IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:**
HU/00639/2021

[UI-2021-000875]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 28 February 2022	**On the 11 April 2022**

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

ADEOLA DEBORAH ADELEKE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation
For the Appellant: Ms K Wass, Counsel instructed by DJ Webb & Co Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Nigeria who was born in April 2006. Both of her parents live in the UK. She lives in Nigeria with her maternal grandmother.

2. The appellant's father ("the sponsor") has been in the UK since 2007. He was granted indefinite leave to remain in 2012 and became a British citizen in 2015.

3. The appellant's mother is separated from the sponsor. She came to the UK, independently of the sponsor, in 2008 as a visitor, leaving the appellant with her parents. She remained in the UK after her visit visa expired. In 2019, after marrying a British citizen, she returned to Nigeria in order to apply for entry clearance as his spouse. She returned to the UK in December 2019 with limited leave until September 2022.

4. On 15 September 2020 the appellant applied for leave to enter the UK in order to join the sponsor. On 23 December 2020 the application was refused. The appellant appealed to the First-tier Tribunal where her appeal came before Judge of the First-tier Tribunal Mann ("the judge"). In a decision promulgated on 5 August 2021, the judge dismissed the appeal. The appellant is now appealing against that decision.

Decision of the First-tier Tribunal

5. The judge considered three routes by which the appellant could potentially be eligible for entry clearance under the Immigration Rules.

6. The first potential route considered by the judge was section E-ECC of Appendix FM (entry clearance as a child whose parent has limited leave as a partner or parent under Appendix FM). In paragraph 24 of the decision, the judge found that the conditions of section E-ECC were not satisfied because the appellant's parents are not partners.

7. The second potential route considered by the judge was paragraph 297(i)(e) of the Immigration Rules ("one parent… has had sole responsibility for the child's upbringing"). The judge found in paragraph 30 of the decision that paragraph 297(i)(e) was not met because both parents share responsibility for the appellant and therefore neither has "sole responsibility". Amongst other things, the judge found that both of the appellant's parents support her financially and maintain contact with her.

8. The third potential route considered by the judge was paragraph 297(i)(f) ("serious and compelling family or other considerations which make exclusion of the child undesirable…"). In paragraphs 31-33 the judge found that the conditions of this provision were not satisfied because: (a) the appellant lives with her grandmother and has close friends and family nearby; (b) the appellant is doing well academically; (c) neither of the appellant's parents envisaged her living with them in the UK when they left Nigeria; and (d) her family protect her from the risk of kidnapping in Nigeria.

9. The judge then considered, in paragraphs 34-35 of the decision, GEN 3.2 of Appendix FM (whether there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8 ECHR because of unjustifiably harsh consequences). The judge found that refusing entry to the appellant would not be unjustifiably harsh because: (a) she is cared for by, and living in familiar circumstances with, her supportive grandmother; (b) she receives financial support from her parents; (c) she has spent nearly all of her life away from her parents (who have visited her only very occasionally) and she does not have ties to them that are as strong as they would have been had they resided together; and (d) there is nothing to suggest that she will suffer any detriment as a consequence of entry being refused.

10. In paragraphs 36 – 37 the judge considered article 8 ECHR outside the Immigration Rules. The judge found that the appellant and her parents enjoy a family life together that engages article 8 but that refusal of entry was proportionate. The judge identified the following factors as weighing against the appellant in the proportionality assessment: (a) she does not meet the requirements of the Immigration Rules and the maintenance of immigration control is in the public interest; (b) she will continue to be supported and cared for in familiar surroundings; and (c) she is not adversely affected by her current circumstances. The judge stated that weighing in the appellant's favour in the proportionality assessment was that:

> "The appellant wishes to live with the sponsor in the UK and I have no doubt that she will be disappointed that she is unable to do so"

Grounds of Appeal

11. Although set out under three headings, there are five distinct submissions in the grounds of appeal.

12. The first submission is that the judge failed to consider the appellant's argument that the only reason she did not fall within the Immigration Rules was that there is a lacuna in their drafting.

13. The second submission in the grounds is that the judge failed to consider, in the article 8 proportionality assessment (and/or when considering GEN 3.2), that the appellant's particular family situation is not catered for in the Rules.

14. The third submission in the grounds is that the judge erred by differentiating "present" and "future" family life and by giving the appellant's family life less weight because she has not been residing with her parents.

15. The fourth submission is that the judge failed to give anxious scrutiny to the best interests of the appellant.

16. The fifth submission is that the judge erred by placing weight on the fact that the appellant's parents did not mention her when they (separately) applied for leave to enter the UK. The grounds submit that treating this as undermining of the appellant's case is "tantamount to blaming" her for actions in respect of which she had no responsibility.

Analysis

17. At the hearing, we heard helpful submissions from both Ms Wass, on behalf of the appellant, and Ms Everett, on behalf of the respondent. We have not set out their submissions in this decision, but have considered, and drawn upon them, in the analysis below.

18. The unchallenged finding of the judge was that responsibility for the appellant's upbringing is shared by her parents in the UK but not by the person (her grandmother) with whom she resides in Nigeria. The consequence of refusing entry to the appellant, therefore, is that she will be unable to live with either of the people who share responsibility for her upbringing and instead she will continue to reside with a person who does not share in this responsibility.

19. This is an extremely unusual situation. In almost all circumstances where a British citizen in the UK has responsibility for the upbringing of a child outside of the UK **and** there is no one in the child's country who shares in that responsibility, a child will satisfy the conditions of the Immigration Rules. Between them, subparagraphs (a), (d) and (e) of paragraph 297(i) cover the frequently occurring instances where this is the case. However, the appellant's particular circumstances are such that none of the subparagraphs of paragraph 297(i) apply to her and she is left in the unusual position of having parents in the UK who share responsibility for her upbringing but not being able to satisfy the Immigration Rules which have as their underlying purpose the maintenance of family unity. That this is the purpose of paragraph 297(i) is made clear in paragraph 48 of *TD (Paragraph 297(i)(e): "sole responsibility") Yemen* [2006] UKAIT 00049, which states:

> 48. The purpose of paragraph 297 is clear: it is designed to maintain or effect family unity. Under sub-paragraphs (a) to (d) of paragraph 297(i), the child is accompanying his parents or a parent to live in the UK or he is seeking to join them when they are already settled in the UK. The end product is that parents and child live together in the UK; only if one parent is dead will the other be able to be in the UK alone with the child. By contrast, paragraph 297(i)(e) is concerned with settlement where one parent is in the UK and the other is abroad and will remain so. Paragraph 297(i)(e) has the potential to split up a family and separate a child from one of its parent abroad who is involved in its life. It is only the requirement of "sole responsibility" which acts as a control mechanism. It would, in our view, usually run counter to the policy of family unity to admit a

> child for settlement where the parent abroad is caring for the child and involved in its upbringing, unless the requirements of paragraph 297(i)(f) are met. This must be borne in mind when interpreting, and applying, the test of "sole responsibility". The requirements of that latter sub-paragraph are onerous requiring "serious and compelling family or other considerations which make exclusion of the child undesirable". Hence, the family will be split up only because the parent abroad has no involvement for the child's upbringing (para 297(i)(e) applies) or, where there is involvement, because all the circumstances (including the child's interests) require such a result (para 297(i)(f) applies).

20. Ms Webb described the failure of the Immigration Rules to cover the appellant's circumstances as a lacuna. Ms Everett rejected this argument, but acknowledged that it was difficult to understand why the ambit of paragraph 297 would exclude a person in the appellant's position.

21. We are not persuaded that there is a lacuna in the Immigration Rules. The Rules do not – and do not need to – cover all circumstances where refusal of entry might violate article 8 ECHR. As explained in *MM (Lebanon) & Ors, R(on the applications of) v Secretary of State and another* [2017] UKSC 10 the Immigration Rules are not a "complete code" as to how article 8 is to be applied. The unambiguous language of Paragraph 297 (as well as section E-ECC of Appendix FM, which was also referred to by Ms Webb) leaves no doubt that the appellant does not meet the Rules. The Rules could have been drafted to encompass a person in the appellant's position, but they do not. Ms Webb did not provide any authorities, published guidance or extraneous material to support her contention that the Rules were intended - or logically must be interpreted - to cover the appellant's circumstances. In the absence of any such material we are not satisfied that there is any merit to her lacuna argument.

22. However, we are persuaded by Ms Webb's argument that the judge fell into error by failing to consider, in the article 8 proportionality assessment, that (a) the consequence of refusing entry to the appellant is that she will remain in a different country to the two people who share responsibility for her upbringing and will continue living with a person who does not share in this responsibility; and (b) it is highly unusual for a child who has a British citizen parent in the UK responsible for her upbringing **and** no one sharing in that responsibility in her own country to not fall within the ambit of paragraph 297 of the Immigration Rules.

23. As noted above (in paragraph 10), the only factor found by the judge to weigh in the appellant's favour in the article 8 proportionality assessment was the following, which is set out by the judge in paragraph 37 of the decision:

> "The appellant wishes to live with the sponsor in the UK and I have no doubt that she will be disappointed that she is unable to do so"

24. This finding is problematic for two reasons: first, the appellant does not just wish to live with the sponsor in the UK, she wants to live in the same country as both of her parents who share in responsibility for her upbringing. Second, the language used by the judge indicates that he has not engaged with what needed to be a key consideration in the article 8 proportionality assessment, which is that those with responsibility for the appellant's upbringing live in the UK and no one in Nigeria shares in that responsibility.

25. We recognise that paragraph 37 should not be read in isolation and that the decision needs to be read as a whole. However, a reading of the decision as a whole only serves to reinforces our view that the unusual feature of this case (that responsibility for the appellant's upbringing lies with people located outside of Nigeria but she still does not satisfy the Immigration Rules) has not been addressed in the assessment of proportionality under article 8. This is because, not only is it not considered in paragraph 37 of the decision where the judge explicitly addressed proportionality; it is also not considered in the parts of the decision where the judge considered GEN 3.2 of Appendix FM and paragraph 297(i)(f) of the Immigration Rules. In these circumstances, we have no hesitation in finding that the judge's article 8 proportionality assessment is undermined by a material error of law.

26. For the same reasons, we accept Ms Webb's argument that the judge's evaluation of the appellant's best interests was inadequate. The assessment of her best interests needed to grapple with the implications of her being apart from both parents who share responsibility for her. The absence of any such analysis renders the best interests assessment in the decision unsafe.

27. In the light of these errors, the decision will need to be remade and it is not necessary to address the other arguments advanced in the grounds of appeal.

Remade Decision

28. We reserved the error of law decision at the hearing. However, Ms Webb and Ms Everett agreed that in the event we were to find an error we should proceed to remake the decision without the need for further submissions or evidence. Given that the findings of fact are not undermined by the error of law and therefore can be preserved, we are satisfied that we are in a position to remake the decision.

29. The preserved findings of fact are as follows:

a. The appellant's parents have lived (separately to each other) in the UK for many years. The appellant's father is a British citizen. Her mother has limited leave to remain as a spouse.

b. The appellant's parents provide for her financially, maintain contact with her and are involved with her education. They share responsibility for her upbringing.

c. The relationship between the appellant and her parents is less developed than it would have been had they lived together.

d. The appellant lives with her grandmother and also receives care from wider family in Nigeria. She lives in a stable environment with her grandmother, and has done so from a very young age.

e. The appellant's parents failed to mention the appellant in their (separate) immigration applications, and have only visited her rarely (her father once and her mother twice). They did not envisage her living with them when they decided to relocate, when she was very young, to the UK without her.

f. The appellant is doing well academically and has close friends and family local to her in Nigeria. She is looked after by her family and is relatively safe/well protected from the danger of kidnapping of schoolchildren in Nigeria.

30. We make a further finding of fact, based on the unchallenged witness evidence of the sponsor and appellant's mother, which is that there is no realistic prospect of either of the appellant's parents joining her in Nigeria. The appellant's father has four children in the UK and has not demonstrated any willingness to relocate to Nigeria to be with the appellant. Indeed, since coming to the UK in 2007 he has visited her only once (in 2016). Likewise, the conduct of the appellant's mother (who left the appellant with her parents in 2008 and did not return to Nigeria until 2019 when doing so was necessary to apply for leave as a spouse) demonstrates that there is no realistic prospect of her returning to Nigeria to be with the appellant.

31. The sole ground of appeal is whether refusing entry to the appellant is contrary to article 8 ECHR and therefore unlawful under section 6 of the Human Rights Act 1998.

32. The first question to address is whether the relationship between the appellant and her parents engages article 8 ECHR. The threshold for the engagement of article 8 ECHR is low in the case of family life between parents and their minor children. Given the preserved findings of fact summarised above in paragraph 29(b) (that the appellant's parents provide for her financially, maintain contact with her and are involved with her education) there can be, in our view, no doubt that article 8 ECHR is engaged in this case.

33. The next question to consider is whether the appellant meets the conditions of the Immigration Rules. If she does, this will be positively determinative of the appeal in her favour as the respondent will not be able to point to the importance of maintaining immigration control as a factor weighing against her in the article 8 balancing exercise. See paragraph 34 of *TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department* [2018] EWCA Civ 1109 and paragraph 27 of *OA and Others (human rights; 'new matter'; s.120 : Nigeria)* [2019] UKUT 65 (IAC). If the factual matrix had been only slightly different the appellant would have satisfied the Immigration Rules. She would, for example, have met the conditions of Paragraph 297(i) if her mother did not share responsibility with her father for her upbringing (subparagraph (e)); if her mother had indefinite leave to remain rather than limited leave to remain in the UK (subparagraph (a)); or if her mother was deceased (subparagraph (d)). And she would have satisfied the conditions of section E-ECC of Appendix FM if her parents lived in the UK as partners rather than separately. However, even though she comes close, her particular circumstances are such that she does not meet the conditions of any part of the Immigration Rules.

34. As the appellant does not fall within the ambit of the Immigration Rules, it is necessary to undertake a proportionality assessment in order to determine whether refusing her entry breaches Article 8 because it results in unjustifiably harsh consequences. To evaluate proportionality we adopt the balance sheet approach endorsed in *Hesham Ali v. Secretary of State for the Home Department* [2016] UKSC 60.

Considerations weighing in the appellant's favour

35. It is, in our view, firmly in the appellant's best interests to live with one of her parents. We reach this conclusion for the following reasons:

    a. It is usually in the best interests of a child to live with one or more of her parents rather than another family member. This is well established in the case law on article 8 ECHR. See, for example, paragraph 38 of *Mundeba (s.55 and para 297(i)(f))* [2013] UKUT 00088(IAC) ("As a starting point the best interests of a child are usually best served by being with both or at least one of their parents").

    b. Although the appellant's parents chose to leave her in Nigeria, did not envisage her joining them in the UK when they applied for entry to the UK and have visited her infrequently, they have both maintained contact with her, supported her financially, been involved with her education and – crucially – shared responsibility for her upbringing. In our view this demonstrates a close connection, albeit one that is not as

close as it would have been had the appellant been living with (or in the same country as) her parents.

c. Living in Nigeria with an elderly grandparent who does not have (and has not taken) responsibility for her upbringing is not a good substitute for being with parents who, despite living in a different country, have maintained shared responsibility for the appellant's upbringing throughout her life. This is the case even though the appellant has the support of wider family and has been provided with a stable environment in Nigeria.

36. It would be in the appellant's best interests to live with one of her parents in either Nigeria or the UK. However, for the reasons given above in paragraph 30, it is extremely unlikely that either parent would relocate to Nigeria and therefore in order for the appellant to reside with one of her parents she will need to be granted entry clearance.

Considerations weighing against the appellant

37. As the appellant is not entitled to entry clearance under the Immigration Rules the public interest in the maintenance of effective immigration controls weighs against her. The weight to attach to this public interest is not fixed (see *Patel (historic injustice; NIAA Part 5A)* [2020] UKUT 00351(IAC)) and it is our view that it is significantly diminished in this case. The reason for this is that, as explained in paragraph 48 of *TD* (see paragraph 19 above), the purpose of Paragraph 297 of the Immigration Rules is "to maintain or effect family unity". In this case, the only way family unity can be "effected" is by granting entry clearance to the appellant, as otherwise she is prevented from living with either of her parents. As we have explained above, the fact pattern in this case is highly unusual because invariably entry clearance is granted under Paragraph 297 where, as is the case here, a British citizen in the UK has responsibility for the upbringing of a child outside of the UK and there is no one in the child's country who shares in that responsibility. We therefore consider it appropriate, because of the particular and unusual facts of this case, to reduce the weight we would otherwise give to the public interest in effective immigration controls.

38. For the avoidance of doubt, we have reduced the weight we attach to the public interest in effective immigration controls because of the underlying purpose of Paragraph 297 as explained in *TD*, not because the appellant came close to meeting the Rules. This is because, as explained in paragraph 26 of *Miah & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 261, there is no "near miss" principle and the requirements of immigration control

are not weakened by the degree of non-compliance with the Immigration Rules.

Neutral factors

39. We do not attach any weight to the wish of the appellant's parents to live with the appellant in the UK. It is apparent that they chose to live apart from the appellant by moving to the UK without her and article 8 is not a mechanism through which a wish to live in the UK can or should be fulfilled.

40. The wish of the appellant's parents (to which we give no weight) is entirely distinct from the question of the best interests of the appellant. As we have explained above, we consider it to be firmly in the best interests of the appellant to live with one of her parents (notwithstanding their choice to leave her in Nigeria); and, as neither parent is likely to move to Nigeria, the appellant's best interests can only be achieved if she relocates to the UK. See paragraphs 35-36 above.

41. The appellant speaks English and therefore an inability to speak English does not weigh against her in the proportionality assessment.

42. The financial position of the appellant's sponsor, as summarised in paragraph 29 of his statement, is such that the appellant is unlikely to be a significant burden on the taxpayer. The public interest in immigrants being financially independent therefore does not weigh against the appellant.

43. The appellant claims that she faces a risk of kidnapping in Nigeria. We are not satisfied that the evidence before the First-tier Tribunal on this issue demonstrates that there is more than a very small risk and therefore we treat this as a neutral factor.

Conclusion on proportionality

44. A child's best interests are not a paramount consideration in a proportionality assessment and they can – and often will – be outweighed by other considerations. However, in this case, for the reasons explained above, we are satisfied that it is strongly in the appellant's best interests to be granted entry to the UK whereas the public interest in immigration controls is diminished because of the particular and unusual circumstances.

45. Having considered all of the circumstances, we are of the view that refusing the appellant entry to the UK has the unjustifiably harsh consequence of preventing her from living with either of her parents and therefore, for the fact specific reasons explained above, the proportionality assessment in this case falls firmly on the side of the appellant.

46. We note, for completeness, that we are required, in our assessment of proportionality, to have regard to the considerations listed in Part 5A of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"). We have done so: section 117B(1) is addressed in paragraphs 37-38; section 117B(2) is considered in paragraph 41; and section 117B(3) is considered in paragraph 42. The other considerations in Part 5A of the 2002 are not relevant.

Notice of Decision

47. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

48. We remake the decision by allowing the appeal on the ground that the decision to refuse entry to the appellant is unlawful under section 6 of the Human Rights Act 1998.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 8 March 2022