**Upper Tribunal**
**Immigration and Asylum Chamber** **Appeal Number: IA/35829/2013**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Promulgated** |
|---|---|
| **On 10 December 2014** | **On 18 December 2014** |

**Before**

**Upper Tribunal Judge Kekić**

**Between**

**Adeyinka Adepashe-Kareem**
**(anonymity order not made)**

**Appellant**

**and**

**Secretary of State for the Home Department**

**Respondent**

**Representation**
For the Appellant: Ms M Hannan, Solicitor
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

## Determination and Reasons

**Background**

1. This matter first came before me on 2 October 2014. Following that hearing I decided that First-tier Tribunal Judge Powell who had allowed the appeal on Article 8 grounds had made an error of law and I set aside his determination. My reasons are set out in my decision dated 14 October. I now deal with the resumed hearing.

2. The appellant is a citizen of Nigeria born on 22 August 1977. She last entered the UK as a visitor on 20 April 2012 and four days later applied for indefinite leave to remain as the mother of two British children. Her partner, also of Nigerian origin but a British national, was present in the UK. The application was refused on 4 July 2013 on the basis that she did not meet the requirements of Appendix FM, R-LTRP.1.1 (d), E-LTRP.2.1, E-LTRPT.2.2-2.4 or 3.1 and could not benefit from EX.1. Her case was considered under paragraph 276ADE but those requirements were not met either and the Secretary of State took the view that her circumstances did not warrant consideration outside the rules. A decision to remove her was made.

**The hearing**

3. I heard oral evidence from the appellant and her partner, Lanre Bhadmus. The appellant gave evidence first. She relied upon her witness statement and confirmed it was accurate. She said she lived with her partner and children. They had been together for eight years. They had lived in Nigeria until she came here with the children on 20 April 2012. The children were aged 8 and 6. They were at school. Her partner had travelled before her and she joined him using a visit visa. She then applied to remain because her husband was in poor health. He suffered from diabetes and was partially blind. She stated she had never worked in Nigeria and was supported by her partner. If she had to return to Nigeria she would not be able to support herself so it would be inconvenient. Further, if the children remained, her partner would be unable to look after them. If they accompanied her, their education would be affected.

4. In cross examination the appellant said that she had no family in Nigeria. Her parents were dead and she had a sister in Dublin. She had no uncles, aunts or cousins.

5. She stated that that her husband had suffered a stroke in 2011 whilst in the UK. He then returned to Nigeria in October 2011. He then saw some neighbours had died after strokes so he decided to come to the UK. He re-entered the UK in January 2012, returned to Nigeria in March and then back again to the UK at the end of March 2012. She had remained in Nigeria with the children until 20 April 2012. He had been regularly visiting the UK throughout their married life, not just for medical treatment. When he left in March, she did not expect him to return. She travelled to join him but had planned to go back to Nigeria with him. However when she arrived, he told her the same day that he did not intend to return to Nigeria. She then made her application because he was feeling down and she thought it would affect the children if she went and left them.

6. The appellant stated that her partner worked full time at night as a security officer. They did not receive any benefits. His income would be insufficient to support her if she returned to Nigeria. It was more expensive in Nigeria than in the UK. She had no idea what a hotel would cost. She denied that they had already planned that they

would stay here before she had come. She said that he had two brothers and a sister in Nigeria. It would not be convenient to stay with them as they all lived in one roomed accommodation.

7. In re-examination the appellant confirmed that her partner had told her of his plans to stay here on the day she arrived. He had said that he had been to the hospital and that his health was not good. Her partner's monthly income was £1000 or £1100 net.

8. In response to questions I then put for clarification, the appellant stated that she had been in contact with her partner after his departure. They had last spoken a few days before her arrival. He met them at the airport. He had been in hospital a few days after his arrival here. He had been here about 3 weeks prior to her arrival. Prior to that he used to visit the UK every 3-4 months for around 2 weeks at a time. Once a year or so, she would accompany him. She agreed that the children were used to separations from him. The appellant said that they had lived in rented accommodation in Nigeria and had just left it when they came here. They also left their belongings. She then said they gave them away. Her partner went back in October 2012 to sort it all out. He stayed away for two weeks and then returned again in October 2013 for a week. She was not sure about the cost of a ticket to Nigeria but thought it was about £400. She said they paid £400 in rent a month. His salary of £1000 was before taking rental costs into account. They had no savings and no credit card debts. When asked how they were able to afford trips to Nigeria, she said that they received child benefit. They had made enquiries about the waiting times for visas and had been told that this was 3-6 months. When her partner visited Nigeria, he stayed with friends. Those were my questions. Neither party had any questions arising.

9. I then heard from Mr Bhadmus. He relied on his witness statement and confirmed he lived with his partner and children. He said he suffered from high blood pressure and diabetes. In 2011 he had a stroke and lost 30% of his vision. He did not drive as a result. He relied on the appellant to take care of the children. Due to his employment, he could not do things with the children. He stated that the appellant had intended to return when she came here but the situation changed. When asked what had changed, he said that he had decided to stay with the children because of his health. He had had a stroke in 2011 and so when he came here on 2 April 2012, he decided to remain. He stated he would not be able to cope with caring fro the children because his daughter relied on her mum. His partner did all the cooking. He said he took medication for diabetes, high blood pressure and for the stroke. If the appellant returned to Nigeria, he would lose his job and his house. He paid £400 a month for the mortgage but from January that would fall to £324. His income was £950 per month net but he received £730 per month in tax credits and also received child benefit. The children could not accompany the appellant to Nigeria as there was no means of support there, it was unsafe and the children were settled at school. They had friends here and he would miss them if they left. Mr Bhadmus stated that if the children left, all the benefits he received would cease. When asked whether he had

made enquiries about that, he conceded he had not. He said that they had sold their property in Nigeria in order to buy the house here.

10. The witness was then cross examined. He said that he was advised to reduce his stress and as he had felt less stressed here, he decided to remain. He was asked whether he had received any medical advice or been to any appointment as a result of which he had decided to remain. He said that he was meant to see the consultant in May. He had also had an appointment in February 2012 and had travelled here for that. He had been told that February that he should reduce his stress. He could not recall if he had told the appellant about this. He said that he decided to remain here on 10 April. He then changed this to 21 April and then changed his evidence again and said he had decided before the appellant came here. He told her when she arrived. He denied she had known prior to her entry. She had a multiple visit entry clearance. He could provide no explanation for why he had not told the appellant of his plans before she came here. He said he had no excuse but thought he would show her his doctor's appointment letter. He confirmed that the appellant had continued to live in their house until her departure. He could not explain why she would have said it was rented. He said the house had been put up for sale prior to his departure and was sold in July 2012. He told her the house was up for sale when she arrived. He made no response when he was twice asked to confirm that he had put the house up for sale before the appellant arrived here. He said he had received £85,000 from the sale of the house. He bought a house here for £180,000. He had had savings of £40,000 but now these amounted to £600. He had just one brother and some uncles in Nigeria. When the appellant's evidence was put to him, he said his sister was married and he did not speak to his other brother. His siblings all had small flats. He had not checked the costs of hotel accommodation in Nigeria but did not believe he would be able to afford it from what he used to know. He had no spare money. That completed cross examination.

11. In re-examination Mr Bhadmus said that he had waited until the appellant's arrival to tell her of his plans because he wanted her to be here physically and to see the reasons he did not want to return.

12. I asked him for her reaction to this information. He said she had mixed feelings. I asked what his plans had been prior to his health problems. He stated that he had intended to return before his son's sixth birthday. When the children arrived here, his son was 5. He said that he worked 48 hours a week from 10 pm until 6 or 8 am but sometimes he would work until 10 and sometimes he started work earlier. He would see the children before they went to school on the days he finished at 6 and then he slept until 2 when he would wake up until 4; he then went back to sleep. He worked five nights a week. Neither party had any questions arising and that completed the oral evidence.

13. I then heard submissions from both sides. These are fully set out in my Record of Proceedings. In summary, Mr Jarvis relied on his skeleton argument and submitted that the rules prevented visitors from switching and so the appellant could not bring

herself within the rules. Following Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 (IAC), EX.1 could not apply. It would defeat the purpose of entry clearance control if visitors were permitted to switch. He acknowledged that the Act recognised the weight to be attached to relationships with children and accepted that family life existed but pointed out that other factors had to be considered too. The prohibition on switching was a serious matter which weighed heavily against the appellant. The evidence made it obvious that circumstances did not evolve after the appellant's entry. There had been a clear and deliberate attempt to break the law. The appellant had no intention of leaving when she had entered. It was not credible that she would not have known about the sale of the house. This was a deliberate attempt to queue jump and showed a disregard for the rules and of those others who waited and applied in the proper way. It was not disproportionate for the children to accompany their mother to Nigeria for a short time; this would not be a permanent separation and not unusual given their father's regular travel history. I was asked to reject the account of financial difficulties as the truth had not been told and the true circumstances of the appellant were not known. The appellant's family life had always been precarious as she had known she was here on a temporary basis. There were no compelling circumstances which were required where there was a failure to meet the rules.

14. Ms Hannan adopted her skeleton argument and relied on the documentary evidence. She submitted that EX.1 should apply. Removal of the appellant would cause great difficulties friend the family given the sponsor's hours of work and the age of the children. If the rules were not met then they qualified under Article 8. The First-tier Tribunal Judge had found there was family life. There was no property to return to in Nigeria. Relatives there had inadequate accommodation. The sponsor was not in a position to cover the costs if the appellant returned. There would be financial consequences and also a physical impact on the sponsor's health. There was no concrete evidence to prove deception by the appellant. This was not the first time she had been here. Her partner told her of his decision to remain here after her arrival because he wanted to explain his decision on a one to one basis. It would be disproportionate for the children to leave the UK as their education would be disrupted. It was not in the children's best interests to disturb their lives. Moving to Nigeria would affect their development.

**Findings and conclusions**

15. I have carefully considered all the evidence before me and the submissions that have been made by both parties. I assess the evidence in the round and applying the lower standard of proof. I am aware that as I am re-making the decision I am required to consider section 117 of the Nationality, Immigration and Asylum Act 2002. Section 117A(2) requires that the Tribunal must in particular have regard to all the considerations in 117B. These are :

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.

(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) 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.

16. I accept the finding of the First-tier Tribunal Judge with regard to there being family life between the appellant and her children and partner. That has not been challenged by the respondent and indeed in his submissions Mr Jarvis agreed that family life had been established.

17. It is not disputed that the appellant arrived here on a visit visa and that she then sought discretionary leave to remain on Article 8 grounds. Although Ms Hannan's initial submission to me was that the appellant met the requirements of the rules, she did not seek to expand on that submission and did not address the fact that the appellant only made an application to remain outside the rules.

18. I concur with the respondent who maintains that the appellant cannot bring herself within the rules because of the prohibition on visitors to 'switch' and because EX.1 is not free standing: Sabir (Appendix FM - EX.1 not free standing) [2014] UKUT 63 (IAC). It was not argued that she could and I therefore proceed on the basis that this appeal arises from the respondent's refusal to grant discretionary leave to the appellant.

19. The Immigration Rules now in force are to be read as incorporating article 8 but of course there may be matters which are not covered by Appendix FM or paragraph 276ADE. If the appellant can show that there are non standard elements in her

circumstances which would warrant a grant of leave outside the rules, then a full Razgar style assessment shall be undertaken. However, in the absence of such circumstances are established, there is no necessity to do so as all the factors relied upon will have been covered under the rules.

20. The appellant's skeleton argument in Bundle 1 attempts to argue that the factors set out at paragraph 10 are *"overwhelming and exceptional"*. These are that: the appellant has two UK born British children under ten, she lives with them and their father, he is British, she is lawfully in the UK (by virtue of her application and her entry as a visitor), she is the primary carer for the children, they depend on her financially, physically and emotionally and they lived with her in Nigeria before their entry in April 2012. I do not dispute these facts apart from the place of birth of the younger child, the contention of financial dependence and the appellant's lawful presence in the UK. The first because the child's birth certificate and passport show that she was born in Nigeria, the second because the appellant's own evidence was that her partner was the one who financially supported the family and the third because it is the respondent's case that she gained entry by deception using a visit visa when her intention was to remain. I do not however consider these factors can be described as overwhelming or exceptional. They are quite commonplace in cases before these courts.

21. I deal firstly with the appellant's entry as the maintenance of effective immigration control is in the public interest. In his undated witness statement (at pp. 21-24 Bundle 1), Mr Bhadmus when talking about his stroke in September 2011 states: "On my return to Nigeria in October 2011, I witnessed two of my *neighbours both are of the same age group with me suffered the same fate and they died before they could get to the hospital. It was at this point that I took the pragmatic decision on the 1 April 2012 to return back to the UK after which my family joined me on 21 April 2012. This is because I realised that the environmental stress and threats to my life in Nigeria contributed a great deal to my having a stroke"* (at p. 22).

22. In his statement of 1 November 2014 (pp 9-11, Bundle 2) he states: *"We were advised and informed prior to our arrival in the UK that we can switch my partner's visiting visa to leave to remain on a compassionate ground"* (at p.9).

23. It is plain to me from this evidence and the evidence at the hearing where Mr Bhadmus stated that the house in Nigeria had been put up for sale before the appellant and the children came to the UK, that the decision to remain here permanently was made before 20 April 2012. I was asked to believe that the appellant had no idea about her partner's plans but it is simply absurd to maintain that the appellant would not have known that the house she was living in was on the market. Her evidence that her partner had made his decision following admission to hospital before she arrived was contradicted by his evidence. He made no reference to hospital admission or indeed any medical appointment, when questioned by Mr Jarvis and he referred to earlier advice given to him when he had his stroke some years ago and again in February 2012. He also stated in evidence that he had decided

to stay when he came here on 2 April. Additionally he admitted that the plan had been to reside here permanently before his eldest child turned six and had to be educated; the child was five when he last entered the UK. For all these reasons I conclude that both the appellant and her partner knew full well that they planned to relocate permanently to the UK and that they made a deliberate decision for the appellant to enter using her visit visa so as to avoid the inconvenience of applying for the appropriate entry clearance. It follows that the respondent's conclusion that she entered using deception is justified. The public interest requires immigration control to be effectively maintained and clearly rewarding people who set out to abuse the immigration law is not to be encouraged.

24. I accept that the appellant speaks English although of course she has not adduced the required language test certificate that she would be required to produce if an entry clearance application were to have been made and I cannot make findings as to her competence. I accept that she is financially supported by her partner who is in full time work notwithstanding his various ailments. Whilst I do not dispute that he has impaired vision following his stroke a few years ago, that has not prevented him from continuing to carry on with a normal life, from frequent intercontinental travel and from holding down a job involving long hours. I do not accept that the presence of the appellant is crucial to his care.

25. The appellant plainly has family life with her partner and their children. No separate submissions were made as to a private life here. The appellant's family life was however established here at a time when she knew that her status was precarious. Both she and her partner were aware that as a visitor she was not entitled to remain permanently and instead of abiding by the rules and applying for the appropriate entry clearance, the appellant chose to disregard the law and remain in defiance of it. The statute requires me to give little weight to a family life built up in such circumstances.

26. I am, however, also required to take account of the fact that the public interest does not require the removal of a parent where it would be unreasonable for the children to leave the UK. I agree with Mr Jarvis that this sub section does not operate as an amnesty for all those here with children. It is a consideration that is to be afforded weight and is to be considered with all the other relevant factors. The children are British but they are also young and have spent the majority of their lives in Nigeria where they lives until April 2012. I do not consider that it would be unreasonable to expect them to leave the UK for a temporary period with their mother whilst she regularises her stay. They would be returning to a familiar environment and despite what Mr Bhadmus stated about their education, a short absence from school at their ages would not cause any lasting damage. There is certainly nothing in the evidence to support Ms Hannan's submission that it would affect their development. Alternatively, they could remain here and arrangements for childcare could be made.

27. Financial difficulties are pleaded but given the untruths that have been told, I am not satisfied that I can rely on the oral evidence of either the appellant or her partner in

this respect. They appear to be in a comfortable position where according to the documentary evidence, 75% of the purchase price of their UK house (in October 2012) was funded by funds from abroad leaving it necessary to obtain a mortgage for just the remaining 25% (£31,790 in October 2014) over a term of 8 yrs and 11 months as at April 2014 and with modest monthly repayments of £362. The family also benefit from work and child tax credits and child benefit which amount to close to £1000 per month. Although Mr Bhadmus claimed these would cease if the children left, he conceded no enquiries had been made as to whether a temporary absence from the UK would have the result he claimed. Whilst initially claiming he had £40,000 in savings, he then changed this to £600. Yet plainly there is sufficient money to fund regular trips abroad with several having been undertaken since Mr Bhadmus came here in 2012. Mr Bhadmus also initially attempted to conceal the presence of two siblings in Nigeria. I am therefore not satisfied that the truth has been told with regard to the family circumstances there.

28. A claim is made in written evidence that it would not be safe for the children in Nigeria. There is no evidence to support such a sweeping claim and indeed it is difficult to give it credence when the family chose to base themselves in Nigeria for several years despite the option of relocating to the UK. There has never been any suggestion that they encountered any problems there.

29. The appellant has placed herself in this position because of choices she made. She came here as a visitor knowing that she was not permitted to settle and then made an application to remain within four days rather than applying to enter as a spouse. It is in the public interest to ensure that visitors do not seek settlement through the back door without any assessment of their ability to meet the language and other requirements. The presence of children, though a weighty factor, is not a trump card and they are not being forced to leave. The prohibition on switching is there for a reason. Those who abuse the rules ought not to be rewarded unless there is something compelling otherwise it promotes abuse of the system. Having considered all the factors I therefore conclude that the factors pleaded for the appellant are not compelling enough to warrant a grant of leave outside the rules.

30. Essentially, as I stated before when setting aside the decision of the First-tier Tribunal Judge, this is a run of the mill case of an appellant with a partner and children who seeks to bypass the rules and to stay knowing that her visa did not entitled her to make an application within the rules. Even acknowledging that in some cases the public interest does not require a parent to be removed, the circumstances do not disclose that this is a special case.

**Decision**

31. I set aside and re-make the decision of the First-tier Tribunal Judge. The appeal is dismissed on all grounds.

**Anonymity order**

32. There has been no request for an anonymity order at any stage.

**Signed:**

**Dr R Kekić**
**Judge of the Upper Tribunal**
17 December 2014