Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08801/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 June 2019	**On 4 July 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MR GEORGE BONSU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms D Ofei-Kwatia, Counsel, instructed by BWF Solicitors
For the Respondent: Ms S Cunha, Senior Home Office presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Moore ("the judge"), promulgated on 18 January 2019, in which he dismissed the Appellant's appeal against the Respondent's decision of 22 May 2017, refusing his application for entry clearance and thereby refusing his human rights claim.

2. In essence the claim had been made by the Appellant (just a day before he reached his 18th birthday) to join his mother and father in the United Kingdom. In refusing the human rights claim, the Respondent proceeded to consider the matter under paragraph 301 of the Immigration Rules ("the Rules"). Concerns were raised about the relationship between the Appellant and the claimed parents and whether or not

the Appellant had been living an independent life. Reference was also made to the fact that by the date of the decision the Appellant had turned 18. No issues were raised in respect of maintenance and accommodation issues.

3. On review by an Entry Clearance Manager, the issue relating to the Appellant's age was quite properly conceded in light of paragraph 27 of the Rules. The other points were maintained.

The judge's decision

4. In deciding the appeal, the judge proceeded on the basis that paragraph 301 was the applicable Rule. Nothing to the contrary was indicated by either of the representatives appearing before him. The judge had a number of concerns about various aspects of the evidence including the ability of the Appellant's grandfather to continue looking after him, the nature of the financial support, contact between the Appellant and his mother in the United Kingdom, and the mother's earnings in this country. The judge concluded that the Appellant could not meet the requirements if paragraph 301 and that the appeal had to fail.

The grounds of appeal and grant of permission

5. The grounds of appeal challenging the judge's decision assert that he erroneously applied paragraph 301 of the Rules rather than the relevant provisions under Appendix FM to the Rules. It is also said that the judge erred in his consideration of the mother's ability to adequately maintain the Appellant.

6. Permission to appeal was granted by Upper Tribunal Judge Keith on 29 May 2019.

The hearing before me

7. Before me it was agreed by both representatives that paragraph 301 of the Rules was not the correct provision. In light of the relevant transitional provisions, the Respondent, and then in turn the judge, should have considered the Appellant's application in light of Appendix FM, in particular those provisions relating to the application for entry clearance by a child to join the parent or parents residing in the United Kingdom with limited leave to remain (section E-ECC).

8. Ms Cunha accepted the biological relationship between both parents and the Appellant and that the parents' limited leave to remain in the United Kingdom was based upon their parentage of a British child.

Decision on error of law

9. It is clear that the judge erred by, albeit inadvertently, applying the wrong Rule to the Appellant's case, as had the Respondent. The question is whether this error is material.

10. Ms Ofei-Kwatia submitted that it was because the test of maintenance was not that relating to the minimum income requirement and the need to provide specified evidence, but rather that of adequacy in light of E-ECC.2.3A of Appendix FM. She

submitted that sufficient evidence of the ability to adequately maintain the Appellant had indeed gone in with the application and was before the judge.

11. I agree that the judge's error was material in particular for the reasons put forward by Ms Ofei-Kwatia. In my view, although the judge did have concerns about the Appellant's mother's earnings, he did not consider all of the relevant evidence in the context of the applicable maintenance test. In addition, the other matters of concern raised by the judge did not in fact go to the relevant issues under E-ECC.

12. It cannot be said that a consideration of the correct provisions of the Rules could have made no difference to the outcome. Indeed, Ms Cunha accepted that this must be the case.

13. In light of the above, I set the judge's decision aside.

Remaking the decision in this case

14. I now go on to remake the decision in this appeal based upon the applicable provisions of Appendix FM. Having seen the covering letter sent in with the application by the Appellant's representatives, it is quite clear that reliance was placed on section E-ECC of Appendix FM from the outset. Ms Cunha specifically stated that I should now apply those provisions. It was, quite rightly, not suggested that any "new matter" arose.

15. There is no dispute that the Appellant was able to meet all of the requirements of the relationship criteria. There is no issue as to the Appellant's age as at the making of the application.

16. The sole issue relates to the adequacy of maintenance and accommodation under E-ECC 2.3A. In respect of the relevant case law on this issue I direct myself to KA (Pakistan) [2006] UKAIT 00065. I note that the Respondent did not take any issue with maintenance or accommodation when refusing the Appellant's human rights claim albeit on the basis of an incorrect provision of the Rules. I note that the adequacy of the maintenance test is the same under E-ECC 2.3A and paragraph 301.

17. I have been helpfully provided with references to the Appellant's bundle in respect of the earnings of both his mother and father in the time running up to the date of decision. On the basis of the unchallenged evidence to which I have been referred, I am satisfied that as at the date of decision the combined gross earnings of the parents amounted to £33,804 a year, that being £2,876 a month. I am satisfied that the monthly rent at the relevant time was £800 and that the council tax was approximately £135 a month. Once these relevant deductions are made, the monthly net income of the couple was £1,882.

18. I then move on to compare this with the relevant family unit in receipt of Income Support. This family unit would have consisted of two adults and four dependent children, with an additional weekly Family Premium. I am satisfied that the correct monthly figures are as follows. For the couple, £497.68 a month; for the four

dependent children, £1,159.60 a month; with the family premium being £75.61 a month. The total of this was £1,732.89 a month.

19. When one deducts the Income Support figure from the parents' net monthly income one is left with an excess of £149.11 per month in the Appellant's favour. Thus, the adequacy of the maintenance threshold was met as at the date of decision. There has been no challenge to the adequacy of accommodation and there is ample evidence within the Appellant's bundle to show that such accommodation was in place at all material times.

20. Ms Cunha expressly accepted that if it could be shown that the Appellant met the appropriate Rule as at the date of decision, he would be entitled to succeed in his appeal in light of TZ (Pakistan) [2018] EWCA Civ 1109.

21. In light of my findings as a whole and in relation to the adequacy of maintenance and accommodation in particular, I conclude that the Appellant did meet all of the relevant provisions under Appendix FM as at the date of decision.

22. In turn, given Ms Cunha's position that satisfaction of the applicable Rule as at the date of the Respondent's decision should lead to success, I conclude that the Appellant's appeal falls to be allowed on Article 8 grounds.

23. Even if I was obliged to consider the Appellant's circumstances as at the date of hearing before me (with reference to the amended section 85(4) of the Nationality, Immigration and Asylum Act 2002), it would make no difference to the outcome. On the evidence, the Appellant's application for entry clearance was put on the correct footing from the very start, that being section E-ECC of Appendix FM. It is equally clear that the evidence submitted with that application was sufficient for the maintenance and accommodation criteria to have been met. Whilst the Entry Clearance Officer had concerns over the relationship between the Appellant and his parents, this has been proved by way of DNA evidence. Therefore, had the Respondent considered the Appellant's case on a correct footing from the outset (as he undoubtedly should have), the only issue would have related to the familial relationship, a matter that was subsequently met with incontrovertible evidence. The Respondent's flawed approach to the Appellant's case throughout this prolonged period is a significant matter, and, taking all of the circumstances into account, I would regard this Article 8 claim as being sufficiently strong to justify allowing the appeal in any event.

Anonymity

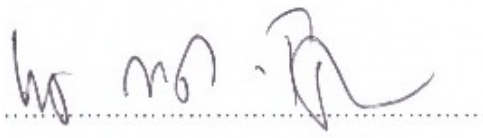
24. No anonymity direction is made.

Notice of decision

The decision of the First-tier Tribunal involved the making of a material error of law.

I set that decision aside.

I remake the decision by allowing the Appellant's appeal.

Signed  Date: 1 July 2019

Upper Tribunal Judge Norton-Taylor