Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/11443/2012

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 2nd October, 2012	**On 28th October 2013**

Before

Upper Tribunal Judge Chalkley

Between

MRS OVONIMO NORA ERIH

Appellant

and

ENTRY CLEARANCE OFFICER - ABUJA

Respondent

Representation:

For the Appellant: Mr Karnic of Counsel instructed by BINAS
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 22nd October, 1983 and is a citizen of Nigeria. She made application to the Entry Clearance Officer Abuja for entry clearance as the spouse of Onome Efekpokoor ("the sponsor"), a British citizen who also has Nigerian nationality.

2. The application was made under paragraph 281 of Statement of Changes in Immigration Rules, HC 395, as amended ("the Immigration Rules"). The respondent was not satisfied that the appellant met the requirements of paragraph 281(iii) or paragraph 281(iv).

3. The appellant appealed that decision to the First-tier Tribunal and First-tier Tribunal Judge Saffer considered the appeal without an oral hearing. He found that the appellant did meet the requirements of paragraph 281(iii), but not paragraph 281(iv). He went on to consider the appellant's Article 8 appeal and said at paragraph 18 of his determination:-

> "18. In relation to human rights, it is in the couple's child's best interests to be with her mother wherever she is. There is no evidence to suggest that the appellant is unable to provide care to an adequate standard. The child is at a nursery in Nigeria. That can continue. I am not satisfied that the child is sufficiently old to have developed a significant private life outside the family home or to have developed a settled life within the education system here. Her British nationality is not a trump card especially as both her parents are Nigerian nationals and that country provides the core of her cultural origin. Her father can leave to live in Nigeria with them if he wishes. He can send money to support them and can visit them."

4. The judge concluded that it had not been established that consequences of gravity existed to the appellant or her child by them residing in Nigeria. In the alternative, he found that it would not be a disproportionate interference with their private or family life for them to continue it in Nigeria.

5. The appellant challenged the decision, pointing out that both the sponsor and the appellant's daughter are British citizens and that the daughter is dependent on both her parents.

6. Counsel suggested that it was wrong of the judge to consider the balancing exercise on the basis that the child should be expected to be required to live outside the United Kingdom. The child is, after all, a British subject. The child's nationality is important. At the time of the hearing the child was living in Nigeria with the appellant's mother, but the judge erred in failing to recognise that the best interests of the appellant's child were served by living with both parents.

7. With his customary fairness, Mr Harrison, on behalf of the Secretary of State for the Home Department, entirely properly in my view, conceded that the judge had erred in law by failing to properly consider the best interests of the appellant's child. He explained that he was not in a position to concede the appeal on behalf of the appellant, but accepted that he would find it extremely difficult to argue that in all the circumstances of this appeal the decision of the respondent was proportionate.

8. I am satisfied that the First-tier Tribunal Judge did err in failing property to consider the best interests of the child and recognising that the child could not be required to live outside the United Kingdom, of which the child is a national. The best interests of the child are served by living with both its parents. The judge was satisfied that the appellant could not meet the requirements of paragraph 281(v) and given that the decision was on 24th May, 2012, on the evidence before the judge it seems unlikely that the appellant would have been able to meet the requirements of the new Rules which became effective in July 2012. The period of separation was likely, therefore, to be lengthy and the extent of the interference with the appellant's family life rights, extensive.

9. Having found an error of law on the part of the First-tier Tribunal, I set aside the decision. I have concluded that the respondent's decision is a disproportionate response in the particular circumstances of this appeal and I substitute the First-tier Tribunal decision with mine. This appeal is allowed.

Upper Tribunal Judge Chalkley