Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09283/2016
HU/09285/2016
HU/09288/2016
HU/09289/2016
(HU/09277/2016)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th November 2018	**On 21st November 2018**

Before

UPPER TRIBUNAL JUDGE COKER

Between

OBA
AMIA
OJA
AJEA
(AAA)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Fitzsimons, instructed by The Cardinal Hume Centre
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellants in this determination identified as OBA, AMIA, OJA, AJEA, AAA. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. AAA is no longer in the UK, having left the UK prior to the hearing before the First-tier Tribunal. Although he sought and was granted permission to appeal the decision of the First-tier Tribunal, it is accepted by all parties that he has, because of his departure from the UK, abandoned his appeal. The evidence of OBA that he is in Nigeria and remains in contact with the family was accepted by the First-tier Tribunal and is a finding that remains undisturbed.

2. The appellants' human rights claim, made on 20th January 2015, was refused on 15th March 2016. A copy of the application was not in the evidence before the First-tier Tribunal, but various documents were in the bundle and it seems that those documents were before the respondent when she made her decision and were before the First-tier Tribunal judge. They appealed to the First-tier Tribunal and, in a decision signed on 27th October 2017, First-tier Tribunal Judge Wylie dismissed their appeal.

3. Permission to appeal was sought and granted on the grounds that it was arguable the judge had, in making her finding that the appellants would be able to look to their husband/father for support in Nigeria on their return there, had failed to have adequate regard to the evidence before her and did not make a decision based on the evidence before her.

Background

4. All appellants are Nigerian citizens. OBA and AAA are wife and husband. The other three appellants are their children. AMIA was born on 28 September 2007 in South Africa and is diagnosed as suffering from sickle cell anaemia; OJA was born on 21st February 2010 in the UK; AJEA was born on 9 December 2012 in the UK and is diagnosed as suffering from sickle cell anaemia.

5. AAA came to the UK as a Tier 4 student with leave valid from 14 January 2009. Although subsequently extended, his leave was curtailed with no right of appeal on 11 April 2014. He left the UK around August 2015.

6. OBA arrived in the UK on 3rd June 2009 with AMIA as dependents of AAA; their leave to remain was curtailed in line with AAA. OJA and AJEA were both born in the UK whilst their parents were lawfully in the UK as students/dependents. When they initially arrived in the UK they lived in Aberdeen until 2014 and then they relocated to Margate.

7. OBA's evidence to the First-tier Tribunal included that she had not been abandoned by her husband; she was not a single parent. She said that she had uncles, aunts and cousins in Nigeria but her own parents had died when she was young. Her husband's mother remained in Nigeria and before coming to the UK they had lived in her husband's family property. Her evidence was that she thought that property had been sold.

8. Prior to coming to the UK, OBA had worked as an accountant and reached a managerial position. Since being in the UK, she has undertaken voluntary work as a school volunteer and on the school parent's council in Aberdeen, assisted the church in helping people with difficult circumstances and since moving to Margate she has volunteered at a Salvation Army drop-in centre. She was at the time of the hearing, working as a senior care assistant, supporting herself and the children with her earnings together with financial support from friends, family and the church.

9. The two children with sickle cell are both prescribed penicillin and folic acid; they go for check-ups at hospital three or four times a year.

10. OBA in her evidence denied she had received treatment for a mental health problem saying that she had been found to have no mental health condition but suffering stress due to her then circumstances, with three young children.

11. The First-tier Tribunal judge said ([29]) that although AAA had left the UK prior to the decision the subject of this appeal, she "did not see that this prevented him from pursuing the appeal, as long as he was represented." This is plainly incorrect:

- AAA should have notified the respondent that he had left the UK and thus was not making an application for leave to remain in the UK. He had left the UK and could therefore not be said to be making an application for leave to remain;
- The solicitors notified the Tribunal on 16th May 2016 that they continued to represent him, submitted an out of time appeal purporting to be an "in country" appeal on his behalf, giving his address as in the UK and declaring that they had his instructions to lodge the appeal on his behalf;
- AAA and his solicitors failed to notify the Tribunal that he was not in the UK;
- AAA's representative stated at the hearing before the First-tier Tribunal judge that he represented AAA;
- To represent AAA, unless the solicitors are purporting to act for someone from whom they have not in fact received instructions, it must be assumed they have received instructions.

AAA's application for leave to remain must have ceased to exist prior to the decision of the respondent – an application for leave to remain can only be made and continued when a person is in the UK. The respondent's decision, although it seems it was made in ignorance of the fact that AAA had left the UK because his passport remained at the Home Office, was (in so far as AAA was concerned) not a valid decision. It is not possible to appeal an invalid decision. His appeal to the First-tier Tribunal should not have proceeded, it was an invalid appeal.

If this is incorrect, the fact that AAA left the UK prior to the hearing of the appeal, means that he has abandoned his appeal - see s92(8) Nationality Immigration and Asylum Act 2002. Although the Tribunal did not send AAA a

notice to that effect, no address having been provided, Ms Fitzsimons stated she was not acting for him and that in so far as both she and Mr Bramble were concerned, the appeal had been abandoned.

Error of Law

12. The grounds upon which permission to appeal were amplified in the skeleton argument filed and served by Ms Fitzsimons. I heard submissions from Ms Fitzsimmons and Mr Bramble.

Ground 1 - Failure to give adequate weight to the evidence from social services and the mental health history of the OBA.

13. OBA's evidence to the First-tier Tribunal judge was that she did not have a mental health problem. Ms Fitzsimons submitted that the First-tier Tribunal judge should not have accepted this without taking account of the medical and social services evidence that had been submitted, such evidence providing support for the submission that she did have mental health problems, and these should be factored into the decision on the reasonableness of the removal of the children with their mother to Nigeria. It was submitted that the medical evidence supported the contention that OBA lacked insight into her mental health, declined treatment and this impacted upon her ability to care for her children's health including ensuring compliance with prophylactic medication.

14. OBA's witness statement signed on 16th October 2017 and her oral evidence, states, *inter alia,* that her health is presently stable, that she is worried she may suffer a relapse in Nigeria with no friends or relatives to assist her in Nigeria, that whilst she was unwell her husband dealt with studying, caring for the children and her ill health, that she had been suffering from child care stress, that she is concerned about her children and provides support for them in their medical needs, that she has not been abandoned by her husband who has returned to Nigeria, that remaining in the UK will provide the children and her with continued support from family and friends.

15. The medical evidence relied upon in connection with OBA's health included a letter dated 22nd September 2014 stating she was liable to be detained under s2 Mental Health Act 1983 for 28 days, a letter dated 16th October 2014 stating she was liable to be detained under the Mental Health Act 1983 for up to 6 months, a referral and assessment by Enfield Social Services completed on 18th September 2014 in relation to the three children which concludes, *inter alia,* that OBA did not at that time have the mental capacity to care for her children and that her mental health condition had led to separation because of her detention under s3.

16. There was no medical or social services evidence either for OBA or the children which post-dated the human rights application (January 2015), or the respondent's decision (March 2016) or the Notice of Hearing before the First-tier Tribunal (12th June 2017 for a hearing on 16th October 2017). There was no evidence, other than OBA's evidence, before the First-tier Tribunal what mental health condition OBA had been diagnosed with. There was no evidence before the First-tier Tribunal that OBA continued to require treatment for a mental

health condition or that she was refusing treatment. There was no evidence the children were not being compliant with their medication needs. There was no evidence of any current social services input. There was no evidence before the First-tier Tribunal judge to contradict OBA's evidence that she did not have a mental health condition and that at the time of her admission to hospital she was suffering from childcare related stress or that she did not provide the necessary support for her children. The evidence before the First-tier Tribunal was that OBA undertook voluntary work and was herself working as a senior care assistant, such evidence not being contradicted by any other evidence.

17. It was plainly open to the First-tier Tribunal judge to conclude ([36]):

> "… the children's] interests are currently being safeguarded living together as a family in the care of [OBA]. Social services were involved in the child and family assessment in 2014, but there was no suggestion that there was current contact with social services or that there was any current concern about the children's care".

18. The First-tier Tribunal judge took account of the medical and social services report and gave it very little if no weight – it was out of date and there was nothing to suggest that it had any relevance to the circumstances of the appellants at the date of the hearing.

19. Ground 1 does not disclose a material error of law.

Ground 2 – Failure to make clear findings whether the family would in fact be able to look to the father for support.

20. OBA's evidence was that she was not a single mother and had not been abandoned. There was evidence in the 2014 social services report that AAA had referred the children to social services because of concern about OBA's parenting and ability to cope; there was no current evidence that she was not able to cope in his absence. There were family members in Nigeria, according to OBA. The First-tier Tribunal judge found that if she and the children were to go to Nigeria, they could be reunited as a family together. The judge also found that the children's interests were safeguarded by OBA. There was no evidence before the First-tier Tribunal judge that the children and OBA would not be reunited with AAA. There was no evidence before the First-tier Tribunal that if they were not, then there would be some level of hardship or difficulty endured by them, other than OBA's evidence that she had some unspecified concerns about a relapse if she had no support and that she received support from people in the UK. The evidence before the First-tier Tribunal was that OBA had previously worked, was working and volunteering in the UK and there was no evidence that she would not be able to turn to family members in Nigeria or that family members in the UK would not be able to continue to provide such unspecified support as they were currently providing.

21. Ms Fitzsimons was correct when she said to me that there was no positive evidence before the First-tier Tribunal that the family could look to AAA if they are removed to Nigeria. But that misses the point. The burden of proof is upon the appellants. There was a distinct lack of evidence before the First-tier Tribunal that there would be any difficulties for the appellants if they were

removed to Nigeria; they had not been living with AAA for the last two years or so, medical services are available in Nigeria for treatment of the children's sickle cell, there are family members in Nigeria and OBA had previously worked in Nigeria in a management position. Even if the First-tier Tribunal judge was wrong in concluding that the family would be re-united with AAA, there was nothing in the evidence before the First-tier Tribunal that could lead to a finding that not being reunited with AAA would result in difficulties for the appellants or that it would be unreasonable for them to go to their country of nationality. The references by Ms Fitzsimons to out dated medical and social services reports does no more than support the judge's finding that, at the date of her decision there was no such supporting evidence. It is incorrect to state that because that out-of-date evidence was not challenged then it somehow continued to be applicable.

22. There is no material error of law identified in ground 2.

Ground 3 – failure to give weight to the residence of the qualifying children

23. Two of the children – AMIA and OJA – are "qualifying" children. The oldest child had been in the UK for 8 years having come to the UK aged 2; OJA had been born in the UK and lived all his life in the UK. Although there had been previous social services involvement some two years earlier there was no suggestion in the evidence before the First-tier Tribunal judge that the children were not now in a stable environment.

24. The First-tier Tribunal judge considered the position of the children absent any consideration that the parents were overstayers at the time of the application and that the mother continued to be an overstayer. The judge did not "visit the sins of the mother upon the children" but examined the circumstances of the children in isolation. There was no evidence from friends or clubs or information about activities that either qualifying child was involved in or whether and to what extent there would be any disruption or what effect any disruption would have. There were no significant school reports save that they were performing appropriately for their chronological ages. There is reference to AAA performing the main role, but that reference is in January 2015 since which time he left the UK and, since August 2015 OBA has performed that role. There was no indication that there were any difficulties in obtaining documentation in support of the appeal. The documentary evidence did not provide any significant support and OBA's evidence was that she had not been abandoned and she was not a single parent.

25. The judge considered the evidence in connection with sickle cell. The children were on prophylactic medication. There was no evidence of sickle cell episodes and no evidence that the children were not able to receive adequate treatment in Nigeria.

26. The judge fully considered the length of time the children had been in the UK. It was open to the judge to find that OBA was, given her previous employment history, likely to find employment on return to Nigeria, that the children would be

reunited with their father and that although there would be disruption to their education, such disruption would be temporary.

27. It is not merely the fact that the children are qualifying children but whether it would be reasonable for them to go to their country of nationality. Ms Fitzsimons submitted that strong reasons were required before it could be said to be reasonable for a qualifying child to leave the UK. But in this case, there were no adequate reasons put forward. There was no evidence that the children had established any significant or meaningful social, cultural or other ties in the UK; the medical evidence did not indicate that they would suffer medically in Nigeria. The evidence was however that they would be with their father again – even if not living with him then at least in closer contact because, as OBA said, she was not a single mother and had not been abandoned.

28. There is no material error of law identified in ground 3.

Ground 4 – failure to determine the private life claim of OBA

29. It is correct that the First-tier Tribunal did not make findings regarding the private life of OBA in terms of paragraph 276ADE of the Immigration Rules; she did not make a finding on whether there were significant obstacles to her return to Nigeria.

30. But there was no credible evidence that there would be obstacles, never mind significant obstacles to her return. Her husband was there; there were family members there; she was not suffering from any mental health issues; she would be likely to find employment. There was no evidence that whatever financial support she was currently receiving (unspecified and unevidenced) would not continue at least for the short-term.

31. If the First-tier Tribunal judge had considered paragraph 276ADE, the outcome of that consideration would inevitably have been that there were no obstacles to her return there.

32. There is no material error of law identified in ground 4.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

The First-tier Tribunal decision dismissing the appeal stands.

Date 14th November 2018

Upper Tribunal Judge Coker