Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/04013/2020**
HU/01207/2021

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On the 29 July 2022 **On the 22 August 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR DA (NIGERIA)
MR TEMIDAYO OYEKHELOME
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr P. Corben, Counsel instructed by Wimbledon Solicitors
For the Respondent: Mr C. Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity

1. I have decided that it is no longer necessary to make an order for the appellants' anonymity. The second appellant turned 18 some time ago. The first appellant will very shortly attain the age of majority, on 9 August 2022. His identity will sufficiently be protected in respect of the likely very short period between the promulgation of this decision and his

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attainment of the age of majority by the omission of his full name from this decision.

Procedural background

2. By a decision promulgated on 14 July 2021, First-tier Tribunal Judge Clarke ("the judge") allowed the appeals brought by the appellants under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") against linked decisions of the respondent dated 11 June 2020 and 11 February 2020 to refuse their human rights claims, made in the form of applications for entry clearance.

3. In an *extempore* decision given on 21 January 2022, sitting as a panel with Deputy Upper Tribunal Judge Parkes, I allowed an appeal brought by the respondent against the decision of Judge Clarke. I set the decision aside and directed that the appeal be reheard in this tribunal, with certain findings of fact reached by Judge Clarke preserved. That judgment may be found in the **Annex** to this decision. I refer to it as the "error of law decision".

4. It was in those circumstances that the matter resumed before me, sitting alone pursuant to a transfer order given by the Principal Resident Judge of the Upper Tribunal, to be remade, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Factual background

5. The appellants are brothers. They were born on 9 August 2004 and 18 August 2002 respectively. They live in Nigeria, the country of their nationality, with their grandmother, where they are supported financially by their parents who live in this country. Their mother, Becky Ayeni, the sponsor, is Nigerian and holds limited leave to remain. Their father, Olumuyiwa Ayeni, is her husband. He is also Nigerian and holds leave to remain under Appendix FM of the Immigration Rules (paragraph 8 of Mrs Ayeni's statement dated 9 March 2022 says that he was granted indefinite leave to remain on 15 November 2021). The appellants applied for entry clearance when they were both still children, under Section EC-C of Appendix FM, which is entitled "*Entry clearance as a child*".

6. Judge Clarke reached the following findings of fact which were not challenged, and which have been preserved:

    a. Although the respondent had assessed the application under the "sole responsibility" limb of paragraph E-ECC.1.6.(b), it was common ground at the hearing before the judge that if the appellants were able to demonstrate that that Olumuyiwa Ayeni was their father, they would meet paragraph E-ECC.1.6.(a). The judge found that Mr Ayeni was the appellants' father, and so this requirement was met.

b. The judge found that all other criteria contained in Section EC-C were met, save for the financial requirements, which is a matter to which I shall return shortly.

c. The appellants enjoy "family life" for the purposes of Article 8 ECHR with their parents.

d. It was in the appellants' best interests to live with their mother and father, in the United Kingdom.

Scope of the resumed hearing

7. As set out in the **Annex**, I set the judge's decision aside because it failed to engage with the prospective financial burden the appellants would be on public funds, if admitted to the United Kingdom. That was because their parents' income did not meet the minimum income threshold under paragraph E-EC's C.2.1. of Appendix FM, which was £24,800. The sponsor's combined income from two jobs was around £15,800.

8. Upon setting aside Judge Clarke's decision, I gave directions for matter to be reheard in the Upper Tribunal, with the above findings of fact preserved. I gave directions for the appellants to rely on updated evidence. This was provided to the Upper Tribunal in two tranches:

a. On 17 March 2022, the appellants provided a bundle of documents demonstrating that the sponsor was employed by "Rubikot Limited", on a salary of £21,500, on 14 January 2022.

b. On the morning of the resumed hearing, 29 July 2022, the appellants provided a further supplementary bundle. It included documents demonstrating that Mr Ayeni is now also employed by Veolia on an annual salary of £23,463. The additional supplementary bundle included bank statements demonstrating receipt of net monthly salary payments from each employer in terms corresponded with the payslips provided from each.

Mr Avery, on behalf of the Secretary of State made no objection to the late submission of the documents and confirmed that he was satisfied that the appellants now meet the financial threshold contained in the minimum income requirement of the rules. Although the sponsor and Mr Ayeni had attended the hearing, Mr Avery accepted the documentary evidence and did not seek to challenge either prospective witness in relation to it. The hearing proceeded on the basis of submissions alone.

9. I heard submissions from both advocates and reserved my decision.

Submissions

10. On behalf of the appellants, Mr Corben drew my attention to paragraph 79 of the judge's decision, which he submitted had been expressly preserved by my earlier judgment:

> "The crucial factor for me in this appeal is the appellants' best interests. As I have stated, while the appellants' best interests are of primary, and not paramount, importance, no other factor ranks higher. In my view, the appellants' best interests to live with their parents outweighs the strong public interest in effective immigration control. On the specific facts of this case, I find that refusal of entry clearance is a disproportionate interference with the appellants' Article 8 rights."

11. Mr Corben submitted that, given it was now accepted that, as at the date of the resumed hearing before me, the appellants met the financial requirements of the rules, the appeal should be allowed. The mischief in the judge's decision, and the reason it had been set aside, was solely because it failed properly to engage with the prospective financial burden the appellants would place on the State. Since the appellants now not only met the financial requirement in the rules, but exceeded it by a considerable margin, the public interest did not require their continued exclusion.

12. For the Entry Clearance Officer, Mr Avery submitted that the financial requirements were not met at the time of the applications. The Entry Clearance Officer's decision was entirely correct on the material before her, at the time of the decision. The Immigration Rules reflect the Secretary of State's view on the public interest in the maintenance of effective immigration control; the rules exist for good reason. They require a full and thorough assessment of the circumstances of applicants at the time applications are submitted. Although the financial requirements are nominally now met, that is not a good reason to allow the appeal.

13. Mr Avery said that he accepted that, although the elder appellant is now an adult, since there was a preserved finding that he enjoyed Article 8 family life with his parents, that was a factor of less relevance.

The law

14. This is an appeal brought on the ground that the refusal of entry clearance to the appellant would be unlawful under section 6 of the Human Rights Act 1998, on the basis that it would breach the United Kingdom's obligations under Article 8 of the European Convention on Human Rights ("the ECHR") (right to respect for private and family life).

15. As Baroness Hale explained in *R (oao Bibi) v Secretary of State for the Home Department* [2015] UKSC 68 at [25] to [29], and in *R (oao MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10 at [38] and [40] to [44], the European Court of Human Rights has for long distinguished between the negative and positive obligations imposed by Article 8 of the ECHR. Contracting parties to the ECHR are subject to negative obligations not to interfere with the private and family lives of settled migrants, other than as may be justified under the derogation contained in Article 8(2). By contrast, in cases concerning the admission of migrants with no such rights, the essential question is whether the host

state is subject to a positive obligation to facilitate their entry. In positive obligation cases, the question is whether the host country has an obligation towards the migrant, rather than whether it can justify the interference under Article 8(2). But the principles concerning negative and positive obligations are similar. As the Strasbourg Court held in *Gül v Switzerland* (1996) 22 EHRR 93:

> "In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation…" (paragraph 106)

16. Part 5A of the 2002 Act contains a number of public interest considerations to which the tribunal must have regard when considering the proportionality of the refusal of entry clearance. In addition, it is settled law that the best interests of the child are a primary consideration when assessing proportionality under Article 8(2) of the ECHR.

Discussion

17. Judge Clarke found that the appellants enjoy Article 8 "family life" with their parents. That finding has been preserved. Since this is an entry clearance case, it is necessary to determine whether the appellants' continued exclusion from the United Kingdom is proportionate; if it is not, the United Kingdom will be subject to a positive obligation to facilitate their admission, in order for them to enjoy family life with their parents, who are within the United Kingdom's territorial jurisdiction under the ECHR, in this country. I will perform this assessment through a "balance sheet" analysis, in order to determine where the "fair balance" lies (see the summary of the law at paragraph 15, above). The assessment is to be informed by the relevant provisions of the Immigration Rules, S-EC of Appendix FM.

18. I begin by recalling that the best interests of DA, a child, are a primary consideration. As Judge Clarke found, those best interests are to reside with his parents. However, contrary to the submissions of Mr Corben, paragraph 79 of the judge's decision had not been expressly preserved, and the appellants do not benefit from preserved findings of that generosity. Paragraph 79 featured as part of the judge's proportionality assessment under Article 8 ECHR. That assessment was expressly set aside: see [20] of the error of law decision, "on that basis, we conclude that the judge's proportionality assessment was flawed and must be set aside." And at paragraph 21, "it is solely the judge's analysis of Article 8 outside the rules that has been impugned."

19. The judge's preserved findings relating to the best interests of the appellants were more nuanced, and were at paragraph 72:

> "I find that the appellants' best interests are to live with the sponsor and their father. There is nothing in the evidence to suggest that the appellants are not being looked after by their elderly grandmother. I take into account that the appellants are in their late teenage years

> and will be able to care for themselves to a large extent and, if anything, will be able to care for their grandmother. However, in terms of the best interests, I find that those interests lie with being their biological parents. I will factor my assessment of the appellant's best interests into the balancing exercise."

20. While Judge Clarke found that the best interests of Temidayo were to be with his parents, that cannot have been a finding in the sense of 'the best interests of the *child*', since he had already attained the age of majority at the date of the hearing in the First-tier Tribunal. Little turns on this for present purposes, since DA was then a child, and at the date of the resumed hearing in the Upper Tribunal, he was still a child. The judge's unchallenged finding that both children enjoyed Article 8(1) "family life" with their parents must have encompassed a finding that the brothers enjoyed family life with each other, since there was no evidence before him concerning any form of division between the siblings. It follows that it is in DA's best interests to be with his parents, and to continue the family life he enjoys with his older brother, which will not have stopped simply because Temidayo is now an adult in the eyes of the law.

21. Judge Clarke's assessment of the appellants' best interests followed the hearing before him on 22 June 2021. His assessment at that time may, in my judgment, properly be categorised as marginal. Time has moved on since then. DA will become an adult very shortly. What was marginal in June 2021 is now even more so.

22. A feature of the proceedings which causes me some concern (although was not challenged by Mr Avery) is the fact that Mr and Mrs Ayeni attended the resumed hearing with additional two sons, aged 10 and 11, who had not hitherto featured in the case. At paragraph 5 of Mrs Ayeni's statement prepared for the hearing before the First-tier Tribunal dated 28 April 2021, she wrote that she gave birth to a daughter in July 2009 who tragically died later that month. She made no additional references to having any sons or other children at the time.

23. In her supplementary statement dated 9 March 2022, submitted pursuant to the directions I gave in the error of law decision, Mrs Ayeni stated at paragraph 2 that the couple also have two sons living with them in the UK. As far as I can tell, that was the first time any additional children had been mentioned. This is troubling since it goes to the minimum income requirement under the Immigration Rules. As set out by Judge Clarke at paragraph 48 of his decision, an additional £2,400 is required for each additional child when calculating the minimum income requirements. Since Mr Avery did not take this point, I do not consider that it is appropriate for me to raise credibility concerns that were not addressed between the parties. I will assume that it was an omission from the evidence before the First-tier Tribunal, and not an attempt to mislead it. If nothing else, it would be surprising if Mr and Mrs Ayeni sought to conceal their two younger sons from the tribunal, since they attended the hearing before me. Nevertheless, the existence of the two sons who are already in

this country potentially throws the ability of the appellants to meet the minimum income requirement calculated by Judge Clarke into sharp relief. The figure now required is higher; under paragraph E-ECC.2.1.(a)(iii), the total additional sum required is £4,800, giving a revised total income of £29,600. Since Mr Ayeni's combined income from his two employments exceeds this figure by over £10,000, I conclude that the appellants continue to meet the level of the minimum income threshold as required by the rules.

24. There is no suggestion that the best interests of the two younger sons are anything other than to continue the current arrangements. Certainly, there is no evidence before the tribunal that provides any concrete reasons to conclude that it is in their best interests for their older brothers to live with them, rather than to maintain their current family arrangements.

25. Returning to the financial thresholds, the fact that Mr Ayeni earns a combined salary that is sufficient to meet the financial threshold stipulated in the rules does not mean that the appellants can be regarded as *meeting* that requirement of the rules. The requirement of the rules is that an applicant is able to provide specified evidence, in the required form, *at the date of the application*. Such evidence was not provided with the application. It is only some two years *after* the original applications to the Entry Clearance Officer that the appellants have been able to demonstrate that their parents meet the income level required by minimum income requirement. This means that the appellants cannot succeed under Article 8 on the basis that they "meet" the requirements of the Immigration Rules. But the appellant's prospective financial independence is nevertheless a factor will be relevant in the balance sheet assessment, when considering Article 8 outside the rules.

'Balance sheet' assessment

26. Factors militating against granting the appellants entry clearance include:

   a. The public interest in the maintenance of effective immigration controls. This is a statutory consideration under section 117B(1) of the 2002 Act. Mr Avery placed considerable reliance on this factor. The Secretary of State has issued Immigration Rules setting out her view of where the policy balance should lie between the rights of the individual, on the one hand, and the broader public interest in the maintenance of effective immigration controls, on the other. Those rules require that applicants submit evidence in a specified form to demonstrate that they meet the substantive requirements of the relevant rules, at the date of the application. It is common ground in these proceedings that the evidence accompanying the application was deficient in this respect, and that it remains the case that the appellants did not and do not meet the requirements of the immigration rules.

   b. Both appeals were correctly refused under the Immigration Rules.

c. The appellants continue not to meet the requirements of the Immigration Rules.

d. Temidayo has now attained the age of majority, and DA will do so very shortly. As Judge Clarke noted, although their best interests "lie with being with their biological parents", there is no evidence that they are unable to look after themselves and, indeed, can surely be expected to provide physical and practical assistance to their elderly grandmother. The appellants are young men whose parents have chosen to leave them in Nigeria.

e. Neither parent is British. It is not clear what the immigration statuses of the children who already live here are since they have played a very minimal role in these proceedings thus far.

f. The preserved best interests findings of Judge Clarke only amount to "best interests of the child" findings in relation to DA. I accept that the findings concerning Temidayo's "best interests" are still relevant; they amount to a finding that it would be hugely beneficial to him to be able to live with his parents.

27. Factors militating in favour of a grant of entry clearance to the appellants include:

a. Mr and Mrs Ayeni now earn the amount specified by the minimum income requirement and exceed that by a considerable margin. While the appellants do not "meet" the rules for the reasons given above, they will be financially independent upon their arrival in the UK. That is a neutral factor under section 117B(3) of the 2002 Act.

b. The appellants were found by Judge Clarke to meet all other relevant requirements of the Immigration Rules, and there has been no challenge to his conclusions in that respect.

c. The appellants speak English and will be well placed to integrate.

d. The best interests of DA, a child, are to be with his parents. He enjoys family life with his brother who, although is now an adult, has only just attained the age of majority.

e. The Secretary of State has not argued that the British leg of the family should relocate to Nigeria. Although the two additional children attended the hearing, Mr Avery did not seek to cross-examine either Mr or Mrs Ayeni about them, their immigration status or their length of residence.

28. I consider that the factors against allowing the appeal outweigh those in favour of allowing it.

29. DA and Temidayo have lived without their parents for a considerable period, and Judge Clarke's preserved finding that their best interests lay with residing with their parents was only marginal, and the position is now even more marginal given the passage of time. As a formal 'best interests of the child' assessment, Judge Clarke's findings apply only in relation to

DA, who will only remain a child for a matter of days. While DA's best interests are, by a small margin, for him to be granted entry clearance to the UK, that is a factor capable of being outweighed by the cumulative force of all remaining factors in the case. There is nothing to suggest that it is in the best interests of the two younger brothers for the appellants to be admitted to the UK; there is not so much any evidence that they have a relationship of any sort with each other, and Mr Corben did not advance a case on this point.

30. Neither DA nor Temidayo met the requirements of the Immigration Rules at the time of their applications. I accept that the appellants now meet the financial threshold, although, as set out above, that does not amount to 'meeting' the requirements of the Immigration Rules, since there is a temporal requirement that has not been met. At its highest, it has been demonstrated that they will be financially independent, although that is a factor of neutral relevance. Although, on Judge Clarke's analysis, this would have been sufficient for the appeal to have been allowed without an error of law being found, that analysis has been set aside, and, in any event, the balance sheet assessment must be updated in light of the passage of time. On the other hand, the cumulative weight of the factors listed in paragraph 26 are capable of outweighing the best interests of DA. As Judge Clarke found, the appellants will be able to care for themselves to an extent. They do not need the care of their parents. One is an adult, the other will be shortly. To the extent that DA's best interests militate in favour of his admission to the UK, they are outweighed. I consider that a fair balance in this case is for the status quo to continue. The United Kingdom is not subject to a positive obligation under Article 8 ECHR to admit the appellants to the UK.

31. The appeals are dismissed.

Notice of Decision

The decision of Judge Clarke involved the making of an error of law and is set aside.

I remake both appeals, dismissing them.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant DA is granted anonymity until 9 August 2022. No report of these proceedings shall directly or indirectly identify him or any member of their family, while it remains in force. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Stephen H Smith Date 3 August 2022
Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeals there can be no fee awards.

ANNEX – ERROR OF LAW DECISION

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04013/2020
HU/01207/2021

THE IMMIGRATION ACTS

Heard at Field House
On 21 January 2022
Extempore decision

Decision & Reasons Promulgated

10 February 2022

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DA
TA
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondents: Mr P Corben, Counsel instructed by Wimbledon Solicitors

DECISION AND REASONS

1. This is an appeal of the Secretary of State. For ease of reference, we will refer to the parties as they were before the First-tier Tribunal, unless otherwise stated.

Factual background

2. The appellants, DA and TA, are brothers. They were born on 9 August 2004 and 18 August 2002 respectively. They are citizens of Nigeria. On 12 December 2019 they each submitted applications for entry clearance to join their parents, who are living in this country. The applications were submitted under Section EC-C of Appendix FM of the Immigration Rules, concerning entry clearance as a child. In the eligibility requirements of those rules, the relevant criteria include a financial requirement that the sponsors of the application must earn a minimum income of £18,600, plus a further £3,800 for the first child covered by the application, and an additional £2,400 for each additional child thereafter. Accordingly, in order for their applications to succeed under the Rules it would have been be necessary for the appellants' sponsors, their parents, to earn a combined total of £24,800.

3. The applications were rejected on a number of grounds. Relevant for present purposes is the fact that the appellants failed to meet the minimum income requirements of the Rules. The appellants' mother was, at the time of the application and the appeal below, working in two separate roles. Her combined income from both roles was in the region of £16,328, which was several thousand pounds short of the minimum income requirement to which the applications were subject.

The decision of the First-tier Tribunal

4. The appellants appealed to the First-tier Tribunal and their appeal was heard remotely on 22 June 2021. First-tier Tribunal Judge G Clarke allowed both appeals in a decision promulgated on 14 July 2021. Having set out at [7] to [19] of his decision the essential factual matrix upon which the appeal was based, the judge summarised the grounds of appeal, before turning to his operative findings at [29] and following. The judge resolved a number of disputed issues in the appeal, finding that the appellants' parents were in a genuine and subsisting relationship, and accepting the parental link between the parents and the appellants. Having analysed the income of the parents, the judge found that the appellants failed to meet the minimum income requirements of the Rules. At [53] the judge considered Article 8 outside the Rules. It is in relation to the judge's analysis of that issue that the Secretary of State appeals on grounds to which we will turn shortly.

5. At [54] to [57] the judge directed himself concerning certain key statutory and common law authorities concerning the public interest in Article 8 claims considered outside the Rules. He summarised the provisions of sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and the need to view the

proportionality question "through the lens" of the Immigration Rules in light of *AQ and Others* [2015] EWCA Civ 250. At [56] the judge set out the now well-established *Razgar* criteria taken from *Razgar v Secretary of State for the Home Department* [2004] UKHL 27 and reminded himself, at [57], that as the appeal was an entry clearance appeal, Article 8 private life was not capable of being in issue.

6. At [58] the judge reached an unchallenged finding that the appellants enjoy Article 8 family life with their parents, the sponsors. This was because the sponsor had sent financial support to the grandparents of the appellants, with whom the appellants reside in Nigeria, and continues to send support to the paternal grandmother of the appellants, which will continue to be for their benefit. In addition, the judge noted at [59] that the sponsor pays the school fees for the children and, at [60], that there is ongoing contact between the appellants and their parents. The judge explained why he considered that there would be an interference in the family life enjoyed by the appellants with their parents in this country in the event of the continued refusal of entry clearance.

7. Addressing the remaining questions in the *Razgar* criteria, the judge found that the refusal of entry clearance would have consequences of such gravity so as potentially to engage the operation of Article 8. He found that in principle the refusal of entry clearance was lawful and was in the pursuit of a legitimate aim, namely a firm and fair immigration policy.

8. Turning to the fourth and fifth *Razgar* questions, the judge directed himself once again concerning section 117B of the 2002 Act. At [67] he reminded himself that the "maintenance of effective immigration controls is in the public interest", pursuant to section 117B(1), and expressly reminded himself that his duty was to give effect to the will of Parliament. He outlined the additional statutory considerations that feature in section 117B, namely that it is in the interests of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom are able to speak English, and that those who seek to enter or remain in the United Kingdom are financially independent. He also directed himself concerning the little weight that attaches to private life or relationships formed with a qualifying partner established by a person at a time when a person is in the United Kingdom unlawfully. This led to the judge's conclusion on the public interest issue in general terms at [69]:

> "In making the proportionality balancing assessment, I find that the public interest requires effective immigration controls. It is clearly in the public interest for Parliament to legislate and establish Immigration Rules that will be applied properly, fairly and equally in the pursuit of the public interest."

9. The judge turned at [70] and following to the facts of this appeal. There he reminded himself that the appellants are citizens of Nigeria,

that they were born there, brought up there and were educated there and that they currently lived there with their elderly grandmother. He stated the following at:

> "71. However, in my view, it is not in their [that is, the appellants'] best interests to be separated from their mother and father. I remind myself that the best interests of children are of primary importance, although not of paramount importance but no factor can rank higher.
>
> 72. Applying this principle, I find that the appellants' best interests are to live with the sponsor and their father. There is nothing in the evidence to suggest that the appellants are not being looked after by their elderly grandmother. I take into account that the appellants are in their later teenage years and will be able to care for themselves to a large extent and, if anything, will be able to care for their grandmother. However, in terms of their best interests, I find that those interests lie with being with their biological parents. I will factor my assessment of the appellants' best interests into the balancing exercise."

10. We pause at this juncture to observe that there was no challenge by the Secretary of State to the judge's analysis of the best interests of the appellants. The judge's operative reasoning which faces the most significant criticism from the Secretary of State may be found at [73] of his decision. He said this:

> "The appellants are financially supported by their mother and as such are not dependent on the British taxpayer. I remind myself that the Supreme Court has defined 'financial independence' in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58 as referring to an appellant not being financially dependent on the British taxpayer."

The judge proceeded to set out factors militating in favour of the appellants being granted entry clearance and those mitigating against a grant of entry clearance.

11. In relation to the interests of the Secretary of State, at [77] he stated that:

> "On the one side of the balance sheet, I find that there is a strong public interest in the maintenance of effective immigration controls. I also rely on my findings that the appellants do not meet the requirements of the Immigration Rules for entry clearance. This is a weighty feature against them in the balancing exercise."

12. The judge then set out factors in favour of the appellants. He stated that they do not have an adverse immigration history or a criminal history and then concluded at [79] in these terms:

> "The crucial factor for me in this appeal is the appellants' best interests. As I have stated, while the appellants' best interests are

> of primary, and not paramount, importance, no other factor ranks higher. In my view, the appellants' best interests to live with their parents outweighs the strong public interest in effective immigration control. On the specific facts of this case, I find that refusal of entry clearance is a disproportionate interference with the appellants' Article 8 rights."

The judge allowed the appeal.

Grounds of Appeal

13. The gravamen of the Secretary of State's challenge to the judge's decision is his assessment of the financial circumstances of the appellants and their parents. The grounds of appeal contend that the judge failed to have regard to the fact that the appellants' sponsors failed to meet the threshold of £24,800 by a considerable margin. They state the following at subparagraph (d):

> "It is noted that the [judge] finds at [73] that the appellants are financially independent. However, it is submitted that as the appellants are currently outside of the UK, the [judge] has failed to take into account future reliance on public funds, given that the sponsor's income fails to meet the minimum income threshold by a large margin."

Permission to appeal was granted by First-tier Tribunal Judge Hollings-Tennant.

Submissions

14. In support of the grounds of appeal Ms Everett relies on the terms of the grant of permission by Judge Hollings-Tennant and also on the very brief submissions she advanced before us. She submitted that the judge had misunderstood the evidence concerning the sponsor's financial circumstances, or misphrased it in terms of the appellants being "financially independent", and underlined that in her submission the appellants will be dependent on the sponsor when in this country, who cannot herself meet the minimum income threshold. Accordingly, submits Ms Everett, the judge failed to ascribe appropriate weight in the balancing exercise. The question was not whether, at the time of the hearing, the appellants were financially independent, in the sense of not being financially dependent on the British government or taxpayer, but what the *prospective* financial circumstances of the appellants will be once they have been admitted to this country following a grant of entry clearance.

15. Resisting those submissions, Mr Corben on behalf of the appellants submitted that, properly understood, the judge ascribed significant and appropriate weight to the requirements of the Rules that an individual be financially independent, and ascribed significant weight to the general public interest that attaches to the notion of appellants and migrants being financially independent. In support of that submission, Mr Corben

highlighted the repeated references throughout the judge's decision to the appellants' failure to meet the requirements of the minimum income requirement. As such, submitted Mr Corben, wherever the judge referred to the public interest in the maintenance of effective immigration controls, or the fact the appellants did not meet the requirements of the Immigration Rules for entry clearance, given the sole basis upon which on the judge's unchallenged reasoning the appellants fell for refusal under the Rules was the financial requirement, each such reference was a proxy for those financial requirements. In contrast to the position as submitted by the Secretary of State, the judge peppered his decision with frequent references to the appellants' failure to meet the financial requirements of the Rules, and repeatedly referred back to those findings when highlighting the fact the appellants failed to meet their requirements.

16. That being so, submits Mr Corben, the judge took into account all relevant factors and reached a decision that was open to him on the facts. Mr Corbyn accepted that if the appellants are admitted to this country they may, in due course, have claims for benefits of some sort on the taxpayer in order for them to be maintained at the level that would be required, but insofar as the judge described them as not being financially dependent on the taxpayer as at the date of the hearing before the First-tier Tribunal, that was a correct and accurate summary of their financial position at the time. Accordingly, submitted Mr Corben, it would be a counsel of perfection for the judge to repeat the findings that he had made throughout the decision concerning the appellants' failure to meet the requirements of the Immigration Rules for he had already done so at repeated points throughout the decision and it would not be necessary expressly to set out those factors or otherwise to repeat himself.

Discussion

17. The term financially independent is something of a term of art in the context of Article 8 human rights appeals. It is to be found in Section 117B(3) of the 2002 Act and reflects Parliament's endorsement of the proposition that those who seek to come to this country and reside here must be financially independent as a facet of the public interest in maintaining effective immigration controls. We accept that the judge's frequent and repeated references to the requirements of the Immigration Rules not being met must, in light of the judge's reasons that it was only the financial requirements that were not met, have been a reference to the appellants not meeting those very financial requirements. Accordingly, to the extent the Secretary of State submits that the judge failed to have regard to that as a relevant factor, that aspect of the Secretary of State's submissions simply amount to a disagreement of fact and weight.

18. In our judgment, the judge failed in a crucial respect to address the prospective financial situation of these appellants upon their admission to

the country. It is significant that Mr Corben accepted, as realistically he was bound to accept, that the judge had only addressed the situation concerning the appellants' financial independence as *at the date of the hearing before him*. By definition, in this entry clearance case, the appellants would have been financially independent at the date of the hearing. They were and still are living in Nigeria and there is no suggestion that there was any legitimate basis for them to claim or be the beneficiaries of United Kingdom public funds in their own capacity remotely from Nigeria. To that extent the judge was, we agree with Mr Corbyn, right to approach the matter in that way.

19. The judge did not expressly address the impact of the sponsor's low income on the financial circumstances of these two young men upon their admission to the country. On the evidence before the judge a family of four would have had an income of only £16,328. The shortfall in the minimum income prescribed the Rules and the income actually earned at the time by the sponsor was a matter which the judge needed to address in express terms. As Mr Corben again realistically accepted in his submissions, the appellants may themselves have claims on the taxpayer in order for them to enjoy the minimum level of lifestyle to which the British state would regard as being necessary.

20. As Ms Everett submits, the purpose of an Article 8 assessment outside the Rules is not to import people to live in penury in this country. We are mindful of the need to approach the judge's exercise of discretion deferentially. It is not the role of an appellate tribunal to substitute its own view for that of a first instance judge. However, in our judgment, the judge failed to address the prospective financial dependence of the two appellants on the taxpayer following their arrival in this country. Accordingly, although the judge was mindful of the financial focus of the appellants' sole basis for not being able to meet the requirements of the Rules, he failed to have regard to this crucial factor. It follows that the finding the judge reached concerning the prospective financial independence of the appellants was flawed. It failed to take into account all relevant factors, and specifically failed to address their likely in-country circumstances following a putative grant of entry clearance to them each. On that basis, we conclude that the judge's proportionality assessment was flawed and must be set aside.

21. However, as we have already noted, there were a number of other findings throughout the decision which have not been challenged by the Secretary of State. Specifically, the Secretary of State has not challenged the judge's findings that the two appellants are the biological children of their father, nor has there been a challenge to the judge's finding that the appellants' mother and father are married and live together as husband and wife. The Secretary of State has not challenged the judge's finding concerning the best interests of the appellants. It is solely the judge's analysis of Article 8 outside the Rules that has been impugned.

22. For those reasons, we set aside the decision of Judge Clarke but preserve the findings of fact outlined above. The decision will be remade in the Upper Tribunal for the proportionality of the refusal of the appellants' human rights claim to be reconsidered, in light of any new evidence the appellants wish to apply to rely upon.

Anonymity

23. For the time being, we preserve the judge's anonymity direction. The tribunal will hear submissions at the resumed hearing addressing the extent to which the anonymity direction is still required, and its scope.

Notice of Decision

The appeal is allowed. The decision of the First-tier Tribunal is set aside, subject to the savings outlined in paragraph 21, above.

The decision will be remade in the Upper Tribunal at a face to face hearing (No interpreter required; time estimate 2 hours)
We give the following additional directions:

1. Within **21 days of being sent this decision**, the appellants:

   (a) May file and serve an application to rely on additional evidence to be considered at the resumed hearing, together with the additional evidence;

   (b) Must file and serve a skeleton argument.

2. Within **35 days of being sent this decision**, the Secretary of State must file and serve a skeleton argument (responding, if appropriate, to the further evidence provided by the appellants pursuant to paragraph (1)).

Signed Stephen H Smith

Date 8 February 2022

Upper Tribunal Judge Stephen Smith