Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48422/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 28 August 2014

Determination Promulgated
On: 10 September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

COLLINS IFEANYI NWAKANMA
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant:	Mr P Haywood, Counsel instructed by Michael Stevens solicitors
For the Respondent:	Ms P Hastings, Home Office Presenting Officer

DECISION AND REASONS

1. This is the continuation of an appeal by the Appellant, a citizen of Nigeria born on 5 October 1960, against the determination of First-tier Tribunal Judge Wyman in which the Judge dismissed the Appellant's appeal both against the Secretary of State's decision to refuse his

application for indefinite leave to remain on the grounds of long residence and on Article 8 ECHR grounds.

2. The Appellant's application was made on 7 February 2004 and refused by reference to paragraphs 276B, 276ADE, 277B and Appendix FM of the Immigration Rules (HC395) on 1 November 2013. The Appellant exercised his right of appeal to the First-tier Tribunal and this is the appeal which came before Judge Wyman on 12 March 2014 and was dismissed. The Appellant applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Landes on 8 May 2014.

3. Following a hearing in the Upper Tribunal on 20 June 2014 I found that the decision of the First-tier Tribunal Judge in respect of Article 8 ECHR involved the making of a material error of law and I set aside that decision to be remade by the Upper Tribunal. This is the continuation of that hearing.

4. The adjournment of these proceedings on 20 June 2014 was to facilitate the proper presentation of all relevant issues from both parties. With this in mind my error of law decision made clear some of the matters that each party would be expected to cover. Paragraph 12 of my decision states:

> This appeal is adjourned to be remade by the Upper Tribunal. At the adjourned hearing the Tribunal will expect to hear evidence pertinent to the Article 8 claim and in doing so will take account of the fact that the application under appeal was made well before the change to the Immigration Rules in 2012. The Tribunal will hear submissions as to the applicability of the 'new' rules. The Tribunal will expect to hear evidence about the Immigration status of the Appellant's wife and children and about the history of the application. In particular the Tribunal will expect the Respondent to confirm whether the chronology put forward by Mr Haywood is accepted.

5. In these circumstances it was a cause of concern at the outset of the resumed hearing to find that Ms Hastings, on behalf of the Secretary of State, was not able to confirm whether the chronology put forward by Mr Haywood was accepted and Mr Haywood submitted a bundle that whilst containing up to date statements from the Appellant and his wife gave absolutely no information about the immigration status of the Appellant's wife and children. Mr Haywood also relied upon the bundle prepared for the error of law hearing and a written skeleton argument. The skeleton argument makes no mention of the immigration status of the Appellant's wife and children. Ms Hastings submitted three documents being a copy of an entry clearance application apparently made by the Appellant's wife, internet contact details showing the international headquarters of the Appellant's wife's church and a UKBA

sponsor search results list detailing family members sponsored to visit the UK by the Appellant's brother-in-law.

6. It was a further cause for concern that despite having received an indication from the Respondent's representative recorded at paragraph 6 of my error of law determination that the Secretary of State may have further evidence to adduce there had been no follow up by the Respondent's representative. This omission is even more striking given that the Appellant's bundle shows that, following the error of law hearing, a letter was sent to the Secretary of State by the Appellant's representative reminding the Secretary of State of her duty of candour. Ms Hastings was able to confirm that notes on the Respondent's file, in existence at the time of the error of law hearing, indicated the existence of 'possible new evidence from HMRC regarding the Appellant's length of stay'.

7. My concern about the Appellant's evidence could be resolved by hearing the oral testimony of the Appellant and his wife who were both present and I allowed Mr Haywood time to take further instructions before calling evidence. My concern about the Respondent's position could, so far as the chronology is concerned, also be resolved by hearing evidence and making findings of fact. So far as any undisclosed evidence may affect the Appellant's position it would be speculative to make any judgement upon what that evidence may be. Suffice it to say that if the Respondent does have evidence that would materially affect the Appellant's position such evidence should be acted upon and disclosed to the Appellant's representatives.

Oral evidence

8. The Appellant gave oral evidence and after confirming his identity and address adopted his written statement of 26 August 2014. He added that his son, Brendan, is asthmatic and he showed Brendan's inhaler and medication.

9. Cross-examined by Ms Hastings the Appellant said that he and his wife had a customary marriage by proxy in 2005. His wife was at the ceremony in Nigeria and the Appellant was represented by his mother. The Appellant had not met his wife and relied on family knowledge and pictures. Asked how it came about the Appellant said that it was like Biblical times. He was sent a picture and the marriage was arranged by their families, in his case his mother. Shown a copy of the entry clearance application details dated 15 April 2005 the Appellant agreed this was his wife but could not recall whether the marriage took place before or after April 2005. He said that a customary marriage takes place over a period.

He agreed with my suggestion that it was fair to assume that in April 2005 he was in the process of marrying.

10. The Appellant said that he spoke to his wife before marriage. He agreed before she came here that they both intended to live in the United Kingdom. He could not remember whether he told her that he had no status in the United Kingdom but thought that he had told her that he had made an application to remain. The Appellant was aware that the application for a visitor's visa made in April 2005 was refused and said that she made another application. Asked if his wife has a passport the Appellant said that there was a passport but she lost it adding that they have moved a lot. He said that his wife made an application to remain in the United Kingdom in 2010 but this was refused.

11. The Appellant said his first language and that of his wife was Ibo. They communicate with each other English and Ibo but their children only speak English. The Appellant agreed that his wife is a pastor at Christ Restoration Bible Church International (CRBCI) and that the headquarters of the Church is in Abuja. The position is unpaid. This is the only church with which she has ties.

12. The Appellant confirmed that Dr Chike Nwamadu is his wife's full brother. Referred to the sponsor search results list the Appellant said he was not aware which relatives had been sponsored by his brother-in-law. He said that his brother-in-law has visited the Appellant's family with his wife and children. His wife's father came to visit in about 2007 and some other relatives have visited.

13. The Appellant said that he did not know if his wife had employment in Nigeria. He thought she did some writing but did not know if this was for magazines or anything else. The Appellant said that he has a sister in Nigeria and a brother who is mentally ill. His mother died in 2011. He was in touch with his mother until she died and was also in touch with his sister until his mother's death. He knew about his brother's mental health problems because his mother told. The Appellant said that he does not know where his sister lives in Nigeria as he has no reason to know. His sister made enquiries to find the Appellant's telephone number to tell him that their mother had died.

14. The Appellant said that his wife does not have an income. She writes books. Asked why his wife says at paragraph 13 of her statement that she supports him financially the Appellant said that they walk around the neighbourhood in the evening taking things that people throw away and then sell them. They have been doing this for about six months.

15. The Appellant said that his wife is in contact with her father in Nigeria but he does not know who else. He thought that her brother had qualified as a doctor in the United Kingdom. His wife is not in contact with her church in Nigeria although people from that church have visited. He did not know if the church in Nigeria would help support his wife.

16. The Appellant agreed that his children had been in school for two years. Asked if there was any reason why he could not work in Nigeria the Appellant said that he was too old and his qualifications were not compatible. He cannot get an entry job at the age of 53. There is a different climate there and they want younger more aggressive people.

17. Answering questions from me the Appellant said that his children see their cousins during the holidays, weekends and parties. They live in Milton Keynes having moved from Cumbria a little over a year ago. He said that his wife's application to remain in the United Kingdom was on the basis of their marriage and children. She did not appeal the refusal.

18. Chinyere Debbie Nwakanma gave evidence and answering questions from Mr Haywood confirmed her identity and adopted her written witness statement. She said that her brother lives in the United Kingdom with his family. She has aged parents in Nigeria and a disabled sister. Her husband has never visited her family in Nigeria and does not have any real idea about her family because he has not been home to see them.

19. Shown the entry clearance application Mrs Nwakanma said that the details were correct. This was a visitor application and she made a subsequent visitor application which was granted. She has made no applications since because she was hoping that when her husband's position was rectified he could apply for her.

20. Cross examined by Ms Hastings the witness said that the subsequent visitor application was made in her own name. She had no evidence to confirm this because she has lost most of her documents through moving and never expected that she would be asked.

21. The witness said that since she came to this country her parents and a brother have visited. There has been no one else. Asked about the other relatives sponsored by her brother she said that she did not know of them. Her brother is a very private person and she is not interested in other relatives. Ms Hastings suggested to the witness that she has an extensive family in Nigeria and the witness replied "I'm a married woman". She said that her children had met her parents, they were last here three years ago.

22. The witness confirmed that her church has its headquarters in Abuja and said that this is the way that it is run. The branch here does not know much about the branch in Nigeria. The pastor sometimes asks people from Nigeria to come to speak but the church here is run independently. She said that the church in Nigeria would not assist her because she is not their pastor and they have enough pastors. She was ordained in the United Kingdom. She added "if you ask for help back home nobody helps - this is the culture". The witness said that her brother qualified as a doctor in Nigeria, their parents paid the fees.

23. Referred to her witness statement mentioning her sons "childhood asthma" the witness said that she does not see it that way. You can't predict. A child can die at any time with asthma at home in Nigeria. Taking him back would be like killing him. She is really scared about this. They would have no money to provide. They have exhausted their resources.

24. The witness said that she has an income in this country from her books and from gifts from her brother. They also trade by way of car boot sales. She supports her husband and children with this income. Her income from books has mostly come since last December and amounts to about £3,000. She thought that they made £100 to £150 or even £200 per week from trading. The witness said that she has a degree in biological education and she is a qualified teacher.

25. Answering questions from me the witness said she has no income in Nigeria and her only work in Nigeria was youth service. Her successful visitor's visa application was made using a new passport. She agreed that she made an application to stay in the UK and thought that it was based on long residence. The application was denied and she did not appeal.

Submissions

26. On behalf the Respondent Ms Hastings relied on the refusal letter of 1 November 2013 and the oral evidence. So far as the chronology forward by Mr Haywood is concerned it was not accepted.

27. Ms Hastings asked me to consider the credibility of the Appellant and his wife. They were highly evasive in terms of their ties to Nigeria and their circumstances in the UK. Both have remained here illegally and there is no evidence to show that either entered lawfully. So far as the long residence application was concerned there was a huge evidential gap. The Appellant may have been here prior to 2003 but there is no evidence to show that his residence was continuous. There is nothing to

show that he was in the United Kingdom between 1996 and 2003. The Appellant's ties to the United Kingdom are with the church. His children have ties to their school. However this is an international church with its headquarters in Abuja. It is not credible that the church would not assist. In addition it is quite clear that the Appellant has family in Nigeria. Whereas he may not be in contact with them his wife has an extensive family there. Their families arranged their marriage. The children have cousins here and they have grandparents and other relatives in Nigeria. There are plenty of family members in Nigeria.

28. Ms Hastings said that the family are likely to have access to money in Nigeria. The Appellant's wife was educated to degree level. Her brother is a doctor. Her family must have money to be able to afford to educate their children in this way. The Appellant's wife's family have travelled to visit the United Kingdom. The Appellant and his wife are resourceful people as shown by their ability to make money trading in this country.

29. Turning to the question of delay Ms Hastings accepted that this is something to be taken into account in the proportionality balance. There is no doubt that the Respondent has been guilty of a delay of about five years. However when the Home Office wrote to the Appellant in 2009 he was not at the address given. He had a duty to keep in touch with the Home Office.

30. Ms Hastings said that this was not an issue of family life but one private life. The family would stay together. The Appellant cannot succeed under the Immigration Rules pertaining at the time of his application and Appendix FM does not help. Ms Hastings accepted that Article 8 is the only way the matter can be considered. In this respect section 55 of the Borders Citizenship and Immigration Act 2009 has to be considered as does section 117 of the 2002 act. In this respect the eldest child is a qualifying child. The question becomes one of reasonableness and in the Respondent's submission it is reasonable to expect the family to return to Nigeria.

31. For the Appellant Mr Haywood relied on his skeleton argument. The Respondent has simply looked at the situation in the country of return whereas the proper approach is to look at the situation in the United Kingdom and then the position in the country of return. The test in the 2014 amendment to the 2002 Act is one of reasonableness and not one of insurmountable obstacles. It is a softer test. The Respondent has suggested that the Appellant and his wife are not credible but has not particularised in what respects they should be found not to be credible. The Appellant was upfront about family members. He has not gone into detail but this is the nature of the Appellant. There is nothing suspicious about his evidence.

32. The Appellant has been in United Kingdom continuously since 2003. He was also here in the 1980s and 1990s. He says that he has never left. There is evidence that he has worked, that he paid council tax and that he has paid other bills. He has not gone to ground. The application under appeal was made of his own volition in 2004. Between 2004 and 2008 there was no action taken by the Respondent and contact from the Appellant was discouraged. There is a hiatus in 2009 when the Respondent made a decision, the Appellant says that he did not receive the decision. It is however clear that his employers were in contact with the Home Office at the time. Detailed representations were submitted about his marriage and children, no enforcement action was taken and responding to the representations was not prioritised. EB (Kosovo) [2008] UKHL 41 was raised as early as October 2010. The representations were repeatedly chased including by way of an MPs letter but there was no significant prioritisation. The delay was significant. This was a long residence application which took 10 years to determine. The only delay which was down to the Appellant was between January and May 2009. Referring to EB (Kosovo) the gravity of delay is accentuated because of the children. The delay is inconsistent with the public interest in immigration control. This was not firm fast or fair decision-making.

33. I reserved my decision.

Decision

34. The background to this appeal has been recited previously but there has been significant clarification. The Appellant applied for leave to remain on the basis of long residence. His application was made on 7 February 2004 and refused on 1 November 2013 almost 10 years later. During this period the Appellant arranged a marriage through his family in Nigeria, married, met his wife (in 2005) and had two children (in 2007 and 2009).

35. The basis of the Appellant's application was that he had been continuously resident in the United Kingdom since 1986. That was rejected by the First-tier Tribunal and the finding made that his continuous residence dated from 2003. The long residence appeal was dismissed under the Immigration Rules on that basis and that decision stands. Mr Haywood in his submissions suggested that the Appellant had spent time in United Kingdom in the 1980s and 1990s and that is not inconsistent with the findings of the First-tier Tribunal (paragraph 50). I am satisfied that the Appellant has been continuously resident in United Kingdom since 2003.

36. The factual clarification relates to the Appellant's wife and his relationship with her. It is significant in two particular ways. Firstly because it discloses her immigration status and secondly because it speaks to the ties of the Appellant and his wife with Nigeria. So far as the Appellant's wife's immigration status is concerned it is clear that she has none. She applied to come to the United Kingdom as a visitor and her application was rejected. It is clear that this was a dishonest application because the Appellant accepts that the intention was that his wife to come United Kingdom to live not to visit. The Appellant's wife says that she made a further successful application to come as a visitor and that she arrived here on that basis. There is no evidence to corroborate this. In any event taking matters in the most favourable light for the Appellant's wife it was a fraudulent application because she had no intention of visiting, her intention was to stay. She has remained without leave ever since. She says that she has lost her passport. She also says that she made an application to remain which was denied. There is no evidence of this but in all likelihood it was an application to be joined as a dependent to a husband's outstanding application.

37. Turning to the ties of the Appellant and his wife with Nigeria his evidence is that this was an arranged marriage negotiated on his behalf in Nigeria by his family. This can only be demonstrative of strong and continuing ties to his home country. It is also demonstrative of a relationship between the Appellant's family and his wife's family. Indeed the Appellant's wife says in her statement "We got connected in 2003 through a mutual family member". If the Appellant did not retain strong ties to Nigeria he would not have sought to arrange a marriage in Nigeria and bring the wife, whom he had never met, from Nigeria.

38. I have already made comment above about failure of the Appellant to address the immigration status of his wife and children despite having been exhorted to do so at the error of law hearing. The significance of this is perhaps emphasised by the fact that this failure was also highlighted in the decision of the First-tier Tribunal (see paragraph 51). It is from this starting point that I view Ms Hastings allegations of evasiveness. The failure to address the immigration status, including method of entry, of the Appellant's wife was evasive. Mr Haywood did not deal with this issue in examination in chief of the Appellant. No detailed evidence in this respect was sought in examination in chief of the Appellant's wife. A large amount was left to cross-examination and I can only agree that the answers given bore the hallmarks of evasiveness. So far as the Appellant's wife is concerned I am satisfied that she entered this country unlawfully by falsely claiming to be a visitor, that she knew that she was entering this country unlawfully, that she remained here unlawfully and that the Appellant was not only fully complicit in her actions but that he encouraged and indeed instigated her actions.

39. So far as the Appellant's status is concerned the unchallenged conclusion of the First-tier Tribunal that he did not meet the long residence rules means not only that the Appellant was a person who unlawfully stayed in this country but also that he made his application to remain on a false premise.

40. Returning to the issue of evasiveness the evidence given by both the Appellant and his wife in respect of their ties to Nigeria was also evasive. I do not accept Mr Haywood's contention that this, so far as the Appellant is concerned, is simply down to his nature. I have already found above that the Appellant retained strong ties to Nigeria evidenced by the circumstances of his marriage. The Appellant's evidence of his own family ties was not only vague and lacking in detail but also inconsistent. On the one hand he said that he had not spoken to his sister for 10 years (see paragraph 52 first-tier Tribunal determination) on the other hand he said at his sister called him to inform him of his mother's death in 2011. I find the Appellant's evidence that his sister had to make enquiries to find his telephone number incredible and equally I do not believe that the Appellant does not know where in Nigeria his sister lives. The Appellant's evidence about his brother's mental health problems was equally vague and no detail was given about the nature or extent of these problems or about his brother's whereabouts. I do not accept that the Appellant was giving an open and complete account.

41. The evidence of the Appellant's wife was equally evasive in terms of her ties to Nigeria. No substantial information was disclosed about her contact with her family in Nigeria and, her response when pressed "I am a married woman" demonstrated her evasiveness. I find substance in Ms Hastings' submission that a family, educating at least two children to degree level and beyond, is likely to have significant resources. The Appellant's wife is a 42 year old woman who came to the United Kingdom at the age of around 34. I do not accept that the Appellant's wife does not retain significant ties to Nigeria. Her evidence that she is a qualified teacher yet only to have undertaken youth service prior to leaving Nigeria at the age of 34 is also indicative of an evasive approach to evidence with no indication given of how she occupied herself prior to leaving Nigeria.

42. Finally I found the Appellant's wife's responses to the questions asked about the church in Nigeria to be expedient. The Appellant's wife is a pastor at CRBCI in London. The church website clearly shows that this is the UK branch of a church having its international headquarters in Abuja with two other branches in the city. The various branches share a common e-mail provider 'crbci.org'. I do not accept that the UK branch has little or nothing to do with the headquarters. I do not accept that the

Appellant's wife could expect to receive no assistance from her church were she to return to Nigeria or for that matter that Nigerian culture or Pentecostal Christian culture denies help to those in need.

43. The Appellant's wife has a growing income as an author from the sale of books. She is a qualified teacher. The Appellant and his wife have been making money through trading in unwanted goods. There is every reason to believe that they will be able to support themselves in Nigeria. Writing and selling books is not an employment that is dependent upon home location and the money that the Appellant's wife currently makes in this respect would continue to be made were she to return to Nigeria. As a teacher qualified in Nigeria no reason has been put forward why she would not be able to obtain employment in Nigeria. The couple's resourcefulness in making money from trading could also produce an income in Nigeria. Taking this into account together with my finding that both have family in Nigeria and that the church is also likely to support if support were needed it is my judgement that this family would in all probability be self sufficient in Nigeria.

44. Having examined the facts I now turn to the question of delay. The Appellant's application was submitted in 2004 and the decision under appeal was made in 2013. The Respondent accepts that nothing was done between 2004 and 2009 and indeed the Appellant cannot be blamed in anyway for not chasing progress during this period because the letter from the Respondent acknowledging the application expressly discouraged contact. Although a letter was sent by the Respondent to the Appellant's last known address in 2009 and thereafter the Respondent purported to refuse the application it is clear firstly that the Appellant resumed contact in 2009, secondly that he has remained in contact ever since, thirdly that the purported refusal in 2009 was not the Respondent's final and appealable decision and lastly that it was not until the end of 2013 that a final decision was made on the Appellant's 2004 application. In short I accept the chronology put forward by Mr Haywood. There is no doubt that the Respondent was responsible for a substantial and inexcusable delay.

45. It was agreed by both representatives that the matter under appeal engaged and indeed could only considered by reference to Article 8 of the Human Rights Convention. In considering the Appellant's appeal in this respect it is self-evident that the first four of the five stage Razgar v SSHD [2004] UKHL 27 criteria are met. The Appellant having been present in the United Kingdom since 2003 and having commenced his married life and started a family in this country has established a private life here as have his wife and children. The interference to that private life meaning that the family would have to uproot and move to Nigeria is of sufficient gravity to engage the operation of Article 8. Nobody

within the family has the right to be here and so the interference is in accordance with the law and necessary in the public interest for the legitimate aim of immigration control. The issue is therefore one of proportionality.

46. Mr Haywood invites me to take a holistic approach when considering proportionality and that really is the only way to properly deal with the complex issues arising. In weighing matters in the balance I look at the public interest on the one side and the private life of the Appellant and his family on the other. So far as the public interest is concerned I have regard to the matters specified in section 117 of the Nationality Immigration and Asylum Act 2002.

47. Dealing first with the statutory public interest considerations I take as a positive factor the fact that the Appellant and his wife both speak English. I cannot take financial independence in their favour as the evidence presented to the First-tier Tribunal showed them to be reliant on the support of the London Borough of Newham and there is no evidence before me of financial independence. I also take account of the fact that the Appellant has been present in the United Kingdom for a significant period of time and has built up social connections with friends and with his wife's family in this country. The Appellant's witness statement does not detail and further qualitative aspects of private life to take into account. I also take account of his wife's private life because a holistic approach requires me to consider the position of all family members. The Appellant's wife has built up substantial connections with her church where she is an ordained pastor and with the church community for whom she provides pastoral care. I also take into account the private lives of the Appellant's children, both born in the United Kingdom and who have never travelled out of the United Kingdom. Both have built childhood friendships in this country and both have positive family contacts with their cousins here. I also take account of the fact the younger child is showing signs of excellence at school and also that he suffers from asthma and that his mother worries about the effect that the climate and conditions in Nigeria will have upon his condition.

48. Section 117(4) Nationality Immigration and Asylum Act 2002 requires little weight to be given to a private life established by a person when present in the United Kingdom unlawfully. The Appellant has been in United Kingdom unlawfully throughout the period when his private life here has been established. His wife has never been lawfully present. Section 117(5) requires little weight to be given to a private life established by a person at a time when the person's immigration status is precarious. The Appellant and his wife having been present unlawfully

throughout have, in my judgement, always held precarious immigration status. I will deal with Section 117(6) below.

49. There are in my judgement substantial negative issues to be weighed in the proportionality balance. I have analysed these above. In summary the Appellant and his wife have made cynical and calculated attempts to circumvent immigration control. The Appellant had no lawful status at the time he made his application to remain and indeed based his application on a long-term lack of lawful status. The Appellant conspired with his wife to bring her to this country unlawfully and having done so she remained without lawful status. The Appellant and his wife commenced their family life together and extended their family through the birth of their two children in the full knowledge of their unlawful presence in United Kingdom. Whereas the Appellant had an outstanding application it was not only one based upon a lack of lawful status it was also one founded on falsity.

50. I have also examined above the family ties of the Appellant and his wife in Nigeria and their likely ability to sustain themselves in that country. These are factors that militate in favour of their return. I am satisfied that with the Appellant returning to Nigeria with his wife and children there will be no interference in their family life. There is no reason why the children cannot continue their education in Nigeria. English is an official language of the country and the children have been exposed to their parents speaking in the Ibo language. The children will have their grandparents and other family members in Nigeria. There is no corroborative evidence to suggest that the younger child's asthma will be adversely affected by the Nigerian climate or that treatment of this common condition is not available in Nigeria.

51. There has been substantial delay on behalf of the Respondent in dealing with the Appellant's application and I have carefully considered such delay in the light of EB (Kosovo) [2008] UKHL 41. There can be no doubt that the weight accorded to the requirements of firm and fair immigration control is diminished and little doubt that the Appellant's ties with the United Kingdom have strengthened and that as time went on he will have felt more secure and his expectation that the authorities would accede to his request to remain will have grown. These are weighty matters which individually and cumulatively lessen the negative weight in the proportionality balance. However it must also be significant that the Appellant's claim to remain was built upon sand and his hope that he would be allowed to stay was always based upon a hope that the authorities would accept a situation that he could not prove.

52. Taking all the above into account in my judgement and despite the inexcusable delay in decision-making on the part of the Respondent it is my judgement that the proportionality balance falls very heavily against the Appellant. It is a balance where the public interest considerations outweigh the private life established by the Appellant. It is at this point that the consideration of section 117B(6) enters the equation. Despite the public interest in removal outweighing the Appellant's right to a private life the public interest does not require his removal where he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. The Appellant's eldest child is a qualifying child because he has lived in United Kingdom for a continuous period of seven years or more. The question is whether it is reasonable to expect the child to leave the United Kingdom.

53. In deciding whether it is reasonable I take into account firstly the fact that the Appellant's eldest child was born and brought up in United Kingdom, secondly that he is in school and thirdly that he is progressing well. I take into account the letter from his school. Having done so I find it reasonable that he should return with his family to Nigeria. This is a Nigerian family in which he parents not only speak English, one of the official languages of Nigeria but also Ibo a language widely spoken in Nigeria. I have found that they have substantial ties to Nigeria. I have found that it is proportionate to require them to return. There is no reason why the family should have any difficulty integrating into Nigerian society. There is no reason why both children should not continue their education there. The youngest child suffers from asthma but there is not medical evidence to suggest that this cannot be treated in Nigeria. There is nothing to suggest that Brian, or indeed any family member, will be adversely affected by relocating to their country of nationality. It is entirely reasonable to expect the eldest child to leave the United Kingdom and for the family unit to re-establish itself there

Summary

54. The decision in respect of Article 8 ECHR of the First-tier Tribunal involved the making of a material error of law and has been set aside.

55. I remake the decision by dismissing the Appellant's appeal.

Signed: **Date:**

J F W Phillips
Deputy Judge of the Upper Tribunal