Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05474/2017
HU/05473/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 September 2018	**On 12 October 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

AO
FF
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Canter, Counsel, of 1215 Chambers
For the Respondents: Ms L Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal against a decision of judge of the First-tier Tribunal G C Solly (the judge), promulgated on 8 February 2018, dismissing their appeals against a decision of the respondent dated 23 March 2017 refusing their human rights claims.

Background

2. The appellants are both nationals of Nigeria. The 1st appellant was born on 2 October 1972 and is the mother of the 2nd appellant. The 2nd appellant is female and was born on 24 December 2000.

3. The 1st appellant was granted entry clearance to visit the UK in December 2004. In January 2005 the 1st appellant entered the UK accompanied by the 2nd appellant. The 2nd appellant was 4 years old at the time, although very close to her 5th birthday. The 2nd appellant has not left the UK since her arrival in January 2005. At the date of the First-tier Tribunal hearing she had just turned 17 years old and had lived in the United Kingdom for 13 years.

4. The 2nd appellant's father is OF. The 1st appellant had a relationship with OF during a separation from her former husband, AO. The 2nd appellant was born from the relationship. The 1st appellant's relationship with OF ended during the pregnancy and he and the 1st appellant have only had contact on 3 occasions during the 2nd appellant's life. The 1st appellant resumed her relationship with AO in 2001. The 1st appellant has 2 children from her relationship with AO, one born in 1998, the other born in 2003. Both these children live with AO and his new wife in Nigeria.

5. The 1st appellant claims that AO was treating the 2nd appellant differently from his other children and, after sending the 1st appellant to live with her mother in Nigeria, the 1st appellant hatched on a plan to bring the 2nd appellant to the UK. The 2nd appellant stayed with a friend of the 1st appellant and was registered at a school soon after her arrival in 2005. The 1st appellant travelled back and forth to the UK to stay in contact with her daughter, but she separated from AO in 2007 and they were divorced in 2009. The 1st appellant last entered the UK on 12 April 2009 pursuant to a visit into clearance. She overstayed.

6. The 1st appellant made an application for an EEA residence card on 17 September 2012 based on a proxy marriage with a Portuguese national, with the 2nd appellant named as a dependent child. This was refused on 13 February 2013 and an appeal dismissed on 13 June 2013. On 6 August 2013 an application was then made for leave to remain on the basis of the appellants' family and private lives but this was refused on 6 January 2014. A further application for an EEA residence card was made by the 1st appellant on 8 July 2014, with the 2nd appellant as dependent, but this was refused on 13 September 2014 and an appeal dismissed by the First-tier Tribunal on 22 December 2014. Although permission to appeal was granted by the Upper Tribunal, the appeal was ultimately dismissed on 12 April 2015. The First-tier Tribunal judge had rejected the 1st appellant's claim to have been in a durable relationship with an EU national, or to have

contracted a valid marriage. Further representations were made on behalf of the appellants and these led to the respondent's decision dated 23 March 2017.

The respondent's decision

7. The respondent was not satisfied that the 1st appellant met the requirements of Appendix FM of the immigration rules as a parent because it was considered reasonable to expect the 2nd appellant to return to Nigeria. The respondent noted, *inter alia*, that the 2nd appellant's half siblings and other family members lived in Nigeria, that her father lived in Nigeria until she was 4 years old, that the official language of Nigeria was English and that an education system was available, and that she would be returning with her mother. Nor was the respondent satisfied that either appellant met the requirements of paragraph 276ADE. With respect to the 1st appellant it was noted that she lived in Nigeria until the age of 36, that she spent the formative years of her life there and that she still had family in the country (although the respondent noted the 1st appellant's claim in a statement dated 14 February 2017 that her mother now resided in America, there was said to be no evidence in support). With respect to the 2nd appellant, the respondent noted that, at that stage, she was 16 years old and had lived in the UK for 12 years. The respondent however considered that the 2nd appellant could reasonably be expected to return to Nigeria where her mother would help her make any adjustments and where her two half siblings lived. The respondent was not satisfied there were any exceptional circumstances outside of the immigration rules which, consistent with the right to respect for family and private life under Art 8, warranted a grant of leave to remain. The respondent considered that the 1st appellant could use her experience as a support worker to find employment in Nigeria and that her private life was established when she had no right to work. The respondent noted that while the 2nd appellant had completed the majority of her education in the UK and was due to complete her exams, she would be able to use her qualifications gained in the UK to further his studies in Nigeria.

The First-tier Tribunal decision

8. The judge set out the immigration history (although she got the dates of birth of both appellants wrong) and correctly outlined the burden and standard of proof and the provisions of Art 8. The judge noted that the 2nd appellant was now in Year 12 at school and accepted that there was no dispute as to the immigration history. The judge heard oral evidence from both appellants and from a number of the 2nd appellant's friends. From [28] onwards the judge set out her findings of fact and reasons.

9. The judge noted the 1st appellant's claim that her relationship with her former partner in the UK ended in February 2015. The judge found, at [35], that the 1st appellant's father was deceased and that, since August 2016, her mother had resided in the United States. The judge found that the 1st appellant had a sister in Ireland whose children often came to the UK for summer holidays. The judge additionally found that the 1st appellant had sisters in Italy. In the UK the 1st appellant had a few 1st cousins, an aunt and uncle and two sisters as well as well-established friends. The 1st appellant's other 2 children, who were 14 and 19 years old, were in the custody of her former husband and his new wife and they lived in Nigeria.

10. The 2nd appellant indicated that she spoke to her family in Nigeria, consisting of her half siblings and her mother's former husband, every 1 to 2 months, whenever her mother telephoned. The judge therefore found that both appellants spoke to family members in Nigeria. The judge found that the 1st appellant spoke Yoruba but that the 2nd appellant new only a few phrases or words of the language. The judge noted the 1st appellant's employment history in Nigeria and that she worked as a hairdresser when she arrived in the UK in 2009 and then as a support worker with the elderly and the disabled. The judge found that the 1st appellant's experience in hairdressing and support work would be useful skills in obtaining work in Nigeria. The judge found that both appellants were in good health.

11. At [44] the judge noted that the 2nd appellant only had limited recollection of life in Nigeria, that she completed her GCSEs in 2017 attaining 10 grade A to C passes, and was now studying A-levels. The judge found that the 2nd appellant had "… *clearly established good friendships in the UK as is illustrated by the willingness of the witnesses to attend court on her behalf and give evidence in accordance with their letters*." The judge identified four witnesses who were all "*prepared to give up their time whether from school or otherwise*" and noted this as, "… *A testament to the depth of the relationship they have with the 2nd appellant and their faith in her*." The judge noted that none of this evidence had been challenged. The judge additionally noted that the 2nd appellant had achieved a National Citizen service certificate, that she was in the school netball team, and that she wished to go on to further education.

12. At [45] the judge stated that the only issue, so far as the 1st appellant was concerned under the immigration rules, was whether there were 'insurmountable obstacles' to her reintegration into Nigeria. The judge found that no 'insurmountable obstacles' existed because the 1st appellant spoke Yoruba and English, which was the official language, that she worked in several jobs in Nigeria, that she had 2 children in Nigeria whom she spoke to every one or 2 months, and that, although the family home in Nigeria had been sold, the 1st appellant would be able to find other employment. The judge noted the absence of any

background evidence to support the 1st appellant's claim that she would face difficulties getting a job in Nigeria.

13. At [46] to [48] the judge considered whether, under the immigration rules, it would be reasonable to expect the 2nd appellant to leave the UK. At [47] the judge stated that the 2nd appellant was at a stage in her life when she was rapidly developing contacts of her own whilst legally remaining a child. The judge accepted that the 2nd appellant had developed social and cultural and educational ties in the UK and that she wished to remain here with them and her extended family. At [48] the judge found that education was available in Nigeria and that, on the basis that the official language was English, the 2nd appellant would be able to access education in Nigeria. Whilst accepting that the 2nd appellant had limited knowledge of Yoruba the judge found that, with the assistance from her mother, the 2nd appellant's proficiency would increase to a working knowledge of the language. The judge noted that the 2nd appellant's mother would be able to support her and help the 2nd appellant reconnect with her half-siblings and her "father" to whom she spoke on the telephone. The judge said that the 2nd appellant would be able to maintain links with her family elsewhere in the world and her friends in the UK by social media which she already uses. The judge concluded that, because of these reasons, she could not say that it would not be reasonable to expect the 2nd appellant to leave the UK.

14. The judge then proceeded to consider the appeals under Art 8, outside of the immigration rules. the judge directed herself according to the authorities of **Razgar** [2004] UKHL 27 and **Zoumbas v SSHD** [2013] UKSC 74 and her duty under s.55 of the Borders, Citizenship and Immigration Act 2009. At [55] the judge stated,

> I have considered all the circumstances of the 2nd appellant, examining them carefully. It is clear that she is well established in the UK having both friends and family, and is finding her path successfully through education here. Although the 2nd appellant benefits from remaining in the UK there are advantages to her, were she to live in Nigeria she would be in closer contact with her sibling and father. Taking this into account together with my findings I therefore conclude that it is not in her best interests to remain in the UK.

15. The judge then found, at [57], that the 2nd appellant had never had leave to remain in the UK and that the 1st appellant had only had a very limited period of leave. The judge took into account the fact that the 2nd appellant was, on arrival, a child and under the control of her mother. At [59] the judge stated,

> It is not in the interests of the legitimate public end for those who have no right to remain in the UK to do so.

16. It is only at this stage that the judge considered the authority of **MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor** [2016] EWCA Civ 705, noting in particular what was said at paragraph 49 of the Court of Appeal decision[1]. The judge then stated that she gave significant weight in favour of the 2nd appellant taking into account the time that she has been in the UK, the family that she has been in contact with in the UK and the private life she has built up. The judge then proceeded to consider the public interest factors in s.117B of the Nationality, Immigration and Asylum Act 2002, noting in particular that the 2nd appellant had ever been granted leave and that this weighed against both appellants.

17. At [65] the judge, again, considered whether it was reasonable to expect the 2nd appellant to leave the UK. Given that the 'reasonableness' assessment under s.117B(6) is the same as that under paragraph 276ADE(1)(v), it is unclear why the judge sought to assess reasonableness twice. The judge accepted that the 2nd appellant, as a child, will have had little influence over her status, although noting that the 2nd appellant said in her witness statement that she was now aware of this and that it created uncertainty for her. The judge stated that the conduct of the mother was weighed in the scales when public interest in effective immigration control was considered, and that it weighed against the appellants. The judge referred to her previous indication that it would not be unreasonable to expect the 2nd appellant to leave the UK and, taking into account factors in the proportionality assessment, the judge found again that it would not be unreasonable to expect the 2nd appellant to leave the United Kingdom. At [66] the judge stated that, in the event that the 2nd appellant had satisfied her that it was in her best interests to remain in the UK, the judge would have found that the public interest considerations of immigration controls and the other factors that weigh in the balance against cumulatively, outweighed those best interests. The judge consequently dismissed the appeals.

Grounds of appeal, grant of permission, and parties submissions

18. The grounds level a variety of criticisms at the judge. They note that the judge applied the wrong legal test under paragraph 276ADE(1)(vi) in respect of the 1st appellant (the judge considered whether there were 'insurmountable obstacles' to the 1st appellant's return to Nigeria, and not whether there were 'very significant obstacles'), and that the judge failed to appreciate that there had to be 'strong' reasons for not granting leave to a child who had resided in the UK for 7 years under MA (Pakistan), and that the judge failed to identify those 'strong reasons'. The grounds further contend that the judge's

[1] "The fact that a child has been in the UK for 7 years would need to be given significant weight in the proportionality exercise for 2 related reasons: 1st, because of its relevance to determining the nature and strength of the child's best interests; and 2nd, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."

'best interests' assessment was flawed because there was no consideration of the 2nd appellant's own views, because she wrongly believed the 2nd appellant was on contact with her 'father' in Nigeria, and because the judge failed to appreciate that the 2nd appellant was at a critical stage of her education. The grounds further contend that the judge's Art 8 assessment was based on a flawed assessment of the 2nd appellant's best interest, and that the judge treated the appellants' lack of leave to remain ass 'trump cards, and that there had been insufficient consideration of the impact on the 2nd appellant's life in the UK.

19. In granting permission judge of the First-tier Tribunal Birrell noted that, in a case where the unchallenged history was that the 2nd appellant came to the UK when she was 5 years old and had therefore accrued 13 years continuous residence in the UK, it was clearly arguable that the judge failed to identify the strong or powerful reasons in accordance with the guidance given in **MA**. It is also arguable that, in the assessment of best interests, there was no acknowledgement either of the weight to be given to such a lengthy period of residence, or that the 2nd appellant's views had been taken into account.

20. Mr canter relied upon and expanded his grounds, contending that the judge's 'best interests' assessment went against the weight of evidence from both the 2nd appellant and her mother. It was apparent from the 1st appellant's statement that the 2nd appellant did not have any contact with her own father, and that the only contact she now had was with the former husband of her mother and her half siblings. Mr Canter submitted that the judge failed to identify any strong or powerful reasons such as to undermine the starting point that the 2nd appellant ought to be granted leave to remain. He invited me to find that there had been an insufficient consideration of the impact on the 2nd appellant of the proposed removal in the judge's reasonableness assessment. Ms Kelly submitted that the judge was entitled to take into account the precarious immigration status of the appellants and that they had contact with family members in Nigeria. It was submitted that the judge did acknowledge the 2nd appellant's own view at [47]. Even if the was an error in respect of the "best interests" assessment, the judges overall assessment was still one open to her and that the grounds essentially amounted to a disagreement.

Findings and assessment

21. I am satisfied, for the following reasons, that the judge's decision is vitiated by material legal errors.

22. The judge's "best interests" assessment is premised on a factual mistake. The judge finds that there would be advantages to the 2nd appellant returning to Nigeria as she would be in closer contact with

her sibling "and father". The unchallenged evidence before the judge however was that the 2nd appellant had no contact with her biological father, and that he played no part in her life. It is possible that the judge meant to say that the 2nd appellant would be able to enjoy closer contact with the former husband of her mother, but this is not sufficiently clear from the decision. There is no indication that the judge considered the length of the 2nd appellant's very significant separation from her half siblings and from her mother's former husband, or that she adequately considered the nature of their relationship as it existed at the date of the hearing. Nor is it sufficiently clear that the judge fully took into account, when determining the 2nd appellant's best interests, her own wishes. I accept that the judge referred to the 2nd appellant's wish to remain in the UK at [47], but this acknowledgement did not occur in the context of the judge's "best interests" assessment. I am, in any event, entirely satisfied that the judge's conclusions in respect of the "best interests" assessment was one she was not rationally entitled to reach on the basis of the evidence before her. The 2nd appellant entered the UK as a 4-year-old and was 17 years old at the date of the hearing. She had resided in the UK for over 13 years. She was in the middle of her A-levels. The unchallenged evidence contained in her statement indicated that she considered British traditions as her own and that she considered the UK as her home, and that she enjoyed deep relationships with friends and extended family in the UK. In these circumstances it is extremely difficult to ascertain how the judge could rationally conclude that the 2nd appellant's best interests were to return to Nigeria. I find that the judge's conclusion was perverse.

23. I am additionally, and independently, satisfied that the judge fell into legal error in her "reasonableness" assessment. Firstly, it is concerning that the judge appears to have undertaken the 'reasonableness' assessment at two separate parts of her decision (at [48], and then again at [65]). The assessment of whether it is reasonable to expect a qualifying child to leave the UK is the same under paragraph 276ADE(1)(iv) and s.117B(6) (see **MA (Pakistan)**, at [13]). The judge only identified the 2nd appellant's best interests in respect of her assessment outside of the immigration rules, and not in respect of her assessment under paragraph 276ADE(1)(iv). It is therefore not clear whether the judge took into account the 2nd appellant's best interests at all when determining that it was reasonable for her to leave the UK. Moreover, whilst the judge has identified, at [48], a number of factors that could ameliorate the impact on the 2nd appellant of having to return to Nigeria, nowhere does the judge adequately assess the impact of such a move on the 2nd appellant's private life. Whilst the judge acknowledges in several paragraphs that the 2nd appellant has established good friendships in the UK and that she has rapidly developed social, cultural and educational ties to the UK, the judge's 'reasonableness' assessment does not consider the impact on the 2nd appellant of being separated

from the life she has established in the UK and her social and cultural expectations and experience. The judge primarily and narrowly focuses on the 2nd appellant's ability to integrate into Nigerian life rather than the impact on her social identity which she established through her very long residence from a very young age. In short, there has been no adequate assessment of the disruption to the 2nd appellant's life, a very significant factor in the assessment of reasonableness.

24. I am further satisfied that the judge failed to adequately identify the 'powerful' reasons as to why, as a starting point, the 2nd appellant should not be granted leave. No such assessment is carried out when the judge purports to consider the appeal of the 2nd appellant under paragraph 276ADE(1)(iv). At [65] the judge does refer to the conduct of the 1st appellant as weighing in favour of the public interest in effective immigration control, and previously referred to the fact that the appellants never had lawful leave to remain in the UK, but there is no further clarification or explanation as to why the 1st appellant's immigration history is sufficiently powerful to render it reasonable to expect the 2nd appellant to return to Nigeria.

25. Finally, I am satisfied that the judge applied the wrong legal test when assessing whether there were 'very significant obstacles' to the 1st appellant returning to Nigeria, asking herself instead whether there were 'insurmountable obstacles' to the 1st appellant's return.

26. I am satisfied, for the reasons given above, holistically assessed, that the judge's determination is unsafe and must be set aside.

Remaking

27. Having identified material legal errors in the First-tier Tribunal's decision, I was invited by Mr Canter to immediately remake the decision. there was no objection from Ms Kelly. I therefore heard evidence from both appellants.

28. The 2nd appellant adopted her statement. There was no examination-in-chief. In cross-examination the 2nd appellant did not believe it was reasonable for her to return to Nigeria because her "whole life" was here. All of her connections were here, everything she knew when she was growing up. The thought of returning to Nigeria seemed like an alien concept to her. She referred to her family in the UK, which included 2 aunts, and her various cousins. She saw them quite often, for example at birthdays and during the holidays, and especially in the summer. She confirmed she was in Year 13. She hopes to go to university to study either Photography or Media and Communications. She also hoped to do a lot of travelling to see the places she had been unable to visit. Outside of her studies she was interested in art and music, and had recently stopped her athletics in order to focus on her

exams. Her main memory of Nigeria was a large gathering at her grandmother's house. Apart from that, she did not really remember anything. She did not have much memory of her half siblings she was much closer to her cousins in the UK than to her half siblings in Nigeria. When asked how she would feel about not being close to her half siblings, the 2nd appellant answered, "*not as devastated as I would be if I was not surrounded by the cousins I grew up with*." The 2nd appellant did not find it that easy to make friends and had to be around people for a long time before she could consider them as a real friend. In response to questions from me the 2nd appellant confirmed that she was currently working on her A-levels.

29. The 1st appellant adopted her statement. There was no examination-in-chief. In cross-examination the 1st appellant explained that she had to get her daughter out of her home in Nigeria because the 1st appellant's husband was not treating her daughter fairly. The 2nd appellant had no father who wanted to stay with her. The 2nd appellant spoke to her half siblings once every 2 months. The 2nd appellant had a lot of cousins in the UK. Taking her back to Nigeria would be like taking her back to square one. The 2nd appellant was getting older and was forming her own life. The 1st appellant tried to remind her daughter of things they did when she was young, such as Nigerian food, but the 2nd appellant could not really remember. The 2nd appellant did not speak Yoruba but could understand the basics of the language. The 1st appellant did not believe she would find employment in Nigeria because the healthcare employment was not like that in the UK. It was not reasonable to expect the 2nd appellant to rekindle her relationship with her half siblings after 13 to 14 years. The 1st appellant said that her daughter's childhood was spent in the UK. He had focus on what she wanted to do and the 1st appellant would not want to take this away from her. The 2nd appellant made friends easily and was still good friends with those she met in grammar school. Although the 2nd appellant was averagely sociable she was also shy.

30. Ms Kelly adopted the Reasons For Refusal Letter and submitted that the 2nd appellant was an intelligent young lady with good ambitions and there was no reason why she would not be able to access education in Nigeria. She still had family in Nigeria, albeit that her grandmother was not there any longer. Given the immigration histories, it was reasonable to expect the 2nd appellant to return to Nigeria and the public interests outweighed her wishes to remain in the UK. Mr Canter submitted that the 2nd appellant was in the middle of her A-level studies and, given the length of her residence in the UK and her connections with friends and family here, it would not be reasonable to expect her to return to Nigeria as she would have to adapt to a completely different system. She was brought up by a friend of the family for some years in the UK and the 2nd appellant was still very close to this person. The evidence relating to her deep friendships was accepted in the First-tier Tribunal. It was not disputed

that the 1st appellant had a subsisting parental relationship with the 2nd appellant. I was invited to allow the appeal the basis that it would be unreasonable to expect the 1st appellant to return to Nigeria, and that, as the 2nd appellant has a subsisting parental relationship with the 1st appellant, it would be disproportionate to expect the 2nd appellant to leave her daughter.

Findings and reasons

31. The 2nd appellant is a child, albeit she is now towards the upper end of the age spectrum. She entered the UK as a four year old (although nearly 5), and was, at the date of her application under paragraph 276ADE(1)(iv), 15 years old. I must ascertain the 2nd appellant's best interests pursuant to s.55 of the Borders, Citizenship and Immigration Act 2009. I remind myself that, while her best interests are a primary consideration, they are not a paramount consideration and that even though it may be in her best interests to remain in the UK this can be outweighed by opposing public interest factors.

32. In *EV (Philippines) & Ors v Secretary of State for the Home Department* [2014] EWCA Civ 874 (at [35]) the Court of Appeal explained that a decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

33. The first headnote of *Azimi-Moayed and others (decisions affecting children; onward appeals)* [2013] UKUT 00197 reads, "*As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary*." Headnote (ii) reads, "*Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.*" Headnote (iv) of the same case indicates, "*Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life.*"

34. I consider and apply the principles enunciated in the above decisions in assessing the 2nd appellant's best interests. The 2nd appellant has lived in the UK since she was almost 5 years old and is now 17 years old. She has not returned to Nigeria since she entered the UK and therefore spent the formative years of her life here. She has studied in the UK for over 12 years, and has never studied in Nigeria. She is currently in the middle of her A-Level studies and, according to the letter from the headmaster of Sir Thomas Rich's School, is due to complete her A-level studies in June 2019. I find that she is at a critical stage of her education. The letter from the school additionally indicated that the 2nd appellant contributes to extra-curricular activities and was a committed member of the netball team.

35. The bundle of documents before the First-tier Tribunal contained a number of letters and statement from the 2nd appellant's friends, four of whom attended the First-tier Tribunal hearing. I note that the First-tier Tribunal judge found that the willingness of the 2nd appellant's friends to attend the court was *"... a testament to the depth of the relationship they have with the 2nd appellant and their faith in her*." The unchallenged evidence from the 2nd appellant's friends indicates that she has established several very close friendships, characterised by strong bonds and high degrees of trust and mutual support. The supportive letters refer to the 2nd appellant's involvement as a volunteer in a care home and the various photographs show the 2nd appellant at many stages of her life in the UK with many different friends. In her statement the 2nd appellant refers to her strong relationship with TE, with whom she lived in the UK until her mother's last entry to the UK. The 2nd appellant also describes her various friendships and her social and cultural experiences such as shopping and staying with friends all night, carrying out the Duke of Edinburgh Expedition and her involvement with an athletics club. She also describes her relationship with her cousins in the UK and that her grandmother, the person to whom she was closest in Nigeria, has now moved to the USA. This evidence was not challenged by Ms Kelly. In her statement the 2nd appellant stated that it would be unfair to expect her to suddenly change her way of life against her will and that, in her mind, she considers the UK her home. "*I know nothing else*." She states that she considers "*British traditions as my own*." No challenge was made to the 2nd appellant's claim to understand only basic Yoruba.

36. I accept that the 2nd appellant has half-siblings in Nigeria, and that she communicates with them and with their father (her mother's former husband) every one to two months, and that the 1st appellant would be able to support her daughter through any transition period if they were required to return to Nigeria, and that the 2nd appellant may be able to access the education system in Nigeria. Although she may struggle linguistically given her lack of proficiency in Yoruba, she is likely to be able to learn the language relatively quickly given her

obvious intelligence and the support of her mother, and I note, in any event, that English is the official language. I find however, based on the written and oral evidence, that the solidity of the 2nd appellant's private life relationships, including those with her cousins and her friends, is firmly centred in the UK and that she has fully integrated into British society.

37. Given the 2nd appellant's age and length of residence, her establishment of relationships outside her immediate family, the extent of her integration and the critical stage of her education I find, pursuant to my duty under s.55, that her best interests are to remain in the UK with her mother.

38. Having identified the 2nd appellant's best interests, and given that she has lived continuously in the UK for at least 7 years, I must now consider whether it is be reasonable for her to leave the UK, pursuant to paragraph 276ADE(1)(iv). I proceed on the basis that she would be accompanied by her mother and that the immediate family unit will remain intact. In assessing the issue of reasonableness I have to take into account all relevant public interest considerations, including the 2nd appellant's conduct and the conduct of her mother.

39. In **MA (Pakistan)** Lord Justice Elias stated, at [46],

> Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

40. At [47] of **MA (Pakistan)** Lord Justice Elias stated,

> However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it

establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.

41. The 2nd appellant's removal would undoubtedly have a deleterious impact on the life she has established in the UK. Although established when her immigration status was precarious she cannot be held accountable for the decisions of her mother and her private life was rooted through no fault of her own. I find that she has fully integrated into British society having lived in the UK throughout the formative years of her life. Although she still has half-siblings in Nigeria has little recollection or experience of life in that country. Her removal would effectively severe the friendships and relationships that now form the core of her private life and, while she may be able to retain some contact with her friends through remote means, the impact on her social integration is likely to be profound.

42. The 2nd appellant is due to undertake her A-Levels in the summer of 2019 and is consequently at a critical stage of her education. I find that the disruption caused to her education by her proposed removal, at a critical stage of her studies when she is undertaking important examinations that could determine her future prospects, is likely to be significant.

43. In assessing whether it would be reasonable to expect the 2nd appellant to leave the UK I must consider the relevant public interest factors, including those detailed in s.117B of the Nationality, Immigration and Asylum Act 2002. I note the public interest in the maintenance of effective immigration controls, detailed in s.117B(1). I note, pursuant to s.117B(2) and (3) that the 2nd appellant is proficient in English (her oral evidence before me demonstrated a high level of proficiency), but that she is not currently financially independent as she is still a minor in education. The 1st appellant gave her evidence in English to a relatively high standard, and I note that she previously worked in the UK and would be able to do so again if granted the appropriate immigration status. Pursuant to **Rhuppiah v Secretary of State for the Home Department** [2016] EWCA Civ 803 and **AM (S 117B) Malawi** [2015] UKUT 0260 (IAC) I regard both the 1st and 2nd appellants' English language proficiency and the 1st appellant's ability to be financially independent as neutral factors. I take into account as a relevant public interest factor the fact that the appellants have always resided in the UK without lawful leave, and that their private lives have nevertheless been established when their immigration status was precarious (s.117B(5)). This is of greater relevance to the 1st appellant as the 2nd appellant has always been a minor and would have no control or influence over her immigration status or the precarious nature of her residence. I must attach little weight to the private life established by the 1st in the UK. In identifying and considering the relevant public interest factors I additionally take into account the likelihood of the appellants' use of NHS resources and the drain on the public purse of educating the 2nd appellant. I also take

into account the 1st appellant's poor immigration history. I note that she brought the 2nd appellant to the UK with the intention of leaving her here, thus circumventing the immigration rules, and that she applied for an EEA residence card in circumstances where the First-tier Tribunal found her relationship was not genuine. I also note that she worked in the UK without lawful authority. I attach appropriate weight to the public interest in ensuring those who abuse immigration control should not benefit from their actions. I note however the absence of any suggestion that she has used false identities or sought to obtain public funds by deception, and that she has no criminal convictions.

44. I now draw together the public interest factors identified above, and weight them against the impact of removal on the 2nd appellant and the extent of the disruption to her private life. I note once again that her best interests are a primary but not a paramount consideration. The evidence that I have carefully considered indicates that the daily social and cultural experience and expectations of this 17-year-old girl, who has lived in the UK since she was almost 5 years old, have been moulded by her residence to such an extent that she would encounter considerable difficulty integrating to life in Nigeria, despite having the support of her mother and half-siblings. I find also that her removal would cause significant upheaval to her education which is at a critical stage. The extent of her integration and the solidity of the 2nd appellant's relationships established in the UK are such that to uproot her from all that she has known and grown up with over 13years would render her removal unreasonable. I consequently find that the 2nd appellant meets the requirements of paragraph 276ADE(1)(iv). As such, it would be disproportionate to remove her.

45. I turn to the appeal of the 1st appellant. She lived in Nigeria for most of her life and worked as a hairdresser and a care worker in the UK. She can use these skills to obtain further work. The older children from her former marriage live in Nigeria. She therefore has social and family links. Nigeria is a country she is familiar with, culturally and socially, and she speaks Yoruba. In these circumstances I find there are no 'very significant obstacles' to her integration in Nigeria.

46. I must consider the position of the 1st appellant outside the immigration rules and determine whether there are compelling or exceptional reasons for allowing her appeal on article 8 grounds (**SSHD v SS (Congo) & Ors** [2015] EWCA Civ 387; **MF (Nigeria) v Secretary of State for the Home Department** [2013] EWCA Civ 1192, at [42]). I note again that the 2nd appellant is not independent or self-sufficient and remains living with the 1st appellant. There was no challenge to Mr Canter's submission that the 1st appellant has a genuine parental relationship with the 2nd appellant. The 2nd appellant enjoys a close and loving relationship with the 1st appellant, and this mother/minor child relationship includes elements of reliance and

dependency. Any separation would have a very significant detrimental impact on this relationship.

47. In assessing the proportionality of the refusal of the 1st appellant's human rights claim, I again consider and apply the factors identified in s.117B of the 2002 Act, as detailed in my assessment at paragraph 43 above. Given the relatively low threshold for establishing a breach of Art 8, I am satisfied that Art 8 is triggered in respect of the 1st appellant. I find that her proposed removal is in accordance with the law and in pursuit of a legitimate aim.

48. Section 117B(6) states,

> In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

49. In **MA(Pakistan)** the Court held, at [17],

> Subsection (6) falls into a different category again. It does not simply identify factors which bear upon the public interest question. It resolves that question in the context of article 8 applications which satisfy the conditions in paragraphs (a) and (b). It does so by stipulating that once those conditions are satisfied, the public interest will not require the applicant's removal. Since the interference with the right to private or family life under article 8(1) can only be justified where there is a sufficiently strong countervailing public interest falling within article 8(2), if the public interest does not require removal, there is no other basis on which removal could be justified. It follows, in my judgment, that there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal.

50. The 1st appellant has a genuine and subsisting parental relationship with the 2nd appellant, and I have already concluded that it would be unreasonable to expect the 2nd appellant to leave the UK. I consequently find that the public interest does not require the 1st appellant's removal even having regard to the countervailing public interest considerations. Having regard to the assessment conducted outside the immigration rules in **PD and Others (Article 8 – conjoined family claims) Sri Lanka** [2016] UKUT 00108 (IAC), at [43], I am satisfied that the effect of dismissing the 1st appellant's appeal would be to stultify my decision that the 2nd appellant qualifies for leave to remain in the United Kingdom in accordance with the immigration rules and Art 8 considerations. Undertaking the s.117B(6)

balancing exercise, and in light of my previous analysis and findings, I am satisfied that the test of compelling or exceptional circumstances is satisfied.

Decision

The First-tier Tribunal decision contains material legal errors and is set aside.

I remake the appeals, allowing both appeals 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 appellants in this appeal are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

8 October 2018

Signed Date

Upper Tribunal Judge Blum