that the position of the first and third [the judge meant second] appellants had not changed in any material respect since December 2013.
3. The focus of ground (1) is what the judge stated at paragraph 36:

“36. As the public interest provisions are contained in primary legislation they override existing case law. Section 117A(3) confirms that the Tribunal is required to carry out a balancing exercise. It follows the Tribunal cannot just rely on the listed public interest factors as a basis for rejecting a claim but must carry out a balancing exercise where a person's circumstances engage Article 8(1) to decide whether the proposed interference is proportionate in all the circumstances.”
4. I heard helpful submissions from Miss Hashmi and Mr Tan, the former highlighting the recent reported decision of the Upper Tribunal in **MT and ET** [2018] UKUT 00088.
5. I consider that the judge materially erred in law.
6. As regards ground (1), I am not persuaded that the judge meant by his first sentence of paragraph 36 to suggest that somehow Section 117B of the NIAA 2002 and case law were in competition; the judge meant only that the provisions of the former had to be applied. The public interest considerations set out in Section 117B are not an exhaustive list and as the judge correctly stated, he was required to carry out a balancing exercise. That said, ground (1) does properly highlight the fact that despite citing case law, including **MA (Pakistan)**[2016] EWCA Civ 705 and despite noting correctly that he was “bound to take into account that the second appellant had resided in the UK for seven years (and was thus a qualifying child)”, the judge nowhere acknowledged that, following **MA (Pakistan)** his task was to ask whether there were “powerful reasons” why the second appellant should be prevented from remaining in the UK. Mr Tan sought to argue that the judge's reasons for concluding at paragraph 26 that it was reasonable to expect the second appellant to leave the UK did in effect voice such powerful reasons, but the judge's approach appears rather to

have been that it was for the appellants to show powerful reasons why they should be allowed to stay.

7. In assessing ground (2), it can be said that the judge did recognise that the fact that the second appellant had now been in the UK for over seven years did constitute a material change of circumstances. That is clearest from paragraph 23 where the judge stated:

“23. As I have already indicated, I am mindful of the fact that the passage of time means that the second appellant has now lived in the United Kingdom for more than 7 years. This means I must consider whether she meets the requirements of paragraph 276ADE(v) and/or whether her circumstances are such as to engage section 117B(6) as well as taking account of the respondent’s policy in relation to the removal of non-British children. None of these issues were considered in the earlier decision as the second appellant was under the age of seven years at that time. I note the respondent has made no reference to her policy in the refusal however it is a consideration I am bound to take into account.”

However, this recognition co-existed with an unqualified statement at paragraph 17 that “there are no factors before me that were not considered by the judge at the first appellant’s most recent appeal”.

8. Taken on its own, I do not consider ground (2) describes a material error of law since paragraph 17 read in context was primarily intended to address the asylum-related aspects of that appeal. Nevertheless, this ground does reinforce the point that the judge did not really grasp how material the change in the second appellant’s circumstances had been as a result of residing in the UK for seven years and coming under a different set of criteria as set out in Home Office policy and case law.
9. For the above reasons I consider that the judge’s decision must be set aside for material error of law.
10. Both parties expressed the view that if I set aside the decision of the FtT Judge I was in a position to re-make the decision without further ado. I agree. In re-making the decision I have regard to the appellants’ indexed bundles that include a number of documents relating to the second and third appellants’ education and achievements.
11. Whilst I have set aside the decision of the FtT Judge there has been no challenge to his principal findings of fact. Those findings include the following: that the first appellant has an appalling immigration history (paragraphs 12 – 13, 28); that the first appellant has a sickle cell trait but this is a genetic condition, not a disease and she had not produced evidence to show she suffered from any significant ill-effects (paragraph 14); that none of the appellants has significant health problems (on the second appellant, see paragraph 26(i)); that the appellants would have family support in Nigeria (paragraph 21) and would not be destitute (paragraph 18(ii)); that both children would be able to continue their education in Nigeria (paragraph 18(ii)); that language would not be a significant obstacle to the children because in Nigeria

English is the official language (paragraphs 21 and 26(iv)); that overall there would be no insurmountable obstacles or difficulties to their integration; that there is a lack of family relationships in the UK (paragraph 26(iii)); and that the third appellant is relatively young and removal to Nigeria would not have a significant effect. As regards the second appellant, the judge's findings (on which I have already drawn) were that:

"26. When considering this policy, I note the following:

- i. Although a number of assertions have been made in relation to the state of health of the second appellant, there is no evidence before me to suggest she is undergoing any course of treatment or suffering from any life-threatening or serious illness. There is no evidence before me to suggest that the healthcare available in Nigeria would, in relation to the second appellant, be of such poor quality as to threaten her well-being.
- ii. The second appellant would have to leave the United Kingdom if her appeal is not allowed however she will not do so alone but rather in the company of her mother and her younger sibling; neither of whom have any right to which he clearly was not entitled to it in the United Kingdom.
- iii. There is already a finding of fact as to the lack of family relationships in the United Kingdom and there is no evidence before me to suggest that circumstances have changed since the previous decision of this Tribunal.
- iv. I am satisfied that the second appellant, along with the first and third appellants are citizens of Nigeria and whilst I accept that neither she nor her younger sibling have ever visited that country, I am mindful that she is very young and of an age when integration is at its greatest ease. Further, English is a language in Nigeria the second appellant may well need to learn a local language but she has sufficient command of existing language in Nigeria to enable her to communicate with her peers and to understand lessons in an English speaking school."

12. I remind myself that when conducting the proportionality assessment very significant weight must be given to the fact that the second appellant has been in the UK all her life, having been now resident for nine years. She cannot reasonably be expected to be removed from the UK unless there are powerful reasons to the contrary. I remind myself, as well, that in **MT and ET** the Upper Tribunal allowed the appeals of appellants, also Nigerian, where the qualifying child (aged 14) had been in the UK for over ten years and had embarked on a course of studies leading to the taking of GCSEs.
13. In the present case I consider there are powerful reasons why the second appellant can reasonably be expected to leave the UK in the company of the first and third appellants. Whilst the second appellant has put down roots in the UK, she is still under 10. Both children are making excellent progress at their school (and have

some involvement in their local church), but the evidence does not indicate that either has established significant links in the UK outside their own family.

14. The appellants have no other family relationships in the UK. They will be able to receive education in Nigeria in English and they are of an adaptable age. In Nigeria they will have family support. There is no evidence to indicate that despite the fact that neither child has lived in Nigeria, they would face significant difficulties in integrating (the first appellant has lived there for most of her life). None of the appellants has a significant health problem. The first appellant is educated. So far as concerns the best interests of the two child appellants, the balance of considerations indicate that they lie in remaining with the first appellant, but not necessarily in the UK.
15. In assessing the factors to be weighed in the proportionality assessment and in evaluating whether they amount to powerful reasons why the second appellant should not be expected to leave the UK, I must adopt the approach that public interest factors stand to be taken into account both in assessing whether the appellants can meet the requirements of the Immigration Rules including on the basis of private life considerations (paragraph 276ADE(v)) or by satisfying the requirements of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. In this context it is necessary to examine in more detail what comprised the first appellant's appalling immigration history. This was dissected by the FtT Judge at paragraph 12:

"12. The first appellant has an appalling immigration history. During the course of her asylum appeal (AA/09830/2013), she was found to have lied both to that Tribunal and the Tribunal that had heard her earlier appeal against the refusal of a Residence Card. The judge described the first appellant as mendacious. I cannot ignore these findings."

It was also noted in paragraph 6(i) that the first appellant had arrived in the UK using a false passport.

16. On its own it is arguable that this immigration history constitutes a powerful reason for requiring the second appellant to leave the UK; and of course, I must also take into account that the immigration wrongdoings of a parent should not be visited upon the children in any direct way. However, when I weigh up the factors pointing in favour of the public interest in this case, I consider they do amount in their totality to "powerful reasons". I am conscious that in **MT and ET** the Tribunal did not consider as a powerful reason the parent's abuse of immigration law and receipt in the past of a community order for using a false document to obtain employment. I do not in any event consider it helpful to try and compare two different sets of facts or seek to link them along a spectrum of immigration misconduct. What I do see fit to do, however, is assess that the first appellant in this case has sought to obtain immigration advantage over a lengthy period - having used a false passport on entry and unsuccessfully claimed asylum; having applied for an EEA residence card in 2008 without any foundation in fact; having failed to depart despite the issuing of enforcement notices; having been considered by two different FtT Tribunals to be

mendacious and (by FtT Judge Maxwell) to be someone who has “simply attempted to play the system making futile application after futile application and being content to lie both to the respondent and this Tribunal in her attempts to gain leave to remain” (paragraph 20). I repeat the observation I made earlier that the appellants’ grounds make no challenge to this or any other of Judge Maxwell’s findings of fact.

17. For the above reasons I conclude that the appellants cannot meet the requirements of the Immigration Rules and in particular the second appellant does not meet the requirements of paragraph 276ADE(1). Neither do they satisfy the reasonableness requirement set out in Section 117B(6) of the 2002 Act. Having weighed all the competing considerations and even taking as my starting point that the second appellant (and in consequence the first and third appellants) should not be expected to leave the UK unless there exist powerful reasons to the contrary, I conclude that the decisions of the respondent do not amount to a disproportionate interference with their right to respect for family or private life.

Notice of Decision

The decision of the FtT Judge is set aside for material error of law.

The decision I re-make is to dismiss the appellants’ appeals.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the second and third appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 16 October 2018



Dr H H Storey
Judge of the Upper Tribunal