IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-003228
UI-2024-003229
UI-2024-003230
UI-2024-003231
First-tier Tribunal Nos:
HU/56638/2023
HU/56639/2023
HU/56649/2023
HU/56651/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 October 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

NABINTOU SILLAH
FATOUMATTA JABBIE GASSAMA
SALIMATOU JABBIE GASSAMA
OUMIE JABBIE GASSAMA
(ANONYMITY ORDER SET ASIDE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Ms A Kogulathas, Counsel, instructed by Lawlex Solicitors
For the Respondent: Ms R Arif, Senior Presenting Officer

Heard at Field House on 25 September 2024

DECISION AND REASONS

Introduction

1. The appellants seek to appeal a decision of First-tier Tribunal Judge Woolley ("the Judge") dismissing their human rights (article 8 ECHR) appeals. The Judge sent his decision to the parties on 7 May 2024.

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2. The appellants are a mother and three children. One of the children is now an adult but was a child at date of application. They seek to join Mr Abdou Batul Jabbie Gassama, the husband and sponsor of the first appellant and the father and sponsor of the second, third and fourth appellants. Mr Gassama is a British citizen.

3. Lawlex Solicitors wrote to the Upper Tribunal on 23 September 2024 confirming that the sponsor could not attend the hearing as he had been taken unwell. Medical evidence was provided.

Anonymity

4. The Judge issued an anonymity order observing that the third and fourth appellants are children and reasoning that it was appropriate to make the order under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

5. I am required to consider whether the order should continue. I observe that there is no information presented to this Tribunal that is on its face detrimental to the well-being of the children if shared with the public. As detailed below, the decision of the Judge is set aside, and the appeals are allowed outright with the agreement of the respondent. The children will be permitted to enter the United Kingdom to join their father. It is reasonably likely that people they meet at school or in the community will become aware that they have relocated from The Gambia to join their father. In the circumstances, I consider that the public interest in knowing the parties to these proceedings as protected by article 10 ECHR now outweighs the article 8 ECHR concerns to which the Judge gave weight.

6. I set aside the anonymity order issued by the Judge on 7 May 2024.

Relevant Facts

7. Mr Gassama and his wife have six children. The two youngest are British citizens having secured their citizenship through their father. The three oldest children are appellants in these proceedings.

8. The appellants applied for entry clearance on 13 December 2022. By a decision dated 27 April 2023, the respondent refused the first appellant's application on one ground alone, namely that she did not satisfy the English language requirement of paragraphs E-ECP.4.1 to 4.2 of Appendix FM of the Immigration Rules. No exceptional circumstances were identified as arising in her matter. The children's applications were refused in line.

Decision of the First-tier Tribunal

9. The hearing came before the Judge virtually on 3 May 2024. The appellants were represented by Counsel. The sponsor attended remotely and gave evidence.

10. The representatives identified the following issues as arising before the Judge:

    (a) Did the appellants meet the eligibility requirements of E-ECP;

    (b) If not, were GEN.3.1 and 3.2. were satisfied; and

    (c) Did the decision breach the appellants' rights under article 8.

11. The Judge found that the first appellant did not meet the English language requirement under E-ECP.4.1 and so her human rights (article 8) appeal under the Rules was properly to be dismissed. The children's appeals under the Rules were dismissed in line.

12. Turning to article 8 outside of the Rules, the Judge concluded that the best interests of the children was that they continue to live in The Gambia with their mother. Undertaking the proportionality assessment the Judge concluded that no exceptional circumstances arose, at [29].

Grounds of Appeal

13. The appellants rely upon grounds of appeal drafted by Counsel who represented them before the Judge. I note that the author was not Ms Kogulathas.

14. The grounds are unhelpfully not numbered. I identify three challenges as being advanced:

    (i) A failure to consider the family's wish to be united when considering the best interests of the children and to have their family life safeguarded and promoted under article 8.

    (ii) A failure to place into the proportionality assessment the fact that the two youngest children are British citizens and entitled to reside in the United Kingdom.

    (iii) An error in drawing a negative inference from the appellants having no status in the United Kingdom with reference to section 117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002.

15. Judge of the First-tier Tribunal Nightingale granted the appellants permission to appeal by a decision dated 10 July 2024. She reasoned, *inter alia*:

> "3. In a reasoned decision, the Judge considered the best interests of the children and was entitled to consider their language skills and the fact that they had lived with their mother, with whom they would continue to live, all their lives in Gambia. Read as a whole, the Judge considered the best interests of the children and reached a conclusion which was open on the evidence. No arguable error arises on the first of the grounds pleaded.

> 4. The Judge considered the fact that two other children, who are not appellants in these appeals, were British citizens. Again, the Judge was entitled to conclude that this did not impact upon the appeals of family members who did not hold British citizenship.
>
> 5. Ground 3 is arguable. The wording of Section 117B does not require little weight to be given to family and private life in the circumstances of those who have not entered the United Kingdom. This ground is arguable and permission is granted but limited to the final ground headed 'public interest considerations.'"

16. It is appropriate to observe that in the section above the black line on the form, entitled "Permission to appeals", all that is said by Judge Nightingale is "Granted".

17. The respondent filed a helpful rule 24 response dated 16 August 2024.

Discussion

Preliminary Issue

18. The respondent initially took a point by means of her rule 24 that whilst Judge Nightingale had granted permission at large in the relevant section above the black line, her reasoning was clear and unambiguous as to having only intended to give a limited grant of permission in respect of ground 3. The respondent sought to rely upon her reading of the guidance in *Safi (permission to appeal decisions)* [2018] UKUT 388; [2019] Imm AR 437.

19. At the hearing Ms Arif properly took time to consider the position advanced by the respondent in her rule 24 response. Having considered both the headnote and the substance of the decision in *Safi*, in which the circumstances were on point with the grant of permission in this appeal, she properly accepted that Judge Nightingale had given an unrestricted grant of permission to appeal to this Tribunal.

Ground 1 – Best interests of the children

20. Upon careful consideration I do not consider ground 1 to be meritorious. Ms Kogulathas submitted that the Judge had commenced from the wrong starting point when considering the best interests of the children because his considerations commenced from little weight being lawfully applied to the existing family life. I am unable to read this starting point into the Judge's consideration at [21] of his decision. He properly examined the life the children enjoy in The Gambia and their close connection with their mother. I find that he gave cogent and lawful reasons as to why their best interests were satisfied by their continuing to reside with their mother and so live apart from their father. In essence, he concluded in favour of the existing status quo. Such conclusions were reasonably open in circumstances where the mother was unsuccessful in the appeal before him.

21. I turn next to the core ground in this appeal.

Ground 3 – error as to geographical restriction imposed by section 117B(4) and (5) of the 2002 Act

22. Section 117B(4) and (5) of the 2002 Act:

> "(4) Little weight should be given to
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."

23. The appellants' challenge is directed to the Judge's reasoning at [28(i) and (iii)] of his decision:

> "... There has been no development of family life in the UK, and any family life development has taken place in [The] Gambia when her status in the UK was not even precarious but non-existent. Little weight should be given to a family life developed in this way, under Section 117D(4) and (5) and under Rajendran (s117b – family life) [2016] UKUT 00138 (IAC). The appellant when she married the sponsor would have known of her own status (as would he) and they cannot have anticipated that she would be allowed entry clearance on this basis of this. I must take this as a factor weighing against her. In respect of the remaining appellants, they are dependent on their mother's claim."
>
> "I have accepted that the sponsor and appellants have a potential private and family life in the UK and accept that the sponsor would much prefer them to come to the UK rather than stay in [The] Gambia. Article 8 however gives no one the right to choose one country of residence over another. I bear in mind that no private and family life in the UK has been built up. They have never had any guarantee of private and family life in the UK. I find that Sections 117B(4) and (5) are engaged and that little weight should be given to any family and private life that has been developed in [The] Gambia between them and the sponsor."

24. I observe that the Upper Tribunal in *Rajendran* was concerned with an in-country appeal where the appellant was seeking leave to remain based on her private life.

25. At the outset of the hearing, I provided the representatives with copies of the unreported decision of the Upper Tribunal (Mr Justice Dove and Upper Tribunal Judge O'Callaghan) in *Iqbal* UI-2022-001106 (18 April 2023). The representatives were given time to consider the unreported decision and confirmed that they were content to proceed.

26. In *Iqbal* the Upper Tribunal considered whether there was a geographical restriction imposed by section 117B(4) of the 2002 Act, and the panel concluded at [19] and [20]:

> "19. On behalf of the respondent, Ms Gilmour conceded before us that section 117B(4) is solely focused upon the weight to be given to identified factual circumstances at the time consideration is given to granting leave to remain in this country or alternatively considering removal from this country. We agree that the concession is correctly made as the statutory provision is geographically restricted, being directed solely to circumstances appertaining at the time consideration of leave to remain (or removal) is being considered, and there is no equivalent to section 117B(4) in any provision of law or policy relating to entry clearance applicants.
>
> 20. A reading of 'in all cases' in section 117A to result in every one of the identified public interest considerations in section 117B being applicable to both applications for leave to enter and remain adopts a construction that is not coherent and self-consistent with the clear terms of individual considerations. Section 117B(1) sets out that the maintenance of effective immigration control is in the public interest and is applicable in all cases, as are the considerations in section 117B(2) and (3). Section 117B(4) and (5) are geographically restricted in the circumstances of an applicant whilst they are present in this country. As addressed below, consideration of section 117B(6) is also geographically restricted, being expressly rooted in an application for leave to remain or when assessing the merits of directing removal."

27. Whilst not expressly referring in her rule 24 response to the panel decision in *Iqbal*, understandable as it is not a reported decision, the respondent adopted the same position as her concession before the Presidential panel; an acceptance that the Judge made an error in the public interest assessment at [28(i) and (iii)] by reference to the geographical restriction.

28. I am satisfied that a material error was made by the Judge when failing to observe the geographical restriction arising in respect of both section 117B(4) and (5). Whilst the respondent sought before me to rely upon other matters placed by the Judge in his proportionality assessment, the error as to geographical restriction was given great weight and adversely infected the entirety of the balancing exercise. In such circumstances the proportionality assessment as conducted cannot properly stand. I appreciate the Judge was not aware of the respondent's concession in the unreported decision in *Iqbal.* However, ultimately, he materially erred in his consideration of the applicability of sections 117B(4) and (5) in entry clearance appeals. In the circumstances, the decision is properly to be set aside.

Ground 2 – proportionality assessment and the citizenship rights of two children/siblings

29. Ms Kogulathas identified the challenge as being directed to the proportionality assessment. This was unclear from the grounds and may well have influenced Judge Nightingale as to her reasoning that the ground enjoyed no merit. However, when considering whether the family unit could properly stay in The Gambia absent the sponsor, weight may properly have been given to the fact that the two youngest children could travel to the United Kingdom whenever they wished as they are British citizens. Whether such fact would be determinative, or significant in the assessment exercise, is a moot point. It would depend upon the particular facts of the case. However, as I have already concluded that the balancing exercise to the assessment of proportionality is fatally flawed for material error of law, I am not required to consider whether the contention advanced by ground 2 is material.

30. In the circumstances I set aside the decision of the First-tier Tribunal in its entirety.

Remaking the Decision

31. The representatives confirmed that they were content for the Upper Tribunal to proceed straight to the remaking of the appeal.

32. The appellants filed and served a rule 15(2A) application seeking to rely upon an IELTS A1 Speaking and Listening test report form dated 23 August 2024, relating to a language test undertaken by the first appellant at the British Council offices in Accra, Ghana, and validated by IELTS. The test form confirms that she passed her Common European Framework of Reference for Languages (CEFL) Level A1 test in the English language. The accompanying application confirms the following:

> "The reason why the language certificate was not submitted to the First-tier Tribunal was that due to personal circumstances, Mrs Sillah could not obtain the certificate at that time. She did not have the opportunity to go to school in her home country and having dedicated all of her time raising the children. Allowing this evidence will change the course of this application.
>
> The absence of a language certificate in Mrs Sillah's submissions to the First-tier Tribunal stems from a series of profound personal circumstances that have shaped her life's journey. Growing up in her home country, Mrs Sillah was tragically denied the fundamental right to education, her deprivation has cast a long shadow over her opportunities. Instead of pursuing her own academic growth, she selflessly dedicated her entire adult life to raising her children, ensuring that they would have the chances she never did.
>
> Despite these challenges, Mrs Sillah has shown remarkable determination. For many months, she has been tirelessly working towards attaining the required language certificate. Her perseverance has finally borne fruit: on August 23 she proudly secured her language certificate, marking a significant personal triumph over adversity."

33. Ms Arif did not oppose the admission of the test results document under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. She noted paragraph E-ECP.4.1(b) of Appendix FM to the Rules and the requirement that an applicant must provide specified evidence that they have passed an English language test in speaking and listening at a minimum of level A1 of the CEFL with a provider approved by the respondent. She accepted on behalf of the respondent that the first appellant now met the one outstanding requirement under the Rules, and I was informed that it was considered appropriate that the appellants' appeals be allowed outright.

34. I am very grateful for Ms Arif taking this pragmatic and proper approach to the remaking of these appeals.

35. In the circumstances I allow the human rights appeals of all the appellants.

Notice of Decision

36. The decision of the First-tier Tribunal sent to the parties on 7 May 2024 is set aside for material error of law.

37. The remaking of the appeals is to be undertaken by the Upper Tribunal. I re-make the decision and allow the appellants' appeals on human rights grounds.

38. The anonymity order issued by the First-tier Tribunal on 7 May 2024 is set aside.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 October 2024