



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/12283/2019

THE IMMIGRATION ACTS

**Heard remotely at Field House
On 14 October 2021 *via Teams***

**Decision & Reasons Promulgated
On 7 January 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**RA (NIGERIA)
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr M. Fazli, Counsel instructed by Supreme Solicitors
For the Respondent: Ms N. Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

1. This is an appeal against a decision of the Entry Clearance Officer dated 3 July 2019 to refuse the appellant's application for entry clearance as the child of a parent with limited leave to remain in the United Kingdom with a view to settlement, submitted under paragraph 301 of the Immigration Rules (although wrongly considered by the respondent under paragraph 319(x)).
2. The appellant's appeal against the Entry Clearance Officer's decision was originally dismissed by First-tier Tribunal Judge Wyman in a decision dated 30 March 2021. On 25 May 2021, I found the decision of Judge Wyman to have involved the making of an error on a point of law, and set the decision aside with certain findings of fact preserved: see the **Annex** for my 'error of law' decision, and the discussion below for a summary of the operative findings of fact preserved. I directed that the matter be reheard in this tribunal, and the resumed hearing took place before me on 14 October 2021.

Factual background

3. The full factual background is set out in my error of law decision. In summary, the appellant was born on 26 March 2006 and is now 15. He is a citizen of Nigeria. He lives in Nigeria and attends school there. He wants to move here, to be with his mother, the sponsor. The sponsor is also a citizen of Nigeria. She resides here with limited leave to remain granted on the basis of her other son, who is a British citizen, and was born in July 2014. At the time of the 'error of law' decision, the sponsor held leave under section 3C of the Immigration Act 1971, while an in-time application for further leave was under consideration; since then, she has been granted further limited leave to remain on the basis of her private and family life.
4. Pursuant to Judge Wyman's preserved findings of fact, the appellant's mother bears 'sole responsibility' for this appellant for the purposes of paragraph 301(i) (b) of the Immigration Rules, and the proposed accommodation arrangements would be adequate. The central issues in this appeal are, by reference to the Immigration Rules, whether the appellant is able to demonstrate that adequate maintenance will be available to him and, secondly, whether Article 8 'outside the rules' imposes a positive obligation on the Secretary of State to admit him to the United Kingdom, if not, taking his best interests as a primary consideration.
5. In evidence before Judge Wyman, the appellant's mother had relied on an arrangement she claimed to have arrived at with her employer, JA, whereby JA was said to have undertaken to meet the appellant's maintenance costs of £5,000 annually until he reached the age of majority. The judge had some concerns about that arrangement because JA was also the sponsor's landlady, and received housing benefit in respect of her, and, in any event, the judge did not consider the evidence about JA's finances, and those of her husband, PB, to be sufficient to permit a conclusion that JA and PB were able to act in accordance with their financial pledge to the appellant. I found that the judge was entitled to have concerns in relation to the evidence concerning JA's ability to provide the sums pledged, but held that the assessment of the appellant's best interests was flawed, thereby infecting the proportionality assessment undertaken outside the rules. In directing that the matter be reheard in this tribunal, I permitted the appellant to make an application to rely on additional evidence at the resumed hearing, which he did, by a notice dated 19 June 2021. The evidence related to the appellant's brother in this country, and the finances of JA and her husband PB.

The appellant's case and the Entry Clearance Officer's response

6. The appellant's case is that JA and her husband PB have wealth that is amply sufficient to meet the annual pledge of £5,000 towards his maintenance, and that, by virtue of their support, he will meet the maintenance requirements of the rules. That being so, in light of the preserved findings of fact, he meets all relevant eligibility requirements under paragraph 301 of the rules, with the effect that the Entry Clearance Officer is subject to a positive obligation under Article 8 to admit him to the United Kingdom.
7. In any event, the appellant contends that his best interests are overwhelmingly for him to be admitted to this country. The arrangements for his care in Nigeria are now precarious and are drawing to an end. He is sofa-surfing from house to

house. The appellant's best interests are to relocate to be with his mother and brother here. The Secretary of State has recognised that the appellant's brother cannot leave this country, in light of having granted his mother, who would otherwise have no basis to reside here, leave on the basis of her relationship with him. Before this tribunal, Ms Willocks-Briscoe, did not advance a 'counter factual' scenario, whereby she contended that it *would* be reasonable for the younger, British, brother to move to Nigeria, a country he had never known, in order for the family unit to live together there. As such, the family should plainly be united in this country, submits Mr Fazli, and the appeal should be allowed.

8. Ms Willocks-Briscoe accepts that the appellant's best interests are to be with his mother but submits that that is only a primary consideration and is not a paramount consideration, or a sufficient basis to allow the appeal. The appellant's best interests are not such that the United Kingdom is subject to a positive obligation under Article 8 ECHR to admit the appellant. She maintained the Secretary of State's position that the maintenance arrangements would not be adequate and submitted that much of the sponsor's evidence concerning what had been introduced for the first time during oral evidence and should thereby attract little weight. It would not be disproportionate to maintain the *status quo*, and the appeal should be dismissed.

Legal framework

9. 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 (right to respect for private and family life).
10. 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)
11. In practice, provided Article 8 is engaged, if an appellant meets the requirements of the Immigration Rules for a grant of entry clearance, that will be positively dispositive of the existence of a positive obligation to admit the appellant. The rules applicable to this appeal are found in paragraph 301 which provides, where relevant:

“301. The requirements to be met by a person seeking limited leave to enter or remain in the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement are that he:

(i) is seeking leave to enter to accompany or join or remain with a parent or parents in one of the following circumstances:

[...]

(b) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and has had sole responsibility for the child’s upbringing; or

[...]

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately without recourse to public funds, in accommodation which the parent or parents own or occupy exclusively; and

(iva) can, and will, be maintained adequately by the parent or parents without recourse to public funds; and

(ivb) does not qualify for limited leave to enter as a child of a parent or parents given limited leave to enter or remain as a refugee or beneficiary of humanitarian protection under paragraph 319R; and

(v) (where an application is made for limited leave to remain with a view to settlement) has limited leave to enter or remain in the United Kingdom; and

(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.”

12. Where the rules are not met, a proportionality balancing exercise must be conducted, in light of the appellant’s best interests, to determine whether it would be disproportionate for him not to be granted entry clearance.
13. Part 5A of the Nationality, Immigration and Asylum Act 2002 (“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.
14. It is for the appellant to demonstrate that the United Kingdom is subject to a positive obligation to admit him to the country under Article 8 ECHR, to the balance of probabilities standard.

The hearing

15. The resumed hearing took place remotely, having been listed at a time when it was necessary to do so in order to guard against the spread of Covid-19. All parties were content that the hearing had been conducted fairly in its remote form.
16. I heard evidence from the appellant's mother, and she was cross-examined. There were no other witnesses. Mr Fazli and Ms Willocks-Briscoe each made submissions.
17. I do not propose to recite the evidence and submissions in their entirety. I will highlight the salient elements of each to the extent necessary to reach my decision and give reasons for it.

Documentary evidence

18. The appellant relied on the original bundle prepared for the First-tier Tribunal, plus the additional materials that featured in the application made under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 20 June 2021. I granted the application. There was a good reason for the evidence not being before the First-tier Tribunal previously, in that it was mainly in the form of documents addressing the matters identified by the First-tier Tribunal for not allowing the appeal. It was in the interests of justice to admit the documents, in light of the issues I identified in the error of law decision for resolution in this hearing.

Discussion

19. I reached the following findings having considered the entirety of the evidence, in the round, to the balance of probabilities standard.
20. It is common ground that Article 8 is engaged on a family life basis between the appellant and his mother. The appellant's mother bears "sole responsibility" for him in Nigeria, and there is no suggestion that there is anything other than a genuine and subsisting relationship between mother and son. That being so, it is necessary to consider whether the appellant can meet the requirements of the Immigration Rules. The central issue is whether there are adequate maintenance arrangements for him to reside in this country without becoming a burden on public funds.
21. Before me, there is very little information about the expected living costs the appellant's mother will have to meet in order to maintain not only the appellant, but also her and her other son, too. Her annual salary is £15,000 and her monthly rent is £950. Before the First-tier Tribunal she claimed to receive approximately £880 monthly in benefits. However, there are no details of her current or projected expenses before me, and there has been no attempt to engage with the findings reached by Judge Wyman at paragraph 50 that the appellant's own income (including the benefits she receives) would be insufficient to maintain the family. Nor has the appellant sought to engage with the unchallenged reasoning in Judge Wyman's decision which analyses adequate maintenance by reference to the income that would be provided pursuant to public funds. Instead, before me the sponsor has relied on the pledge of £5,000 annually from JA and PB, on the basis that, if the promise of that financial assistance is accepted by this tribunal, it will be sufficient to demonstrate that she will be able to maintain her son.

22. Putting to one side the fact that there is precious little evidence concerning the sponsor's overall income and expenses, and assuming that all that is needed is the additional £5,000 annually as pledged by JA and PB, I am unable to accept that the pledge will reliably and consistently be provided in the circumstances as claimed. The pledge assumes a considerable responsibility, given the appellant will not attain the age of majority until 2024.
23. First, neither JA nor PB attended the hearing to give evidence and be cross-examined on the proposed arrangement. Given JA is the appellant's employer and landlord, the suggestion that this sum may be provided on a regular basis does give rise to a number of questions which could have been put to either witness during cross-examination. For example, why the sum has been pledged in this way, what the motivation for doing so was, whether any payroll or tax implications arising from JA as the sponsor's employer making tax-free gifts to her had been considered (or whether money would, in fact, be taxable), and what the expenses and means of the proposed benefactors were. I note that in the rule 15(2A) application, a number of documents were provided relating to PB's pension income and property holdings. But income and capital assets alone do not demonstrate an ability to make regular payments until the appellant turns 18, for much turns on the outgoings of PB and JA over the same period, details of which have not been provided. Similarly, while JA and PB have provided a single bank statement demonstrating that from 8 May to 7 June 2021 they maintained a current account balance of at least £7,200, with expenses of less than £400 and a payment in of £1,500, this does not provide anything like a sufficient picture of their finances to demonstrate how they would be able to afford a regular contribution to the appellant's maintenance until he attains the age of majority. The bank account in question is clearly not a current account used for all daily expenditure, as there appear to be only seven transactions in the course of the month. The payment in does not correspond to PB's payslips. I find that I have not been provided with the full financial picture pertaining to JA and PB.
24. Details of JA and PB's mortgaged properties have also been provided; in isolation it is difficult to see how holding capital assets such as mortgaged real property will assist with the pledge of maintenance. There is, for example, no suggestion that properties will be sold, or further mortgaged, in order to meet any ongoing pledge made in respect of the appellant's maintenance. In the circumstances, therefore, it is difficult to see how the materials relating to the property owned by JA and PB take matters any further forward.
25. In order to be satisfied to the balance of probabilities standard that the claimed maintenance will and could be paid as pledged until the appellant's eighteenth birthday, far more detail would be required. In light of the above concerns, while I accept that PB and JA would be able to make a contribution to the appellant's maintenance, I am not satisfied that they are both willing and able to do so, each year, until the appellant turns 18.
26. There was no other basis upon which Mr Fazli contended the maintenance requirements of the rules were met. I find that the maintenance requirements contained in paragraph 301(iva) have not been met.
27. I turn to Article 8 'outside the rules'.

Article 8 outside the rules

28. I begin my assessment of Article 8 outside the rules by considering the best interests of the appellant. In order to do that, it is necessary to reach a number of findings of fact concerning the appellant's circumstances in Nigeria.
29. I permitted a number of additional questions during the sponsor's evidence in chief. She explained the circumstances that led her to move to this country, leaving the appellant behind. These were largely unchallenged, and I accept that the sponsor has given an accurate account in this regard. She explained that she came to the United Kingdom to be with her then partner, the father of her British child. She left the appellant in Nigeria while visiting this country briefly on a tourist visa, planning to sort out her 'papers' and return with her son, the appellant, at a later stage. However, she became pregnant while in this country, and gave birth to her British son. She has remained here ever since, both as an overstayer, and later with leave to remain. She could not apply for a partner visa because her then partner was, at that time, married to someone else, she explained, although she did not know that at the time she travelled here. It was only when she was pregnant that she found out that he was, in fact, married. She has not been in touch with the father of her British son since the birth and, as such, she is the only family her British son knows in this country. She explained that she has no family in Nigeria, and no income there, having left in 2013. She is integrated with her church community in this country. Her son is settled at school. It is not possible for the family to relocate to Nigeria.
30. Under cross-examination, when challenged about the circumstances of her the appellant in Nigeria, the sponsor introduced a number of significant developments. These had not featured in her witness statement prepared for the First-tier Tribunal, and nor did they feature in any of the materials that formed part of the rule 15(2A) application made on 20 June 2021. In her witness statement dated 17 March 2020, the sponsor explained that the appellant resides with his aunt in Nigeria. She said that he had previously lived with different family members, although she did not say that there had been any difficulties with those arrangements. However, when asked in cross-examination as to who looks after her son at the present time, the sponsor said, for the first time, that her son does not have a stable place to live in Nigeria. He spends a week here and a week there, with friends from school. When challenged as to why there were no materials, such as a letter, from either the aunt or any of the families the appellant is now said to be living with, she said that she had not obtained anything because "we are not putting in another application". She said she is accused by people in Nigeria of having abandoned her son, and they implore her to collect him. He continues to attend school in Nigeria, and is educated in English.
31. On any view, for the appellant to be sofa-surfing from family to family, and no longer welcome with the aunt with whom he was said previously to live, would be a very concerning development, which would go to the heart of his best interests, and would be a weighty factor mitigating against maintaining the *status quo*.
32. In my judgment, however, there is no good reason for the very significant and concerning developments concerning the claimed precarious nature of the appellant's living arrangements to be introduced for the first time under cross-examination, and the manner in which these claimed developments were introduced causes me to ascribe less weight to this aspect of the sponsor's evidence. In the directions I gave when directing that this matter be reheard in the Upper Tribunal, I specifically highlighted the possibility of updating evidence

being provided. There was no evidence, not so much as even a statement from the sponsor, let alone the persons concerned in Nigeria, in relation to these matters. There is nothing, for example a letter, from the appellant himself, or even from the school he attends outlining concerns which would, one would expect, be apparent to those responsible for teaching the appellant if he had become homeless as claimed.

33. I have concerns arising from the sudden introduction of these developments, and the absence of any supporting material of the sort that would readily be available. The sponsor's suggestion that she did not provide additional evidence of the sort which would go to the heart of his best interests assessment '*because we are not putting in another application*' does not withstand scrutiny. It is inconsistent with the approach the sponsor has adopted in relation to the other outstanding matters in these proceedings, such as providing evidence relating to JA and PB's finances, and other materials relating to her British son's integration in the community in this country. On the evidence I have heard, I do not accept that the appellant is sofa surfing from one family to another. I do not accept that he has been rejected by his aunt, nor that he is generally not welcome in the circumstances to which he will have become accustomed over the course of the previous eight years during which he has lived in Nigeria without his mother.
34. I emphasise that these findings are questions of weight and I have not made a finding of dishonesty in relation to the sponsor (or the appellant). Nothing in the evidence I have heard precludes the possibility of a future application dealing credibly with these concerns.
35. There was no challenge to the sponsor's evidence as to her integration in this country through her work, community, and church involvement. I accept that she is integrated as claimed.
36. These findings do not mean that it is in the appellant's best interests to remain in Nigeria, but they do mean I have rejected a significant feature of the appellant's case about his circumstances in that country. I find that he continues to live with the aunt who housed him at the time his mother signed her statement for the First-tier Tribunal, and that there are no credible concerns arising from that arrangement.

Best interests of the appellant

37. I unhesitatingly conclude that it is in the appellant's best interests for him to reside with his mother and his brother. The appellant's mother bears sole responsibility for him, and it is plainly in the best interests of the appellant to be with his mother and brother. While I do not accept that the appellant's circumstances in Nigeria are as bad as the sponsor claimed them to be, on no view could it be preferable for him to remain living with persons other than his mother and brother, especially given he appears to have no other immediate family, in particular a father. He is a teenage boy approaching a crucial stage in his development and education. Being with his mother would be in his best interests. It would also be in the best interests of his British brother, who is a much younger child, and who will plainly benefit from growing up alongside his brother.
38. The question then arises as to where in the world should the appellant reside with his mother and brother. The respondent has not suggested that it would be

reasonable for the sponsor and the appellant's brother to relocate to Nigeria, on the basis that it would not be reasonable to expect her British son to leave the United Kingdom. I am not bound by that approach, but I nevertheless can see the considerable force in the sponsor and her British son remaining in this country, and treat the Secretary of State's approach as a concession that the British son and sponsor cannot be expected to relocate to Nigeria. In this country, the sponsor has employment, accommodation, and recourse to some public funds. Relocation to Nigeria would remove from the sponsor and her British son many elements of the protective framework they currently enjoy. The sponsor and her British son also are integrated into their church community, as set out in the letters of support provided to the tribunal.

39. I find that it would be in the best interests for the appellant to be granted entry clearance to reside with his mother and brother in this country.

Balance-sheet exercise

40. As Ms Willocks-Briscoe submits, the best interests of the appellant are a primary consideration, not *the paramount* consideration. In order to determine whether the Secretary of State is subject to a positive obligation to admit the appellant to the United Kingdom, I will conduct a balancing exercise. In the analysis that follows, I will consider where the fair balance lies between the interests of the appellant and his family, on the one hand, and those of the community as a whole, as embodied by the Secretary of State, on the other, in order to determine whether there are exceptional circumstances that would render a refusal of entry clearance unduly harsh (or, put another way, whether the UK is subject to a positive obligation to admit the appellant).

41. Factors against the appellant being admitted include:

- a. The maintenance of effective immigration controls is in the public interest (section 117B(1), 2002 Act);
- b. The appellant does not meet the requirements of the Immigration Rules, which set out the Secretary of State's view as to where the balance between the competing interests of the individual and the broader public interest. Specifically, the appellant does not meet the requirements of the rules insofar as they relate to the necessity of adequate maintenance;
- c. It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, the persons who seek to enter or remain in the United Kingdom are financially independent, because such persons are not a burden on taxpayers, and are better able to integrate into society. While the appellant is a child, and so cannot be expected personally to be held responsible for any economic dimension to his integration, it is nevertheless a relevant statutory factor militating against his admission that his mother does not meet the requirements of the immigration rules concerning maintenance;
- d. The appellant's mother will be free to visit Nigeria from time to time;
- e. The appellant's mother's leave to remain here is precarious, in the sense that she is not settled. I accept, however, that there are degrees of precariousness (see *Lal v Secretary of State for the Home Department* [2019] EWCA Civ 1925 at [57]), and the sponsor's leave is likely to be

renewed until her young son reaches adulthood, at which point she may be eligible for settlement.

42. Factors in favour of the appellant being admitted include:

- a. It is in the best interests of the appellant, a child, for him to be admitted to this country. If he is not admitted, while I have not accepted that the evidence in its present form demonstrates that he will face the precarious existence he the sponsor claims he will face, he will nevertheless reach adulthood without the daily presence and closeness of his mother (who bears sole responsibility for him) or his brother;
- b. It is in the best interests of the appellant's British brother for the appellant to be admitted, and I accept that it is not in the best interests of his brother to relocate to Nigeria, reflecting the position adopted by the Secretary of State;
- c. It is not in the best interests of the appellant's British brother to relocate with his mother to Nigeria, pursuant to the concession by the Secretary of State. The sponsor has relied on a range of documents which demonstrate her integration within her community and church, which make clear the links enjoyed by the UK-based limb of the family in community;
- d. The appellant speaks English, which is a neutral factor under section 117B(5) of the 2002 Act. He is educated in English and will therefore be better placed than some other migrants to begin his cultural integration into this country;
- e. The sponsor does have *an* income, meaning that the financial impact of the appellant's admission will be lesser than would otherwise be the case were she not working at all.

Conclusion

43. As Ms Willocks-Briscoe submits, Article 8 is not a dispensing tool in relation to the Immigration Rules, to 'bridge the gap' when an applicant for entry clearance does not meet the full criteria under the rules. Yet the rules cannot cater for every situation. While the rules, in particular the maintenance requirements, set out the considerable public interest reflected by expecting those who come to this country to meet certain criteria, there will always be cases, particularly in family life situations, where the factual matrix calls for a different approach. In these proceedings, the appellant's younger brother is British and lives here. Understandably, the Secretary of State has not advanced a 'counter factual' scenario whereby she would expect the sponsor and the appellant's younger brother to relocate to Nigeria, where the sponsor would live as a single mother (as to which, see her unchallenged evidence on that point), devoid of the community, church connections, support and employment she enjoys in this country while residing here legally. She would appear to be on a pathway to settlement. The presence of the appellant's younger British brother in this country, and the Secretary of State's realistic approach to his continued residence here, in my judgment takes this case into the exceptional territory of where the Secretary of State is subject to a positive obligation to facilitate the appellant's residence in this country. The provisions of the Immigration Rules under consideration do not cater for the situation where, as here, there are the best interests of more than one child involved, with the effect that the considerable weight ordinarily ascribed to ensuring the provisions of the rules are

satisfied is tempered to a degree. The appellant will enjoy a degree of financial support from his mother and her employment. He speaks English and will be well placed to integrate into the community. The possibility of the sponsor visiting Nigeria does not negate these considerations. A fair balance in this case, bearing in mind the circumstances of the appellant's younger brother, is for the appellant to be admitted.

44. The appeal is allowed.

45. In light of the age of the children involved, I maintain the anonymity order already in force.

Notice of Decision

The decision of Judge Wyman involved the making of an error of law and is set aside, subject to the savings set out in my decision dated 24 May 2021.

I remake the decision by allowing the appeal.

This appeal is allowed on human rights grounds.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. 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 4 January 2022

Upper Tribunal Judge Stephen Smith

Annex - Error of Law decision



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/12283/2019

THE IMMIGRATION ACTS

**Heard remotely at Field House
On 19 April 2021 via Skype for
Business**

Decision & Reasons Promulgated

.....

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**RA (NIGERIA)
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr M. Fazli, Counsel instructed by Supreme Solicitors
For the Respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

The documents that I was referred to were primarily the materials that were before the First-tier Tribunal, the judge's decision, the grounds of appeal, and written submissions, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: the parties were content that the proceedings had been conducted fairly in remote form.

1. This is an appeal concerning the refusal of entry clearance to a child living in Nigeria whose mother lives in this country. The Secretary of State refused the appellant's entry clearance application on 3 July 2019. Judge Wyman of the First-tier Tribunal dismissed the appellant's appeal against that refusal in a decision dated 30 March 2021. The appellant now appeals to this tribunal against Judge Wyman's decision with the permission of First-tier Tribunal Judge Cruthers.

Factual background

2. The appellant was born on 26 March 2006. His mother, the sponsor, is also a citizen of Nigeria. She left the appellant in Nigeria in 2013 under the care of family members, and now resides here with limited leave to remain, currently under section 3C of the Immigration Act 1971, as she submitted an application for further leave prior to the expiry of an earlier grant of leave on 21 January 2021. The appellant's mother has another son with whom she lives in this country, the appellant's half-brother, who is a British citizen, born on 31 July 2014.
3. The central issues before the First-tier Tribunal were whether the appellant met the requirements of paragraph 301 of the Immigration Rules, and whether Article 8 of the European Convention on Human Rights ("the ECHR") obliged the United Kingdom to admit him in any event, if not.
4. The judge reached a number of unchallenged findings of fact, including that the appellant's mother bore sole responsibility for him [40], and that the proposed accommodation would be adequate [45].
5. The judge dismissed the appeal on the basis that there was insufficient evidence concerning the maintenance available for the appellant. The appellant's case before the First-tier Tribunal was that his mother's employer, JA, who was also her landlord and recipient of housing benefit paid on the mother's behalf, would meet his maintenance costs, of up to £5,000 annually, until he reached the age of majority. JA's evidence was that she had a wealthy husband who would meet these expenses.
6. At [53], the judge held that JA had provided limited evidence of her own income. She had provided no evidence of her husband's claimed wealth and high income, and he had not attended the hearing. While her bank statements demonstrated a balance regularly ranging between £3,000-£4,000, that was insufficient to demonstrate she could meet the pledged maintenance expenses of £5,000 annually, found the judge. Accordingly, at [55], the judge found that the appellant would not be maintained adequately by his mother and concluded that the appeal could not succeed by reference to article 8 as articulated by the Immigration Rules.
7. The judge proceeded to address exceptional circumstances outside the rules in these terms:

"58. It is noted that the sponsor left Nigeria in March 2013 and has chosen to remain outside of Nigeria since this date. It appears that the appellant's son is healthy, is attending school, and has a number of people who have looked after his general care including Ms [A, the

appellant's guardian in Nigeria]. The sponsor was able to pay for his school fees and there is no reason as to why this cannot continue in the future.

59. I am aware that the sponsor has another child was the stepbrother of the appellant. He is a British citizen born on 31 July 2014. The appellant has visited Nigeria (it is assumed with her young son) and there is no reason as to why they [*sic*] could not be further visits in the future. Whilst I note that the sponsor now has limited leave to remain in the United Kingdom, she could of course choose to return to live in Nigeria with her son, including her young son who would not lose his British citizenship in any event."

Permission to appeal

8. The appellant's grounds of appeal are threefold. First, he contends that the judge erred by discounting the offer of third party maintenance support from JA, erroneously ascribing significance to the fact she benefited from housing benefit paid to the sponsor. Secondly, that the judge failed properly to assess the best interests of the appellant. Thirdly, that the judge's assessment of Article 8 outside the rules meant that the appellant "should have succeeded."
9. There was no formal rule 24 response, but Mr D. Clarke, Senior Home Office Presenting Officer, submitted a comprehensive skeleton argument dated 9 October 2020, pursuant to case management directions given by Upper Tribunal Judge Norton-Taylor on 30 July 2020. Judge Norton Taylor had directed both parties to provide written submissions. Nothing was received from the appellant.

Submissions

10. The primary focus of Mr Fazli's oral submissions was the judge's assessment of the appellant's best interests, as a child. He submitted that the consideration conducted by the judge failed to have regard to all relevant factors, especially in light of the findings earlier in the decision that the sponsor bore sole responsibility for the appellant and would be able adequately to house him in this country. The judge did not, submitted Mr Fazli, address section 117B of the Nationality, Immigration and Asylum Act 2002; the appellant speaks English, and would be able to integrate well. The substantive requirements of the rules, namely that the sponsor has sole responsibility for the appellant, have been met. Although the judge had some concerns over the maintenance requirement, there was evidence before him which demonstrated that some maintenance would be possible, which he failed to consider. Even if the judge had concerns about JA's husband's claimed wealth, the bank statement she had provided demonstrated a healthy balance on a regular basis, such that, even if £5,000 annually would not be possible, she would be able to make a substantial contribution to the maintenance he would require. JA's unchallenged evidence was that she earned at least £21,000 annually in her own capacity.
11. Further, by suggesting that there was some form of irregularity in the offer of support from JA to the sponsor, in light of her being the beneficiary of housing benefit paid on behalf of the sponsor, the judge impermissibly the evidence of both JA and the sponsor is tainted.
12. On behalf of the respondent, Ms Isherwood submitted that the appellant's grounds of appeal misunderstood the judge's findings. The reason the judge had

rejected the claimed evidence of third party maintenance was not because JA was in some way tainted, it was simply because there was no evidence. The appellant may disagree with those findings, but they are not irrational.

Discussion

13. Dealing first with the judge’s analysis of the Immigration Rules, the judge did not err when finding that the maintenance requirements were not met. While Mr Fazli proffered a number of alternative constructions of the evidence before the judge, none demonstrated that the judge reached findings of fact that no reasonable judge could have reached. The approach appellate courts should take to findings of fact has been the subject of extensive jurisprudence. See, for example, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [\[2014\] 1 WLR 2600](#) at [62], with emphasis added:

“It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. **What matters is whether the decision under appeal is one that no reasonable judge could have reached.**”

14. It was open to the judge on the evidence to raise concerns about the absence of full financial information relating to JA. Contrary to the submission that the judge erroneously imputed some form of impropriety or irregularity to the arrangements between JA and the appellant’s mother, properly understood the judge simply found that there had been no financial evidence as to the claimed wealth of JA’s husband. Given JA’s evidence was that her husband would be the source of the maintenance support she would provide to the appellant, it was entirely open to the judge to conclude that evidence had not been provided to substantiate those assertions.
15. It is nothing to the point that the judge raised concerns relating to the receipt by JA of the mother’s housing benefit; the operative reasons given by the judge for finding the maintenance requirements of the rules were not met related to the absence of evidence of her financial means. I accept that the bank statements provided by JA show a healthy balance. However, they also reveal that in some months the “money in” equals the “money out”; see, for example, February 2019 at page 99 of the appellant’s bundle. By finding JA could not afford £5,000 based on this paucity of evidence, the judge did not reach findings that no reasonable judge could have reached.
16. I accept Mr Fazli’s submission that the judge’s assessment of the appellant’s best interests, as a child, does not feature a full consideration of all relevant factors.
17. The judge did not address the impact of her earlier findings that the appellant’s mother bore sole responsibility for him. That was a significant part of the factual matrix which should have featured at the heart of the judge’s assessment of the appellant’s best interests; it is not simply a question of weight. The judge failed to have regard to a material consideration. Further, the judge’s treatment of the appellant’s British stepbrother failed to engage with the essential question of whether it would be reasonable to expect him to leave the United Kingdom, a country of which he is a citizen. The only consideration in the decision relevant to the stepbrother’s British citizenship was the judge’s observation that he would not lose his British citizenship in the event he were to relocate from the country

of his birth, nationality and formative years to Nigeria. That was an insufficient basis to conclude that the family could relocate; the mere non-loss of British citizenship is only one factor when addressing whether it would be reasonable the stepbrother to leave the United Kingdom. The judge did not consider the “real world” situation as it pertained to the stepbrother, nor the appellant himself. Similarly, the judge did not ascribe any significance to the fact the appellant’s mother had been granted limited leave to remain in this country on the basis of her private and family life.

18. Very fairly, Ms Isherwood accepted that there were some difficulties with [59] of the judge’s decision. Nevertheless, she submitted that the best interests of the appellant would be to remain in Nigeria, where he is clearly settled and established, pursuant to his mother choosing to move to this country without him in 2013. However, there is nothing about his situation that is so compelling, she submits, that a grant of entry clearance outside the rules would be appropriate.
19. In light of my finding that the judge’s assessment of the appellant’s best interests was flawed, it follows that the overall proportionality assessment conducted by the judge was also flawed. It was not based on a proper assessment of the appellant’s best interests. Such an assessment has not taken place.
20. It will be necessary to consider matters including whether it would be reasonable for the appellant’s step-brother to relocate to Nigeria (to include consideration of the relationship he has, if any, with family in this country, including his father), and the appellant’s mother’s family and likely circumstances in Nigeria, and other factors concerning the appellant’s best interests and wider Article 8 considerations relating to this family.
21. The decision of Judge Wyman involved the making of an error of law. I set it aside, preserving her findings that the Immigration Rules were not met for the reasons she gave. In light of the preserved findings of fact, it will be appropriate for the decision to be remade in this tribunal, to determine (i) the appellant’s best interests, in light of all relevant factors (including any updating evidence, as appropriate); (ii) Article 8 outside the rules.
22. At this stage, I maintain the anonymity order already in force.

Notice of Decision

The decision of Judge Wyman involved the making of an error of law. I set it aside, preserving her findings that the Immigration Rules were not met for the reasons she gave. In light of the preserved findings of fact, it will be appropriate for the decision to be remade in this tribunal, to determine (i) the appellant’s best interests, in light of all relevant factors (including any updating evidence, as appropriate); (ii) Article 8 outside the rules.

The resumed hearing will be held on a remote basis, subject to reasoned objections from either party sent within **seven days** of being sent this decision.

I give the following directions:

- a. Within **no more than 28 days of being sent this decision** the appellant is to submit to the Tribunal, copied to the Secretary of State, any further evidence he seeks to adduce, together with an application for permission to adduce it, giving reasons. The appellant must also provide a skeleton argument by that date.
- b. **Within 42 days of being sent this decision** the Secretary of State is to file and serve a skeleton argument.

The matter will then be listed on the first available date 42 days after these directions are sent.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. 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 24 May 2021

Upper Tribunal Judge Stephen Smith