



**In the Upper Tribunal
(Immigration and Asylum Chamber)
Judicial Review**

In the matter of an application for Judicial Review

The King on the application of
Bleuse Mawa Kone

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Jackson

HAVING considered all documents lodged and having heard Mr P Lewis of Counsel, instructed by Coram Children's Legal Centre, for the Applicant and Mr M Biggs of Counsel, instructed by GLD, for the Respondent at a hearing on 18 June 2024.

IT IS ORDERED THAT:

- (1) The application for judicial review is granted for the reasons in the attached judgment.
- (2) The Respondent's decision dated 17 October 2023 is quashed.
- (3) The Respondent shall pay the Applicant's reasonable costs to be assessed on the standard basis if not agreed.
- (4) The Applicant's legally aided costs shall be subject to detailed assessment.
- (5) No application for permission to appeal was made on behalf of the Respondent, however I am obliged to consider this in any event. Permission to appeal is refused because there are no arguable errors of law in the attached judgment.

Signed: G Jackson
Upper Tribunal Judge Jackson

Dated: 30th July 2024

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 01/08/2024

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).



Case No: JR-2023-LON-002770

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

30th July 2024

Before:

UPPER TRIBUNAL JUDGE JACKSON

Between:

THE KING
on the application of
Bleuse Mawa Kone

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Mr P Lewis of Counsel

(instructed by Coram Children's Legal Centre), for the Applicant

Mr M Biggs of Counsel

(instructed by the Government Legal Department) for the Respondent

Hearing date: 18 June 2024

J U D G M E N T

Judge Jackson:

1. In this application for Judicial Review, Ms Kone challenges the Respondent's decision dated 17 October 2023 upholding her earlier decision dated 25 June 2019 to refuse her application for entry clearance/indefinite leave to enter as a child under paragraph 297 of the Immigration Rules and instead granting her entry clearance and limited leave to remain in the United Kingdom. Although there were originally four pleaded grounds of challenge, the sole issue upon which permission was granted concerned the construction and application of

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paragraph 297(i)(f) of the Immigration Rules. Put another way, the sole issue is whether the Respondent erred in considering the Applicant's application under Appendix FM rather than paragraph 297 of the Immigration Rules.

2. The Applicant made unsuccessful applications for an EEA Residence document and an EEA Family Permit in 2005 and 2008. She first made an application to join her father, a British citizen present and settled in the United Kingdom, under paragraph 297 of the Immigration Rules in 2015. That application was refused by an Entry Clearance Office on 29 June 2015 on the basis that it was not accepted that the Applicant was related to her sponsor as claimed, nor that he had sole responsibility for her. In addition, the Applicant had not supplied the mandatory TB screening certificate with her application.
3. The Applicant appealed against that refusal and in a decision promulgated on 21 August 2017, Judge Lenier dismissed the appeal on human rights grounds. The following findings are relevant to the current proceedings.
4. First, in paragraph 57, Judge Lenier deals with the Applicant's parents' status in the United Kingdom and the relevance of that to the Immigration Rules as follows:

"57. The Appellant's mother, Ms Doumbia, is present in the United Kingdom, but not settled. She has leave to remain until 2018. This leave has to be renewed every three years. Mr Kone, the sponsor, is settled, and is a British citizen. In such circumstances, the relevant part of the rules that apply to this appellant is paragraph 297(e), or (f). ..."

5. Secondly, following a number of more detailed factual findings, the conclusion in paragraph 97 was that the Applicant met the requirements of paragraph 297(i)(f) of the Immigration Rules, in which Judge Lenier stated:

"97. Taking all of the above circumstances into account, I am satisfied there are persuasive and powerful circumstances, which can be rightly categorised as compelling, to allow Bleuse to join her family. There are very strong family considerations, as well as the fact that she is currently living in an unsatisfactory economic situation, and in poor accommodation. In my view, the combination of these circumstances are sufficient to make the exclusion of Bleuse from the United Kingdom undesirable."

6. However, the appeal was dismissed on the basis that the Applicant could not meet the mandatory requirement to provide a TB certificate and there was insufficient evidence to support the need for the Applicant's urgent removal from the Ivory Coast and that whilst it was in her best interests to be reunited with her family as quickly as possible, obtaining a TB certificate should not cause undue delay and then a further application could be made. The Judge stated this should be considered expeditiously by the Respondent. Overall, what was expected to be a delay of a few months would not likely have a significant impact on the Applicant's welfare. As such, there was no disproportionate interference with the right to respect of family life contrary to Article 8 of the European Convention on Human Rights.

7. The Applicant did obtain the required TB certificate, which was issued on 11 August 2017 and received in the United Kingdom (it is not clear whether it was sent to the First-tier Tribunal or to the Respondent) on 15 August 2017, two days before the First-tier Tribunal decision; but not taken into account with it. On 8 September 2017, this was referred to in correspondence to the Respondent with a copy and a request for reconsideration of the application.
8. It does not appear that there was any positive response to this request and a further application was made for entry clearance under paragraph 297 of the Immigration on 3 June 2018. That application was refused on 25 June 2019, however the Applicant was granted limited leave to enter and remain under Appendix FM to 26 September 2021 and subsequently entered the United Kingdom pursuant to that on 9 July 2019. Further to an application for Judicial Review, the Respondent agreed by consent to reconsider this initial decision. It is the subsequent refusal/upholding of the initial decision that is the subject of these proceedings, the reasons for which are set out in more detail below. The Applicant has subsequently made separate applications which are not relevant to this application for Judicial Review.

Immigration Rules

9. The applicable Immigration Rule relevant to the issues in this application for Judicial Review are set out in paragraph 297 as follows:

Leave to enter or remain in the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom

Requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom

297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

- (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
 - (a) both parents are present and settled in the United Kingdom; or
 - (b) both parents are being admitted on the same occasion for settlement; or
 - (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
 - (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
 - (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
 - (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and

10. For the purposes of interpretation of the above and submissions made by the parties, it is necessary to also consider the wider scheme within the Immigration Rules in which there is some similarity of wording.
11. Paragraph 298(i)(d) contains materially identical provision to that in paragraph 297(i)(f) in respect of the requirements to be met for indefinite leave to remain in the United Kingdom as a child of a parent, parents or relative present and settled or being admitted for settlement in the United Kingdom.
12. In paragraph A277 and following of the Immigration Rules, a number of transitional provisions are set out in relation to the rules in Part 8 for applications made on or before 8 July 2012. Paragraph 297 and 298 are preserved (with an additional suitability requirement) but in general, Appendix FM will apply to new applications from 9 July 2012, including those where the requirements for indefinite leave to enter or remain are not met under Part 8.
13. Appendix FM contains a section for 'Family life as a child of a person with limited leave as a partner or parent'. Section EC-C: Entry Clearance as a child deals with entry clearance requirements, which include relationship requirements as follows:
 - E-ECC.1.6. One of the applicant's parents must be in the UK with limited leave to enter or remain, or be being granted, or have been granted, entry clearance, as a partner or a parent under this Appendix (referred to in this section as the "applicant's parent"), and
 - (a) the applicant's parent's partner under Appendix FM is also a parent of the applicant; or
 - (b) the applicant's parent has had and continues to have sole responsibility for the child's upbringing; or
 - (c) there are serious and compelling or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care.
14. There are separate requirements for leave to remain contained in Section E-LTRC: Requirements for leave to remain as a child. The relevant relationship requirements are contained in E-LTRC.1.6, and save for the initial requirement that one of the applicant's parents must be in the UK and have leave to enter or remain or indefinite leave to remain (or is at the same time being granted either), the requirements in (a) to (c) are identical to those set out immediately above.

Decision under challenge

15. In a decision dated 17 October 2023 the Applicant's application was again refused under paragraph 297 of the Immigration Rules. The Respondent noted that at the time of the application, the Applicant's father was a British citizen and her mother had been granted limited leave to remain under Appendix FM to the Immigration Rules. As such, it was said that the Applicant could not meet the requirements in paragraph 297(i)(a) to (c) because of her mother's status in the United Kingdom, nor the requirement in sub-paragraphs (d) and (e) because both parents were alive and there was joint parental responsibility. So far as relevant to the current challenge, the decision continues as follows:

“As both your parents are living together in the United Kingdom, you do not meet the requirements for 297(f) as this applies to “one parent or relative”. This also requires there to be serious and compelling circumstances that make the exclusion of the child undesirable.

I note you received a previous appeal determination where the Immigration Judge found the requirements of paragraph 297(i)(f) were met despite both parents being in the UK. This appeal was dismissed on the grounds that you had not provided a TB certificate so the element regarding 297(i)(f) was not challenged because the appeal had been dismissed.

When you re-applied in 2018, your circumstances had changed. Your mother now had limited leave to remain under the 10 year Family and Private Life Route. Therefore, the ECO considered your application under the Child Appendix FM rules, which was the correct route based on your circumstances. As your mother was granted Leave to Remain (LTR) under the Family and Private Life route on 15 March 2019 with leave valid until 26 September 2021, you were issued on the 10 year route in line with your Mother’s leave and in line with UK immigration policy.

In section D-ECC rule 1.1 of Appendix FM, it states that if the applicant meets the requirements for Entry Clearance, the child will be granted entry clearance of a duration which will expire at the same time as that granted to the Applicant’s parent, and will be subject to the same conditions in respect of recourse to public funds as that parent. Thus in line with this policy, we issue children in line with the parent who has the least leave.

The original grant of entry clearance leave was correct based on your circumstances at the time you applied in 2018. We acknowledge the comments made by the Immigration Judge that you qualified for ILE in 2017, however that appeal was dismissed on the basis that no TB certificate was provided and you chose not to challenge that. Therefore, when you re-applied in 2018, your application was assessed on your current circumstances and as your mother had leave on the 10 year route, you were granted in line with her leave, in line with immigration policy as referred to above. I am therefore satisfied no error was made and you should remain on your current route.”

Grounds of challenge

16. In his skeleton argument on behalf of the Applicant, Counsel identifies three specific issues for the Upper Tribunal to determine in relation to the sole ground on which permission was granted. These are as follows:
 - (i) On a proper construction, is the application of paragraph 297(i)(f) excluded where the other parent is in the UK with limited leave?
 - (ii) When considering whether there are “serious and compelling family or other considerations which make the exclusion of the child undesirable,” is it relevant that the child is eligible for limited leave under Appendix FM as the child of a non-settled parent?
 - (iii) Does paragraph 31(2A) of the Senior Courts Act 1981 apply because the Applicant was over 18 at the date of decision?

17. There was no dispute as to the identification of these three issues, which I will deal with in turn, albeit the final issue was raised only in the Detailed Grounds of Defence and was not the subject of any further oral submissions, at least not in the way originally put.

(i) Statutory construction of paragraph 297(i)(f) of the Immigration Rules

18. There is no dispute between the parties that ordinary principles of statutory construction apply to the relevant provision of the Immigration Rules in this application, as most recently set out by the Supreme Court in R (Wang) v Secretary of State for the Home Department [2023] UKSC 21.
19. The Applicant's primary case on the construction of paragraph 297(i)(f) of the Immigration Rules is that there is nothing in the express wording of the provision that excludes its application in circumstances where the other parent is in the United Kingdom with limited leave to remain (or without any leave to remain). If that was the intention, the provision could easily have been drafted so as to exclude an applicant in this situation. The other provisions in paragraph 297(i)(a) to (e) do expressly set out what the required position of the other parent is, for example, (a) to (c) deal with situations where the other parent is present and settled or being admitted for settlement on the same occasion, (d) specifies a situation where the other parent is dead and (e) the situation where the other parent does not have parental responsibility for the applicant.
20. In response to the Respondent's case, Counsel for the Applicant submits that this would require a strained construction, requiring to read in to the provision the following words in bold, "*one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement, **the other parent is outside the United Kingdom**, and there are serious and compelling family or other considerations which make exclusion of the child undesirable ...*" However, there is no basis to give such a strained construction to achieve the legislative intent given the clear ordinary meaning of the words used, without any inconsistency, nor any undesirable consequences of a literal construction.
21. The Respondent's position is that the proper construction of paragraph 297(i)(f) of the Immigration Rules does not apply where one parent of the child is settled in the UK but the other parent is also in the United Kingdom, either with leave to remain under Appendix FM as their partner, or, as confirmed by Mr Biggs during the hearing, even if they are here without any lawful status at all.
22. In a situation where the other parent has limited leave to remain, the appropriate route for the child is through Appendix FM as it tailors the grant of leave of the child to match that of the parent with limited leave and avoids the danger of a family being split if the parent with limited leave to remain is required to depart from the United Kingdom. The Respondent's position is that it would be undesirable for the child then to remain with the settled parent, splitting the family and running counter to the intention of paragraph 297 of the Immigration Rules as identified in TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049, the purpose being family unity. The Respondent dismisses the Applicant's concerns that there would also be the risk of a family split on the Applicant's construction on the basis that that

would 'risk incentivising the separation of a child from her primary carer, the person with whom she resided outside the UK, and in that way leads to a risk of serious disruption to the family situation that existed at the time of the application'.

23. As to the drafting of paragraph 297(i)(f) itself, the Respondent's position is that it could have easily been drafted for the purpose of the Applicant's situation as, "*both parents are present in the United Kingdom and at least one is settled*", but that is not the wording used. The Respondent proposes that the provision is read as only one parent is present and settled.
24. Further, the Respondent submits that on the Applicant's construction of paragraph 297(i)(f) there would be further absurd results that many more children would be entitled to indefinite leave to enter and remain, particularly because if both parents are in the United Kingdom, it is more likely that a child would meet the test that there are serious and compelling family or other considerations which make the exclusion of the child undesirable (if the Respondent is wrong on the second issue below). It is submitted that this would undermine the provisions of Appendix FM and render the overall scheme incoherent, which can not have been the intention.
25. At the oral hearing, Mr Biggs relied on five indicators to support the Respondent's position. First, that the language of the rule itself in the opening part refers to 'a parent', meaning a single parent (with different provision for parents and a relative). Secondly, that the list of individuals set out in the rule is disjunctive, with separate concepts of a single parent or two parents in different scenarios, with only 297(i)(f) referring to 'a parent' which is intended to be exclusive. The drafting only requires the word 'only' to be added and it is in any event implicit. In essence it was submitted that it was the intention of the Applicant as to who they wished to join in the United Kingdom which reflected the appropriate provision of paragraph 297(i) and in the present case, the Applicant's construction does not work as the intention was to join both parents.
26. Fourthly, Mr Biggs emphasised the overall scheme for leave to remain as a child, comprising of paragraph 297 and Appendix FM of the Immigration Rules; the latter of which would be undermined if the Applicant's construction were accepted given it would be relatively easy to meet paragraph 297(i)(f) if neither parent is outside of the United Kingdom. It was accepted that the reliance on the purpose of the provision as one of family unity was likely to be a red herring given that there was, on either construction, a risk of a family split in the future. However, there was still an overall purpose to grant leave to remain tailored to individual circumstances and where indefinite leave to enter and remain is a privilege and not a right, it would be appropriate for an applicant to be given a shorter period of leave under Appendix FM as indefinite leave to remain would not be necessary to achieve the purpose of family unity.
27. Finally, Mr Biggs relied on the decision in TD (Yemen) as in indicator that paragraph 297(i)(f) was designed for situations where the other parent would be outside of the United Kingdom but the onerous requirement of serious and compelling considerations which make exclusion undesirable permit a family split because of the best interests of the child.

28. In reply, Mr Lewis submitted that there was nothing in paragraph 297 of the Immigration Rules to indicate that this was a provision of last resort. To the contrary, as a logical and practical approach, consistent with the transitional provisions in Part 8 of the Immigration Rules, it would be normal to consider first whether someone is entitled to indefinite leave to enter and only if not, that the Respondent would go on to consider whether an applicant was instead entitled to limited leave to remain, under Part 8 and if not under Appendix FM. As was the approach in this particular case as well.

Conclusion

29. In my view, the natural and ordinary meaning of the requirement in paragraph 297(i)(f) is clear and does not give rise to any mischief or unintended consequences which would require a reading in to the provision of any additional words or qualification as suggested by the Respondent. There is no exclusion based on the initial reference to 'a parent', nor any choice between sub-paragraphs of the Immigration Rules and consequential construction of paragraph 297(i)(f) that could be tied to the intention of a particular applicant. Further, there is no implicit inclusion of the word 'only' before a parent; the requirement is simply that one parent is present and settled in the United Kingdom without any specification of where the other parent is or what their status is. That is in contrast to the wording of the five earlier sub-paragraphs, all of which make express provision as to the required situation of the other parent. If there was a similar intention that only one parent was in the United Kingdom and the other was not, then express wording to that effect would be expected in paragraph 297(i)(f).
30. That construction is also in keeping with the overall purpose of paragraph 297 as found in TD (Yemen) of a provision designed to maintain or effect family unity, albeit with the prospect that if the onerous conditions in paragraph 297(i)(f) are met, a family split may be required in the child's best interests. A provision which fails to take into account the best interests of a child, which is in the vast majority of cases to be with both parents, because both parents are in the United Kingdom but only one has settled status does not promote or achieve family unity.
31. I do not consider that the decision in TD (Yemen) otherwise lends any support to the Respondent's contended construction because of the reference in paragraph 48 or otherwise to the other parent being abroad as this was not a case which on the facts concerned a scenario where both parents were in the United Kingdom, but both were not settled here. The point in the present application simply did not arise, nor was it considered, such that it can not be authority on the issue here.
32. The overall purpose of the provision in paragraph 297(i)(f), when construed in its ordinary and natural way as including a requirement only as to the whereabouts and status of one parent without exclusion, is also met to achieve family unity. The Respondent sought to suggest that it would be a negative factor, that more children would be able to obtain indefinite leave to enter the United Kingdom as the test of serious and compelling considerations making the child's exclusion undesirable would be more easily met in circumstances where both parents are in the United Kingdom and the child is not being cared for by either parent in a third country. It is however hard to see how that is

contrary to the overall purpose and objective of the provision taken as family unity.

33. In a similar way, the submissions on behalf of the Respondent on the basis that a grant of indefinite leave to enter or remain is a privilege and a grant of limited leave to remain would be more appropriate tailored to the other, non-settled parent take the matter no further. There was clearly a deliberate policy choice in the drafting of paragraph 297 to provide for a grant of indefinite leave to enter, even if relatively generous and unusual in the broader scheme of applications for entry clearance in other categories. It could readily be inferred that that was to support the purpose of family unity and to provide certainty and stability for a child to continue to be with a parent, parents or a relative in the United Kingdom. If the policy objective was for Appendix FM to be the primary or only route in the Immigration Rules where one parent had limited leave to remain, then that could easily have been achieved and the transitional provisions requiring consideration of paragraph 297 first (such as those in paragraph A277B of the Immigration Rules) would not have been included.
34. As Mr Biggs accepted at the oral hearing, the suggestion that only the Applicant's construction of paragraph 297 would lead to absurd consequences of a potential family split was in essence a red herring, as on either construction, there is such a risk. If the non-settled parent did not obtain further leave to remain or leave was curtailed; then if the child was granted leave in line with that parent, there would be a risk of separation from the settled parent. The risk would be even greater and cause greater uncertainty if the non-settled parent only had a relatively short period of leave remaining when the child was granted entry clearance for the same period.
35. The risk is however slightly different on the Applicant's construction given that in circumstances where the non-settled parent is not entitled to further or continuing leave to remain, the family would likely have a choice as to the future, at least as to what family split may occur, as the child could remain with the settled parent or return to the home country with the non-settled parent. That is more likely to better promote and protect the best interests of the child than a potential enforced split on the Respondent's construction.
36. The alternative submission of Mr Biggs was that the Applicant's construction risked incentivising a family split by allowing a child to remain in the United Kingdom permanently if one parent leaves; rather than re-applying for entry clearance with that parent. The point is not easily understood, as in such a case, as above, the family and child would simply have the choice as to what happened if not all members had leave to remain in the United Kingdom. There is no incentive to act one way or another to cause a family split, on either construction, a family split is possible, it is just that in one scenario it would be enforced and on the other, a choice as to which way the family is split. There is also no assumption that a parent with limited leave, or then no leave to remain would always be the primary carer.
37. The Respondent has failed to identify any actual mischief or absurd results caused by paragraph 297(i)(f) being given its ordinary and natural meaning as a basis for interfering with the current wording that would necessitate reading in additional words or requirements. For this reason, there is no basis on

which it would be appropriate to do so. If as a matter of policy, rather than construction of the Immigration Rules, a different outcome is sought, it is a matter for the Respondent to make an appropriate amendment to paragraph 297(i)(f) to specify the situation of the other parent.

38. One further point which reinforces the conclusions above, albeit not the subject of submissions at the hearing, it would also be reasonable to expect that if right, the Respondent's proposed construction would be reflected in her own policy documents as to how to approach paragraph 297(i)(f) of the Immigration Rules. At present, it does not, beyond giving an example of factors to consider if the other parent is remaining overseas. The guidance does not make it clear that this is in reality the only scenario that could possibly apply to enable consideration of paragraph 297(i)(f) at all, nor is there any direction to consider the application under Appendix FM if the other parent has limited leave to remain in the United Kingdom.

(ii) *"Serious and compelling family or other considerations which make the exclusion of the child undesirable"*

39. The Applicant's case in relation to the test to be applied to determine whether there are *"serious and compelling family or other considerations which make the exclusion of the child undesirable"* is that this requires a decision maker to consider the consequences if the child were to be excluded and not whether the child would in fact be excluded if not granted indefinite leave to enter (because of a grant of limited leave to remain under Appendix FM or otherwise).
40. Counsel for the Applicant relies by analogy on the decision in Secretary of State for the Home Department v AB (Jamaica) [2019] EWCA Civ 661, in which the test for whether it would be *"reasonable for the child to leave the UK"* in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 was interpreted, and in which the Respondent's claim that the requirement could not be met where in fact there was no prospect of the child leaving the United Kingdom was rejected.
41. Further, on the facts of the present case, there has already been a finding by Judge Lenier in 2017 that the Applicant met the requirement in paragraph 297(i)(f) of the Immigration Rules as there were serious and compelling family or other considerations which made her exclusion undesirable; the application under the Immigration Rules only failing because of the lack of a mandatory TB certificate. It is the Applicant's case that there was no basis for the Respondent to go behind those findings, which are binding, particularly where there has been no change of circumstances.
42. The Respondent's case is that in circumstances where a child will be entitled to limited leave to enter and remain in line with the other parent, in this case the Applicant's mother, then a child would not be able to satisfy the requirement of *"serious and compelling family or other considerations which make exclusion of the child undesirable"* as a grant of indefinite leave to remain would not be necessary. The Respondent in the present case is not bound by the findings of Judge Lenier in circumstances where she was unable to appeal the decision given the appeal was dismissed. The Respondent initially submitted that in any event there was a change of circumstances in that the

Applicant's mother had since the First-tier Tribunal decision been granted limited leave to remain under Appendix FM; however on a request for clarification this appears not to be accurate, as reflected in Judge Lenier's decision, there was also a limited grant of leave to remain at that time as well.

43. On a matter of construction, the Respondent also submits that in circumstances where a child has been granted limited leave to enter/remain, there would be no question of the "*exclusion of the child*" from the United Kingdom; there being no analogy with the provision in section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The word 'exclusion' should be interpreted in a factual, not a normative sense in the context of paragraph 297 of the Immigration Rules.
44. On the facts of this case, Mr Biggs submitted that it was appropriate for the decision maker on reconsideration to take into account the factual situation as it then was, that the Applicant had leave to remain and there was therefore no possibility of her exclusion from the United Kingdom. The difference between paragraph 297(i)(f) of the Immigration Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002 being that the former would be maintaining the status quo of the child outside of the United Kingdom and the latter would be considering a change by needing to leave the United Kingdom. In relation to the same wording of 'exclusion' being used in paragraph 298(i)(d) of the Immigration Rules, Mr Biggs submitted that it was not clear why this word rather than 'removal' was used in what would be an in-country application for leave to remain, other than to reflect that the wording mirrors that in paragraph 297(i)(f).

Conclusion

45. As a starting point, it is noted that this second issue was at the oral hearing more focused on the question of appropriate relief should the Applicant be successful on the primary construction point in paragraph 297(i)(f) as to the whereabouts and status of the other parent. That must be the correct way to view this submission in the alternative to the primary point given that the decision under challenge in this case does not expressly refuse the application on the basis that there are no "*serious and compelling family or other considerations which make the exclusion of the child undesirable*". This is mentioned as part of the requirement, but the focus of the reasoning is solely on the fact that both of the Applicant's parents were in the United Kingdom and therefore paragraph 297(i)(f) was not met as it only applies to "*one parent*". There is no mention at all of the argument now made that because the Applicant has been granted limited leave to remain, she can not satisfy the test as she would not in fact be excluded from the United Kingdom.
46. The Respondent noted the previous finding by Judge Lenier in 2017 that the Applicant had been found to meet the test of "*serious and compelling family or other considerations which make the exclusion of the child undesirable*" without a challenge to the overall finding despite both parents being in the United Kingdom as the appeal was dismissed on other grounds. The Respondent further specifically relied on there being a change of circumstances since the appeal hearing, in that the Applicant's mother had since been granted limited leave to remain. However, as confirmed at the oral hearing, that was not factually accurate as the Applicant's mother also had a

period of limited leave to remain at the time of the appeal hearing. There had been no change of circumstances at all.

47. In any event, as to the matter of substance of the interpretation of the test in paragraph 297(i)(f) requiring there to be *“serious and compelling family or other considerations which make the exclusion of the child undesirable”*, I find that this is a normative rather than a factual assessment for the following reasons.
48. First, there is an analogy which can properly be drawn with the interpretation of the test in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 that it *“would not be reasonable to expect the child to leave the United Kingdom”*. Although phrased slightly differently, the provisions are in place for the same purpose, to enable an assessment of the best interests of the child and to consider whether there are reasons in that context for them to be in the United Kingdom and with a family member here.
49. There is no clear difference between the ‘reasonable to expect’ wording and ‘exclusion undesirable’ in practical terms; the assessment is a similar one with a similar set of relevant factors to take into account when determining it. The two can not be distinguished on the basis that one considers whether the status quo can be maintained and one considers whether there should be a change; given that exactly the same wording is also used in paragraph 298(i)(d) of the Immigration Rules which is an in-country application for indefinite leave to remain and therefore would also, as a matter of practicality, require an assessment not of maintaining the status quo of the child being outside of the United Kingdom, but consideration of whether they should be removed, in exactly the same kind of situation as section 117B(6) of the Nationality, Immigration and Asylum Act 2002 would apply.
50. Secondly, in accordance with paragraph A277B of the Immigration Rules, there must first be an assessment of whether an applicant meets the requirements for limited or indefinite leave to remain under Part 8 of the Immigration Rules, and only if they do not, should the application then be considered under Appendix FM. At the oral hearing, Mr Biggs was careful in his submissions to clarify that it is only in circumstances where an applicant is eligible and granted leave to remain under Appendix FM that they could not meet the requirements of paragraph 297(i)(f) of the Immigration Rules as they would not in fact be excluded. The initial suggestion that it was only eligibility for another form of leave that would be sufficient was quickly withdrawn, presumably because it would be practically entirely unworkable for the Respondent to consider what other leave a person may be entitled to in the context of an application under paragraph 297(i)(f) of the Immigration Rules. In these circumstances, a person could not be refused under paragraph 297(i)(f) because of a grant of leave to remain under Appendix FM as the latter could not, in accordance with paragraph A277B, even be considered until the primary application failed.
51. Thirdly, the same formulation of *“serious and compelling family or other considerations which make the exclusion of the child undesirable”* also appears as one of the requirements for a grant of leave to remain under Appendix FM (in paragraph E-ECC.1.6(c) and E-LTRC.1.6(c)) where one parent is in the United Kingdom with limited leave to enter or remain (or being

granted entry clearance for the same). It would be odd at the very least for the same wording to lead to opposite results depending on whether it was considered in the context of an application for indefinite leave to enter or an application for entry clearance or leave to remain – even on a purely factual application, the same circumstances, such as those in the present appeal, would fail under paragraph 297(i)(f) but could succeed under Appendix FM.

52. For these reasons, the assessment is logically and by analogy, a normative and not a purely factual one to determine if there are “*serious and compelling family or other considerations which make the exclusion of the child undesirable*”. In these circumstances, the position of the Applicant without reference to whether she would in fact be excluded from the United Kingdom because of a different grant of leave to remain, should be assessed for her application under paragraph 297 and she is not prevented in succeeding under that provision because of a different grant of leave to remain.
53. On the facts of the present case, there has been a finding by the First-tier Tribunal in 2017 that the Applicant meets the test of “*serious and compelling family or other considerations which make the exclusion of the child undesirable*”. Whilst it is the case that in reality, neither party could practically have appealed against that decision, such that the finding may not be formally binding on the Respondent, it is highly relevant and persuasive, particularly where the decision under challenge was wrong to cite a change of circumstances since the decision. That assessment was made following a very detailed consideration of the Applicant’s circumstances, her best interests and the wider family situation. In that regard, nothing of substance has been or would be affected by a grant of limited leave to remain.

(iii) Section 31(2A) of the Senior Courts Act 1981

54. In the Detailed Grounds of Defence, the Respondent suggested that as the Applicant was over the age of 18 from 17 October 2023, the Applicant could not now succeed under paragraph 297 of the Immigration Rules as she was too old, such that relief should be refused under section 31(2A) of the Senior Courts Act 1981.
55. In response, the Applicant relies on paragraph 27 of the Immigration Rules which provides that an applicant will not be refused entry clearance in certain categories (including paragraph 297 and Appendix FM) solely on account of his attaining the age of 18 years between receipt of his application and the date of the decision on it. The fact that the Applicant was at the time of the reconsidered decision over the age of 18 is therefore not a reason to refuse relief.
56. This point was rightly not pursued in the Respondent’s skeleton argument, nor in oral submissions at the hearing. However, the Respondent did rely on section 31(2A) of the Senior Courts Act 1981 in a different sense, that if right on the second issue, even if not identified for those reasons in the decision letter, then the application must fail for those reasons as there is no material error of law in the decision.
57. The first point had no merit, the Applicant’s position is protected as at the date of her application and the fact that she is now over the age of 18 does not

affect any reconsideration and does not preclude relief in this application for Judicial Review. The further point raised in reliance of the second issue being decided in the Respondent's failure does not apply in circumstances where the Applicant can, and has already been found to meet the test in paragraph 297(i)(f) of the Immigration Rules. It remains appropriate for the Applicant to be given appropriate relief.

Conclusion

58. For all of these reasons, the application for Judicial Review is granted.

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