Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44419/2013

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham **Determination Promulgated**
On 2nd December 2015 **On 14th January 2016**

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

Miss FATOU TOURAY
(ANONYMITY NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Pipe instructed by Rashid & Co Solicitors.
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1 This appeal comes before the Upper Tribunal following our error of law decision dated 2 October 2015, which is to be read alongside the present decision and which is appended to it. In that decision we held that Judge of the First tier Tribunal Frankish materially erred in law in dismissing the Appellant's appeal against the Respondent's decision of 14 October 2013 to refuse to vary her leave to remain in the United Kingdom and making a decision under s.47 Immigration Asylum and

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Nationality Act 2006 to remove her to Gambia. The error had been to fail to have proper regard to the Appellant's best interests: [19], and [27-30].

2 At the earlier hearing, we set aside the FtT's decision and proposed to remake the decision, but it was not possible to proceed to re-hear the appeal on that occasion. We ruled that the following finds of fact of the FtT, not vitiated by error of law, would stand:

(i) it was not the intention of the Appellant's family that the Appellant should come to the United Kingdom only as a genuine short term visitor; the family's intention had been, all along, to use the visit visa to abuse the system and circumvent the settlement rules (FtT para 16);

(ii) the Appellant's paternal uncle could continue to provide a supportive role to the Appellant upon return (FtT para 21).

Hearing

3 Before us, the Appellant, her father Mr Bakary Touray, and her mother Natoma Ceesay adopted recent witness statements and gave oral evidence which is recorded in the record of proceedings. We do not set it all out here. Documentary evidence before us establishes that the Appellant's parents and her brothers KT and ST have all been granted further discretionary leave to remain until 4 February 2018. The Appellant's oldest brother MT has already been registered as British.

4 The Appellant herself said in evidence that before she travelled to the United Kingdom she did not in fact know her parents very well, but all witnesses gave evidence to the effect that since the Appellant arrived in the United Kingdom the bonds between them had grown strong, and they were all now very close. Her uncle in Gambia had looked after her but it was not the same as being with your own parents. The Appellant had obtained GCSE's at school in the UK. She would like to continue studying here; a Diploma in Health and Social Care. Her further education would suffer if she had to leave the UK. The Appellant said that talking on the phone with her family here would not be enough if she had to leave the UK. She had friends in the UK but has not maintained contact with school friends from Gambia.

5 If the Appellant had to leave the UK, the Appellant's parents both said that it would not be possible for the whole family to relocate to Gambia; their other three children had been born in the UK; MT had now been registered as British. When they had travelled on holiday to Gambia before to see the Appellant, the boys had found the climate difficult to cope with. The boys' education would suffer if they lived in Gambia. Mr Touray said that the Appellant having to leave would be devastating. The Appellant's mother is expecting her fifth child, due on 6 January 2016.

6 In evidence some further information was also given about the Appellant's circumstances before travelling to the UK. For the 12 years prior to her travelling to the UK, the Appellant had lived in a house in Brikama with her maternal grandmother (Fatoumatta Dibba), her grandfather (who we note died in September 2013), and also the Appellant's paternal uncle, Alagi Touray, his wife and their (then) two children, the Appellant's cousins. Since the Appellant came to the UK there been another cousin born to her uncle Alagi and his wife.

7 They now live in Essau, which is across the mouth of the river Gambia from the capital Banjul. There is a ferry service. The witnesses described this as taking 45 minutes to an hour. Mr Touray stated that his brother Alagi had built a house in Essau and travelled by ferry each day to work at GAMTEL, the Gambia Telecommunications Company, in Banjul from 9 am to 6 pm Monday to Thursday. He is a very busy man. Mr Touray said that his brother had built his house in Essau because that is where he could afford to build it. Although the Appellant suggested that there were no schools or colleges in Essau, her father gave evidence that there were primary and secondary schools there, but no colleges of higher education - these were in the capital.

8 The Appellant's paternal grandmother now lives with the Appellant's paternal aunt, (also called Fatou Touray) in the aunt's house which is also in Brikama. There is now nobody living in the house the Appellant lived in with her grandmother. Mr Touray described that house as now belonging to him. The Appellant's mother explained that she had a sister, Fatou Ceesay, in Tangeh, said to be about 2 hours from the capital. Fatou has 8 children. The Appellant has never lived with them. The mother of Natoma and Fatou Ceesay also lives in Tangeh, with their uncle (their mother's brother).

9 There are in fact affidavits dated 15 November 2015 sworn in Gambia from the Appellant's paternal aunt Fatou Touray and her uncle Alagi Touray. The aunt's evidence is much the same as that indicated from the witnesses before us. Alagi Touray asserts as follows:

> "3. However, I have my own family with three children and Bakary's three bedroom house is not spacious enough to accommodate us all.
>
> 4. For this reason, having built my own house, I decided to move to my property.
>
> 5. Although I have also contributed helping Fatou Touray while she was in the Gambia, I would like to suggest that Fatou stay with her parents at this moment as I will not be in a position to provide any care for her due to my commitments.
>
> 6. Also, felt it is in the best interest of Fatou Touray to stay with her family because some time in February 2016, I intend to travel to Ghana to pursue my master programme."

Submissions

10 Mr Mills accepted that it was in the Appellant's best interests to live with her parents and younger siblings, even in a case such as a present where they had been separated for a prolonged period and have only lived together relatively recently. However, it was not necessary, for those best interests to be served, for the Appellant and her immediately family to live together *in the United Kingdom.* Her family members are Gambian nationals, save for the Appellant's brother MT who is now also British, although he accepted that MT's British nationality was a significant factor in determining whether it would be reasonable to expect the whole family to live in Gambia.

11 If the Tribunal was not satisfied that the whole family could reasonably be expected to live in Gambia, Mr Mills submitted that the Appellant's return to Gambia, even if contrary to her best interests, was proportionate, given the importance of maintaining immigration control and, in light of the retained findings of fact from the First tier decision, and the Appellant's parents having been involved in a deception in securing the Appellant's entry to the United Kingdom.

12 The proportionality of the Appellant's proposed removal should be considered through the lens of the immigration rules, and neither paragraph 301 or appendix FM of the rules afforded a route to leave to remain for the Appellant - her parents do not have the appropriate form of leave to remain in the United Kingdom as required by Parliament. The Appellant's parents had entered as a student and student dependent respectively and had leave to remain until 2007, from which time they overstayed. Following judicial review proceedings they were granted discretionary leave to remain in 2011 on the basis the long residence of the children born in the United Kingdom. The Appellant however does not satisfy any requirement of leave to remain under e.g. para 276ADE(1) on the grounds of the duration of her private life in the UK. There was a strong public interest in her removal given in particular the family's action of deliberately acting to circumvent the immigration rules.

13 As regards Part 5A of the Nationality Immigration and Asylum Act 2002, Mr Mills doubted that with such a large family the Appellant's family was or would remain financially independent (a relevant consideration under s.117B(2)), and the Appellant's private life, such as it was, as distinct from her family life, was developed when her status was precarious and was to be given little weight under s.117B(5).

14 There were no 'compelling' circumstances required by SSHD v SS (Congo) [2015] EWCA Civ 387 to demonstrate that the Appellant's proposed removal would be disproportionate, although he suggested that the case was finely balanced and not 'run of the mill'.

15 Mr Pipe for the Appellant argued that the task in the present appeal was to balance the immigration history of the Appellant with the best interests of all the children. The Appellant's immigration position is not sufficiently recognised by the rules, for example, where a child has been in the United Kingdom for less than 7 years, then their private lives are not capable of being considered within the rules, because, for instance, para 276ADE(1)(vi) which considers whether there would be very significant obstacles to an applicant's integration into the country to which he would have to go if required to leave the UK, does not apply to children.

16 Mr Pipe set out the ages of the children born in the UK and argued that the question was not only about whether the children would receive a better education in the UK but that by reason of their being born and brought up in the UK they had strong roots here. He argued that with MT being British and KT being entitled to be registered as British as from 8 July 2016, the Respondent cannot argue that it would be reasonable to require British national children to leave the European Union - as per the concession made by Mr Devereux (Assistant Director UKBA and Head of European Operation Policy) in evidence to the Upper Tribunal in Sanade and others

(British children - Zambrano - Dereci) India [2012] UKUT 48 (IAC), and as maintained to the present time under the Respondent's Immigration Directorate Instruction Family Migration: Appendix FM, Family Life (as a Partner or Parent) and Private Life from page 53 onwards. In any event the Appellant's siblings had only visited Gambia for short periods.

17 The meaning of the expression 'bests interests' is informed by paragraphs 26 -30 of Re G (Children) [2012] EWCA Civ 1233, a case regarding a dispute about the welfare of children.

18 The Appellant has now been in the UK for 2 ½ years and has a strong bond with her family members. It is not in the best interests of any of the children for the Appellant to be removed from the United Kingdom.

19 As to the Appellant's potential circumstances if living in Gambia, Mr Pipe argued that it was not appropriate for the Appellant, aged 16, to live by herself. There was a paternal grandmother, in ill-health, who now lived with the Appellant's paternal aunt together with her children. There is also the Appellant's paternal uncle who expresses the view that the Appellant should live with her family and states that he does not want to care for her. There are some relatives on the maternal side of the family but the Appellant has never lived with them.

20 Regarding Part 5A NIAA 2002, Mr Pipe suggested that there was no particular test within s.117B as to financial independence, and noted that both of the Appellant's parents are in work (save for the fact that her mother has recently commenced maternity leave ahead of her expected delivery in January).

21 Mr Pipe pointed out that there is no route by which the Appellant may gain entry clearance to the UK as an alternative to the present appeal; if the Appellant's family members are successful in obtaining indefinite leave to remain at the end of their second period of discretionary leave to remain (which runs to 4 February 2018) then the Appellant will by that time be an adult and will not be able to apply for entry as a dependent child. In conclusion, any adverse point arising from the Appellant's parents' immigration history does not outweigh the best interests of the Appellant, which are to remain in the United Kingdom with her family.

22 Neither advocate objected to our looking at a map of Gambia if necessary to assist us in understanding the locations of the places mentioned in evidence.

Discussion

23 Directing ourselves according to the principles set out at paragraphs 22-26 of our error of law decision, we find that the first issue to determine is what is in the best interests of the children in this case. We also agree that the principles discussed in the context of proceedings under the Children Act 1989 in Re G (a child) are relevant, e.g.:

> "26 'Welfare', which in this context is synonymous with 'well-being' and 'interests' (see Lord Hailsham LC in In re B (A Minor) (Wardship: Sterilisation) [1988] AC 199, 202), extends to and embraces everything that relates to the child's development as a human being and to the child's present and future life as a human being. The judge

must consider the child's welfare now, throughout the remainder of the child's minority and into and through adulthood. The judge will bear in mind the observation of Sir Thomas Bingham MR in Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124, 129, that:

> "... the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems."

...

27 ... Evaluating a child's best interests involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community, is potentially relevant and has, where appropriate, to be taken into account. The judge must adopt a holistic approach ..."

24 Both parties now appear to agree that it is in the best interests of the Appellant and her younger brothers that she remain living with them. We agree, and also find, taking into account the medium and long term view of the development of the Appellant and her siblings, that those best interests would be served by the Appellant remaining in a household with her parents and siblings in the United Kingdom, rather than in Gambia. It would not be in the best interests of the Appellant's siblings, who have lived the whole of their lives in the United Kingdom, to be uprooted from that life to a place where they have little experience. The educational opportunities of all of the children, including the Appellant, are likely to be greater in the UK than in Gambia. We treat the fact that is in the best interests for the Appellant to remain with her family in the UK as a primary consideration in determining the proportionality of her proposed removal, and as an integral part of that assessment.

25 We find, applying the approach in Razgar [2004] 3 All ER 821, as follows:

(1) The Appellant clearly enjoys a family life with her family in the UK, and , to a lesser extent, will have developed private life connections with friends, and the proposed removal would amount to an interference by a public authority with the exercise of the Appellant's right to respect for that private and family life.

(2) Such interference will have consequences of such gravity as potentially to engage the operation of article 8.

(3) The interference is in accordance with the law, involving the maintenance of immigration control.

(4) The interference is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

(5) In assessing the proportionality of the end to be achieved we take into account the following factors.

26 The Appellant's parents are not settled in the UK. Routes for leave to enter or remain under paragraph 301 or Appendix FM (Section R-LTRC: requirements for leave to remain as a child under Appendix FM) are not available to her. The Secretary of State has drawn the rules under Appendix FM in such a way that a child may be granted leave to remain under that appendix only if one of their parents has also been granted leave to remain under that appendix (see E-LTRC.1.6). Neither of the Appellant's parents has gained their leave to remain by that route. There is nothing about these parts of the immigration rules which suggests that a person in the Appellant's position is not catered for by reason of inadvertent drafting; it is likely to be intentional.

27 However, Paragraph 17 of SSHD v SS (Congo) provides:

> "If the gap between what Article 8 requires and the content of the Immigration Rules is wide, then the part for the Secretary of State's residual discretion to play in satisfying the requirements of Article 8 and section 6(1) of the HRA will be correspondingly greater. In such circumstances, the practical guidance to be derived from the content of the Rules as to relevant public policy considerations for the purposes of the balance to be struck under Article 8 is also likely to be reduced: to use the expression employed by Aikens LJ in *MM (Lebanon)* in the Court of Appeal, at [135], the proportionality balancing exercise "will be more at large". If the Secretary of State has not made a conscientious effort to strike a fair balance for the purposes of Article 8 in making the Rules, a court or tribunal will naturally be disinclined to give significant weight to her view regarding the actual balance to be struck when the court or tribunal has to consider that question for itself. On the other hand, where the Secretary of State has sought to fashion the content of the Rules so as to strike what she regards as the appropriate balance under Article 8 and any gap between the Rules and what Article 8 requires is comparatively narrow, the Secretary of State's formulation of the Rules may allow the Court to be more confident that she has brought a focused assessment of considerations of the public interest to bear on the matter. That will in turn allow the Court more readily to give weight to that assessment when making its own decision pursuant to Article 8. An issue arises on this appeal as to whether the Secretary of State has made a conscientious effort to use the new Immigration Rules to strike the fair balance which Article 8 requires and whether there is a substantial gap, or not, between the content of the FTE Rules and the requirements of Article 8."

28 We are of the view that Article 8 ECHR requires consideration to be given to the respect for family and private life of children in the United Kingdom whose parents have limited leave to remain, but are not settled. There is nothing in the immigration rules which permits such a private or family life to be considered. There is therefore a gap between what is required under the ECHR and that which may be considered under the Rules. For that reason, we are of the view that the proportionality balancing exercise is more 'at large' in the present case than where the rules have been more closely fashioned to the requirements of Article 8 ECHR.

29 In assessing what the Appellant's circumstances are likely to be if remaining in the United Kingdom, we record that her family (save for MT, who is British) currently enjoy limited leave to remain here. We make no prediction about whether they will

be able to secure indefinite leave to remain, but for the purposes of our present assessment we take no negative point from the fact that her family are not yet settled in the UK. If remaining in the UK, the Appellant is likely to continue to develop bonds with her immediate family. There is another sibling due to be born in January 2016. The Appellant will continue to maintain and develop friendships in the UK. As the Appellant becomes an adult, we think it likely that if the Appellant starts to live independently, she will probably maintain close relationships with her parents and younger siblings.

30 In assessing the circumstances that the Appellant is likely to experience in Gambia if returned, we are entitled and indeed required to take into account the findings of the FtT which have not been successfully challenged by the Appellant, as set out at paragraph 2 above.

31 As regards the position of the Appellant's uncle, we reject any suggestion that he is now simply unwilling to care for the Appellant. In his witness statement of 12 August 2015, the Appellant's father states that sometime in April 2012 his brother told him that he intended to move to his own house in Essau. However, in his letter dated 17 June 2013 addressed to Bakary Touray (page 65 of Part B of the Appellant's bundle) Alagi Touray himself says:

> "I just want to inform you that my responsibility at work has increased and the fact that is full time employment is a big burden for me at this present time. It is my wish to continue to take great care of Fatou Touray but at the moment due to the nature of my work, it will be difficult to take care of her as you would like. For that been (sic) the case I would suggest that Fatou live with the family in England permanently."

32 Taking into account the findings of the FtT, we are entitled to treat any assertions of Alagi Touray about his inability to care for the Appellant with caution, as with his recent assertion that he intends to travel to Ghana for studies. We note in any event that that assertion was made in relation to himself; the evidence was silent as to whether his whole family would be relocating. There was no corroborative evidence of his proposed travel to Ghana.

33 We also note that Alagi Touray was not saying in June 2013 that he was unwilling to care for the Appellant; in fact, he says the opposite. Even if Alagi himself is busy at work (which we note in any event is only four days a week, 9 - 6 pm, plus commuting time by ferry, and therefore burdened with work no more or less than many parents in the UK), other members of his household include his wife and children; i.e. the same people that the Appellant grew up with for 12 years. The amount of time that Alagi himself may be away from the household at work is of no great relevance in determining whether the household is an acceptable environment for the Appellant.

34 We therefore consider that it is possible for the Appellant to live in Essau in her uncle's household. Although the Appellant's original home in Brikama was said, at 3 bedrooms, to be too small, no assertion has been made by any witness before us that the house in Essau could not accommodate the Appellant. We proceed on the basis

that there are schools in Essau that the Appellant could attend; that was her father's evidence, and we think it unlikely that Alagi, an educated and professional man working for a national company, would build and move to a house in a location where there were no schools for his own children. The Appellant's family in the UK could continue to contribute financially to her upbringing, as they have done in the past (there are a number of such remittances shown in the Appellant's bundle). The very positive school report from the Brikama Methodist Academy dated 4 July 2013 (Appellant's bundle Part B page 47) is testament to the fact that the Appellant was doing well in Gambia when surrounded by Alagi's family (although we accept that she was also then living with her paternal grandparents).

35 With the consent of the parties, we have considered a map of Gambia (Google maps). Even taking into account the fact that there is the physical barrier of the Gambia river between Essau (which is near the ferry port of Barra) and the westernmost part of Gambia on which Banjul, Brikama and Tengeh are situated, we find that in the immediate and medium future there would be no regular requirement for the Appellant to commute to Banjul. Bakary Touray gave evidence that there are higher education colleges in Banjul. If in future the Appellant wishes to pursue higher education and needed to take the ferry commute from Barra to Banjul to achieve that, we do not see that that would present a difficulty; indeed we do not find any great difficulty in her making such a journey at her present age.

36 We find in any event that there are other possible alternatives to the Appellant living in Essau. There are other relatives in the Brikama or Tanji/Tangeh. The impression from oral evidence was that the Appellant's maternal relatives lived in a remote rural area - however, maps indicate that Tanji/Tangeh is a coastal town some 30 minutes from Brikama. Both are a similar distance (some 50 minutes) from Banjul. Although there are many children living in the households of both the Appellant's paternal aunt and grandmother in Brikama, and her maternal aunt and grandmother in Tanji, the Appellant is at 16 a largely self-sustaining near-adult. There is a resource of an empty home in Brikama, belonging to the Appellant's father, from which capital or income could be derived to improve the accommodation in Brikama or Tanji.

37 We do not find it necessary to specify exactly what living arrangements might prevail for the Appellant in Gambia; rather we find that it has not been established that no appropriate accommodation, in an appropriate household, would be available for her in Gambia.

38 Having found above (without reference to the Appellant's immigration history) that it would be in her best interests to remain in the UK, we proceed, applying the guidance of Supreme Court in ZH (Tanzania) v SSHD [2011] UKSC 4 (1 February 2011), to see if the cumulative effect of other considerations outweigh them: See para 33:

> "... In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair

immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created."

39 In the present case, a significant countervailing factor is the fiction advanced by the Appellant's parents that following her arrived in the UK, circumstances overtook them and it was no longer possible for the Appellant to return to Gambia. The Appellant's mother more candidly stated in oral evidence before us that 'Our plan was for her to be here with her family'. The Appellant's parents came to the UK for the temporary purpose of enabling her father to study. It was her parents' active decision that her mother travel to the UK to support her husband, and leave the Appellant in Gambia being cared for by other relatives. The Appellant's parents had three children in the United Kingdom. The situation which prevailed before the Appellant entered the UK as a visitor was one entirely of her parents' making. After the Appellant's arrival in the UK, her parents then put forward an unreliable account as to why the Appellant could not return to Gambia.

40 We find that there are not sufficiently compelling factors in the present case to demonstrate that the public interest of maintaining effective immigration control (s.117B(1) NIAA 2002) is outweighed. Even if the Appellant's family in the UK are financially independent, and if the Appellant can speak English, this does not result in a positive entitlement to leave to remain in the UK: AM (s.117B) [2015] UKUT 260 (IAC). We give little weight to the private life that the Appellant may have developed in the UK during her precariously held status (s.117(5) NIAA 2002). We accept that there will be a detrimental impact on the Appellant upon returning to Gambia; she will be distressed at being separated from her parents and siblings and will have to resume her relationships with her relatives in Gambia, and make contact with old friends and make new ones. However, we find that these factors do not result in the Respondent's decision being disproportionate.

Decision

41 Having previously set aside the decision of the First tier Tribunal, we remake the decision, dismissing the Appellant's appeal.

Signed:

Deputy Upper Tribunal Judge O'Ryan

Date: 13 January 2016