**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers: HU/17349/2016

**THE IMMIGRATION ACTS**

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| **Field House** | **Decision & Reasons Promulgated** |
| **On 10th September 2019** | **On 17th September 2019** |

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**WURAOLA [O]**
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr J Waithe, of Counsel, instructed by Mascot Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Introduction*

1. The appellant is a citizen of Nigeria born on 15th November 1964 who entered the UK as a spouse on 7th October 2013 with leave valid until 11th April 2016. On 12th April 2016 she applied for indefinite leave to remain based on her marriage. Her application was refused in a decision dated 1st July 2016. Her appeal against the decision was dismissed by First-tier

Tribunal Judge N Haria in a determination promulgated on the 1st March 2019.

2. Permission to appeal was granted by Upper Tribunal Judge Blundell on 29th May 2019 and I found that the First-tier Tribunal had erred in law for the reasons set out in my decision at Annex A.

3. The matter came before me to remake the Article 8 ECHR appeal outside of the Immigration Rules. The appellant attended the Upper Tribunal with her husband and step-children. She and her step-daughter T confirmed that their statements were true and their evidence to the Upper Tribunal, and T provided a brief update regarding her education orally in response to examination in chief. Mr Melvin had no questions for the witnesses.

*Evidence & Submissions – Remaking*

*4.* In summary the evidence of the appellant from her written statement is as follows. She met her husband in a church in Nigeria in June 2011, and they were married in March 2012 in Lagos, Nigeria. She came to the UK with entry clearance as a spouse in October 2013 and went to live with her husband and his four children (A born in August 1991, TT born in August 1994, O born in July 1997 and T born in June 2002). When she joined the family the two youngest children were under the age of 18 years. T was 11 years old at that time, and is now 17 years old. T was born in the UK and is now applying to register as a British citizen. She has become a mother figure to T and the other children, who all call her mother. There is no other mother in their lives. She has cooked, washed and cleaned for all of them since she came to the UK. She helped T to obtain a scholarship to a top independent school, namely City of London Freemen's School, and also goes on trips with her to places such as Nottingham and Manchester. For her to leave would have a profoundly negative impact on T's education and well-being.

*5.* In April 2016 the appellant applied to extend her leave as a spouse. She believes that the refusal is wrong and particularly unfair on T. She earns £17,000 per annum (her payslips in the appeal bundle show that she earned a gross salary of £17,746 in the year ending April 2019 from work with Acorn Lodge Care) and her husband has an income of £1,600 from his pension (his Barclays bank statements from a monthly pension of £136.36 paid into his account and thus an annual amount of £1636.32). They are not reliant on any benefits. Her husband has lived in the UK for over 20 years, and all the children have been here for most of their lives.

*6.* In summary the evidence of T from her written statement and oral evidence is as follows. She was born in London in the UK on 13th June 2002. She was granted indefinite leave to remain in October 2009. Her biological mother left her and her father when she was about 8 years old, in 2010, which made her very sad and lonely. Her father did his best to care for her, but he struggled and she felt rejected and upset. When her father married the

appellant she was worried that she might take her father from her. However, from the first phone call from Nigeria she found the appellant welcoming and they made a connection. When the appellant came to the UK in October 2013 she became her mother figure and her best friend, and as a result she cannot imagine life without her. She has helped her get into City of London Freemen's School, has attended parent's evenings, funded the costs of private maths tutoring, attended graduations and taken her on trips. She obtained 10 GCSEs and is now doing three A levels in English, history and psychology. T hopes to study law at UCL or LSE in the future, and believes that she would not have imagined she could do this without the appellant's support and encouragement.

*7.* Mr Melvin's submissions for the respondent are, in summary, as follows. Reliance is placed on the reasons for refusal letter dated 1st July 2016. The starting point is the appellant cannot satisfy the Immigration Rules. It is however accepted that the appellant and her husband have a genuine and subsisting relationship, and that there is a genuine and subsisting parental relationship between T and the appellant. It is accepted that it would not be reasonable to expect T to leave the UK and also that the income of the appellant and her husband is currently more than £18,600. The Upper Tribunal was invited to draw its own conclusions on the appropriate outcome for this appeal.

*8.* At the end of Mr Melvin's submissions I informed Mr Waithe that he did not need to make any submissions as I would be allowing the appeal on Article 8 ECHR grounds for the reasons which I now set out in writing below.

*Conclusions – Remaking*

9. I have preserved the finding by the First-tier Tribunal that the appellant could not succeed in her appeal by reference to the requirements of the Immigration Rules. I therefore consider this appeal on general Article 8 ECHR grounds, by way of a balancing exercise with reference to the framework at s.117B of the Nationality, Immigration and Asylum Act 2002.

10. My first consideration is the best interests of the child, and therefore I turn to the provision at s.117B(6) of the 2002 Act. I find that T is a qualifying child as she has lived in the UK for more than 7 years.

11. In R (RK) v SSHD (s.117B(6); "parental relationship") IJR [2016] UKUT 31 (IAC) the Upper Tribunal approached the question of whether a person has a parental relationship (which of course must be considered in the context of the entire phrase "genuine and subsisting parental relationship") with a child at [42]:

> "Whether a person is in a "parental relationship" with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and

> making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have "parental responsibility" in law for there to exist a "parental relationship," although whether or not that is the case will be a relevant factor. What is important is that the individual can establish that they have taken on the role that a "parent" usually plays in the life of their child."

12. I find that appellant has a genuine and subsisting parental relationship with T as T has had no contact with her biological mother since she was 8 years old and the appellant has entirely filled the role of mother for her, and her siblings, since her arrival in the UK in October 2013, a period of nearly six years. She has cared for her on a day to day basis; formed a loving relationship with her; taken the initiative on issues concerning her education including getting her a scholarship at a private school and arranging private tuition when that was necessary; and has inspired and support her in an ambitious career choice.

13. The correct approach to reasonableness in this context is set out in MA (Pakistan) V SSHD [2016] 1 WLR 5093, [2016] EWCA Civ 705. I must determine whether it is reasonable to expect the T to leave the UK, in light of all the circumstances. These include her best interests on the one hand and any countervailing circumstances such as the public interest in maintaining immigration control on the other. In other words, the public interest must be balanced against the impact upon the child when assessing reasonableness. I find that it would not be reasonable to expect T to leave the UK as she has lived in this country all of her life ( a period of 17 years), has indefinite leave to remain here and is applying to become a citizen. She has all of her private life ties with this country and is at a crucial stage in her education, studying for A levels with a scholarship at a private school. She also has her father and three siblings in this country, who are all lawfully present in this country with indefinite leave to remain. She lives with all of these family members in a family home, and the family are not reliant on benefits and currently have an income of over £18,600, which I find means the appellant is financially self- sufficient. So whilst I give weight to the fact that the appellant did not meet the requirements of the Immigration Rules, because at the time of application the appellant and her husband had not evidenced having sufficient funds, I find that the fact that all persons in the family are lawfully present, the fact that the appellant entered the UK lawfully and has never remained without leave and the weight of T's private and family life ties to this country means that it is not reasonable to expect T to leave.

14. As such I find the requirements of s.117B(6) of the 2002 Act are met, and that there is no public interest in the deportation of the appellant, and that

therefore the interference with her family and private life ties to the UK which removal represents would be clearly disproportionate.

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 but preserve the findings with respect to the appellant being unable to show that she meets the requirements of the Immigration rules.

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

Signed: *Fiona Lindsley* Date: 11th September 2019
Upper Tribunal Judge Lindsley

**Annex A: Error of Law Decision**

**DECISION AND REASONS**

*Introduction*

1. The appellant is a citizen of Nigeria born on 15th November 1964 who entered the UK as a spouse on 7th October 2013 with leave valid until 11th April 2016. On 12th April 2016 she applied for indefinite leave to remain based on her marriage. Her application was refused in a decision dated 1st July 2016. Her appeal against the decision was dismissed by First-tier Tribunal Judge N Haria in a determination promulgated on the 1st March 2019.

2. Permission to appeal was granted by Upper Tribunal Judge Blundell on 29th May 2019 on the basis that it was arguable that the First-tier judge had erred in law in failing to consider the fact that the minimum income requirement was found to be met in substance and in concluding that the appellant should apply for an entry clearance when it was also found that the departure of the appellant from the UK would result in the income of the couple falling below the minimum income requirement.

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 lodged by Edward Marshall Solicitors (E1) are very hard to understand. In summary it is thought that it is perhaps argued that the decision is flawed given the finding that the appellant met the financial threshold despite failing to fulfil all of the requirements of Appendix FM-SE. It is also perhaps argued that the respondent might have mislaid documents which led to the self-employed income of the sponsor being disregarded and issues with accepting the income from a Tesco pension, and that there had been miscalculations by the First-tier Tribunal Judge.

5. At the hearing it was accepted by Ms Ofei-Kwatia, who had been very recently instructed by new solicitors, namely Mascot Solicitors, that the only live contention was that the decision on the appeal on Article 8 ECHR outside of the Immigration Rules erred in law. Ms Cunha accepted that there were errors in that part of the appeal decision although she submitted it may ultimately be that the outcome of the appeal will be the same. She consented to the amendment of the grounds so that the failure to weigh the best interests of the appellant's partner's child (T) in the proportionality exercise could also be added as a contended error of law.

6. It was agreed by both parties that it would be appropriate to adjourn the remaking hearing as Ms Ofei-Kwatia's instructing solicitors had not yet received the file from Edward Marshall Solicitors, and so had not been able to prepared for this aspect of the hearing, and in light of the fact that the previous solicitors had failed to put in relevant material regarding the best interest of the child and other matters.

*Conclusions – Error of law*

7. The First-tier Tribunal provides a clear and coherent analysis of the financial evidence provided in this case at paragraphs 27 to 37 of the decision, and it is lawfully and properly concluded that the appellant could not meet the Immigration Rules due to a failure to provide the specified documents under Appendix FM-SE of the Immigration Rules. The decision on this aspect is preserved.

8. I find however that the treatment of the appeal outside of the Immigration Rules errs in law. The fact that the appellant was found to have income well above the minimum income requirement of £18,600, see paragraphs 37 and 38 of the decision, was not given proper consideration given what is said at paragraphs 99 and 100 of MM Lebanon v UKSC [2017] UKSC 10 about looking at what would lead to a lack of financial burden on the state in a less rigid fashion when conducting a general Article 8 ECHR consideration. There was also an error in concluding at paragraph 72 of the decision that little weight could be given to the appellant's family life with a qualifying partner as her stay was precarious by reference to s.117B(4) or (5) of the Nationality, Immigration and Asylum Act 2002, as these provisions only apply to those who are unlawfully present or to the private life ties of someone with precarious status. There is also an error in treating the fact that the appellant could return to the UK via an entry clearance application at paragraph 75 of the decision as a relevant consideration when at paragraph 73 of the decision it was found that that she would not qualify, and in any case it is not a relevant consideration to place the outcome of an entry clearance application in the balance.

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 but preserve the findings with respect to the appellant being unable to show that she meets the requirements of the Immigration rules.

3. I adjourn the re-making of this appeal outside of the Immigration Rules on Article 8 ECHR grounds.

Directions

1. Any further evidence for the remaking hearing will be filed with the Upper Tribunal and served on the respondent no less than 10 days prior to the hearing date.

Signed: *Fiona Lindsley* Date: 26th June 2019
Upper Tribunal Judge Lindsley