**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/24612/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 6th July 2018** | **On 16th July 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**IME RONKE IKPEME**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr A Corban of Corban Solicitors
For the Respondent: Mrs L Kenny, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellant appeals against a decision of Judge Hodgkinson (the judge) of the First-tier Tribunal (the FtT) promulgated on 1st March 2018.

2. The Appellant is a female Nigerian citizen born 29th July 1986 who applied for leave to remain in the UK on the basis of her private and family life. The Appellant relied upon

her relationship with her unmarried partner, [OS], to whom I shall refer as the Sponsor and who is a British citizen. He has two sons from a previous relationship.

3. The application was refused on 24th October 2016 and the appeal was heard by the FtT on 15th February 2018.

4. The judge found that the Appellant and Sponsor were in a genuine relationship and have lived together since 2012. The judge considered EX.1, finding that there would be no insurmountable obstacles to family life continuing outside the UK.

5. The judge considered paragraph 276ADE(1)(vi), concluding that there would be no very significant obstacles to the Appellant reintegrating into her home country. The judge initially correctly referred to the Appellant as being Nigerian, but in the latter half of the decision incorrectly referred to her home country as being Ghana.

6. The judge considered Article 8 outside the Immigration Rules, and concluded that there were no exceptional circumstances which would result in unjustifiably harsh consequences if the application was not allowed. The appeal was therefore dismissed.

7. The Appellant applied for permission to appeal to the Upper Tribunal. The grounds are summarised below.

8. With reference to consideration of Appendix FM by the judge, it was submitted that this was unreasonable and perverse. It was contended that the judge erred in finding no insurmountable obstacles to family life continuing outside the UK, and the judge was wrong to conclude that the Sponsor's fifteen-year-old son would not be disadvantaged if his father left the UK. It was submitted that the judge had not considered properly or at all the best interests of the Sponsor's son, and although the son did not live with the Sponsor on a full-time basis, the Sponsor had played an active role in his upbringing.

9. It was contended that the judge had not properly considered the appeal, because he made repeated references to Ghana whereas the Appellant is Nigerian and has no connection to Ghana.

10. It was contended that the judge erred in law in consideration of paragraph 276ADE(1)(vi) by failing to take into account the Appellant's length of residence in the UK, her age when she arrived, and the fact that she had not returned to her home country since she arrived, the length of her residence in comparison to her age, and the lack of contact or relatives in her home country.

11. It was contended that the judge had materially erred in considering Article 8 outside the Immigration Rules by not undertaking the correct balancing exercise, and did not consider all relevant factors, and did not properly consider the best interests of the Sponsor's son.

12. Permission to appeal was granted by Judge Page of the FtT in the following terms;

> "2. I can grant permission to appeal if I am satisfied that an arguable error of law has been identified in the Judge's decision that could cause the Upper Tribunal to interfere. The Grounds of Appeal are arguable in that it could be said that the judge did not consider the appeal properly given that the judge has referred to Ghana as the country of return. The Appellant comes from Nigeria. The judge has found at paragraph 36 that the Appellant's partner [OS] can relocate to Ghana, with the Appellant, leaving his two sons in the UK and maintain contact from Ghana should he choose to go there with the Appellant. His son Daniel is a minor, so it is arguable that the best interests of Daniel were not considered when the judge reached the conclusion that there was no evidence that Daniel would be materially harmed or disadvantaged by separation from his father. Permission is granted on all grounds argued."

13. Following the grant of permission the Respondent did not lodge a response pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

14. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

**The Upper Tribunal Hearing**

15. Mr Corban relied on the Grounds contained within the application for permission to appeal. It was submitted that at paragraph 36 of the FtT decision, the judge had applied the incorrect test by finding, when considering the Sponsor's minor son that there was no evidence that he "would be materially harmed or disadvantaged if his contact with his father were not as regular as it currently is."

16. It was submitted that the judge had materially erred by finding that it would be appropriate for the Sponsor to maintain contact with his son by modern means of communication as this was no adequate substitute for physical contact.

17. It was submitted that the judge made repeated references to Ghana as opposed to Nigeria, which may indicate that the judge had considered incorrect objective country material. It was submitted that the decision of the FtT should be set aside.

18. On behalf of the Respondent, it was contended that the judge had not materially erred in law. I was asked to accept that when the decision of the FtT was read as a whole, it was clear that the judge had considered the correct test when considering the best interests of the Sponsor's son. It was not accepted that there was any evidence to indicate that the judge had considered incorrect objective background evidence.

19. It was contended that the judge had conducted a balancing exercise in relation to Article 8, which did not disclose any material error of law and the judge was entitled to take into account the precarious immigration status of the Appellant, when she entered into the relationship with the Sponsor.

20. It was submitted that the decision of the FtT should stand.

21. By way of response, Mr Corban submitted that the correct balancing exercise with reference to Article 8 had not been carried out, as the judge had not taken into account that the Sponsor's son sometimes stayed with the Sponsor, and it would be in the best interests of his son to be brought up by both parents.

**My Conclusions and Reasons**

22. I do not find that it can fairly be said that the judge did not consider the appeal properly, because references were made to Ghana rather than Nigeria. Reading the decision as a whole it is clear that the judge appreciated that the Appellant is a citizen of Nigeria, and if she had to leave the UK, her return would be to Nigeria. By way of example, there is reference to the Appellant's Nigerian nationality, and to Nigeria in paragraphs 1, 9(7), 11, 13, 14, 20, 21 and 22. I do not find that there is anything to indicate that the judge took into account incorrect background objective evidence. The judge was not supplied with any evidence in relation to Ghana. The reference to Ghana is an error, but it is not material.

23. I do not accept the contention that the judge did not consider properly or at all the best interests of the Sponsor's son, who is fifteen years of age. His best interests are considered at paragraph 48. The judge specifically considered his best interests as a primary consideration, noting that the son lives with his mother but enjoys regular contact and support from the Sponsor. The judge found that the Sponsor's departure from the UK would not have a materially adverse effect upon his son, and the judge took into account that letters had been written by both of the Sponsor's sons, one of whom is an adult, indicating that they did not wish the Sponsor to leave the UK. The judge was entitled to find there was no independent evidence to suggest that the Sponsor's departure would have a materially adverse or significant effect upon his minor son. The judge also noted there was no evidence from the son's mother to indicate that she had any concern regarding the Sponsor's departure from the UK. The judge found that the son's best interests lay in him continuing to live with his mother in the UK.

24. I therefore conclude that the judge did consider the best interests of the Sponsor's minor son, and made findings which were open to him on the evidence, and gave adequate and sustainable reasons for those findings.

25. With reference to insurmountable obstacles, the judge set out the correct definition at paragraph 34. Consideration of insurmountable obstacles took place in paragraphs 36 – 38. The correct approach to considering insurmountable obstacles is referred to in paragraph 31 of TZ (Pakistan) [2018] EWCA Civ 1109, which is a decision published after the decision I am considering. The Senior President of Tribunals stated at paragraph 31 that consideration of insurmountable obstacles "involves an evaluation or value judgment based upon findings of fact."

26. In considering insurmountable obstacles, I find that the judge did not fail to take into account any material evidence, and did not take into account any irrelevant evidence. The judge noted the contact that the Sponsor had with both his sons, and found that in relation to his minor son, if he moved away from the UK, he would not have contact

of the quality that is presently enjoyed. The judge found that contact could be maintained by modern means of communication and periodic visits.

27. The conclusion reached by the judge that the Sponsor's separation from his minor son would not amount to insurmountable obstacles is a finding open to him on the evidence and I do not find it to be perverse. I acknowledge that there may be some judges who would have reached a different conclusion, but that is not the point, and my view is that the challenge on this issue amounts to a disagreement with the findings made by the judge, but does not demonstrate a material error of law.

28. I find no merit in the contention that the judge erred in considering paragraph 276ADE(1)(vi). The judge was aware of the relevant case law in relation to integration, that being Kamara [2016] EWCA Civ 813, an extract of which is quoted at paragraph 41. The judge took into account the age of the Appellant when she came to the UK, and her length of residence. The fact that she had not returned to her home country was also taken into account. Again, my view is that the challenge on this point amounts to a disagreement with the findings made by the judge, but does not disclose that the judge failed to take any material evidence into account, or that he gave weight or took into account irrelevant evidence. I find no material error of law on this point.

29. I do not find that it has been specified on behalf of the Appellant how the judge erred in relation to Article 8 outside the Immigration Rules, or how it is contended that he did not undertake the correct balancing exercise and did not consider all the relevant factors. In my view, Article 8 was comprehensively considered at paragraphs 44 – 55. I find all relevant factors were considered including the best interests of the Sponsor's son. The judge was aware (paragraph 55) that the appropriate test was that if the consequences of the Respondent's decision were unjustifiably harsh, this should lead to the appeal being allowed. The judge found the consequences of the decision not to be unjustifiably harsh, and was entitled to reach such a conclusion, which is not perverse.

30. Therefore, although, as previously mentioned, there may be judges who would have reached a different conclusion, and although at times the judge referred to Ghana rather than Nigeria which is an error although not material, I find no material error disclosed in the decision of the FtT, and therefore the appeal is dismissed.

**Notice of Decision**

The decision of the FtT does not disclose a material error of law. I do not set aside the decision of the FtT. The appeal is dismissed.

The FtT made no anonymity direction. There has been no request for anonymity made to the Upper Tribunal and I see no need to make an anonymity direction.

Signed Date 6th July 2018
Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT**
**FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed Date 6th July 2018
Deputy Upper Tribunal Judge M A Hall