



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

Appeal number: OA/00256/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 12 May 2016**

**Decision & Reasons promulgated
On 20 May 2016**

Before

Upper Tribunal Judge Gill

Between

**Illyaas Akorede Sowunmi
(Anonymity Order NOT made)**

Appellant

And

Entry Clearance Officer, Abuja

Respondent

Representation:

For the Appellant: Mr D. Coleman, of Counsel, instructed by Daniel Aramide Solicitors.
For the Respondent: Ms A Brocklesby-Weller, Senior Presenting Officer.

Decision and Directions

1. The appellant, a national of Nigeria born on 14 June 2006, appealed to the First-tier Tribunal against a decision of the respondent of 8 December 2014 to refuse his application under para 301 of the Statement of Changes in the Immigration Rules HC 395 (as amended) (hereafter referred to individually as a "Rule" and collectively the "Rules") and under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to join his parents who are Nigerian nationals settled in the United Kingdom as their dependent minor child.
2. The respondent did not accept that the appellant satisfied the following requirements:
 - i. (para 301(i)) that the appellant was related as claimed to his sponsors;

- ii. (para 301 (i) (b) and (c)) that one parent had sole responsibility for his upbringing or that there were serious and compelling family or other considerations which made his exclusion undesirable;
- iii. (para 301(iv)) that he will be accommodated adequately without recourse to public funds;

The respondent did not accept that the decision was in breach of any protected rights under Article 8 of the ECHR.

3. The appellant's appeal was heard before Judge of the First-tier Tribunal K Lester, who dismissed the appeal.
4. By the date of the hearing before the judge, the appellant's parents had separated. The judge heard evidence that the appellant's mother had received some benefit payments. Relying upon RM (Kwok on Tong: HC395 para 320) India [2006] UKAIT 00039, the judge raised the maintenance issue and decided that the appeal must fail because the appellant did not satisfy the requirement in para 301((iva), that *"he can, and will be, maintained adequately by the parents or parents without recourse to public funds"*.
5. It is clear from the decision that the judge decided the maintenance issue on the basis of the circumstances as at the date of the hearing.
6. In his decision, the judge accepted that the appellant was related as claimed to his parents and that his mother had sole responsibility for his upbringing.
7. On 29 March 2016, the appellant was granted permission to appeal to the Upper Tribunal.
8. At the hearing, Mr Coleman accepted on behalf of the appellant that the judge was entitled to require the appellant to address the maintenance and accommodation issues, pursuant to RM. He also accepted that, if the appellant's appeal failed under the Rules, he could not succeed on the basis of Article 8.
9. Mr Coleman and Ms Brocklesby-Weller agreed that the judge had materially erred in law in deciding the maintenance issue by reference to the circumstances as at the date of the hearing, contrary to the terms of s.85(5) of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"). Para 16 of the judge's decision indicates that the judge may have been misled into making this error by the submissions of the Presenting Officer at the hearing before him.
10. The judge's decision does not disclose that he received any evidence relating the circumstances appertaining as at the date of the decision on the maintenance issue, no doubt because it only became apparent from the oral evidence of the appellant's mother that her circumstances had changed since the appellant's application was made by reason of the fact that she and the appellant's father had separated.
11. I am satisfied that, whilst the judge was entitled to require the appellant to address the maintenance issue, he materially erred in law by deciding this issue on the basis of the circumstances as at the date of the hearing. I therefore set aside his decision to refuse the appeal under the Rules.

12. I direct that the re-making of the decision is limited to whether the appellant satisfies the accommodation and maintenance requirements of para 301 of the Rules. The following findings of the judge shall stand:
- i. that the appellant has established that he is related as claimed to his mother;
 - ii. that the sole responsibility requirement in para 301(i)(b) is satisfied. It is therefore unnecessary to consider whether the requirement in para 301(i)(c) is satisfied.
13. There will be no need to consider Article 8 because Mr Coleman accepted that the appellant's Article 8 claim cannot succeed if he does not satisfy the requirements of para 301 of the Rules.

DIRECTIONS:

14. The direction below shall apply in addition to any direction given by the First-tier Tribunal:

Any documentary evidence, whether by way of supporting documentary evidence or witness statements, must be served by the appellant no less than 28 days before the hearing date. The appellant is on notice that the purpose of this direction is to give the respondent (who is abroad) an opportunity to consider the documents. Failure to comply with this direction may lead to evidence being excluded or the hearing being adjourned.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside in its entirety. This case is remitted to the First-tier Tribunal for a hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal K. Lester.



Signed
Upper Tribunal Judge Gill

Date: 20 May 2016