Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00041/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 January 2018	**On 23 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

[M O]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms G Fama of Counsel, instructed via Direct Access
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me further to the 'error of law' decision made at the hearing on 10 October 2017, and further to the adjourned hearing on 15 November 2017. 'Decisions and Reasons' were prepared both in respect of the 'error of law' decision and in respect of the adjournment. Those Decisions are a matter of record on file and should be considered as if incorporated into the decision I give now.

2. [MO] is a citizen of Nigeria born on [ ] 2003. She appeals against a decision to refuse her entry clearance to join her parents, [LO] and [FO], in the UK.

3. Mr and Mrs [O] have had three further children in the United Kingdom, born respectively on [ ] 2006, [ ] 2009 and [ ] 2015. Those three children are British citizens. [FO] is settled in the United Kingdom. [LO], at the date of the hearing before the First-tier Tribunal, was a person with limited leave to remain. He has embarked on the so-called '10 year route' to settlement, having been granted leave to remain on the basis of his relationship with his British citizen children. I was told today that pursuant to the '10 year route' he is expected to renew his leave every 30 months, and that it would not be until 2025 that he might expect to acquire settlement. I was also told today that he is presently awaiting a decision on one such application for further leave to remain. I return to this circumstance in due course.

4. [LO] first came to the United Kingdom in 2004, when the Appellant would have been little more than a baby. [FO] came to the United Kingdom in 2005. The Appellant was left, it is said, with a family friend: indeed one of the matters highlighted in this case in support of the need to be reunited with her parents is that the Appellant has since that time for the main part lived with one family friend or another until such time as she went to boarding school - and even then, during the vacation periods, she would stay with family friends. However, there was a period from 2006 when the Appellant's father lived with her in Nigeria. [LO] was removed from the United Kingdom in 2006 and spent two years in Nigeria being responsible for the Appellant's education and welfare: notwithstanding, he returned to the United Kingdom in 2008 to resume life with his wife and at that time, one young child. However, it was not until 2015 that he secured leave to remain in his own right.

5. The Appellant herself has commented upon this background and life experience in her witness statement before the First-tier Tribunal in the following way:

> "*As far as I could remember, I have never really lived with my biological parents for that long. I know my father very well but I do not really know my mother in person because I was too young when she left for the UK. All my life, I have been staying with different set of people until my father had to make arrangements for me to be a boarding student. Although I do not want to complain, I desire to be like any child that lives with their loved ones. My case is not the case. I moved from one family to the other and when it appears I am settled in that house with such a family, I would be forced to leave there. Being a boarding student has its own draw back as all I want is to live with my parents and get to know my siblings*."

6. The difficult nature of this family history is brought into further relief through the witness statement filed by the Appellant's father dated 25 January 2018. [LO] says this:

> "*Although I have taken time out to visit her regularly to ensure she is ok and she is well catered for, since my wife left her when she was 2 years old she has never set her eye on my wife. The Appellant does not even know her brother and her sisters who were all born in the UK and achieved settled status. The Appellant cries every day because she wants to re-establish contact with her mother and her siblings. I feel pain in my heart any time I am leaving her after visiting her. She cries a lot and it is difficult for her when the parents of her peers come to pick them during holiday and none of us is around. This has become the norm for several years and it has affected her in many ways as she keeps staying with one family and other every time she is on holiday from her studies when they have to vacate the school's dormitory.*"

Later in the statement the following appears:

> "*For twelve years she has not seen her mother. ...She does not know how her mother looks aside the pictures she has seen. She has siblings, yet she has also not seen them except what they look like in pictures. This is complete torture for her. Her peers and friends talk about their parents and siblings and when such topics are discussed she informed me that she is always ever downcast and teary because she does not have the same relationship others have with their parents and siblings.*"

Yet further the following is stated:

> "*My wife regrets to date why she left our daughter behind when she arrived in the United Kingdom in 2005. Although she tried as much as possible to keep in touch with our daughter, my wife is very much disturbed because it appears anytime she has a conversation with our daughter on the telephone it feels as if she is speaking with a stranger. She could sense a resentment from the Appellant as a result of which she cries every time. She wants our daughter to join us in the UK so that we can live as a family. She wants her to get to know the rest of the family. She is really desperate that the Appellant can come to the UK.*"

7. The Appellant made an application for entry clearance to join her parents shortly after both parents had acquired regularised immigration status in the United Kingdom. The application was refused for reasons set out in a Notice of Immigration Decision dated 2 November 2015, with reference to paragraphs 297(i),(iv) and (v) of the Immigration Rules and also after consideration of Article 8.

8. The appeal before the Tribunal is restricted to human rights grounds in accordance with the provisions of the Nationality, Immigration and Asylum Act 2002. Nonetheless, it is appropriate to have regard to the Immigration Rules as offering something by way of an indicator as to where proportionality ordinarily is considered to lie in cases such as this. To that end, and further to the earlier proceedings herein, I have been able to have a helpful discussion with both

representatives at the commencement of the hearing as to the framework under which this appeal is to be considered.

9. In the first instance I should make it clear that even though this is an entry clearance case and prior to the recent amendments to the 2002 Act the Tribunal would ordinarily have evaluated matters as of the date of the Respondent's decision, given the amendments to the 2002 Act by virtue of the Immigration Act 2014 - and in particular the repeal of the old section 85(4) - it is common ground that the Tribunal should evaluate matters as of the date of the hearing.

10. It is also now common ground - essentially for the reasons explored in my earlier Decisions - that paragraph 297 of the Immigration Rules was of no application to the Appellant's case.

11. Ms Fama had raised the possible applicability of paragraph 301 of the Immigration Rules during the previous hearing. However, it is now acknowledged that that Rule is of no application in light of the transitional provisions under Part 8 of the Immigration Rules, in particular paragraphs A277 and A280, which make it clear that paragraph 301 no longer applies in a case such as the Appellant's. Accordingly it is now common ground that the only applicable provision by which the Appellant could succeed under the Immigration Rules is that set out in Appendix FM at Section EC-C – 'Entry clearance as a child'.

12. In this regard Mr Tufan raised an issue in respect of the 'relationship requirement' under E-ECC.1.6, pursuant to which one of the Appellant's parents would be required to be present in the UK with limited leave to enter. Up until very recently it was clearly the case that the Appellant's father satisfied such a condition. However, Mr Tufan highlighted that [LO] was presently enjoying leave pursuant to section 3C of the Immigration Rules 1971, because he had a pending application for variation of leave to remain. Mr Tufan queried - rather than argued forcibly - that that might mean that paragraph E-ECC.1.6 was not presently satisfied.

13. In my judgment the Appellant's father's current leave – statutorily extended leave by virtue of section 3C - must be considered to be limited leave within the contemplation of E-ECC.1.6 because it is essentially a statutory variation of an extant limited leave which in itself, although not limited by reference to a specified date, is nonetheless inevitably limited given that it only pertains for so long as any of the circumstances identified in section 3C(2) might apply.

14. Even if it were otherwise, I would not be prepared to take the view on all of the facts of this particular case that the interim status of the Appellant's father should in itself frustrate the Appellant's appeal - which is brought on Article 8 grounds rather than Immigration Rules grounds. [LO] was previously granted permission to remain on the basis of his relationship with his British citizen children, notwithstanding adverse aspects of his immigration history (including a previous removal). The relationship with his British citizen children continues, and there is little to suggest that there is anything further adverse that might be said against him. I say 'little to suggest' rather than 'nothing to suggest' because Ms Fama brought to my attention a letter confirming that [LO] had an outstanding application lodged with the Home Office, but which stated that the application was pending consideration given that there was an impending prosecution. [LO] denied any knowledge of such a prosecution; indeed Mr Tufan acknowledged that it might be no more than a mistaken reference to the matters that had previously resulted in [LO]'s removal in 2006. I return briefly to this factor at the end of this Decision. Suffice to say for the moment: I am not persuaded that [LO]'s status pending consideration of an application for variation of leave to remain is such as to take the Appellant outside the requirements of the Rules; in any event, even if it were, it is not such as to defeat her appeal without more.

15. So far as the financial requirements of Appendix FM are concerned, because the Appellant's siblings are British citizens it is only necessary to add to the £18,600 specified at E-ECC.2.1(a)(i) the sum of £3,800 "*for the first child*" specified at E-ECC.2.1(a)(ii). That makes a target income of £22,400. The Appellant's father produced evidence before the First-tier Tribunal that he had recently commenced employment – see decision of First-tier Tribunal Judge Wright at paragraph 18. This is not to suggest that the Appellant's father had not previously been in employment, but rather that he had started a new job. He produced a job offer letter dated 2 February 2017 offering him a role at an income of £21,247 and a number of payslips which demonstrated that he had accepted that role. The First-tier Tribunal Judge accepted that evidence.

16. [LO] has filed further up-to-date payslips in this regard which show him in receipt of a gross monthly income of £1,814.13 - which adds up to an annual income of £22,000.92. He confirmed that this was in respect of the same job that he had recently undertaken at the time of the hearing before the First-tier Tribunal.

17. It may be seen that that income is very slightly under the £22,400 target under the Rules. However, in this regard the Appellant's father indicated that in addition to his main employment he also works two days a week at the weekends as a cleaner. He has previously provided evidence of such employment with Turquoise Cleaning, and today provided confirmation by way of a bank statement, albeit produced electronically before the court, of receipt of £203 into his account yesterday. This, he

said, was pay for the previous weekend's work with Turquoise Cleaning - work that he completed, as indicated above, on a weekly basis. This modest additional income would take his earning level over that specified in the Immigration Rules.

18. I am satisfied on a balance of probabilities that the Appellant's father does indeed earn presently beyond the limited specified under the Rules.

19. I am also satisfied that adequate accommodation would be available for the Appellant. A tenancy agreement has been produced in this regard and I can identify nothing in that tenancy agreement that would suggest that the Appellant's parents require any further permission from the landlord for their daughter to join them. Moreover, as the accommodation is 3-bedroom accommodation, it is accepted by Mr Tufan that there would be no statutory overcrowding in the event that the Appellant were to live there with her parents and siblings.

20. Again, on a balance of probabilities, I accept that the Appellant's parents are in a position to provide her with adequate accommodation within the family home.

21. In those circumstances, in substance, I can identify nothing under the Immigration Rules that would prevent an application for entry clearance succeeding at the current time. This conclusion forms a foundation for considering Article 8, and in particular informs evaluation of proportionality.

22. I have given some consideration to whether the answer in this case is not simply to suggest that it is proportionate to expect the Appellant to re-apply for entry clearance. That would necessarily mean that any issues that might arise in respect of the Appellant's father's immigration status could be considered and/or resolved, and it would also mean that the appropriate 'specified evidence' in accordance with Appendix FM-SE might be produced. However, it has been urged upon me by Ms Fama that the expediency of the case would favour the Appellant being granted entry clearance as soon as possible, rather than there be yet further delay in a case that has already gone on for some time and in circumstances where the Appellant is plausibly experiencing increasing upset and anxiety over her predicament. I am persuaded that that is indeed the appropriate approach.

23. In all of the circumstances, I find that the Appellant's exclusion from the United Kingdom by reason of the Respondent's decision - and the concomitant inhibition of her ability to strengthen the bonds of family life with her father, to rediscover family life with her mother, and to discover for the first time family life with her siblings –

constitutes a disproportionate interference with the Appellant's Article 8 rights, and the mutual rights of her family members.

24. Of course it may well be that circumstances change between now and the granting of entry clearance - in particular if it turns out that there is indeed something against the Appellant's father with regard to a prosecution that might impact upon his immigration status. The Appellant and her family should be aware that an Entry Clearance Officer may lawfully have regard to any changes of circumstance which may result in further consideration of whether entry clearance should indeed be granted, irrespective of the favourable outcome in the appeal,. However, absent any such changes, I am entirely satisfied that the proportionate outcome is that the Appellant should now be granted entry clearance to join her family in the United Kingdom.

25. I observed during the course of the hearing that this case brings into stark relief the sometimes very unfortunate circumstances surrounding 'left behind' children. In my judgment the best interests of the Appellant presently are served by being reunited with her parents - but it may not be the case that it could be said that the Appellant's best interests have always been served hitherto. In this regard, whilst I have no doubt that the Appellant's parents have thought that they were acting in the long-term best interests of their daughter in trying to make something of a life in the United Kingdom for her to come and join, the long and difficult pursuit has resulted in a very considerable disruption to the relationship between the Appellant and her parents. The witness statements talk in terms of the extremely difficult relationship between the Appellant and her mother to an extent that they are now largely strangers to each other. Moreover, it seems to me likely that the Appellant may feel some considerable sense of exclusion from the lives of her siblings and from the family unit established in the UK. It may be that the family will have to work hard to get over some of the emotional consequences of the manner in which they have made their domestic arrangements over the past few years. I bear in mind that the Appellant as a minor is not herself directly responsible for any of these matters, and in all of the circumstances I am not prepared to take the view that the arrangements made and acquiesced in by the parents should essentially now be held against the Appellant in circumstances where in substance she satisfies the requirements of the Immigration Rules.

26. For the avoidance of any doubt, I have had regard to section 117B and the considerations thereunder in reaching my decision. Certain aspects of section 117B do not really fall for consideration in the context of an entry clearance application. Be that as it may, ultimately it seems to me that in terms where the Rules are in substance met, the outcome that I have reached is not in any way contrary to the public interest requirements.

Notice of Decision

27. The appeal is allowed on Article 8 grounds.

28. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **19 February 2018**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I decline to make a fee award in this case. Aspects of the public interest considerations, in particular with regard to parental income, have been met by reason of matters that post-date the Respondent's decision.

Signed: Date: **19 February 2018**

Deputy Upper Tribunal Judge I A Lewis
(***qua* Judge of the First-tier Tribunal**)