Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01879/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 25 June 2013	**On 27 June 2013**

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE LATTER

Between

BELJOZA BEQUIRI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: S. Kerr instructed by Karis Law
For the Respondent: G Saunders Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is an Albanian national born in 1986. In December 2006 she met her partner (the sponsor) in Albania. He has travelled to Albania on several occasions thereafter and a relationship developed between them.

2. The sponsor was born in 1986 in Kosovo, then part of Serbia. He arrived in the UK in September 2000 aged 14 with his sister and brother in law. He was in due course granted discretionary leave to remain until December 2007. On a date unknown, but presumably in 2008, he was granted indefinite leave to remain. By June 2009 he had been naturalised as a British citizen and been issued a British passport. He lives and works in London.

3. The appellant made two entry clearance applications to join the sponsor as his partner: in September 2007 and December 2007. Both were refused in November 2007 and February 2008 respectively. The second refusal was because the ECO was not satisfied that the appellant intended to live with the sponsor in a permanent relationship. There was no appeal against either decision; the appellant told the First-tier judge that she was advised on the second occasion by a lawyer that there was nothing more than could be done.

4. In January 2010 the sponsor visited Albania again and the couple went through a Muslim marriage ceremony in the local mosque, although the marriage was not registered under Albanian civil law.

5. Thereafter, the appellant entered the United Kingdom irregularly; she started cohabiting with the sponsor at once, and has given birth to two sons by him in May 2011 and September 2012. Both children are British citizens. The Home Office accepts that the couple have a genuine relationship.

6. In January 2013, the appellant first made contact with the Home Office to regularise her status ; she sought asylum and leave to remain as a partner/mother of British citizen. Then asylum claim was without substance and has not been pursued. She does not qualify for variation of leave as a spouse but her case was considered under the Immigration Rules Appendix FM in force 9 July 2012 that apply to applications made after that date.

7. Her application was refused by reference to these Rules in February 2013. The respondent concluded that given the age of the two boys it would not be unreasonable to expect them to leave the United Kingdom (see Appendix FM EX 1 (a) (ii)).

8. The appellant appealed to the First-tier Tribunal. Her appeal came before Judge Kaler on 2 April 2013. It was dismissed by a determination signed on 6 April. The judge was referred to a number of relevant decisions on Article 8 including the decision of the Upper Tribunal in Sanade and others [2012] UKUT 848 IAC; Izuazu [2013] UKUT IAC ; Ogundimu (Article 8- new rules) Nigeria [2013] UKUT 60.

9. The judge recorded that it was common ground that the appellant could not succeed under the Immigration Rules. She concluded in the

circumstances of the appellant's case that it was not unreasonable for the children to relocate to Albania with their mother and accordingly there was no violation of Article 8.

10. The appellant now appeals with permission to the Upper Tribunal. Three questions arise:

i) Did the judge make an error of law in her assessment of the case?
ii) If so should the decision be remade?
iii) If so with what result?

11. At the outset of the hearing we drew the attention of Mr Saunders to paragraphs [108] to [114] of Ogundimu building on what had been said earlier in the case of Sanade. The relevant extracts are reproduced as Annex 1 and 2 to this determination. This was a deportation case where the question arose whether it was reasonable to expect the appellant's British citizen partner and her British child to follow the appellant to Nigeria on deportation for a sequence of criminal offences.

12. The Tribunal first referred back to its decision in Sanade (promulgated before Appendix FM had been published) and noted:-

i) The decision of the Court of Justice in Ruiz Zambrano had no application to a case where one parent faced removal but the other British parent and British child did not, as the removal of the parent did not force the child to leave the European Union.
ii) However in considering Article 8, the Tribunal noted the reply of the Secretary of State formulated in response to an enquiry that where the child is a British and therefore an EU citizen 'it will not be logically possible when assessing the compatibility of their removal ...with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is outside of the EU'.
iii) The Tribunal concluded in Sanade at [95] that accordingly it would not be possible to submit that it would be reasonable for the children to relocate outside the EU.

13. The Tribunal then noted:

i) The same response continued to apply after Appendix FM had
come into force.
ii) The response only applied where there were British citizen children under 18 and did not follow if there was a British citizen partner but no children.

iii) Accordingly where a human rights claim under Appendix FM of the Rules depended on whether it was reasonable to expect a child to relocate outside the United Kingdom to be with the child's parent and primary carer, it could not be contended that it was reasonable for a British child to leave the EU.

14. Mr Saunders accepted that there had been no change in the Home Office position since Ogundimu, and applying the reasoning of that decision, it could not be contended that it was reasonable for a British child to leave the EU on an indefinite basis to enjoy family life with the child's mother. He contended that the position was different if the departure from the United Kingdom was only for a short period to enable the mother to obtain entry clearance to return as a partner.

15. As to the first issue, before us, we are satisfied that the Judge made a material error of law. She failed to understand that the decision in Ogundimu was directed to the issue of whether it could be said to be reasonable to expect a British child to relocate outside of the European Union, as opposed to the issue whether there was a violation of European Union law by taking a decision against the mother that forced the child to leave the EU.

16. As to the second issue, the error of law was material. The decision maker considered Article 8 by applying EX 1 of Appendix FM. EX 1 applies where a person seeks leave to remain as a partner but does not meet the requirements for indefinite leave to remain as a partner under D-ILR P.1.3 but does meet the requirements of EX 1, then the applicant will be granted thirty months leave to remain. The first requirement of EX 1 was met (genuine and subsisting parental relationship with a child under 18; the second requirement is met because the child is in the UK; the third requirement is met because the child is a British citizen and the alternative limb of 7 years residence is inapplicable; the final requirement is whether it would be reasonable to expect the child to leave the United Kingdom. The decided Tribunal cases show that present practice accepts that it cannot be submitted that it is reasonable for the child to leave the UK where to do so would be to invite the child to leave the EU, when such a child cannot be required to leave the territory of the EU.

17. We will accordingly set aside the decision of the judge and remake it for ourselves.

18. There were two factors that carried weight with the judge but carry no weight with us when we remake the decision under appeal.

19. The first was that the judge suspected that the sponsor might in truth have been from Albania rather than Kosovo, and so may have entered the United Kingdom on false pretences. We raised this matter with Mr

Saunders. He did not rely on such an observation. If the Secretary of State was satisfied on the balance of probabilities that the sponsor had indeed been granted leave to remain and British citizenship on a false basis he could have been deprived of his status. No such action has been taken and such matters cannot arise as a result of suspicion or conjecture.

20. The second is that the judge observed that the sponsor did not encourage the appellant to regularise her status for over two years and that 'the couple has made the choice to have children in what is clearly an attempt to entrench their position in the UK prior to making a clearly unfounded application for asylum'. We recognise that the fact of illegal entry after rejection of the entry clearance applications means the appellant has a discreditable immigration history but there is nothing in the history, the decision letter or the evidence adduced before the judge to indicate that the decision to have children was done to boost an immigration claim. The genuine nature of the family life between appellant, sponsor and their two children was not doubted by the decision maker. With the benefit of hindsight it can be said that this was a genuine relationship that preceded the appellant's entry into the United Kingdom for the purpose of cohabitation; this was not a relationship that began after irregular entry when the appellant was in a precarious position. The appellant had failed to satisfy the entry clearance officer of her intentions to cohabit with her partner, but her subsequent actions have satisfied the Secretary of State.

21. We accept that if this was a case where either the appellant and the sponsor had no children or the children were not British, the Article 8 analysis would almost certainly have reached an adverse conclusion to her claim. But there are children and they are British. Their welfare is a primary albeit not paramount consideration, and the sins of their mother in entering without leave to be with her partner are not to be visited on the children. British nationality is a weighty factor in the Article 8 claim for the reasons stated in both ZH Tanzania [2011] UKHL 4 and the Tribunal's case law cited above where the relevant passages from ZH Tanzania are set out. Despite their young age and their absence of an independent social life in the United Kingdom, we do not consider it reasonable to expect them to grow up outside their country of nationality and indeed the European Union of which they are also citizens.

22. It is clear that they should be with their mother who cares for them as well as their father who supports them.

23. In our judgment, both the analysis under EX 1 of the Rules and the general principles of Article 8 case law developed without reliance on the Rules indicate that this claim should succeed unless:-

i) The appellant's conduct has been such a threat to the public order of the United Kingdom that she should be

removed irrespective of the impact on the human rights of her family.

ii) This is a case where the exceptions to Chikwamba apply and it would be reasonable to expect the appellant to go abroad and apply for entry clearance.

24. As to the first, of these questions, we note that the Home Office decision maker in full knowledge of the material facts of the case, did not conclude that the appellant fell to be refused leave under section S-LTR of Appendix FM (suitability of leave to remain) (see decision letter paragraph 26). Potentially disqualifying characteristics under S-LTR include being the subject of a deportation order, serious criminal convictions for which a sentence of over twelve months has been imposed, repeated offending makes it conducive to the public good to remove the person concerned, character conduct, associations or other reasons make it undesirable to allow the person top remain, false representations have been made to obtain leave to remain or material non disclosure. It has, therefore, been accepted that a wide ranging set of factors spelt out by the rules do not defeat this claim.

25. Looking outside the rules although the appellant's conduct is discreditable and her immigration history is poor, it was not of such an abusive nature as that of the applicant in the case of Nunez v Norway [2011] ECHR 1047, 28 June 2011 whom the European Court of Human rights found nevertheless at [84] should not be expelled having regard to the interests of her child.

26. Performing the balance as between the competing interests and factors for ourselves, we do not find that the conduct is of such a nature to require her removal irrespective of the outcome on the children.

27. We now turn to the submission advanced by Mr Saunders, that a temporary interruption of stay may be justified in all of the circumstances of the cases applying the decision in Chikwamba [2008] UKHL 40 at [44] as elucidated by the Court of Appeal in Hayat [2012] EWCA Civ 1054 at [30]. On this hypothesis, this would be to insist on a procedural requirement causing some undetermined period of separation between one parent of the two and their children. No sensible reason has been advanced why the procedural requirement makes the interference with family life proportionate and justified. Our conclusions on the gravity of the appellant's conduct are set out in the preceding paragraphs. They do not justify the proposed interference. We observe by contrast with some other cases, that the appellant had twice sought entry clearance as a partner and on the second occasion at least the reasons for the refusal have now been shown to be unwarranted. The relevant facts have all been identified. There are no procedural advantages for examining the case again from abroad. We conclude that to insist on the procedural requirement in this case would be disproportionate.

28. In the circumstances we remake the decision by allowing the appeal. It will be for the Secretary of State to decide what leave to remain to grant the appellant.

Signed

Date 26 June 2013

Chamber President of the Upper Tribunal

Appendix 1 Extract from Sanade and others

6. The interests of the child

59. ZH (Tanzania) v SSHD [2011] UKSC 4 concerned a mother who was a national of Tanzania and formed a relationship with a British citizen. They had two children, a daughter, T, born in 1998 (who was then 12 years old) and a son, J, born in 2001 (who was then 9). The children were both British citizens, having been born here to parents, one of whom was a British citizen. They had lived here with their mother all their lives, nearly all of the time at the same address. The Court of Appeal upheld the Tribunal's finding that the children could reasonably be expected to follow their mother to Tanzania. The Supreme Court considered: “in what circumstances is it permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave?

60. Lady Hale giving the leading judgment said at [25]-[33]

> ….it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as "a primary consideration". Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration". Miss Joanna Dodson QC, to whom we are grateful for representing the separate interests of the children in this case, boldly argued that immigration and removal decisions might be covered by section 1(1) of the Children Act 1989:
> "When a court determines any question with respect to -
> (a) the upbringing of a child; or
> (b) the administration of a child's property or the application of any income arising from it,
> the child's welfare shall be the court's paramount consideration."
>
> However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR,

in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly, at para 1.1:

"The term 'best interests' broadly describes the well-being of a child. . . . The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that:

- the best interests must be **the determining factor for specific actions,** notably adoption (Article 21) and separation of a child from parents against their will (Article 9);
- the best interests must be **a primary** (but not the sole) **consideration for all other actions** affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3)."

This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death.

26. Nevertheless, even in those decisions, the best interests of the child must be a primary consideration. As Mason CJ and Deane J put it in the case of *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 CLR 273, 292 in the High Court of Australia:
"A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it."

As the Federal Court of Australia further explained in *Wan v Minister for Immigration and Multi-cultural Affairs* [2001] FCA 568, para 32,

"[The Tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration."

This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia.

27. However, our attention was also drawn to General Comment No 6 of the United Nations Committee on the Rights of the Child (2005), on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin. The context, different from ours, was the return of such children to their countries of origin even though they could not be returned to the care of their parents or other family members (para 85). At para 86, the Committee observed:
"Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights based arguments such as those relating to general migration control, cannot override best interests considerations."

28. A similar distinction between "rights-based" and "non-rights-based" arguments is drawn in the UNHCR Guidelines (see, para 3.6). With respect, it is difficult to understand this distinction in the context of article 8(2) of the ECHR. Each of the legitimate aims listed there may involve individual as well as community interests. If the prevention of disorder or crime is seen as protecting the rights of other individuals, as it appears that the CRC would do, it is not easy to see why the protection of the economic well-being of the country is not also protecting the rights of other individuals. In reality, however, an argument that the continued presence of a particular individual in the country poses a specific risk to others may more easily outweigh the best interests of that or any other child than an argument that his or her continued presence poses a more general threat to the economic well-being of the country. It may amount to no more than that.

Applying these principles

29. Applying, therefore, the approach in *Wan* to the assessment of proportionality under article 8(2), together with the factors identified in Strasbourg, what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child. Specifically, as Lord Bingham indicated in *EB (Kosovo),* it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country; where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child has to move away.

30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In *Wan*, the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:

"(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (*Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5, (1998) 150 ALR 608, 614);
(b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;
(c) the loss of educational opportunities available to the children in Australia; and
(d) their resultant isolation from the normal contacts of children with their mother and their mother's family."

31. Substituting "father" for "mother", all of these considerations apply to the children in this case. They are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community (as might have been the case, for example, in *Poku*, para 20, above). But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.

32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:
'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.'

33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was

> created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979, where Simon Brown LJ held that "there really is only room for one view" (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer."

61. Lord Hope concurring added at [41]:

> The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood.

He concluded at [44]:

> There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration. The proper approach, as was explained in *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568, para 32, is, having taken this as the starting point, to assess whether their best interests are outweighed by the strength of any other considerations. The fact that the mother's immigration status was precarious when they were conceived may lead to a suspicion that the parents saw this as a way of strengthening her case for being allowed to remain here. But considerations of that kind cannot be held against the children in this assessment. It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible.

62. Lord Kerr agreed and added his own observation at [46-47] that 'a primacy of importance' that must be accorded to the best interests of a child of which United Kingdom nationality formed a significant part:

> The significance of a child's nationality must be considered in two aspects. The first of these is in its role as a contributor to the debate as to where the child's best interests lie. It seems to me self evident that to diminish a child's right to assert his or her nationality will not normally be in his or her best interests. That consideration must therefore feature in the determination of where the best interests lie. It was also accepted by the respondent, however, (and I think rightly so) that if a child is a British citizen, this has an independent value, freestanding of the debate in relation to best interests, and this must weigh in the balance in any decision that may affect where a child will live. As Lady Hale has said, this is not an inevitably decisive factor but the benefits that British citizenship brings, as so aptly described by Lord Hope and Lady Hale, must not readily be discounted.

63. ZH (Tanzania) was a removal case. Poor as the mother's immigration history was assessed to be, she had not been convicted for criminal offences disturbing the general public order. Lady Hale recognised that a rights based approach to factors that outweighed the interests of the child as a primary consideration would more readily find weight in protecting the public from dangerous individuals. We conclude that preventing crime by deporting individuals in cases of particular seriousness would also be a legitimate aim that could outweigh the best interests of children, particularly when combined with other aspects of the public interest.

64. As already noted the case of Lee (supra para 49) was such a case where the Court of Appeal considered the impact of ZH (Tanzania) in a revocation appeal by someone sentenced to a lengthy term of imprisonment for drug related offending. Although the Court talked of permanent separation, we do not understand that it was excluding future revocation after the expiry of an appropriate passage of time, particularly where some contact could be maintained between parent and child[3]. Although it may have been unreasonable to expect the family to live in Jamaica, there was no suggestion that it was practically impossible for them to do so or that cultural differences or other factors prevented visits there.

65. The Upper Tribunal has considered these cases in its determination in Omotunde (best interests) [2011] UKUT 00247 (IAC) where it set out the current approach to proportionality in the context of deportation. We summarise the learning relevant to deportation cases as follows:-

a. Article 8 is to be interpreted in a manner consistent with Article 3 of the UN Convention on the Rights of the Child and the statutory duty to have regard to guidance designed to promote the best interests or welfare of the child set out in s.55 the Borders, Citizenship and Immigration Act 2009.
b. The welfare of the child is a primary but not a paramount consideration in immigration decision making. That is to say it is a consideration of the first order and not merely a factor, but not the only consideration or necessarily a determinative consideration.
c. The welfare principle applies irrespective of the nationality of the child, but where the child is British that is a particular pointer to the place where the child's future lies. British nationality imposed a significantly higher threshold when a decision-maker was considering whether a child should be expected to join a parent abroad.
d. Factors that may outweigh the welfare of the child in a particular case are rights based considerations such as those contained in Article 8 (2) in particular the prevention of disorder or crime or the protection of the health and rights of others.
e. Weighty reasons are required to justify separating a family who are legitimately resident together in the United Kingdom.

f. Even where it is not reasonable to expect the other partner to a relationship or the children to accompany the person subject to immigration action to reside abroad the interference with family life may be justified.
g. Notwithstanding the distress caused to a child and the loss of advantage to the child of (in these cases) a father's presence guidance and support, the conduct of the person facing deportation may be so contrary to the public interest as to make such separation proportionate and justified.

66. We further note that in respect of children (foreign or British) in the United Kingdom there is the statutory guidance on making arrangements to safeguard and promote the welfare of children issued by the Secretary of State under s.55 the Borders, Citizenship Immigration Act 2009 "Every Child Matters Change for Children." Paragraph 1.4 states:

> Safeguarding and promoting the welfare of children is defined in the guidance to section 11 of the 2004 Act as:
> - protecting children from maltreatment;
> - preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development');
> - ensuring that children are growing up in circumstances consistent with the provision of safe and effective care;
> - and undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully.

67. In re-making these decisions we give particular importance to the fact the children are British as a strong pointer to the fact that their future lies in the United Kingdom. If their fathers are removed each child will suffer the loss of the presence of a father from the household in which they now are growing up. We shall consider whether there is evidence that such an event would cause maltreatment, loss of safety or impairment of health or development.

.....

93. Finally, we note that a further question on which we asked for the respondent's assistance was in these terms:

> "Does the respondent agree that in a case where a non-national parent is being removed and claims it is a violation of that person's human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU's judgment is that it is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin? If not why not?"

94. To this Mr Devereux replied on 24 November 2011:

> "We do accept, however, that in a case where a third country national is unable to claim a right to reside on the basis set out above it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is outside of the EU".

95. We shall take this helpful submission into account when we consider the application of Article 8 to each appellant's case. We agree with it. This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania). If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation.

.....

105. However Mrs Sanade and both children are now British citizens. The nationality of the children is an important factor as to where their best interests lay: ZH (Tanzania). If their nationality, domicile and place of future residence is to be the United Kingdom, their "optimum life chances to enter adulthood successfully" point to the need for continuity of their residence and education during their formative years in the United Kingdom.

106. Further as British citizens, Mrs Sanade and her children are citizens of the European Union and as such entitled to reside in the Union. The respondent properly accepts that they cannot be required to leave the Union as a matter of law, and that as a matter of relevant consideration they cannot reasonably be expected to relocate outside of the European Union. Accordingly, the question is whether Mr Sanade's conduct is so serious as to make it proportionate to the legitimate aim in his case to require him to leave his wife and young children for an indefinite period unless and until the deportation order can be revoked?

Appendix 2 extract from Ogundimu

108. In Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 48 (IAC) the Upper Tribunal [Blake P and UTJ Jordan] asked the following question of the Secretary of State (recorded at paragraph 93 of the decision):

> "Does the respondent agree that in a case where a non-national parent is being removed and claims it is a violation of that person's human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU's judgment is that it is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin? If not why not?"

109. Mr Devereux, at that time the Assistant Director UKBA and Head of European Operation Policy, responded as follows:

> "We do accept, however, that in a case where a third country national is unable to claim a right to reside on the basis set out above it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is outside of the EU".

110. Having considered the Secretary of State's response the Tribunal concluded (paragraph 95):

> "This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so…"

111. The Tribunal further clarified, when looking at the particulars facts of the case before it, that:

> "…as British citizens, Mrs Sanade and her children are citizens of the European Union and as such entitled to reside in the Union. The respondent properly accepts that they cannot be required to leave the Union as a matter of law…"

112. In the case of Izuazu [2013] UKUT 45 (IAC) the Secretary of State has confirmed that the response continues to apply, subject to a clarification that it only extends to the British citizen spouse or partner where there is in addition a British citizen child. This approach is consistent with the recent decisions of the Court of Appeal in DH (Jamaica) [2012] EWCA Civ 1736, and of the CJEU in O, S -v- Maahanmuuttovirasto [C -356/11 and 357/11: 6 December 2012].

113. Thus, in this appeal, TS cannot be required to leave the European Union to join the appellant in Africa. She needs her mother in order to exercise her residence rights in the Union. To require her mother to join the appellant in Nigeria (a country with which she has no ties of any sort and has never visited) is either to require the child to leave the European Union, or the mother to leave the child. In the latter eventuality there is no evidence of anyone else able to adequately care for the child and so the

first issue would be reopened. It is certainly unreasonable to expect either TS or JD to relocate to Nigeria.