Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/03565/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 26th June 2019	**On 04th July 2019**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

FM
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Sesay, Solicitor-Advocate from Freemans Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nigeria born in 1972. She arrived in the UK in March 2016 with a visit visa. Her leave to remain expired in September 2016, but prior to the expiry of her leave, in August 2016, she applied for leave to remain on human rights grounds. Her application was refused in a decision of the respondent dated 16th January 2018. Her appeal against the decision was dismissed by First-

tier Tribunal Judge Wolfson in a determination promulgated on the 13th December 2018.

2. Permission to appeal was granted by First-tier Tribunal Judge Ford on 24th January 2019 and for the reasons set out in the decision appended as Annex A to this decision I found that the First-tier Tribunal had erred in law and set aside the decision with no findings preserved.

3. The matter came back before me to remake the appeal. The witnesses all gave oral evidence in support of their written statements, in the appellant's case this was through a Yoruba interpreter.

Evidence & Submissions – Remaking

4. The appellant's evidence, in summary, is that she should be allowed to remain as Z, her 15 year old daughter, has had a difficult time with a lot of changes in her life including: her parents breaking up and her new partner not getting on with Z and her brother, I, and mistreating them which led to them coming to the UK to live with their father in 2015; with Z's father, IM, having previously left the home in Nigeria in 2006 and remarrying in the UK in 2009, and then that relationship breaking down and her father mistreating her; and finally with her parents coming back together again in the Spring of 2016. Z's father, IM, had found it difficult to parent Z when he was with her in the UK without the appellant in 2015, and Social Services became involved when he hit her. They had called her in Nigeria about the incident, and she was troubled by IM's behaviour. Social Services no longer have a role assisting the family as she, the appellant, has been present in the home since March 2016. She does not allow Z to be alone with IM even though they now all live together as a family again, and she also tries to guide Z to make better choices in her behaviour. IM has never tried to hit Z since she has been in the UK, she is confident that things are fine now that they are back together as a family. She resumed her relationship with IM as her partner about two months after she came to the UK, and thus in May 2019. At present she does not work, but if she is allowed to remain she will try to get a job which fits into the hours when Z is at school. She previously worked in Nigeria as a trader. IM works in security and provides financially for the family. Z and her older brother I, who is 19 years old, are happy in the UK and have a right to remain here, and do not wish to leave. Z is doing her GCSE examinations next year and will continue with education thereafter. It is her view that it is not in Z's best interests to leave the UK, or to be separated from her.

5. Z herself gives evidence that she wishes to remain in the UK because of her schooling and her friends in this country, and wants the appellant to remain as she needs her guidance and because the appellant's presence has improved the relationship she has with her father and has created a close bond between all family members. She has only had one incident where her father was violent to her, which was the one where the police and Social Services became involved with the family in

2015. She feels that her relationship with him has not fully recovered but that they are getting there, and she is now comfortable with her father, but does not do things such as shopping or going to the cinema just with him. She hopes to go to college to study fashion design after finishing her GCSEs, and believes that she will keep her same friendship circle when she makes this transition. She has no friendship with people in Nigeria and would not wish to visit her mother in Nigeria if she were forced to live there. Z believes that her own best interests are to continue at her current school to complete her GCSEs next year. (This is supported by a letter from the head of Imperial House at Harris Girls Academy.)

6. I, the appellant's 19 year old son, describes the appellant's presence as indispensable as he really loves her and there are things that he can only discuss with her. He is settled in the UK with friends, and plans to continue living at home with his family in the future. He has finished his education and is working as a warehouse operative doing full-time nightshifts. He is concerned that the relationship between Z and his father could deteriorate again if the appellant is not allowed to remain and stresses how important the appellant is for Z's welfare and happiness. He has not had to intervene on behalf of Z with their father since the incident in 2015, and now his mother is here she stops such problems developing immediately. He would of course try to protect Z if the appellant were not in the UK if this was needed but feels he cannot do what the appellant does for Z. He went on a trip to Lagos last year and visited an uncle there, but could not imagine his mother not living with him in the UK which is his home. Z has not visited Nigeria since their arrival in 2015.

7. IM is the appellant's current partner and father of her children. He is a British citizen. He was previously married to Ms Shenese Braams in the UK, after his first relationship with the appellant broke down. The appellant also had a new relationship in Nigeria at that time, and when her partner mistreating his children they applied for them to come to the UK to join him. The appellant had some telephone contact with the children during the year when they were living with him in the UK. He found Z's school, which he believed to be one with good grades, and does things such as attend parents' evenings as the appellant's level of English is not so good as his so she might not understand everything in such a context. He said that he has only hit Z on one occasion in 2015, which was the incident which led to Social Services being called. H realises that this was a big mistake on his part. Now he has learned to listen and talk and be patient, and things have changed since the appellant returned to the family. They would all be devastated if she left as she is their pillar. He and the appellant want to get married again, but are unable currently to book a ceremony as their passports are with the Home Office. He feels happy and settled, and the appellant is playing a very significant role in bringing up the children. She also helps him understand the children, and they make joint decisions about their things such as whether Z should be allowed to go out with friends. He has only been out once with Z without other family members since the

incident in 2015. He currently works as a security officer three days a week and supports the family from this work. He pays for their three bedroom flat without receiving any benefits. He is also doing a three day a week level 5 course in management in health and social care so that he can move on with his career, with the fees for this course being paid via a student finance loan. He will return to working full time once his college course is finished in a few months' time. The appellant has given him the strength to improve his situation through education.

8. Southwark Social Services state in their letter of 3rd June 2019 that they have no involvement with the family as there have been no safeguarding concerns since their return to Southwark in April 2016. Lambeth Social Services set out in their written agreement signed on 14th March 2016 by the appellant and her partner that Z must not be subject to physical chastisement; that the appellant must be present at all times when Z and her father are together; Z must not be left unsupervised by her father at any time; that the appellant and IM should work with the police and children's services to ensure Z is safe; and that IM had to comply with his then applicable bail conditions. It is clear from letters from Morrison Spowart Solicitors that the appellant's partner's criminal charges relating to child protection were discontinued by the police in September 2016.

9. Ms Cunha submits that she relies upon the reasons for refusal letter. In this letter, in summary, the respondent sets out that he does not consider that the applicant can meet the requirements of the Immigration Rules and finds that there are no exceptional matters which require a grant of leave to remain on Article 8 ECHR ground outside of the Immigration Rules. The best interests of the children are served by Z and I remaining in the UK with their father, as they can remain in touch with the appellant via modern methods of communication and visits to Nigeria.

10. Ms Cunha also submits that the appellant was not present in the UK when the incident with Z took place and the police and Social Services managed to protect Z with the help of her brother I, which shows Z's best interests can be served without the appellant being present as these measures could all be put in place again if there was a worsening of the relationship between Z and her father, and therefore it is not disproportionate to remove the appellant as it is in the interests of immigration control that she be removed as she cannot meet the requirements of the Immigration Rules and entered as a visitor and so is expected to leave at the end of her visit.

11. Mr Sesay accepted on behalf of the appellant that she was unable to meet the requirements of the Immigration Rules. He argued however that it was not in the best interests of Z for the appellant to be removed. She wants her mother to remain and has given evidence about how central she has been to the improvement in Z's relationship with her father and in the family bonds becoming close again. Her separation from her mother impacted on her badly and the presence of

the appellant has been key to Social Services no longer needing to assist this family and protect Z. It is also in Z's best interests to continue her education in the UK, and Z has strong integrative links with friends in this country and does not want to leave as she has made her home here. It would not be sufficient for the appellant to maintain contact with Z through modern means of communication given her central role for Z and the family. Whilst it is clear from the case law that Z's best interests can be outweighed in an Article 8 ECHR proportionality exercise this is not the case on the facts of this case. The appellant is not an overstayer but entered legitimately and honestly as a visitor.

Conclusions – Remaking

12. It is accepted that the appellant cannot show compliance with any of the Article 8 ECHR Immigration Rules. It is therefore in the public interest that she is removed, as the maintenance of immigration control is in the public interest. I find that the appellant can speak some basic English is a neutral matter, as is the fact that the appellant is financially self-sufficient as she is supported by her partner, IM, by his work in security.

13. I accept that the witnesses are all credible. There was no submission to the contrary by Ms Cunha, and the evidence they gave was consistent with their written statements and with each other. All witnesses answered the questions put to them fully, and they were all frank about the difficult incident which had led to police/ Social Services involvement with the family and answered extensive cross-examination on this issue openly.

14. As already stated appellant cannot show that she can meet the requirements of the Immigration Rules in relation to the children, equally she cannot show she is entitled to succeed in this appeal by application of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 as Z is not a qualifying child as she has not been in the UK for 7 years and is not a British citizen, although she is lawfully present with an EEA residence card. I must however consider the best interests of Z as a child.

15. Z is a 15 years old girl who has been in the UK for four years, and I find that she is lawfully present as she has an unchallenged EEA right to remain in the UK reflected in a residence card which is valid until July 2021. Her brother, I, has the same status. Her father is habitually resident and a British citizen, and she came to the UK to join him in 2015 as she was unable to live with her mother and her then partner in Nigeria.

16. In the UK, shortly after her arrival in 2015, her relationship with her father deteriorated and the police and Social Services became involved with the family as he beat her during an argument as a result of his becoming angry at her misbehaving at school. Criminal proceedings

were eventually discontinued, but in March 2016 Social Services made the family agree that Z should not be alone with her father at home and that the appellant should always be there with her, the appellant having arrived in March 2016, and the family having taken on its original configuration. Social Services have not been involved with the family since the appellant's arrival as no further issues have arisen between Z and her father. I find that this is because the appellant has proactively diffused conflict between the two and overwhelming kept to the agreement with Lambeth Social Services that Z and her father not be together without other family members, and because the appellant's presence has led to the family reconstituting itself as a happy functioning unit with all family members having fulfilling relationships with her, and finding her presence supportive to the improvement of relations between Z and her father, IM.

17. Z has just finished the first year of her two year GCSE courses, she and her school find that it is in her best interests to be able to finish her examination courses at her current school. She is happy in the UK, and wants to live with the appellant and her father and brother, and with her friendship circle.

18. I find that it is undoubtedly in Z's best interests to remain in the UK, and for the appellant to remain with her and her father and brother, I. Z has had a very disrupted childhood during which she had to leave her country or origin as she was unable to continue to live with her mother (who had been her sole parent for the majority of her childhood) due to the appellant's then partner mistreating her and her brother, I, her father having already left her mother when she was very young to marry someone in the UK. Z was then seriously assaulted by her father shortly after coming to the UK to join him when she was 12 years old, and had to cope with Social Services and police involvement in the family. The appellant's arrival resolved the issues with her father, made police and Social Services involvement with the family unnecessary and led to her returning to her mother being a constant in her life again, as it had been until she was 11 years old and came to the UK. I find that it is in Z's best interests to maintain her current happy family arrangement with the appellant in the UK against this backdrop of instability and distress, and given the appellant was her sole parent for many years prior to her entry to the UK which I find is reflective of the current strong bond between Z and the appellant. The family has come back together in the UK since March 2016 and the evidence of all parties is the appellant is key to the family being reconciled and operating successfully to support Z in her growing up. I do not find that it would be possible for this integration and the constant daily maternal support to Z to be provided by Skype, email, text and telephone calls. Z is also now at a key stage in her education in the UK and has her own private life ties with a strong friendship circle in this country, has an uncontested EEA right to remain in the UK and I find that it is in her best interests to maintain her life in the UK for that reason.

19. Only little weight can be given to the private life ties of appellant with the UK as all of these have been formed whilst she has been precariously present, with leave to enter as a visitor extended by an in-time application to remain on human rights grounds, since her arrival in 2016, applying s.117B(5) of the Nationality, Immigration and Asylum Act 2002. I find that the appellant has a genuine relationship with her current partner, IM, who is the father of Z and I, and has lived with him since May 2016, and thus for a period of three years, in a relationship akin to marriage. I can give some weight to this relationship as it has not been formed whilst the appellant has been unlawfully present, however there is no evidence that there would be insurmountable obstacles to their family life taking place in Nigeria. Clearly the appellant and her partner, IM, have historically lived together in Nigeria and I find that the fact that he is now a dual British and Nigerian citizen does not affect that conclusion. The appellant's son, I, is not a child anymore. He is working full time and is a young adult who is 19 years old. I find however that he remains part of the family unit, and still is dependent on the support of the appellant as his mother in a way which does not differ materially from that of a 17 year old. I find that a family life relationship continues between the appellant and I, who now has strong private life ties with the UK having completed his education here and being in full time employment, and that weight should be given to that relationship when considering the proportionality of the appellant's removal given that he also is lawfully present with an unchallenged EEA right to remain.

20. The ultimate question is whether the fact that it would be strongly in the best interests of Z for the appellant to remain in the UK with her for all of the reasons set out above; and given that the appellant's presence also is important for her son, I, with whom she continues also to have a family life relationship and who is lawfully present in the UK; and given that she also has a family life relationship with her partner, IM, who is a British citizen these factors are sufficient to make her removal disproportionate when significant weight must be given on the other side of the balance to the public interest in maintaining immigration control and removing her as a person who cannot met the requirements of the Immigration Rules. This is a finely balanced decision, but ultimately on the particular facts of this case and giving weigh to the best interests of Z as a primary consideration I conclude that the appellant's removal is a disproportionate interference with her family life ties to the UK.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal

3. I remake the appeal allowing it on Article 8 ECHR grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid the disclosure of the identity of Z who is a minor with whom Social Services has had contact on child protection grounds.

Signed: Fiona Lindsley Date: 2nd July 2019
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nigeria born in 1972. She arrived in the UK in March 2016 with a visit visa. Her leave to remain expired in September 2016, and prior to this expiry in August 2016 she applied for leave on human rights grounds. Her application was refused in a decision of the respondent dated 16th January 2018. Her appeal against the decision was dismissed by First-tier Tribunal Judge Wolfson in a determination promulgated on the 13th December 2018.

2. Permission to appeal was granted by First-tier Tribunal Judge Ford on 24th January 2019 on the basis that it was arguable that the First-tier judge had erred in law in the consideration of the best interests of the child and whether it was reasonable to expect her to leave given that the child holds an EEA residence card, particularly as there was no reference to the decision of the Supreme Court in KO (Nigeria) & Ors v SSHD [2018] UKSC 53.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The grounds of appeal argue that the decision errs in law as it was contrary to the EU Charter of Fundamental Rights to punish the appellant's daughter due to her mother's lack of immigration status. It was in her daughter's best interests to be with her mother and thus to allow her mother to remain, and this had not been properly determined by the First-tier Tribunal.

5. Mr Clarke initially submitted that there had been no evidence from Z or regarding her best interests, but I was able to provide him with the appellant's bundle from the First-tier Tribunal and he then accepted that although limited it was unfortunate that there was some evidence that had not been considered as part of the decision.

Conclusions – Error of Law

6. The appellant has two children, the oldest, I, was born in September 1999 and the youngest, Z, in October 2003 and so is now 15 years old.

7. The two children were both born in Nigeria and have Nigerian citizenship, but are present in the UK with EEA residence cards as family members, those cards being valid until July 2021. They have

lived in the UK with their father since September 2015, having applied for entry clearance in 2013. Their father was divorced from their mother in 2006 and married an EEA national in 2009. Their father then divorced from his EEA wife in May 2015. He was granted permanent residence on the basis of his EEA marriage in December 2015, and British citizenship in March 2017. It was found that there was an incident raising child protection concerns between Z and her father in which the father was subject to police action in June 2016 but that this was discontinued in September 2016. The First-tier Tribunal found that the father and his two children live as a family unit, and that the appellant is now back in a relationship with the father so lives with them too.

8. I find that the First-tier Tribunal failed to consider the best interests of Z as a separate matter as should have happened applying ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4. The consideration of the best interests of Z is mixed up with a consideration of what is reasonable to expect Z and the appellant to do. There needed to be a proper separate consideration of her best interests as a matter of primary importance prior to embarking on a consideration of whether it was proportionate to remove the appellant.

9. The best interests' consideration ought to have considered Z's private life ties with the UK, her schooling, health, future plans and other matters relevant to her such as her relationship with her older sibling and his future plans. I also find that the conclusions of the First-tier Tribunal regarding the letter from Lambeth Social Services regarding the written agreement between the appellant and her husband with respect to Z were irrational. It is not clear what was meant by finding the letter to be "flawed" due to the agreement being signed after the date of the letter or why it was not "plausible" because it had not been followed up by Social Services in the way that the First-tier Tribunal Judge felt it should have been. Given the gravity of the position taken by Lambeth Social Services in that letter it was not rational to have given the letter "little weight" as is done at paragraph 49 of the decision, although of course it might have been rational to have concluded that the concerns no longer applied but this needed to be on the basis of clear evidence. The issue of this serious breakdown in 2015/2016 in the relationship between Z and her father is one which should feature in a consideration of her best interests. These best interests should then have been a primary consideration when assessing the proportionality of the removal of the appellant her mother.

10. The proportionality issue should also properly have included a reasoned consideration of whether it was reasonable to expect Z to go to Nigeria; reasoned conclusions as to whether there were insurmountable obstacles to family life in Nigeria; and if it was not reasonable to expect Z to leave the UK whether it was reasonable to expect Z to have family life with her mother by way of remote modern communications as happened between September 2015 and March 2016.

11. When considering the proportionality of the appellant's removal the First-tier Tribunal properly considered that the appellant could not show compliance with the Immigration Rules or take advantage of s.117B(6) of the 2002 Act. It was rightly accepted that the fact that the appellant speaks English and is supported financially by her husband in the UK were neutral factors. However, there was a failure to balance the best interests of Z, as these are not properly defined as set out above; there was a failure to consider whether there was an interference with any EEA right to reside Z may have (the EU nexus of her father's EEA wife has gone and possession of a residence card is only declaratory, and so is not evidence of Z having such an EEA right, but one might perhaps arise due to Z being in continued education in accordance with the principles set out in the ECJ case of Baumbast C-413/99 or through a different route); there was a failure when considering whether it would be reasonable to expect the appellant to return to Nigeria to have family life in that country to provide reasons as to why Z could be properly expected to either to have her family life with the appellant remotely by modern means of communication or by returning to Nigeria with her father and the appellant.

12. In these circumstances I set aside the decision of the First-tier Tribunal with no findings preserved, although I have indicated above where I have found the approach taken to have been correct. I adjourn the remaking hearing so that amongst other things the appellant, Z and any other witnesses can place proper detailed witness statement evidence about the best interests of Z before the Upper Tribunal and an updated letter from Social Services about whether the agreement of 14th March 2016 continues to apply, and possibly a letter from Z's school about whether in their view it is in her best interests to remain in the UK to continue her education; and also so the appellant can define and document any EU right to reside that it is claimed that Z possesses.

13. In addition, Mr Clarke raised the possibility that the respondent might take the view that the EU right was a new matter, and so an adjournment will enable the respondent to consider this issue and to indicate if it is seen as a new matter whether consent to raise it is given. My preliminary view is that this is not a new matter because it is not a new factual matrix not considered by the respondent in the decision, as the decision under challenge makes reference to the children (Z and I) having residence in the UK as EEA family members.

Decision:

4. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

5. I set aside the decision of the First-tier Tribunal

6. I adjourn the remaking hearing to the 23rd April 2019.

Directions

1. The appellant will provide an updating statement setting out the best interests of Z from her perspective and any difficulties she contends that there would be for the whole family to relocate to Nigeria or her having her parental relationship with Z by modern means of communication.
2. The appellant will provide a witness statement from Z herself in her own words setting out what Z believes to be firstly in her best interests with respect to remaining in the UK or returning to Nigeria with reasons for these opinions; and then secondly explaining whether she believes it would be reasonable for her to remain in the UK without her mother or to return to Nigeria with her mother.
3. The appellant will provide a letter from Lambeth Social Services to confirm whether or not they believe it is in Z's best interests for the appellant to live with Z and her father or whether they would have no concerns if Z continued to live with her father without her mother being in the UK, and giving details of any current contact with the family.
4. The appellant will provide any other witness statements or documentary evidence given, that they decide is necessary, such as perhaps an opinion from Z's school as to whether it is in her best interests to remain in that institution for her education with reasons for any opinion.
5. If it is argued that Z continues to have an EU right to reside then a brief skeleton argument setting out how this is argued should be filed and served by the appellant's solicitors.
6. The updating evidence and skeleton argument will be filed with the Upper Tribunal and served on the respondent by the 12th April 2019.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid the disclosure of the identity of Z who is a minor with whom Social Services has had contact on child protection grounds.

Signed: Fiona Lindsley Date: 19th March 2019
Upper Tribunal Judge Lindsley