Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/17095/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th November 2021	**On the 23 December 2021**

Before

DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

MR LUKMAN TEMIDAYO HASSAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr T Emezie, Solicitor, Dylan Conrad Kreolle Solicitors

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on the 1 January 1970. He appeals against the decision of the Respondent of 15 October 2019 refusing his application for leave to remain on human rights grounds and revocation of an outstanding deportation order.

Error of law decision

2. In a decision made on 16 June 2021 this tribunal set aside the decision of First Tier Tribunal Judge Cooper who had allowed the appellant's appeal.

3. In their decision Upper Tribunal Judge Stephen Smith and Deputy Upper Tribunal Judge Welsh found that Judge Cooper had materially erred in treating the 2 limbs of Exception 2 of section 117C(5) as separate, alternative, tests. Having found that it would be unduly harsh for the appellant and his wife and children to be separated, and then that it would not be unduly harsh for the family to relocate to Nigeria, Judge Cooper had to consider whether there were very compelling circumstances over and above those described in exceptions 1 and 2.

4. The Tribunal set Judge Cooper's decision aside, and in its decision preserved the findings of fact of Judge Cooper at paragraphs 54 and 61 – 95.

The hearing

5. At the outset hearing Mr Emezie raised a number of procedural matters. These had been advanced in a skeleton argument dated 8 October 2021 which Wayne response to directions made by Upper Tribunal Judge Blundell on 20 September 2021. Those directions were as follows:

   (i) The appellant is to file and serve written argument on the matters set out within 28 days of the 16 September 2021.

   (ii) The respondent is to file and serve written submissions on those matters within 56 days of the 16 September 2021.

6. The matters alluded to in Judge Blundell's directions were canvassed with the parties at the hearing before him in September 2021. They boil down to 2 questions:

   (i) In an appeal against the refusal of a human rights claim, how is it said that the tribunal has jurisdiction to consider the appellant's derivative right to reside under the Zambrano principle?

   (ii) In an appeal in which findings of fact been expressly preserved by one constitution of the upper Tribunal, how is it said that a subsequent constitution may revisit those findings?

7. Mr Emezie in his skeleton argument sought to grapple with these questions head-on. In relation to question one he submitted that the respondent's guidance on the EU settlement scheme noted at page 24 that "*as a Zambrano case centres on a person seeking to remain in the UK with a dependent British citizen, there is significant overlap with the right to respect for private and family life which is protected by article 8 of the European Convention on human rights*". That guidance goes onto say "*Where a person wishes to remain in the UK on the basis of family life with a British citizen, they should first make an application for leave to remain under appendix FM to the immigration rules or otherwise rely upon ECHR*

Article 8, if there is a realistic prospect that this would succeed. If the applicant has made an application under appendix FM to the immigration rules or any other ECHR Article 8 claim, which was refused, then – unless their circumstances have changed since that decision was made such that there is now a realistic prospect that a further such application would succeed – you must consider whether they are a person with their Zambrano right to reside by following this guidance".

8. Mr Emezie submits therefore that as the Home Office say there is significant overlap between the Zambrano principle and article 8 that the upper Tribunal has jurisdiction in a human rights appeal to consider the appellant's derivative right under the Zambrano principle. The Upper Tribunal's decision in *Velaj* was therefore of limited utility.

9. The second issue he submitted that the Upper Tribunal may, during a rehearing, revisit findings of fact made by the First-Tier Tribunal which have been expressly preserved where it is in the interests of justice to do so. Further, the Upper Tribunal may consider evidence that has come to light since the determination of the first-tier Tribunal.

10. He raised a further matter, albeit accepted that there was nothing I could do about it, and that was he alleged that the previously constituted upper Tribunal erred in law in failing to remit the matter to the first-tier Tribunal deciding instead to keep it within the upper Tribunal.

11. Ms Cunha, for the respondent, apologised that the respondent had not complied with the Tribunal's directions, she could not explain why. The Tribunal was not particularly assisted by the Respondent's failure to comply. It is not Ms Cunha's fault that the directions were not complied with, it is not satisfactory that the Respondent in this appeal has failed, without explanation, to comply with the directions.

12. Ms Cunha helpfully set out the respondent's position in relation to the two questions raised by Judge Blundell in oral submissions. She submitted that *Velaj* applies and as Regulation 16 has not been preserved by the *Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020/1309*) it cannot be considered. This was not a case which fell within the *Akinsanya* potential exceptions in any event.

13. In relation to the retained findings of fact, they are the starting point, and the findings of fact should not be reopened. There was no basis to, the evidence presented was nothing more than updating the position, rather than identifying anything which undermines Judge Cooper's assessment.

14. Both advocates agreed that the best way forward was to hear the evidence and that I would consider the arguments advanced in my decision.

15. I heard evidence from the appellant and his wife. A note of which is found in the record of proceedings.

16. I then heard submissions from both representatives, again a note of which is found in the record of proceedings.

Findings and reasons

17. As set out above the Upper Tribunal has preserved findings of fact from the First Tier Tribunal. Given there is a dispute as to whether all these findings should be preserved and followed, I set them out in full:

54. Having considered the totality of the evidence in the round, and giving weight to the various elements as set out above, for the avoidance of doubt I make the following findings of fact:

(i) The appellant was born on 1 January 1970 and at the date of the hearing was 50 years of age. He first came to the UK in 1992 as a visitor (at the age of 22). The appellant has produced nothing to demonstrate he was present in the UK between 1992 and 2006. He has, however, resided in the UK for a period of at least 14 years since 2006. The entire period of the appellant's presence in the UK has been unlawful apart from the initial visitor Visa in 1992.

(ii) The appellant personally submitted in support of an application for indefinite leave to remain in 2006. He obtained work illegally as a clean at some point before May 2009 using a false passport. When granted temporary admission while representations were considered, he absconded. In October 2009 he and an accomplice wilfully and knowingly obtained false passports and deceived an innocent priest and two innocent women into believing they were entering genuine marriages, which were in fact bogus. This was a 'premeditated and cynical attempt to circumvent immigration control' with an intention to remain in the UK. In April 2010 [he] was convicted in Manchester Crown Court of two offences; conspiracy to assist with unlawful immigration and possessing another's identity with intent. He was sentenced to. Is of imprisonment of 20 months and 12 months respectively for those offences. Following that conviction, a deportation order was signed on 14 March 2011.

(iii) The appellant is in a genuine and subsisting relationship with Temitope Temidayo Hassan who he met in 2015 and married in June 2016. Miss Hassan was born in Nigeria but came to the UK in 2010 and was naturalised as a British citizen in 2015. Ms Temidayo Hassan has worked and has studied in the UK.

(iv) Temitope Hassan has a daughter by a previous relationship, Emma Ebunola Ayotunde Sotonwa, who is a British citizen or on 9 March 2011. She is now aged nine. The appellant and Temidayo Hassan have a son together, Adnan Ayoola Oluwatise Toluwalase Aduragbemi Moirire Omofalolahan Adeboboye Ayomiposi Ayinde Hassan. He is a British citizen, was born on 19 September 2018, and is now aged one year and seven months.

(v) The appellant has a genuine and subsisting parental relationship with both Emma and Adnan. Emma considers him to be her father. At times he has

been their primary carer, for example when Temidayo Hassan was incapacitated following her emergency caesarean section, and when she was working and studying. Emma has a close attachment to the appellant and considers him to be her father. She suffered symptoms of PTSD following the appellant's removal from the family home in September 2016 by immigration enforcement officers.

(vi) Prior to Miss Hassan's relationship with the appellant from September 2016 until March 2017 and from March to April 2018, Temitope was the primary carer of Emma.

(vii) The appellant and Miss Hassan both have family members living in Nigeria, in Lagos and Ogun State. Temitope Hassan has returned to Nigeria on numerous occasions most recently in the autumn of 2019 to see her mother.

...

61. I am satisfied that it is in the best interests of Emma and Adnan that they are brought up by an continue to have a relationship with the appellant as well as Temidayo Hassan. It is well established that unless there are express reasons to the contrary the starting point is that children should be brought up by both parents (Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)). Although the appellant is not Emma's biological father, he has been a father figure in her life since she was for five years old. The evidence from her psychologist and the independent social worker both confirm Emma's views that the appellant as her father, that she has a strong attachment to him and that he has played a significant role in her care particularly at times in either her mother has been unwell, working or studying. There is clear evidence that the circumstances of the appellant's removal from the family home by immigration officers and his detention in September 2016 were particularly traumatic for Emma resulting in PTSD, and that she continues to suffer anxiety about being separated from him. I find these matters demonstrate the close nature of their relationship and the important role the appellant plays in her life. There is evidence from her school confirming he picks out up and dropped her off, and the photographs illustrate his involvement in daily family chores. Whilst these could have course be staged I have given them some weight in the light of the other evidence before me.

62. Whilst Adnan is only now one year and seven months old, it is also in his interests to be brought up by his father as well as his mother. His focus as a young child will primarily be on his parents and immediate family. I accept that the appellant has provided a significant role in caring for Adnan at times due to Temitope Hassan's health conditions, work and studies.

63. I am also satisfied that it is in the children's best interests to remain in the UK in order that they may take advantage of the benefits flowing from their citizenship; which includes free education and healthcare and access to welfare benefits if required. Whilst I accept that healthcare and education are available in Nigeria, the report of Dr Yusuff confirms that medical treatment is not free, and that there is no welfare state able to support the children if their parents are unable to work.

64. In relation to Emma, although there is little in the way of evidence regarding her life, save for the details of her mental health issues, as a matter of common sense and satisfied that she will have developed friendships with her peers school, and well as a nine year old child be beginning to focus increasingly on those friendships rather than solely on her immediate family unit. Dr Marvan confirms that until the traumatic experiences she had enjoyed school. I am satisfied it will be in her best interests to be able to maintain those friendships, although there is nothing in the evidence before me to suggest she would not be able to establish new ones were she to move.

65. Parliament, however, has decided that the deportation of foreign criminals is in the public interest unless certain exceptions apply. As the appellant has been sentenced to 2 terms of imprisonment between 12 months and four years I must consider first whether exceptions one or two in s117C(4) or (5) of the 2002 Act applying his case.

66. Mr Emezie quite properly did not seek to suggest that the appellant could resist removal on the basis of his private life. Even may have lived in the UK for many years, it is accepted that the appellant has never been lawfully present in the UK for anything other than six months in 1992. Exception 1 in s117C(4) cannot therefore apply.

67. In relation to his family life, the respondent accepts that the appellant has a genuine and subsisting relationship with Ms Temitope Hassan who is a British citizen and is therefore a 'qualifying partner' (s117D(1) of the 2002 Act). The respondent also accepts the appellant has a genuine and subsisting parental with Emma and Adnan, who as British citizens are 'qualifying children'.

68. The principal issue to be determined, therefore, is whether the effect of the appellants deportation on his partner or children would be 'unduly harsh' (s117C(5)).

69. I remind myself that in determining this question I must not focus on the severity of the appellant's offending behaviour all the seriousness of his convictions (KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53). As regards the meaning of 'unduly harsh' Lord Carnwath (with whom the other justices agreed) said this in KO (Nigeria) at [22]:

> *'…" Unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6)… The word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level… One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent…"*

However, Lord Carnwath confirmed that it should not 'be equated with a requirement to show "very compelling's reasons". That test is reserved for those whose prison terms for four years or more.

70. As confirmed in [34] of Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213, the tribunal must consider 'pursuant to rule 399,… Both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and whether it

would be unduly harsh for the child and/or partner to remain in the UK without him'.

71. Clearly, in the light of the children's best interests identified at[60] to [64] above, the appellant's separation from Emma and Adnan would be harsh. They would be deprived of the father who has been involved to a significant extent in their day-to-day care at times when Ms Temitope Hassan has been unable to do so. However, mayor hardship is not sufficient to outweigh the very significant public interest in deporting foreign criminals.

72. Firstly I consider the position as to whether it would be unduly harsh for the children and Temitope Hassan to travel to Nigeria with the appellant. Although Ms Hassan in her statement says she would not go with the appellant, I am required to consider the hypothetical situation they would find themselves in there.

73. As to their ability to support themselves a family in Nigeria, the appellant says he has no home or family in Nigeria and no prospects of employment law means to support themselves (A:A19 and A20). If that were indeed the case, I am satisfied given Dr Yusuff's evidence regarding the cost of living in Nigeria (at A:D30 to 32) that it will be unduly harsh for the family to return.

74. However, for the reasons set out above at [37] I find the appellant's claim to have no family in Nigeria lacks credibility. Although the true extent of their family network in Nigeria is unknown, the appellant has deliberately sought to mislead the tribunal and I have given little weight to Temitope Hassan's unsupported claims given her vested interest in the appellant remaining in the UK. I am satisfied that both he and Ms Hassan do have family in Nigeria. There is, therefore, a family support network available, located in Lagos and Ogun State. Although the appellant claims they would have no home or accommodation, Temitope Hassan has been visiting her family there (most recently in all around October 2019) from which I infer they would in all probability have a place to stay on arrival until they could establish themselves. Other family members might also be able to assist.

75. Although the appellant has been in the UK for many years, he was born in Nigeria and lived there for at least 22 years and possibly more as he has not demonstrated he was in the UK for the next 14 years. I am satisfied, therefore, that he will have retained knowledge of life and culture there. Miss Hassan, who is 37 years of age, was born in Nigeria and only came to the UK in 2010 and she has continued to visit regularly. All of the friends who provided letters of support were either born in Nigeria all, from their names, appear to be of Nigerian heritage. I find this indicates that even within the UK the appellant and his wife have maintained links to their Nigerian culture within the Nigerian community. As such I am satisfied that they would be enough of insiders to understand how society works in Nigeria and establish a life themselves there within a reasonable period.

76. The Appellant says he has no prospects of obtaining employment in Nigeria and the family would suffer great hardship as he has no savings or any means to sustain the family (A:A20). That claim is supported by Dr Yusuff who says unemployment will await the appellant {A:DO6), that his chances of obtaining employment poor or next and now, that his age will be a great disadvantage (A:DO7) and that his desperation may lead him to committing crime {A:DO8).

However, I find Dr Yusuff's assertions somewhat speculative. Dr Yusuff appears to have only have the information about the appellant and Ms Hassan that is before this tribunal. I find there to be a conspicuous lack of information regarding the appellant and Temitope Hassan's education and employment history. Whilst I accept that the unemployment rate in Nigeria here is to be above 20% according to the National bureau of statistics, Dr Yusuff fails to consider what work the appellant has done in the past, his skills or his educational background before giving her opinion. Dr Yusuff provides no statistics regarding the position of women in the employment market in Nigeria no opinion regarding Ms Hassan's ability to secure work. These matters undermined the weight I have given to her opinions regarding the family's inability to support themselves.

77. Temitope Hassan had purportedly been the family's breadwinner in the UK until Adnan's birth although no details are provided regarding the type of employment she was engaged in stop the appellant's solicitors in their representations of 28 November 2018 said the appellant would be the children's primary carer 'once his wife returns to work' (A:B11). Ms Meek records Emma reporting she was looked after by other people when the appellant was in detention and her mother was working (A:A68). Ms Hassan's GP provided a eMED3 in November 2019 can she was not fit to work from which I infer she had been (A:A77B) and Dr Marvan confirms that since Adnan was born in September 2018 Temitope has been working and studying (A:A81). I do not, therefore, accept that Ms Hassan would be unable to work if she went to Nigeria with the appellant. This too undermines the conclusions of Dr Yusuff.

78. I am satisfied the appellant is an extremely resourceful and resilient individual. He has clearly managed to support and accommodate himself since at least 2006, and has had sufficient resources to finance numerous legal challenges both in the High Court and to the Court of Appeal. He was arrested for working illegally into thousand nine as a cleaner at St Pancras station, and I consider it is more likely than not that he worked illegally both before and after that time. Certainly there is no evidence before this tribunal him having been supported or accommodated by any other person except most recently Temitope Hassan.

79. On balance I consider it more likely than not that the appellant would be able to secure some form of working Nigeria given his resilience and resourcefulness and his family links in that country. Ms Hassan may also be able to do so. I accept, however, that finding employment or establishing a business might prove difficult at least initially, and their standard of living would not in all probability be the same as that which they have enjoyed in the UK, given the evidence of Dr Yusuff regarding the cost of living.

80. Little is said by Dr Yusuff regarding the availability of education in Nigeria. Although she reports the cost of school fees in different areas, it is a matter of public record that primary education is officially compulsory and free Nigeria. However I accept that in all probability there are other costs involved, and the free educational opportunities available to Emma and Adnan in the UK would not be available to them in Nigeria.

81. The appellant has not demonstrated that either he or Temitope Hassan would face any violence on returning to Nigeria. No evidence has been produced to substantiate these claims, and in view of my general findings regarding their credibility I find they have been made with a view to enhancing the appellant's

case. The independent social worker and Dr Yusuff were both clearly influenced in their thinking by these claims, which undermined the weight I have given to their reports and conclusions.

82. Whilst I accept FGM is while widely practised in Nigeria, I am not persuaded that Emma would be at risk, and I agree with Mr Davies's submission this was a 'bolt on' to enhance the appellant's claim. Both the appellant and Ms Hassan confirmed they did not believe in the practice. Emma's psychologist, Dr Marvan, says in relation to Emma's therapy that both parents had engaged well and have been known to know how to support Emma (A:A80), and I infer from this that they would do their best to protect and safeguard their daughter from the practice.

83. In relation to healthcare, Dr Yusuff is of the opinion that the family would suffer hardship due to the cost and availability of medical and in Nigeria. In all probability be able to find employment to support themselves, I am satisfied that they would be able to afford the cost of the appellant's Amlodipine and other treatment required. As they would be going to Nigeria as a family, the progress that had been made to date by Emma in recovery from her PTSD and anxiety with the support of her parents could continue. She would no longer be living with the fear of separation, and as they are clearly committed parents they would be able to help her and Adnan are just to living in their new country.

84. Having considered all of these matters in the round I find that the family's circumstances in Nigeria would in all probability be extremely difficult and uncomfortable, particularly during initial stages, and healthcare facilities they enjoy in the UK. However, I am not satisfied the appellant has demonstrated it would reach the enhanced level of harshness envisaged in KO (Nigeria) and the provisions of paragraph 399(a)(ii)(a) are not therefore met.

85. Having reached that conclusion I consider the second test, namely whether it would be unduly harsh for Temitope Hassan and the children remain with their mother in the UK without the appellant stop.

86. The respondent says it would not. Ms Hassan looked after Emma on her own before her relationship with the appellant began and she would be able to care for the children again. Although it was accepted that the appellant plays an active role in Emma's and Adnan's upbringing, he was not their primary carer. This although the respondent accepts also that Emma had experienced mental health symptoms as a result of immigration officers attending the family home, she had access to treatment with the child and adolescent mental health services (CAMHS) for distress and symptoms of PTSD, the treatment was beneficial and that support could continue if the appellant were deported. Emma and Adnan could continue to access health and education, see friends and maintain contact with the appellant via modern means of communication and visits.

87. Temitope Hassan says she would remain in the UK with the children if he were deported (A:A28) and the appellant says this would be unduly harsh.

88. Clearly the families living conditions if they remained was not meet a level of undue hardship. Temitope could return to her paid employment, relying on others to provide care for the children whilst she is at work as she did in the past when the appellant was in detention. If she were unable to work on account of her

health, she would be able to claim welfare benefits to which she and the children are entitled, and which Parliament considers meets an acceptable living standard. They already have accommodation in the UK, and Emma is settled in school, and she and Adnan would have continuing access to free education and other services.

89. Although I have found that it would be in the best interests of both Adnan and Emma to be brought up by both parents, there is nothing in the evidence before me to suggest that it would be detrimental to any significant extent for Adnan to be brought up only by his mother. Although Ms Hassan has had some health problems (the impact of the emergency caesarean in September 2018 and the problem with her right hand), for the reasons set out above, I do not find the extent of disability claims is credible. I am satisfied that Ms Hassan would be able to work to support her children and it would not be unduly harsh to expect her to do so. She confirmed that she was fully aware of the appellant's criminal history and the deportation order when she got into a relationship with him, and it is clear that she and the appellant chose to have a child together notwithstanding the knowledge that he was to be removed to Nigeria.

90. However, having considered the evidence in the round I have reached the conclusion that it would be unduly harsh for the children to remain living in the UK without their father on account of the impact on Emma's mental health. In doing so, to the medical evidence from the clinical psychologist, Dr Marvan, who has been involved in the assessment and treatment of Emma since February 2017.

91. Whilst I accept Mr Davies' submission that Dr Marvan's letter of 16 October 2019 confirms that Emma made significant progress as a result of EMDR treatment and was able to make a recovery from PTSD, I am satisfied that was in the context of her being cared for and supported by both parents, albeit in a state of uncertainty due to the appellants immigration status.

92. Dr Marvan provides a clear and unambiguous opinion that were the appellant separated from his family 'this would have a significant and detrimental impact on Emma's mental health' (A:A81 and R:D86). I have given her opinion significant weight as Dr Marvan is a clinical psychologist and a specialist in children's mental health who had been involved in Emma's treatment between February 2017 and at least October 2019. Dr Marvan's letters from 2017 to 2019 (A:A80 to A:A86 and R:D75 to 89) all confirmed the closeness and significance of the attachment between the appellant and Emma, and of his involvement with her care on a day-to-day basis (at times being her primary caregiver). Dr Marvan also confirmed in October 2019 that despite her recovery from PTSD, Emma had ongoing symptoms of anxiety which worsen at times when she fears her father would be taken away again.

93. In her letter of May 2017, shortly after the appellant was released, Dr Marvan reported on the impact of the appellant's detention on Emma. She noted Emma had isolated herself and friends, had reduced her engagement with school life, and loss of pleasure in activities previously enjoyed, displayed avoidance of dark, suffered nocturnal enuresis, have reduced concentration levels and her schoolwork had deteriorated. In her letter of 11 April 2018 (R:D84) Dr Marvan confirmed that Emma's mental state had 'evidently been affected' by the appellants further recent detention. She spoke of Emma's fears that she herself was at risk of being detained by immigration, of her sullen and unhappy mood,

her unwillingness to attend school, her heightened anxiety, and her fears of being unable to care for her mother (which as the psychologist says is not the responsibility of a seven year old). The attendance of immigration offices again in November 2018 had resulted in a return of symptoms of insomnia, hypervigilance, preoccupation and withdrawal (R:D88).

94. I have given these matters very considerable weight, and find them indicative of the likely impact of the appellant's removal to Nigeria on Emma. I accept that Emma would, as Ms Davies says, be entitled to access treatment on the NHS including further psychological therapy if the appellants were removed. However, I find the expectation that a nine year old child (who has already been traumatised to the extent of developing PTSD) should again be exposed to a significant deterioration in her mental health does amount to a degree of hardship going beyond the 'due' level of hardship that all children face when losing a parent through deportation. In reaching this conclusion I have also given weight to the research Ms Meeks cites regarding the negative side psychological effects of stress, trauma and early adverse experiences on children's development.

95. Although many children separated from a parent will suffer, in the particular circumstances of this case I am satisfied the evidence demonstrates that the impact of the appellant's deportation on Emma would be unduly harsh if she were to remain in the UK without him. Having reached that conclusion, I am satisfied that the appellant meets the exception in paragraph 399 (a)(ii)(b) of the immigration rules.

18. These findings are significant and extremely detailed. Mr Emezie seeks to argue that the findings should be reopened and considered afresh. His simple points being is that there is a material change of circumstances and that fresh evidence has come to light since these findings were made which is capable of going behind the assessment as to the family's ability to relocate to Nigeria. In particular the couple have a new baby who did not feature in the previous determination due to not having been born yet.

19. Before I determine this matter as to the retained findings, I turn to the contents of the updating evidence. Aside from the passage of time and the birth of their second child there is not a huge change of material circumstances. The appellant's wife last travelled to Nigeria in August 2021 when she returned for her mother's funeral. Her daughter Emma travelled with her, and they stayed with her family out there.

20. An updating letter was provided by Dr Marvan which notes as follows:

    (i) *Emma reported that things are 'mostly fine' in her life currently, and she is doing well with her schoolwork and is enjoying being a big sister to her younger brother and new sister. However on further exploration, Emma was able to describe how she tends to worry, particularly at night when trying to get sleep. Emma spoke of how she worries that her father will be 'taken away by immigration again' and deported to Nigeria. Emma was able to expand on the content of her worries, saying she fears that her mother would not be able to cope alone without Mr Hassan, and that her siblings would not get to know their father. Emma tries to think of calming images to*

help her sleep, but will often lie awake for 2 to 3 hours before she falls asleep, and this leaves her time at school.

(ii) Dr Marvan completed the screening for child anxiety related disorders and her scores placed in the clinical range for anxiety scoring particularly highly for somatic symptoms of anxiety and separation anxiety. This was confirmed by her parents responses which also placed in the clinical range for an anxiety disorder.

(iii) One further discussion Emma is able to distract herself from worries of school however she fears everyday she goes to school her father will be taken away. She is experiencing frequent headaches and stomach aches at school which are somatic symptoms of anxiety.

(iv) He identified the anxiety centred around her father being taken away. Now aged 10 she has a more sophisticated understanding of her father's situation is not so easily comforted by her parents and reassurances.

(v) Dr Marvan revisited strategies with Emma for coping with the anxiety the further appointment has been arranged.

(vi) The overall impression is that once Mr Hassan status is settled Emma's anxiety will resolve and chill able to focus on being 10-year-old schoolwork and relationships will improve.

21. I have carefully considered the findings previously made by Judge Cooper in relation to the family all going to Nigeria together, and I'm not persuaded that in law I can revisit those findings previously made and preserved by the Upper Tribunal. In *Cokaj (paras A398-399D: 'foreign criminal': procedure) Albania [2020] UKUT 187* the Tribunal was faced with the following situation:

> *35. The September 2019 report of Professor Daci, the appellant's witness statement of November 2019 (together with that of his wife), the reports of Dr Young and Dr Ahmed and the District Court of Tropoje decision of 26 October 1994 were filed on 19 November 2019. That was four days after the expiry of the deadline set by the Upper Tribunal in its directions (giving effect to a consent order of 31 October 2019).*
>
> *36. The adjourned hearing in the Upper Tribunal was listed for 9 December 2019. On that day, Ms Naik sought to adduce two further reports. One of these was a report of Dr Andres Izquierdo-Martin, dated 29 November 2019, concerning scars on the appellant's body. The other report was a so-called supplementary report of Professor Daci. The "scarring report" had been filed and served some seven days before the hearing. Although the report had been filed in breach of the directions, having heard Ms Naik's explanation, the Upper Tribunal was satisfied - notwithstanding the objections of Mr Gullick on behalf of the respondent - that it would be appropriate for the report to be admitted.*
>
> *37. The new report of Professor Daci, in which he for the first time was asked to address the District Court of Tropoje decision of October 1994, was supplied to the Upper Tribunal only at the hearing (having been sent by email the previous Saturday). Mr Gullick had not seen it beforehand.*

38. As the Upper Tribunal stated on 9 December, the alleged need for this report stemmed from significant failures on the part of the appellant and the appellant's advisers. As we have already noted, the document had been in the possession of the appellant's advisers for a great deal of time. The appellant himself should have been aware of it and have drawn it to his present advisers' attention much earlier than he did. The present solicitors had, in any event, had it since 2017.

39. Having heard the parties' submissions, we concluded that to admit this egregiously late document would not be in the interests of the overriding objective. On the contrary, it would send entirely the wrong message to those who come before the Upper Tribunal, whether as appellants or respondents, that directions regarding service count for little or nothing. Ms Naik submitted that, if the report was not to be admitted, there could well be submissions made by the appellant in respect of it to the respondent, after the conclusion of these proceedings, in order for the report to be considered in the context of a fresh claim under paragraph 353 of the Immigration Rules. The fact that such a procedure exists is not, however, in our view to be regarded as dispensing with the need for proper procedures to be followed in appellate proceedings (R (Tapalda) v Secretary of State for the Home Department [2018] EWCA Civ 84, paragraph 67 (Singh LJ)). On the contrary, in all the circumstances of this case, the point had come when the overriding objective, as it applies to these proceedings, required the Tribunal to proceed, even if that meant submissions pursuant to paragraph 353 might subsequently be made in respect of the new report.

40. The hearing on 9 December could not be completed in the allotted time and an adjourned hearing was arranged for 31 January 2020. On 13 December 2019, the appellant's solicitors wrote to the Upper Tribunal to request that its ruling made on 9 December regarding the new report from Professor Daci should be re-visited. The request was resisted by the respondent. Mr Gullick submitted that the fact the hearing had had to be adjourned to 31 January to allow time for final submissions was not a material change in circumstances, such as to make it appropriate to re-open the decision the Tribunal had made on 9 December. The supplementary report was not concerned with new events relevant to the appellant's alleged fear of harm in Albania, such as a change in country conditions, which it was accepted could be the subject of a successful application. On the contrary, as the solicitors' letter of 13 December quite properly acknowledged, Professor Daci's new report is intended to address matters that had long been within the knowledge of the appellant (and his advisers), and which should have been disclosed far earlier.

22. The Tribunal concluded:

41. The Tribunal refused the application. If it were needed, support for this stance is to be found in the judgment of the Tax and Chancery Chamber of the Upper Tribunal in Gardner-Shaw (UK) Ltd v HMRC [2018] UKUT 419. In that case, the Upper Tribunal held at paragraph 13 that where there is no material change of circumstances and no prior misleading of the court "it will be a rare case and something unusual that could lead to the important considerations of finality and the proper use of the appeals procedure being displaced in favour of revisiting and varying or revoking an interlocutory

order". The TCC's finding on this issue was upheld by the Court of Appeal: [2019] EWCA Civ 841.

23. The decision to retain the previous findings is plainly an interlocutory order for the purposes of this argument. In this case the evidence presented does not demonstrate a "material change of circumstances", the evidence updates the situation, but Mr Emezie does not submit that the circumstances have materially changed, in fact he submits, essentially, that the previous findings are wrong in light of the new evidence.

24. The evidence presented by way of an update is no stronger than the evidence before Judge Cooper. Indeed, I consider, contrary to the submissions advanced on behalf of the appellant, that in some respects the case is weaker. This is because the appellant's wife and her daughter, Emma, have recently travelled to Nigeria to spend a month there. Judge Cooper already dismissed the submission that there was any risk to Emma suffering FGM were she to go and live in Nigeria, and I conclude and agree that her visit there for four weeks are not the actions the family scared for her to go and live in Nigeria.

25. The continuing visit to Nigeria of course also demonstrates the residual ties that the appellant's wife maintains with Nigeria, her ability to go there and stay in family accommodation and receive a degree of support from her family there. That is entirely in keeping with Judge Cooper's finding as to the real family circumstances that the appellant and his wife have in Nigeria. I am not satisfied that there would be any issue, to the level required establishing undue hardship, of this family going to live in Nigeria.

26. It therefore follows that the only matter to consider is whether there are very compelling circumstances over and above those set out in exception one and exception two. In other words, taking everything into account does the public interest outweigh the Article 8 rights of the appellant.

27. I have not been provided with any evidence which in my view takes the case beyond that advanced in the unduly harsh category. The appellant says in his witness statement the societal discrimination which Emma will be subjected to due to her mental health condition. This is however not supported by any useful background material, and in particular, I find it striking that there is no reason why on the face of the evidence Emma's separation anxiety should in anyway be heightened were they all to be in Nigeria together. In fact, none of the experts in this case have been asked to comment on that possibility at all.

28. In the appeal before Judge Cooper there was a country report from Dr Olabisi Yusuff, there is an updated report before me. The report is unimpressive in my view. The author has included his instructions which are:

    (i) In view of the new developments in the life of the Appellant and his family over the last 15 months since the original report, whether in the expert's

opinion, the appellant would face undue hardship if he were deported to Nigeria;

(ii) Whether in his opinion it will be unduly harsh for the children if forced to return to Nigeria with the Appellant, especially Emma who suffers from PTSD and was recently assessed;

(iii) Whether in his opinion it will be unduly harsh for the British wife of the Appellants to relocate to Nigeria with him.

29. The instructions asked of the expert are not ones which he can obviously speak to, and indeed the questions regrettably invite him to present arguments rather than to give evidence as to the country conditions. I therefore approach his report with caution given that his role is not one of an advocate.

30. Within the report the expert seeks to argue why the appellant and his family cannot return to Nigeria. This is plainly not his role. He speaks about the danger to the family as westerners and being perceived as wealthy, the danger to the girls of FGM and the risks of political instability and kidnapping. The report highlights these in general terms without considering the factual position that the appellant and his family find themselves. There is no consideration of the fact that the appellant's wife and stepdaughter have returned to Nigeria to visit, and that there were no instances of attempted harm.

31. I find that his report does not assist me as to why this appellant and his family would face difficulties on return. The generality of the report and lack of consideration of the case specific issues in this case mean that I cannot place much weight on it.

32. An addendum social worker report by Ms Meek has been provided the contents of which are broadly a continuation of her previous report. She speaks as to an update in Emma's situation however, in many respects, it is one and the same. Indeed, it was not suggested on behalf of the appellant that there was anything within this report that was significantly different to her previous ones.

33. The appellant relies also on a report by Dr Patel, from an organisation called DocTap. The consultation was on the 20 May 2021 and was carried out over the telephone. Within the notes the appellant has been referred to a psychiatrist for advice regarding his psychological therapy and medication. The report otherwise is not overly illuminating, and it certainly is not a psychiatric report or assessment. It reports that he has been referred to a psychiatrist for advice regarding psychological therapy however I have no evidence of anything happening since.

34. The appellant does not rely on the private life exception as he has had no lawful leave in the UK. I did not hear any argument as to whether he was socially and culturally integrated here, I did however have limited evidence going to this in any event.

35. The appellant has established a private and family life in the UK and he has established a close and loving family since his conviction, however as the findings demonstrate that close unit can relocate to Nigeria.

36. The appellant advances a submission based on the principles emanating from *Ruiz Zambrano v Office national de l'emploi (Case C-34/09)* in that the appellant is the primary, or at least joing, carer of 3 British children and given the findings of fact as to it being unduly harsh for the family to be separated then, in line with *Patel v Secretary of State for the Home Department [2019] UKSC 59*, there would be a compulsion for the appellant's British children to leave the UK. As a result, it would be inconsistent with the *Zambrano* principle.

37. The difficulty with this argument is that there is no EU ground of appeal available to the appellant in this appeal. The appeal is brought under sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 (as amended) where the only available ground of appeal is that the decision is unlawful under section 6 of the Human Rights Act 1998. There is therefore no available EU ground of appeal. Any argument can only therefore be advanced through the prism of Article 8.

38. Secondly, following the UK's withdrawal from the European Union, and subsequent ending of the transitional period, Regulation 16 of the EEA Regulations 2016 has not been preserved. The Upper Tribunal has recently noted in *Velaj (EEA Regulations - interpretation; Reg 16(5); Zambrano) [2021] UKUT 235 (IAC)*:

    (1) In considering a piece of legislation designed to implement European law, a purposive construction should be adopted as set out in Marleasing S.A v LA Commercial Internacional de Alimentacion S.A. [1992] 1 CMLR 305 and applying the principles set out in British Gas Trading Ltd v Lock and Anor [2016] EWCA Civ 983 at [38].

    (2) Where implementing legislation goes beyond what is required by a Directive or to ensure compliance with rulings of the Court of Justice, there is no imperative to achieve a "conforming" interpretation, but a careful analysis must be undertaken to determine if it was intended that the implementing legislation was to go beyond what flows from the Directive; in any event, the same means of construction set out in (1) must apply.

    (3) On that basis, in construing reg. 16 (5) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), a purposive approach must be followed, bearing in mind also that the question of whether a child would be compelled to leave is a practical test to be applied to the actual facts and not to a theoretical set of facts (Patel v SSHD) [2019] UKSC 59 at [30] (applying Chavez-Vilchez [2017] EUECJ C-133/15). That is a necessary corollary of the use of "unable" in reg. 16(5).

    (4) In order to meet the requirements of reg 16(5), the key issue is inability to reside in the United Kingdom which requires a detailed consideration of the circumstances of both carers.

(5) The EEA Regulations were revoked on 31 December 2020. Schedule 3 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020/1309) sets out those parts of the EEA Regulations preserved for immigration (but not social security) purposes; reg.16 is not one of the provisions preserved.

As is plain, following the end of the transition period Regulation 16 of the EEA Regulations was not preserved for immigration purposes. Consequently, the appellant cannot in any event rely on a provision that is no longer law.

39. Mr Emezie sought to argue that the findings as to it being unduly harsh to separate, when read with *Patel*, leads to the inevitable conclusion that there would be a compulsion for Ms Hasan to leave the UK. I do not agree. The questions as to whether it would be unduly harsh to separate the family and what the family choose to do are different. The appellant's wife confirmed both before Judge Cooper, and in her updated statement before me, that she has no intention of going to Nigeria should the appellant be deported there. This evidence is fatal to any reliance on a *Zambrano* argument given that Ms Hasan's clear statement that she would not leave the UK. As a consequence, *Zambrano* is not triggered because there would be no compulsion to leave.

40. The *Zambrano* issue therefore is not one which can be considered either as a standalone ground or through the prism of Article 8.

41. I have carefully considered the findings of Judge Cooper and the evidence before me in relation to the children. However, a large part of the concern surrounding Emma's medical needs are in relation to the impact that separation will have on her. Notwithstanding her mother's evidence that she will not go to Nigeria were the appellant deported, it would not be unduly harsh for them to relocate there. The evidence relied on does not take the case much further than that.

42. Emma's mental health issues are currently being well catered for, indeed so much so that she travelled to Nigeria with her mother earlier this year without the appellant. The evidence from the various experts does not in my judgment show very compelling circumstances over and above those found in exception two.

43. Turning to the public interest, the appellant has been convicted of serious offences, which cuts to the heart of this entire jurisdiction, and has never had any lawful right to be here save for a visit Visa many years ago. The public interest in this case is significant. I have to apply the statutory provisions of s117A – D, that the family and private life the appellant has established was done entirely when the was in the UK unlawfully and by extension when his status here was undoubtedly precarious. It is of relevance as well that he was already subject to deportation order signed on 14 March 2011. Similarly, he had also lost a previous appeal against the making of a deportation order which was dismissed by Judge Rabin on 4th

July 2011. Consequently, not only was he here unlawfully and his status was precarious he knew full well that the Secretary of State intended to deport him, and notwithstanding that he entered into his relationship with his wife.

44. The public interest is a weighty consideration, as set out in numerous authorities in recent years. The family and private life established by the appellant in the UK does not, in my view, outweigh the very weighty public interest. The family can relocate to Nigeria together, it will be challenging but not unduly harsh. There is nothing in the evidence which establishes very compelling circumstances over and above those in exceptions one and two.

45. In my judgment this is a case where the positive case advanced, through the prism of very compelling circumstances, is not one which outweighs the public interest. The appellant's case is in effect that notwithstanding they can relocate to Nigeria, it would nevertheless be disproportionate given the impact on his children. There is no evidence he points to as to any additional factors not considered through the unduly harsh assessment, and I conclude that the in all the circumstances his deportation is proportionate.

Notice of Decision

The appeal is dismissed on human rights grounds

No anonymity direction is made.

Signed T.S. Wilding

Deputy Upper Tribunal Judge Wilding

Date 10th December 2021