IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-002590
UI-2024-002591
First-tier Tribunal Nos:
HU/60275/2022
HU/60277/2022
LH/02913/2021
LH/02914/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MK (First Appellant)
SG (Second Appellant)
(ANONYMITY ORDER MADE)

Appellants

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellants: Mr K Mukherjee of Counsel, instructed by Rodman Pearce Solicitors Ltd
For the Respondent: Ms H Gilmore, Senior Home Office Presenting Officer

Heard at Field House on 9 August 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellants. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellants are mother and daughter whose dates of birth respectively, are recorded as 23 December 1980 and 19 July 2018. They are nationals of Zambia.

2. On 9 February 2022 the First Appellant made application, on human rights grounds, for leave to remain in the United Kingdom as the parent of the Second Appellant.

3. On 9 December 2022 a decision was made to refuse the application.

4. The Appellants appealed and on 26 April 2024 their appeals were heard by First-tier Tribunal Judge sitting at Birmingham. In a decision dated 6 May 2024, Judge Mensah dismissed the appeals.

5. Not content with that decision, by application, with grounds settled by counsel dated 16 May 2024, the Appellants sought permission to appeal to this Tribunal.

6. The grounds submit that Judge Mensah failed to perform a proper proportionality assessment when determining the appeal. I should observe that at the hearing before Judge Mensah the Appellants conceded that they could not succeed in the appeals under the immigration rules, including the exceptions under the rules, and therefore they relied only upon the wider application of article 8 to the facts of their case.

7. In support of the contention that there was no proper assessment the Appellants aver that:

   (a) The judge erred in taking as the starting point the finding of the judge at an earlier appeal [heard on 20 March 2019 at Birmingham] who allowed that appeal on the basis that the Appellant's daughter should be allowed to stay for eighteen months to have necessary tests to see if she had contracted HIV from her mother and finding that to be a very discrete basis for limited leave, with Judge Mensah then finding that the Appellants sought to use that very limited leave to argue that they are now settled in the United Kingdom.

   (b) It was wrong not to go behind the findings of the previous judge and in particular to reach the finding that, "The Judge had expected the Appellant and her daughter to have the tests and if the child was free from HIV to return to Zambia".

   (c) The judge should have taken as the starting point that the previous appeal had been allowed with leave granted for 30 months with an indication that such leave could be renewed; there was, it is further submitted, never any expectation by the Respondent to require the appellants to leave the United Kingdom at any time during the period of valid leave.

   (d) Failed to give weight to strengthened family ties that had developed over the time the appellants had been in the United Kingdom.

   (e) That there was no proper consideration of paragraph 117B of the Nationality, Immigration and Asylum Act 2002

(f-h) These are other grounds, but they are essentially further submissions in relation to (e) above or otherwise catchall submissions.

8. On 4 June 2024, First-tier Tribunal Judge Dainty granted permission on the basis that it was arguable that Judge Mensah had failed to carry out a proportionality balancing exercise on the facts and evidence before her at the date of the hearing, and arguably adhered too closely to the previous judge's reasons rather than carrying out a fresh balancing exercise including considering those matters referred to in the grounds. Thus, the matter came before me.

9. At the commencement of the hearing before me, Ms Gilmour pointed out that at paragraph 15 of Judge Mensah's determination and reasons, it was stated:

> *"The Appellant and her daughter have had access to public funds via extensive use of the NHS. I do not agree that when considering the public interest, section 117B does not apply to the Appellant. The main Appellant's status has been precarious throughout, but I accept the child did not enter unlawfully given she was born in the United Kingdom. It is reasonable on the evidence before me for the child to return with her mother to the country of which they are both nationals."*

10. That was factually incorrect. The main Appellant's status was not precarious throughout. Ms Gilmour conceded that that meant that subparagraph (viii) of the grounds was made out and that because there was further evidence, that the Appellant's wish to adduce, which is contained now in a supplementary bundle produced at the last moment, the matter should be remitted to the First-tier Tribunal to be heard afresh. Mr Mukherjee did not demur in those circumstances that is what will occur.

Notice of Decision

11. The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal contained a material error of law. The decision is set aside to be heard afresh in the First-tier Tribunal.

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 August 2024