



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/11022/2016
HU/11024/2016
HU/11025/2016
HU/11030/2016
HU/11033/2016
HU/11036/2016

THE IMMIGRATION ACTS

Heard at Field House
On 9th January 2018

Decision & Reasons Promulgated
On 25th January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ROA (FIRST APPELLANT)
OD (SECOND APPELLANT)
SIA (THIRD APPELLANT)
SETA (FOURTH APPELLANT)
AOA (FIFTH APPELLANT)
AAA (SIXTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Allison of Counsel instructed by Refugee & Migrant Forum
of Essex and London
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appeal against a decision of Judge Rastogi of the First-tier Tribunal (the FtT) promulgated on 22nd September 2017.
2. The Appellants are Nigerian citizens. The first Appellant is the father of the third, fourth, fifth and sixth Appellants and the second Appellant is their mother. At the date of the FtT hearing, the four minor Appellants were aged 10, 8, 5 and 1.
3. The Appellants applied for leave to remain in the UK, the application being based on their family and private lives. The application was refused on 8th April 2016, and the Appellants appealed to the FtT.
4. The FtT found that at the date of application the third Appellant had resided continuously in the UK for a period in excess of seven years, and by the time of the FtT hearing, so had the fourth Appellant. The FtT noted that there had been a previous appeal hearing which related only to the second Appellant, which had been dismissed. The FtT was provided with a copy of the previous appeal decision.
5. The FtT found at paragraph 37 that it was “conceded that the real if not only issue in this appeal is the reasonableness of the third and fourth Appellant leaving the United Kingdom”.
6. The FtT found at paragraph 56 that the best interests of the children would be served by remaining in the United Kingdom as a family unit. However the FtT recognised that it must then go on and consider, bearing in mind the length of residence of the third and fourth Appellants, whether it would be reasonable for them to leave the United Kingdom.
7. The FtT in considering reasonableness, took into account the behaviour of the first and second Appellants, as the parents of the children, and found that it would not be unreasonable for the third and fourth Appellants to return to Nigeria with their parents and younger siblings. Therefore the FtT found that the Respondent’s decision to refuse the Appellants’ leave to remain in the UK, was not a disproportionate interference with their right to respect for their private lives, and was not unlawful under section 6 of the Human Rights Act 1998. The appeals were therefore dismissed.
8. The Appellants applied for permission to appeal to the Upper Tribunal. Grounds, settled by Counsel, are lengthy running to 29 paragraphs and sixteen pages. It is not necessary to set them out in full here. In very brief summary, three Grounds of Appeal were relied upon.

9. Firstly it was contended that the FtT had erred in purporting to follow the Court of Appeal judgment in MA (Pakistan) [2016] EWCA Civ 705. This was because the Supreme Court has granted permission to appeal in MA (Pakistan) and therefore the hearing should have been adjourned until the Supreme Court had considered MA (Pakistan) and published its decision.
10. Secondly it was contended that the FtT failed to properly apply the correct legal principles in MA (Pakistan). In brief, it was contended that the FtT had followed the principles in Treebhawon [2017] UKUT 00013 (IAC) rather than the principles in MA (Pakistan).
11. Thirdly it was contended that the FtT had erred by failing to make a material finding of fact, by failing to make a finding not only as to the relative quality of education that the children would receive in Nigeria, but whether they would receive any education at all.
12. Permission to appeal was granted by Judge P J M Hollingworth of the FtT who found the grounds arguable and also of his own volition found it arguable that the FtT erred by failing to “have actively sought further evidence in this context given the duty in applying section 55” in relation to considering the best interests of the children. Following the grant of permission to appeal the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. In summary it was contended that the FtT directed itself appropriately. It was noted that the Appellants had been legally represented at the hearing, and it was contended that there was no basis for the FtT to consider that the evidence had not been fully presented. The Respondent’s view was that the FtT had given adequate reasons for the conclusions reached and had not erred in law.
13. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

14. Mr Allison had lodged prior to the hearing a skeleton argument dated 5th January 2018, and at the commencement of the hearing lodged a supplemental skeleton argument dated 9th January 2018. Also submitted by Mr Allison at the hearing was case law, indexed 1–4.
15. Mr Allison made an application to introduce fresh evidence to be considered at the error of law hearing, the application being made pursuant to rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008. I was asked to admit evidence that had not been before the FtT, in relation to education in Nigeria. Mr Kotas objected, submitting that no good reason had been given as to why any relevant evidence had not been presented to the FtT.

16. I declined to admit fresh evidence in relation to education in Nigeria, which had not been before the FtT. No satisfactory explanation was given as to why this evidence had not been produced before the FtT, and I was satisfied that it was appropriate to consider whether the FtT had erred in law, based upon the evidence that had been produced to the FtT.
17. I then heard submissions from Mr Allison who relied upon the Grounds of Appeal, as amended. Reliance was no longer placed on paragraphs 14–17 of those grounds for the reasons given in the supplemental skeleton argument. Reliance was also placed upon the skeleton argument dated 5th January 2018, and the grant of permission to appeal.
18. Mr Allison expanded at length upon the grounds, and asked that I firstly consider whether an error of law was disclosed by Grounds 2 and 3, and only if I did not find an error of law, was I asked to consider Ground 1, and adjourning the hearing until the Supreme Court had ruled on MA (Pakistan).
19. With reference to Ground 2, Mr Allison submitted that the FtT had relied significantly on Treebhawon which was not a case concerning the reasonableness of a child with seven years' residence in the UK having to leave this country. Therefore the test in Treebhawon was not appropriate and by considering this test, the findings of the FtT were infected by legal error.
20. With reference to Ground 3, it was contended that the FtT had failed to make conclusive findings in relation to the education available in Nigeria which amounted to a material error of law. Mr Allison made it clear that he was not submitting that the level of education in Nigeria was so poor that any child removed there would have a valid Article 8 claim, but it was contended that the FtT should have made findings as to whether the children in this case, would receive an education.
21. Mr Allison also relied upon the point made in the grant of permission that if the FtT was not satisfied in relation to the evidence given on behalf of the Appellants, then the FtT should proactively have sought to obtain further evidence.
22. Mr Kotas relied upon the rule 24 response. In brief, it was contended that the FtT had followed the principles in MA (Pakistan) and had not misdirected itself in law. With reference to education, the FtT had dealt with this more than adequately and made findings which were supported by sustainable reasons.
23. In response Mr Allison submitted that although the FtT had set out in its decision, a summary of the principles in MA (Pakistan) it had in fact relied upon the test in Treebhawon which amounted to a material error of law.
24. At the conclusion of oral submissions I reserved my decision.

My Conclusion and Reasons

25. I will deal with the grounds in the order that they were presented at the hearing.
26. Dealing with Ground 2 I find no error of law, as I find that the FtT correctly applied the principles in MA (Pakistan). At paragraph 56 the FtT found that the best interests of the children would be to remain in the UK. The best interests of the children were considered as a primary consideration, and the FtT explained at paragraph 42 that “the assessment of what is in the children’s best interests is not to be conflated with any other considerations such as the immigration history of the parents, albeit that is a relevant consideration later on in the analysis”. It is not contended the FtT erred in considering the best interests of the children.
27. The FtT recognised that the third and fourth Appellants had resided in the UK in excess of seven years. I find at paragraph 39, the FtT correctly summarised the legal principles in MA (Pakistan), and paragraph 39 is reproduced below;
 39. Paragraph [45] of MA confirms that when considering the question of whether it is reasonable for a qualifying child to leave the United Kingdom pursuant to section 117B(6), a Court should have regard to the conduct of the applicant (in this case the main Appellants) and that, of course includes their immigration history [114]. The CA continued that ‘where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted’ and at [46] that it should be given significant weight. At [49] the CA explained the reason for that as twofold: ‘first because of its relevance to determining the nature and strength of the child’s best interests, and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary’. At [46] after discussing the significance of the Respondent’s IDI, the CA stated ‘in these cases there must be a very strong expectation that the child’s best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment’. However at [47] the CA said that ‘even where the child’s best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend on a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed he should return. At [102] the CA observed that qualifying children in the UK include both UK citizens and those with seven year residence and therefore they may be treated in a similar way. At [103] the Court recognised that the conduct of the parents should only be considered as part of the proportionality exercise after due weight has been given to the fact of seven year residence which is a significant factor pointing away from removal.
28. The above paragraph discloses no error of law, and I am satisfied that the principles summarised above were applied by the FtT. I do not find that the reference by the FtT to Treebhawon infects the conclusions made by the FtT, in relation to reasonableness of return to Nigeria, in relation to the third and fourth Appellants. In

fact, it may not have been necessary to refer to Treebhawon, but the references do not amount to a material error of law.

29. The FtT considered reasonableness in relation to the third and fourth Appellants at paragraphs 58–64. The fact that the FtT had in mind the correct test is confirmed by paragraph 58 which is set out below;

58. I will now move on to consider whether, bearing in mind my decision as to the third and fourth Appellants' best interests, it is nevertheless reasonable for them to leave the United Kingdom. For this part of my deliberation, I remind myself that I should take into account other factors such as the conduct of their parents after having apportioned significant weight to the length of the children's residence and that this points away from removal.

30. In considering reasonableness the FtT makes two references to Treebhawon, the first at paragraph 61 which is set out below;

61. The main Appellants may not have entered the United Kingdom with unlawful intentions. However, that does not change the fact that they made the positive decision to remain here unlawfully. They did not make any attempt to regularise their status before the second Appellant was encountered in 2008 or indeed for the next three years. At this stage, on their own evidence, the second Appellant was working for cash and they could have either decided to leave or paid for an application to stay. They stayed anyway and continued to expand their family. As noted in Treebhawon [51] in the context of the present immigration law, these are factors to which I must attach significant weight.

31. The FtT was entitled to take into account the fact that the parents had made a positive decision to remain in the UK unlawfully and made no attempt to regularise their status until 2011. Reference to Treebhawon in paragraph 61 is not an error of law and does not indicate that an incorrect test was applied by the FtT.

32. The second reference to Treebhawon in relation to reasonableness is at paragraph 63 which is set out below;

63. I recognise that for children who have never been to Nigeria, or who were very young when they left, relocating there would be difficult and there would of course be a significant period of adjustment. I remind myself of the finding of the UT in Treebhawon (see [40] above). However, they would have the support not only of their parents but also of other family members. The culture is not one which would be unfamiliar to them as they have been raised in a Nigerian household and the language is familiar to them. Their aptitude for learning, as clearly evidenced, could be used to improve their language skills. In any event, at school, English is the main language. They have intelligent and resourceful parents who would no doubt support their learning.

33. Reference to Treebhawon in paragraph 63 relates to integration back into Nigeria. This does not indicate that an incorrect legal test has been applied when considering whether it would be reasonable for the children to return.
34. The FtT, in my view, recognised, as set out in paragraph 39, that if a child had seven years' residence, leave should be granted unless there are powerful reasons to the contrary. The FtT set out those powerful reasons. They include the behaviour of the parents in overstaying, and making a deliberate decision to remain in the UK unlawfully. The parents made no attempt to regularise their status until 2011, the second Appellant having been in the UK since 2007 and the third Appellant since 2008. The family have been housed at public expense, and a debt to the NHS of £23,000 incurred. The second Appellant had been working without permission.
35. At paragraph 62 the FtT acknowledged that the third and fourth Appellants had ties in the UK in the form of friends and neighbours, and noted the family ties that they would have in Nigeria.
36. In conclusion, I find that Ground 2 discloses no material error of law, and in my view the FtT correctly applied the principles in MA (Pakistan).
37. I next consider Ground 3 and the contention that the FtT did not make a material finding of fact in relation to whether the third and fourth Appellants would be deprived of education in Nigeria. I find no material error of law. In my view the FtT considered education in relation to all the children. The FtT found at paragraph 56, the best interests of the children would be to remain in the UK, commenting that the education they would receive in the UK is likely to be superior to the one they would receive in Nigeria.
38. The FtT found that the children were not at a critical stage in their education, and this is certainly a finding that was open to the FtT to make, and discloses no error of law. The FtT considered the only objective evidence submitted on behalf of the Appellants in relation to education, that being a document printed from the Unicef website which is initially referred to at paragraph 13 of the FtT decision.
39. At paragraph 34 the FtT finds that weight can be attached to that document, which confirms that there is free education in Nigeria for children between 6 and 14 years of age, although the FtT comments that provision of that service to all children is inadequate for a number of disparate reasons, and many children in Nigeria do not benefit from education, and financial constraints is one of the obstacles.
40. Further, the FtT goes on to note at paragraph 35 that both of the main Appellants were educated to at least year 9, and the first Appellant's family were able to afford to send her and her brother to university, and her brother was educated to Masters degree level. The second Appellant's parents had sufficient funds to maintain their own home.

41. I find the FtT does in fact make a finding that the children would be educated in Nigeria. At paragraph 36 the FtT makes a finding that on the evidence presented, the Appellants have not proved the collective means of the family in Nigeria are such that they could not support the children with any of the costs associated with education.
42. I conclude that the FtT makes appropriate findings in relation to education, and did not fail to make a material finding of fact.
43. With reference to the issue raised by the judge granting permission, which appears to suggest the FtT should have adjourned the hearing to obtain further evidence, I find no error of law. This was not a point raised on behalf of the Appellants in the very comprehensive and detailed Grounds of Appeal. The Appellants were legally represented at the hearing by experienced Counsel. There was no application for an adjournment. If it was felt that insufficient evidence was available, then there would have been an application for an adjournment. The FtT was entitled to consider that in the absence of any application for an adjournment, the Appellants had presented what evidence was available to discharge the burden of proof. The FtT did not err in failing to adjourn the hearing of its own volition.
44. Finally dealing with Ground 1, I find no error of law in the FtT proceeding to hear the case relying upon MA (Pakistan) and following the Court of Appeal authority. I note there was no application to adjourn the hearing, and it has not been made clear to me, whether permission to appeal to the Supreme Court in MA (Pakistan) was actually granted when the FtT hearing took place. This ground has no merit.

Notice of Decision

The decision of the FtT does not disclose a material error of law such that the decision must be set aside. I do not set aside the decision. The appeals are dismissed.

Anonymity

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made because this appeal involves consideration of the best interests of children, and is made pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date

9th January 2018

Deputy Upper Tribunal Judge M A Hall

Appeal Numbers: HU/11022/2016
HU/11024/2016
HU/11025/2016
HU/11030/2016
HU/11033/2016
HU/11036/2016

**TO THE RESPONDENT
FEE AWARD**

The appeals are dismissed. There are no fee awards.

Signed

Date 9th January 2018

Deputy Upper Tribunal Judge M A Hall