**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/34766/2014**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 1 November 2017** | **On 2 November 2017** |

**Before**

**Deputy Upper Tribunal Judge MANUELL**

**Between**

**Mrs ADENUIKE VICTORIA ODEBAMOWO**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr J Plowright, Counsel
(instructed by Perera & Co, Solicitors)
For the Respondent: Mr T Wilding, Home Office Presenting Officer

**DETERMINATION AND REASONS**

*Introduction*

1. The Appellant appealed with permission granted by First-tier Tribunal Judge PJM Hollingworth on 16 August 2017 against the determination of First-tier Tribunal Judge O'Malley who had dismissed the appeal of the Appellant seeking settlement outside the Immigration Rules on Article 8 ECHR grounds on the grounds of her relationship akin to marriage with a British Citizen. The decision and reasons was promulgated on 30 January 2017.

2. The Appellant is a national of Nigeria. The Appellant had claimed to have been in the United Kingdom since March 1995. An Article 8 ECHR application was refused in 2010. Further representations were however made in 2014. The Appellant's appeal to the First-tier Tribunal was dismissed in 2015 but a material error of law was found and the appeal was directed to be reheard, with a preserved finding that the quasi marital relationship was genuine.

3. Judge O'Malley applied that finding in his decision and reasons. He found that that it was not unreasonable for the British Citizen husband/partner to relocate to Nigeria with the Appellant to continue their family life there. There were no insurmountable obstacles and there were no exceptional circumstances. The best interests of the husband/partner's children would not be affected as they would remain living in the United Kingdom with their mother, the Appellant's husband/partner's ex-wife. Contact with their father would be maintained to a similar limited degree as at present. There was no disproportionality in Article 8 ECHR terms when the balancing exercise was performed. The judge dismissed the appeal on that basis. (There was no discussion of Chen [2015] UKUT 00189 (IAC) and the impact of temporary separation while entry clearance was sought from abroad.)

3. Permission to appeal was granted because it was considered arguable that the judge had erred by giving in effect insufficient weight to the value of the existing level of contact with the two minor children and the diminution of contact which would follow if the Appellant's husband/partner went to Nigeria to live with her. The best interests analysis was inadequate.

4. Standard directions were made by the tribunal. A rule 24 notice opposing the appeal was filed by the Respondent.

*Submissions*

5. Mr Plowright for the Appellant relied on the grounds of onwards appeal and grant. In summary he sought to argue that the judge had failed to address the central issue of insurmountable obstacles. The judge had looked at the factual situation too narrowly and without sufficient attention to the value of the paternal relationship with the two minor children, and the importance of the actual level of contact. Agyarko [2017] UKSC 11 applied to reasonableness. The judge had not dealt properly with the parental rôle. The judge's narrow approach was beyond or outside the permissible range of reasonable responses to the facts as found. The determination should be set aside and remade.

6. Mr Wilding for the Respondent relied on the rule 24 notice and submitted that there was plainly no material error of law. It had been accepted that Appendix FM of the Immigration Rules had not been met and the judge's Article 8 ECHR findings were open to him. The substance of Agyarko had been applied. It was understandable that the decision was disappointing to the Appellant and her partner, but the submissions made and the grounds earlier filed amounted to no more than disagreement. The judge had taken care to engage with the best interests of the individual children concerned, as the determination showed. This was not an appeal where there was an inevitable conclusion, one way or the other. The balancing exercise had to be performed and the judge's conclusions were open to him. Welfare and safeguarding had been addressed and the judge's approach was correct. The onwards appeal should be dismissed.

7. In reply, Mr Plowright briefly emphasised the weight which should have been given to the existing level of contact.

*No material error of law finding*

8. In the tribunal's view the grant of permission to appeal was rather generous, and failed to reflect the fact that the appeal was in reality a misconceived one, where a one track approach had been taken. Unfortunately it is typical of many appeals seen in the First-tier Tribunal and again in the Upper Tribunal involving couples who cannot meet the Immigration Rules (or who have made no attempt, as here, to meet them) seeking to rely on Article 8 ECHR grounds.

They have a high hurdle to overcome. Had the Appellant returned to Nigeria in 2010 at latest as she very obviously should have done (it was her own case that she was an illegal entrant), she would have been able to enter the United Kingdom to join her husband/partner under the far less stringent provisions of the now repealed paragraph 281 of the Immigration Rules. Those Immigration Rules were replaced by from 9 July 2012 by the much more demanding provisions of Appendix FM, especially Appendix FM-SE. Even so, there was no evidence that those provisions could not with appropriate efforts be complied with, as the Appellant's husband/partner has secure employment and his income meets or exceeds the minimum income requirement laid down in Appendix FM. The current unhappy situation was created by the parties. The Appellant's husband/partner knew that the Appellant had no leave to enter or remain. Compliance with the law is not a matter of individual choice. Time and money have been wasted seeking the near impossible, when obvious and satisfactory solutions were available.

9. The very experienced judge correctly identified that the issues before him were whether family life could be lived in Nigeria and whether that would be proportionate in Article 8 ECHR terms, in other words, whether there would be "insurmountable obstacles": see the reasons for refusal letter. The judge was well aware that the best interests of two minor children also had to be considered in the Article 8 ECHR balancing exercise to determine proportionality, all approached through the lens of the Immigration Rules. Agyarko was followed, especially [42] and [43].

10. The tribunal agrees with Mr Wilding's submissions as to the judge's analysis and findings. Close attention was given to the situation of the two minor children: see [58] to [67] of the determination. The facts concerning the level of actual contact were not in real dispute and the judge was entitled to draw inferences from his close analysis of those facts, which was commendably thorough. The judge examined the appeal with empathy and considered every aspect with care, including the Appellant's husband/partner's prospects of employment in Nigeria and how that might affect the children's best interests.

11. The judge's findings were all open to him, and cannot be impugned as superficial or unreasonable. As Mr Wilding pithily observed, it was an appeal which could have gone one way or the other,

provided sufficient reasons were given. The facts were open to a range of reasonable responses and the tribunal can only interfere where the response to the facts was demonstrably unreasonable or irrational.

12. There was no suggestion that the experienced judge had misunderstood any of the evidence. Section 117B of NIA 2002 was required to be applied to the findings of fact. The Appellant had been in the United Kingdom precariously for many years by the date of the hearing and her husband/partner was well aware of her lack of status. She was not financially independent.

13. The tribunal concludes that Mr Plowright's submissions, like the onwards grounds, amount to no more than disagreement or disappointment with the judge's decision. The tribunal finds that there was no error of law in the decision challenged.

14. Plainly the Appellant and her husband/partner have several reasonable options open to them for the continuation of their family life, i.e., to live together in Nigeria or to travel there together on a visit while entry clearance is sought or to separate on a temporary basis while the Appellant obtains entry clearance on the terms prescribed by the Immigration Rules. The second option will probably simplify continued contact with the husband/partner's children, but these are decisions for the parties.

**DECISION**

The appeal is dismissed

The making of the previous decision did not involve the making of an error on a point of law. The decision stands unchanged.

**Signed** **Dated** 1 November 2017

**Deputy Upper Tribunal Judge Manuell**