



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-005315
UI-2023-005316
UI-2023-005317
First-tier Tribunal Nos: HU/00722/2023
HU/00723/2023
HU/00724/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5th March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

CHINOYEREM NOLLY OGUNKA (1)
ROYALTY ADAEZE NWADIKE (2)
FORTUNE MUNACHIMSO NWADIKE (3)
(NO ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Uzoechina, Patterson Lawyers

For the Respondents: Ms McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 20 February 2024

DECISION AND REASONS

Background

1. This matter concerns appeals against the Respondent's three decision letters of 28 February 2023 (the "Refusal Letters"), refusing the Appellants' applications made on 7 November 2022.
2. The Appellants applied for entry clearance on the basis of their family life with the Sponsor, Mr Kenneth Nwadike, husband of the First Appellant and biological father of the Second and Third Appellants.

3. The Respondent refused the Appellants' claims in the Refusal Letters for the following reasons:
 - (a) All Appellants:
 - (i) the eligibility financial requirements of Appendix FM of the immigration rules (E ECP.2.1) were not met. The Sponsor needed to earn a gross annual income of at least £24,800 per annum. The Appellants had failed to provide the required documents relating to the Sponsor's employment to demonstrate this level of income.
 - (ii) There were no exceptional circumstances warranting a grant of entry clearance.
 - (b) First Appellant: the eligibility English language requirement of paragraphs E-ECP.4.1. to 4.2 was not met. She had not provided any medical evidence to demonstrate she was exempt from the requirement.
 - (c) Second and Third Appellants: the eligibility relationship requirement of E-ECC 1.2-1.6. was not met. Their mother's application for leave had been refused such that the requirement that one of their parents be in the UK with limited leave to enter or remain, or is being granted, or has been granted entry clearance, as a partner or parent under appendix FM was not met. They had also failed to provide enough evidence that they and their parents were related as stated.
4. The Appellants appealed the refusal decisions. The Respondent did not undertake a review of the appeals.
5. The Appellants' appeals were heard by First-tier Tribunal Judge Burnett ("the Judge") at Taylor House on 12 September 2023. The Judge subsequently dismissed the appeals in his decision promulgated on 12 October 2023.
6. The Appellants applied for permission to appeal to this Tribunal on 6 grounds, as follows:

"Ground 1: the Ftj failed to take into account as a primary consideration the best interests of the two children under section 55 and GEN3.1 and 3.2 of appendix FM and failed to consider the children's article 8 rights.

Ground 2: the judge's consideration of exceptional circumstances in regards to the medical evidence and letter from the last appellant University at [29] was unfair in that the judge based his decision on conjectures, insinuations and self opinions not ventilated during the hearing but only in the determination, therefore the appellant was denied the opportunity to comment or challenge those misconceptions that were material to the decision.

Ground 3 judge failed to consider Home Office policy upon which the appellant relied in order to establish the unlawfulness of the respondent's decision.

3a) at 29 the judge erroneously stated "there is no claim that the appellant's husband has spent periods of time with his wife due to her mental health problem. It is a notable omission from the evidence. If the appellant had such difficulties, I would have expected..... I am not prepared to give much weight to the letter (medical report)."

3b) it is submitted that the judge erred in both law and fact because the appellant's husband travelled to be with the appellant on several occasions due to her mental health problems, in doing so it is wrong, unlawful and procedurally unfair for the judge to take into account evidence or fact not given at the hearing or put to the appellant and/or her husband at the hearing (copies of the sponsors passport showing entry and exit).

Ground 4 the judge finding that no evidence was produced showing the appellant's course were taught in English is perverse in that the University letter referred to by the judge at 30 and 31 were written in English and all objective and documentary evidence in support of the appeals are all written in English, therefore it is unchallenged fact that English language is Nigerian's official language and language of instruction in all of its educational institutions.

Ground 5 the judge erred at 49 in considering the first appellant entry clearance appeal under s.117B 4a and b and s.117B(5) which has no application to this appeal and materially affected the article 8 outcome.

Ground 6 in consideration of the family's article 8 rights [49-53] the judge misapplied s.117 to the facts of the case and failed to give proper reason or justification under article 8, the public interest question, weighing in favour of separating the family or requiring their sponsor who has permanent right of residence to uproot from the UK requiring the family to spend £6000 again for entry clearance application or for the first appellant to meet the English language test."

7. Permission to appeal was granted by First-tier Tribunal Judge Aldridge on 7 December 2023, stating:

"1. The in time grounds submitted that permission to appeal to the Upper Tribunal should be granted as the Judge has failed to take into account the best interest of the two children and failed to consider the children's article 8 rights. The consideration of the judge in respect of the medical evidence and letter from the university was based on conjecture, insinuation and self-opinion which was not ventilated during the hearing, the judge failed to consider Home Office Policy upon which the appellant relied in order to establish unlawfulness of the respondent decision and took into account evidence not given at the hearing or put to the appellant or spouse during the hearing and which was factually incorrect. The judge should have accepted that English is the language used for teaching in Nigeria. The judge also considered s.117B which had no application to this appeal and failed to give proper reason under the public interest question.

2. The grounds are arguable. It is arguable that the judge should have considered the best interests of the two children as a primary consideration in reaching his conclusions in line with the spirit of S.55 considerations. It is arguable that the judge may have erred by asserting his own opinions in respect of the health of the first appellant which were not ventilated during the course of the hearing. It is arguable that the judge drew incorrect conclusions in respect of matters that were not raised during the course of the hearing.

3. The grounds disclose arguable errors of law".

8. The Respondent did not file a response to the appeal.

The Hearing

9. At the outset, I confirmed the purpose of the hearing was to determine whether the Judge's decision contained any material error(s) of law. I referred to the preliminary issue of the Appellant's notice under rule 15(2A) seeking to adduce an English language test certificate for the First Appellant. Ms McKenzie said she

had not been aware of this certificate and took a moment to review it. The representatives then stepped outside for a few minutes to see if they could reach agreement on anything. Upon return, they confirmed they could not.

10. I asked Mr Uzoechina how the English language test certificate was relevant to the hearing, being in mind its nature as an error of law hearing and given the certificate did not exist at the time of the hearing before the Judge. His answer was somewhat unclear but he appeared to submit that it was evidence of the First Appellant's ability to speak English as at the date of that hearing. After further discussion he accepted that the certificate went to a remaking of the Judge's decision should it be set aside. Ms McKenzie said her view was that the certificate was not relevant to the error hearing.
11. I confirmed I would not be admitting the evidence attached to the rule 15(2A) notice as it had not been before the Judge, nor did it even exist at the time, such that he cannot be said to have erred by failing to refer to it.
12. The representatives proceeded to provide their submissions as to whether the decision of the Judge contained any material errors of law.
13. Mr Uzoechina took me through the grounds of appeal in detail.
14. As regards ground 1, I asked him what the evidence was concerning the children's best interests. He referred to the witness statements discussing the First Appellant's mental health conditions. I asked whether there was any evidence discussing the impact of this on the Second and Third Appellants; he said no. He said he understood that section 55 of the Borders, Citizenship and Immigration Act 2009 applies mainly to children in the UK but, as it was mentioned in the Refusal Letters, the Judge had to consider the children's best interests in any case. He said the Judge accepts at [37] that family life exists, but materially erred in failing to consider the children's best interests because this was relevant to article 8 and also to whether the First Appellant's appeal should have succeeded given that the unity of the family is to be encouraged.
15. As regards grounds 2 and 3, he said in [29] the Judge gives reasons for not attaching weight to the medical letter, which reasons are based on matters not raised by the Respondent, which was unfair. He said the Appellant relied on section 7.1 of the Immigration Directorate Instructions (which he referred to as "the Home Office policy") in the Appellant's bundle before the Judge which gives examples of what might be considered exceptional reasons to exempt someone from taking the English language test, one of which is that someone has been hospitalised several months immediately prior to application. He submitted the First Appellant's medical evidence was comparable to this example, saying she has been a patient since October 2020. He said the Home Office policy required evidence from an appropriately qualified medical practitioner, which is what had been provided in the form of the medical letter; this letter had not been challenged by the Respondent. It was therefore unfair for the Judge to take issue with the letter after the hearing without giving the First Appellant the opportunity to comment.
16. He submitted that the Judge's criticism in [29] concerning a lack of evidence of the husband spending time with the First Appellant was also not something raised before or at hearing. He said the Sponsor had produced a copy of his passport stamps showing he had travelled to Nigeria several times. I asked whether there was anything in the witness statements concerning the reason for this travel; he

said no. It then became clear that the passport stamps were only provided after the hearing, as part of the rule 15(2A) notice, such that they were not before the Judge either. At this point I said, for the same reasons that the English language certificate was not permitted, I would also not be permitting the stamps to be adduced as evidence concerning the question of error of law if they were not before the Judge. I said I understood Mr Uzoechina's contention that the Appellant and Sponsor were not given the opportunity to comment on whether they had spent time together due to the First Appellant's mental health conditions, but confirmed that passport stamps only provided after the hearing could not be evidence of whether the Judge erred or not in this regard. Rather, they were again something that could go towards any remaking if the decision were to be set aside. Mr Uzoechina accepted this.

17. Mr Uzoechina said a third point on which the First Appellant had not been given the opportunity to comment was the Judge's finding in [30] that there was no evidence of the university course being taught in English. I questioned whether the Judge had dealt with this in [23] where he records asking the Respondent's representative if they accepted that Nigeria was a majority English speaking country. Mr Uzoechina said no because this only dealt with the question of whether an English language test was needed. He said it was unfair that the First Appellant conducted the whole hearing in English and had provided other evidence of English ability and yet the Judge finds it not proved that she speaks English. I questioned whether the Judge was not entitled to assess what was said in the University letter, regardless of whether the letter itself had been challenged by the Respondent. Mr Uzoechina simply reiterated that it was perverse to find the Appellant did not speak English given all of the evidence adduced.
18. As to ground 4, I asked what was the "objective evidence" referred to as supporting English being an official language of Nigeria. Mr Uzoechina struggled to understand what I meant by this question, asserting there was no evidence of any other language being used. After some discussion, he accepted that there were no documents such as Country Policy and Information Notes or similar supporting the Appellant's case in this regard.
19. As to grounds 5 and 6, I asked Mr Uzoechina to explain how the Judge had misapplied the s.117B factors, as although the Judge refers in [49] to private life when it was family life under consideration, he appears in [50] to say that this does not apply as the Appellants were outside the UK. He said it was hard to understand what the Judge is saying here but he clearly refers to inapplicable provisions which indicates he was asking the wrong questions overall.
20. Ms McKenzie replied as follows:
 - (a) taking ground 4 first, she accepted that in [23] the Judge is asking a question of his own accord as to whether the Respondent accepted Nigeria was an English-speaking country, however he said he raises this "due to recent representations" and it appears he was doing so in favour of the Appellant. The point was raised at the hearing so the Appellants' representative was able to address it and could have asked for more time to do this but they did not. There is no evidence such as a witness statement shedding further light on what happened at hearing. It was not a CCD case and it is up to the Appellants to provide the documents that were before the Judge. It is clear that, having aired the issue and obtained the representative's responses, the Judge accepted the Respondent's

representative in saying that Nigerians are required to take the English language test.

- (b) Ground 1: the section 55 duty is for the Respondent and does not apply to children outside the UK, but there is a Convention right of the child which does say the best interests of children should be a primary consideration. However, no information was given to the Judge setting out what those best interests were and how they could be served; the Judge states in [26] that the Appellant had not provided a witness statement and there was also no evidence from the children. The Judge accepts at [37] that there is a genuine parental relationship and finds at [51] that “there will be little interference with the appellants’ private life and the relationship between family members as this could be conducted outside the UK”. The finding that family life can continue abroad is sufficient to deal with both family life and the best interests of children, given they could be together with the father outside the UK.
- (c) Ground 2: we have no witness statement, transcript or record of proceedings stating what was raised at the hearing so it has not been evidenced that the Judge did raise these points of his own accord.
- (d) Ground 3: this is mere disagreement and the Judge was entitled to conclude as he does. The Judge was entitled to look at what the medical letter actually said, and he found it did not show the Sponsor had been with his wife to support her with her mental health problems and it did not show why the Appellant could not take the English language test. Whilst the Respondent would have considered the Home Office policy in making the refusal decision, the Tribunal looks at all of the evidence rather than just what is in the policy.
- (e) Ground 5: whilst it is unclear why the particular s.117B references are there, the Judge does not go on to make any findings in relation to them, but simply says the Appellants are outside the UK such that no error is disclosed.
- (f) Ground 6: this is also mere disagreement.

- 21. She asked me to dismiss the appeal.
- 22. Mr Uzoechina responded to say he was at the hearing so he knows what was said. There was no evidence from the Respondent on the question of Nigeria not being a majority English-speaking country. He accepted no objective evidence on this point had been produced by either side. Otherwise he reiterated his earlier submissions, emphasising in particular that the medical letter had not been challenged so should have been accepted.
- 23. He asked me to set aside the Judge’s decision and retain it in the Upper Tribunal for remaking as soon as possible due to the time that has elapsed since the initial applications and the expense the parties have been put to. He confirmed he would be happy for any remaking to take place on the papers, to include consideration of the evidence attached to the rule 15(2A) notice. Ms McKenzie agreed with the matter being retained in the Upper Tribunal should the Judge’s decision be set aside, but questioned whether there should be a hearing given the need for an overall article 8 consideration.

24. At the end of the hearing, I reserved my decision.

Discussion and Findings

25. I remind myself of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law if it is found that the tribunal below has made a genuine error of law that is material to the outcome of the decision under challenge. To be absolutely clear, it is not for me at this stage to assess the evidence afresh and reach my own conclusions on it; I could only do this if I were to first set aside the Judge's decision due to material error(s) of law and then remake the decision.

26. I therefore assess whether the Judge's decision contains any material errors of law.

27. Ground 1. Section 55 of the Border, Citizenship and Immigration Act 2009 requires immigration functions to be discharged "having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". However, there is case law (such as SM Algeria [2018] UKSC 9 §19) which confirms this applies in entry clearance cases too, and so the policy is broader than the statutory wording.

28. The UK also has obligations enshrined in the UN Convention on the Rights of the Child (UNCRC), including Article 3:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

29. It was therefore incumbent on the Judge to take into account the best interests of the Second and Third Appellants as a primary consideration. If he did not do so, this will have been an error.

30. Cases such as EV (Philippines) [2014] EWCA Civ 874 indicate that what is in the best interests of children will depend on a number of factors, such as age, stage of education, connections with their home country, likely level of interference with those connections and so on. Lord Hodge in Zoumbas [2013] UKSC 74 says that it is important to clearly identify a child's circumstances and their best interests before balancing them against other considerations. It is also trite that whilst children's best interests are a primary consideration, they are not the only consideration.

31. Whilst it is well established that the starting point is for children to be with both of their parents, the point of the applications was to achieve this, and the applications fell to be assessed under the relevant immigration rules to this end. Simply because the Judge does not expressly mention the best interests of the children does not mean he did not take them into account as a primary consideration. The Judge recognises that the relationship is one of father and children in [2] and refers in [6] to the Respondent's view of there being no exceptional circumstances and the refusal not leading to unjustifiably harsh consequences for anyone concerned. Mention of the children is also made in [30], [31] and, in particular, in [37] where the Judge finds there is a genuine parental relationship and family life exists such that article 8 is engaged. He was clearly

aware that the Second and Third Appellants were children as he acknowledges their ages (referring to their dates of birth in [1]), the fact that they were outside the UK and that they lived with their mother. In [52] he states that (my emphasis in italics):

“It is my judgment the public interest in this case is not outweighed by the *appellants’ interests*”

32. This indicates that he has taken the best interests of the Second and Third Appellants into account.
33. It is correct that, as is recorded in [21] that the main focus of the appeal was the First Appellant’s failure to meet the English language requirement, because as the Refusal Letters say, the Second and Third Appellants were refused on the basis that the First Appellant’s application had been unsuccessful. This focus is underlined by there being an absence of evidence as to the children beyond the fact that they lived with their mother outside the UK.
34. As is recorded in [26] of the decision, there was no witness statement from the First Appellant. Mr Uzoechina referred to the Sponsor’s witness statements discussing the First Appellant’s mental health conditions however nowhere does the Sponsor discuss the circumstances of the children’s care or well-being or whether there is any impact on them of the First Appellant’s mental health conditions. I cannot see that the submission (or similar) was made to the Judge that the children needed to be reunited with their father because they were not being adequately cared for by their mother due to her mental health conditions. Indeed there is no evidence of any submissions concerning the children’s best interests (see below as to discussion of what is needed to show what is said at a hearing).
35. As above, a lack of express mention of the children’s best interests does not mean the Judge did not take them into account as a primary consideration, and there is some indication from the wording in [52] that they were so considered. I accept Ms McKenzie’s submission that the Judge’s finding in [46] concerning, when dealing with the article 8 proportionality exercise, the possibility of the Sponsor enjoying family life with his family outside the UK, also indicates that the Judge had considered the children’s interests. Overall, I find no error is disclosed.
36. I take grounds 2, 3 and 4 together as there is overlap between them.
37. Mr Uzoechina submitted that three matters are raised in [29]-[30] of the Judge by his own volition after the hearing without affording the Appellants an opportunity to address them, being i) points taken against the medical letter, ii) that there was no evidence of the Sponsor spending time with the First Appellant due to her mental health problems and iii) finding the University letter did not confirm the Appellant’s course was taught in English.
38. As regards the medical letter, the Judge finds that [29] that:

“The type of [medical] examination was not stated in the letter, it does not provide the necessary detail to be an expert report and there is no acknowledgement that it will be used in court/Tribunal proceedings. The letter is deficient in this respect.”
39. I consider these were findings that the Judge was entitled to make. Even if the Respondent did not challenge the authenticity or content of this letter,

nevertheless it was open to the Judge to assess what the letter actually said/contained, which is what he did. Even had the Appellant been afforded an opportunity to comment on the specific points highlighted, this would not have changed what the letter actually said. The Judge's finding is that, although it discusses the Appellant's health conditions (he sets this out in [28]), the format of the letter meant he felt able to attach little weight to it.

40. It is well-established that:
 - (a) the assessment of weight is generally for the First-tier Tribunal: AE (Iraq) v Secretary of State for the Home Department [2021] EWCA Civ 948, [2021] Imm. A.R. 1499, at [44]; and
 - (b) appellate courts should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently: AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49; [2008] 1 A.C. 678, at [30].
41. As regards there being no evidence of the Sponsor spending time with the Appellant, the medical letter itself said the First Appellant "has undergone two previous close caesarean sections without an intimate support from her husband". It therefore appears there was some basis for the Judge's comment about there being a lack of evidence of the Sponsor spending time with his wife. Even if it was a point raised by the Judge himself (which I do not accept), I cannot see that this was a material factor in his decision, as it is just one of several things the Judge discusses when looking at the medical letter.
42. As set out above, the Sponsor's passport stamps were not before the Judge and so were not something that he could have taken any account of. Had the Appellants wished to rely on the stamps, they should have produced them prior to the hearing before the Judge with an explanation of their relevance.
43. As regards the letter from the University, the Judge states as follows:

"30. It is stated that the first appellant was studying political science at University but after the birth of her children she has been unable to continue with her studies due to her mental health condition. She states that this course, and all her education, has been taught in English in Nigeria. There was no documentary evidence produced of this. The documents about the appellant's studies in Nigeria are of poor quality and are difficult to read. This was pointed out at the hearing. There is no letter from the University stating that the degree is taught in English and confirming the appellant's difficulties with her studies due to her mental health. This is easily obtainable evidence which has not been produced.

31. The university letter states that the admissions is for the 2013/2014 session. The appellant's first child was not born until 2019 and the claim is she experienced difficulties in 2020. The chronology does not sit with the appellant's claims. I note that there are no results provided for her first years of her University course."
44. Having looked at all of the evidence carefully myself, all of these findings were open to the Judge. There was no documentary evidence of the First Appellant's course/education having been taught in English in Nigeria. The University letter does not provide confirmation of this and whilst it is written in English, that does not mean that English was the language used to teach the course referred to therein.

45. It is incorrect to say, as ground 4 does, that it is an “unchallenged fact that English language is Nigerian’s official language and language of instruction in all of its educational institutions”. This fact has very much been challenged, as the First Appellant’s application was refused because, amongst other things, she had not produced an English language test certificate. Her refusal letter specifically states “I am not satisfied that you are a national of a majority English speaking country listed in paragraph GEN 1.6” such that either evidence of her English-language ability was needed or she needed to show that she was exempt from such a test.
46. The Judge clearly took care to check this, recording at [23] that he asked the Respondent’s representative to comment on “recent representations that Nigerian citizens should not be required to take such tests and that Nigeria should be recognised as a majority English speaking country (MESCC)”. The response was that “The Home Office maintain that there is insufficient data provided at the moment to include Nigeria as a MESCC”, continuing the position taken in the Refusal Letters. It was accepted before me that there was no objective evidence provided by either party concerning the position with English being an official language in Nigeria. It is trite that without supporting evidence, bare assertions are unlikely to hold much weight. Mr Uzoechina sought to expand on the grounds of appeal at the hearing by saying the Appellant spoke English throughout the hearing and that this was not taken into account by the Judge, however this is not something mentioned in the grounds of appeal for which permission has been granted. In any case, without a transcript or recording of the proceedings, I do not know the standard to which the Appellant spoke English to be able to comment on this, even if it were appropriate for me to do so.
47. The Appellants assert that the Judge failed to properly take into account Home Office policy contained in the Immigration Directorate Instructions, November 2014 (“IDIs”) provided in the Appellants’ bundle. Mr Uzoechina took me to paragraph 7.1 of the IDIs headed “exceptional circumstances exemption” and the examples given therein of what might constitute exceptional circumstances, drawing my attention to the example where an applicant “has been hospitalised for several months immediately prior to the date of application”.
48. I can see that the skeleton argument before the Judge referred to the said paragraph 7 of the IDIs but did not explain how it was applicable or comparable to the First Appellant’s circumstances. I cannot see that the Judge’s decision refers to any specific submission being made in this regard either. Mr Uzoechina said he was at the hearing and so knows what submissions were made, however it was not for him to give evidence. The Appellant should perhaps have had regard in advance of the hearing to the guidance given in BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC). I appreciate that BW arose in a different context (allegations of judicial bias) but it is no less relevant to the issue of evidence about what occurred at a previous hearing. Without a witness statement, transcript or recording of the proceedings, I have no evidence of what the submissions were beyond what is contained in the Judge’s decision itself. I therefore do not accept that a specific submission was made to the Judge that the First Appellant’s circumstances were equivalent to any of the examples given in the IDIs.
49. Even if such a submission were made, the Judge was not bound to follow what is in the IDIs. The purpose of IDIs is to provide guidance for the staff of the Secretary of State in carrying out their functions as decision-makers. Since the

Immigration Act 2014 came into force on 6 April 2015, a right of appeal has only arisen in relation to the refusal of human rights and protection claims, or decisions to revoke protection status. There is no longer an ability to bring an appeal on the basis that a decision is “not in accordance with the law”.

50. Thus, the job of the First-tier Tribunal is to review refusal decisions and determine whether those decisions result, in human rights cases, in a disproportionate breach of human rights. In the appeals at hand this involved the Judge first assessing the refusal decisions within the applicable immigration rules, and then outside the rules under article 8. As regards the immigration rules, it is the specific requirements of the rules relevant to the particular application that needed to be met, and not the guidance expounding upon those rules. It is not the job of the First-tier Tribunal to make decisions in accordance with the Respondent’s policy documents, although the Tribunal can look at such policies to shed light on the meaning of any relevant immigration rules. As was said in Sultana [2014] UKUT 540 (IAC), writing of the Immigration Directorate Instructions:

“provided their terms are consistent with the provisions of the Immigration Rules to which they relate, they may, potentially, fulfil a further role, namely that of illuminating the rationale and policy underpinning the relevant Rules.”

51. Overall, I cannot see the specific relevance of the IDIs was explained to the Judge in order that he needed to make any finding as to whether the Appellant’s circumstances were comparable to the example given in those IDIs and I do not find that the Judge erred in failing to refer to or consider the IDIs.
52. Overall, I find no errors are disclosed in grounds 2, 3 or 4.
53. As regards grounds 5 and 6, I agree it is unclear why in [49] the Judge has cited sections 117(4) and (5) of the Nationality, Immigration and Asylum Act 2002 given these apply to private life established when someone has unlawful or precarious status, and there is no obvious application to the Appellants who were outside the UK and whose claims were based on family life. However, it appears that having cited these provisions, the Judge duly finds that they do not apply, stating in [50] that:
- “In this case the appellants applied for leave to enter the UK. They are outside the UK.”
54. He does not take it any further than that and there is certainly no indication that he has held anything against the Appellants as a result of these provisions. No error is disclosed.
55. The final criticism is that the Judge “failed to give proper reasonable justification under article 8 of the public interest question”. I take this to be an assertion that the Judge failed to carry out a proper proportionality balancing exercise for the purposes of article 8 ECHR, or that he failed to take into account the specific factors referred to in the grounds.
56. The Judge addresses article 8 in [34]- [53], commencing his analysis with reference to the applicable case of Razgar [2004] UKHL 27. He was therefore aware of the correct test to be applied. At [37] he finds that article 8 is engaged with the family life existing between Appellants and Sponsor. In [38] and [39] he refers to further relevant case law which discusses the need for a balancing

exercise, which the Judge acknowledges in [40] that he must do. In [41] he refers to his finding that the Appellant does not meet the requirements of the relevant immigration rules concerning English language, and in [45] that all the other requirements of the rules are met. The Judge goes on to consider those factors which weigh both for and against the Appellant, including the necessary consideration of the s.117B factors. One of the factors he takes into account is that family life could be conducted outside the UK because it had not been proved otherwise. This was something he was entitled to take into account when looking at the level of interference caused by the refusal decisions.

57. Again, I cannot see any evidence that specific submissions were made to the Judge that he should take into consideration that dismissing the appeal would mean the family had to spend £6000 on further applications, or that the Sponsor's grant of residence was another important factor. Even if they were, I cannot see how such factors, either individually or cumulatively, could have been in any way determinative when weighed against the public interest referred to by the Judge having looked at all the other factors. He clearly does consider the separation of the family because he mentions it when discussing interference.

58. In [52] and [53] the Judge concludes that:

“52. It is my judgment the public interest in this case is not outweighed by the appellants' interests.

53. Balancing all the factors and the considerations I have outlined above, I consider that there is a currently a proportionate interference with the appellants' private and family life”.

59. I consider the Judge adequately undertook a proportionality balancing exercise for the purposes of article 8 and no error is disclosed.

60. To conclude, I find the decision is not infected by any material errors of law. The decision therefore stands.

Notice of Decision

61. The appeal to the Upper Tribunal is dismissed. The decision of First-tier Tribunal Judge Burnett of 4 October 2023 is maintained.

62. No anonymity order is made.

L.Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
26 February 2024