Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09190/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 June 2019	**On 13 November 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

A-O. A.
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Sowerby of Counsel instructed by Quintessence Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This case comes back before the Tribunal to remake the decision in the appeal, pursuant to the 'error of law' decision promulgated on 11 April 2019, and the Directions contained therein.

2. By way of background, the text of the 'error of law' decision and Directions are reproduced as an Annex to this Decision. The text should be read as an integral part of this Decision.

3. I have had regard to all the evidence on file. In addition to the materials on file before the First-tier Tribunal, pursuant to the Directions issued on 11 April 2019 the Tribunal has received: a Supplementary Bundle filed on behalf of the Appellant under cover of letter dated 8 May 2019; a copy of the Cafcass report (dated 4 August 2015), together with the Appellant's mother's statement dated 14 July 2015 in support of an application for a Child Arrangement Order, and a letter from the Family Court at East London dated 17 May 2019 confirming consent to disclose such documents to the Tribunal (filed under cover of letter dated 23 May 2019). I also heard oral evidence from the sponsor, a note of which is contained in the record of proceedings herein.

Initial Observations

4. It is convenient in the first instance to approach the evidence by making some observations pursuant to the matters discussed in the 'error of law' decision, and raised in the Directions.

5. In preliminary observations Mr Sowerby acknowledged the nature of the discussion in respect of 'sole responsibility' ('error of law' decision at paragraphs 41-54), and indicated that he accepted that that argument had been 'had and lost'. He also indicated further to the discussion in respect of the Immigration Rules (paragraphs 25 *et seq*) that it was accepted that Appendix FM did not apply to the Appellant. He indicated that the Appellant's emphasis in submissions would be in respect of 'best interests' and how they informed proportionality under Article 8, in which context it was contended that schooling in Nigeria would be problematic for the Appellant because there would be nobody to look after her.

6. Witness statements of both the sponsor (7 May 2019) and the Appellant's mother (8 May 2019) stated that they had commenced a relationship under "*native law and custom*" in May 2008, and had lived together from that time until June 2014 when the sponsor moved back to the UK.

7. As regards the Appellant's schooling in Nigeria, the same witness statements stated that she had attended a private school from the academic year 2009/2010 up to and including the academic year 2013/2014 – i.e. up until the time she came to the UK in July 2014. A supporting letter from the school dated 30 April 2019 confirming attendance and payment of fees was included in the Supplementary Bundle (page 12). The letter confirms that for three of the five years the Appellant was a boarder – the level of fees suggesting that it was the latter three years. Fees for the last year, 2013/2014, were stated to have been 1,519,320 Nigerian naira (i.e. approximately £3300).

8. The Appellant's schooling in the UK is said to have commenced in September 2014 as a boarder in a junior school. Fees are stated to have been £12,900. The Appellant is presently a day student at a secondary school, with fees being stated as £7900.

9. The sponsor states that he was advised to commence the proceedings in the Family Court by a lawyer in order to confirm his authority to engage with the Appellant's school and other authorities because he was the only person standing in a position as parent in the UK; the proceedings were commenced on 6 November 2014. The references to a guardian (see 'error of law' decision at paragraph 20(vi) and Directions at paragraph 1(iv)) Arose because it had been intended that a cousin of the sponsor act as guardian to the Appellant because the sponsor was "*shuttling between Nigeria and the United Kingdom to see the Appellant's mother*". The reference to a private fostering arrangement (again see 'error of law' decision at paragraph 20(vi) and Directions at paragraph 1(iv)) was intended as a reference to the sponsor undertaking the care of the Appellant.

10. Although the sponsor has provided a copy of his current Nigerian passport (valid from 18 June 2015 until 17 June 2020) which shows entry and exit stamps for Lagos airport (Supplementary Bundle pages 13-19), and copies of some flight tickets (pages 20-21) this does not cover the period from the Appellant's last arrival in the UK up to the commencement of the Family Court proceedings. Nonetheless the extent of the sponsor's 'shuttling' is partially discernible: whilst it is possible to identify time spent in Nigeria from the entry and exit stamps, it does not follow inevitably that the remaining time not spent in Nigeria was spent in the UK. Be that as it may, it may be seen that from late November 2015 up until September 2018 the sponsor visited Nigeria on 21 occasions. Although some visits were short, many were not: I note in particular 27 December 2015 until 17 January 2016, 24 January 2016 until 2 March 2016, 17 March 2016 until 2 May 2016, 15 May 2016 until 11 July 2016, 18 July 2016 until 21 August 2016, 10 December 2016 until 1 January 2017, 6 August 2017 until 7 September 2007, and 14 July 2018 until 6 September 2018. It may be noted that the sponsor was in Nigeria for more than 200 days in 2016, and over 100 days in 2017 – whilst the Appellant remained in the UK with no parent. It may also be seen that the periods spent in Nigeria overlapped to a significant extent with UK school summer holidays: the sponsor was in Nigeria from 18 July 2016 until 21 August 2016, from 6 August 2017 until 7 September 2017, and from 14 July 2018 until 6 September 2018. Given that the Appellant would not have been in a position lawfully to travel outside the UK, it must follow that for considerable periods even when she was not at school she did not have the company of the sponsor, or enjoy the benefit of his direct care and supervision.

11. I pause to note that at the time of the hearing I was not provided with a schedule of the sponsor's travels, and accordingly have only fully digested and processed the data provided by the passport stamps subsequent to the hearing. As such, the Appellant was not asked any questions directly related to the periods spent abroad. In such circumstances I am circumspect as to the weight to be accorded to such matters. For the avoidance of any doubt, I would have reached the conclusion in this appeal irrespective of this factor. Be that as it may, it seems to me appropriate to note that the significant periods of time spent by the sponsor away from the Appellant only go to confirm and underscore the outcome at which I have arrived. Whilst I have no reason to doubt that the material needs of the Appellant have been adequately provided for by the sponsor at all material times, the picture that emerges is of a young girl, relatively recently arrived in the UK, left for significant periods without the immediate emotional support of either her birth mother, or the partner of her birth mother whom it is said she has come to regard as a father. This is inevitably unsatisfactory and contrary to best interests: it is in the Appellant's best interests so far as possible to have the benefit of day-to-day care and supervision of a parent or parental figure. As I say, this underscores the notion that it is in the Appellant's best interests to reside with her mother in Nigeria rather than living in the UK with the sponsor, whose presence in the UK has been interrupted by significant absences abroad.

12. As regards the Appellant's mother's immigration history ('error of law' decision at paragraphs 12-16, and Directions at paragraph 1(v)) it is said that whilst an appeal was lodged against the decision to refuse entry on 11 February 2015, the appeal was withdrawn on the advice that a further application for entry clearance could be made after 12 months providing she left voluntarily during the period of two weeks temporary admission. No appeal was lodged against the decision to refuse entry clearance of 26 July 2016.

13. As indicated above, pursuant to paragraph 2 of the Directions the Appellant has obtained permission for disclosure of the Cafcass report which has now been filed herein, together with a brief supporting statement from the Appellant's mother. For the avoidance of any doubt, there is nothing in the report or statement that would provide any basis for reversing my earlier analysis in respect of sole responsibility. Indeed the Cafcass officer noted: "*It would not appear that either party [i.e. the sponsor and the Appellant's mother] make decisions unilaterally in respect of [the Appellant], and despite [the Appellant's mother] being unable to visit the UK, she is still active in the decision making*" (report at paragraph 15). As observed above, Mr Sowerby did not seek to reopen such argument.

14. In his submissions Mr Sowerby referred me to various passages within the report in so far as they spoke to the relationship between the Appellant and the sponsor, and emphasised the importance of stability and consistency in the life of the Appellant:

see further below. He argued that support could be gleaned from the Cafcass report for the notion that it was in the Appellant's best interests that the current situation that had been established in the UK should continue.

15. The Respondent did not make any formal written response to the Directions. Further to paragraph 3(iii) of the Directions, Ms Cunha informed me that she was instructed that the processing time for an application for entry clearance from Nigeria should take between two weeks and six months depending upon the nature of the application. Otherwise, Ms Cunha did not dispute the information from the Appellant regarding any challenge by her mother to the adverse decisions of 11 February 2015 and 26 July 2016; Ms Cunha was unable to offer any further information pursuant to paragraph 3(ii) of the Directions.

16. Further to the above I now turn to a more detailed consideration of the core issues in the appeal.

Education

17. The Appellant's 'best interests' are a primary consideration in the appeal. In the context of the instant case the two particular matters upon which focus has fallen are the Appellant's education and the Appellant's parenting. In particular the Appellant seeks to answer any suggestion that her best interests are served by returning to Nigeria to live with her mother in substantial part on the basis that she would face difficulties in respect of her education.

18. It is in this context that it was directed that the Appellant should provide an educational history (paragraph 1(ii) of the Directions), and also "*In the event that it is contended that there is any difficulty in the Appellant continuing her education in Nigeria because of the educational system or the unavailability of a suitable school, all evidence upon which such a claim is based*" should be provided (paragraph 1(iii)).

19. As noted above, a response to paragraph 1(ii) of the Directions has been provided. In respect of paragraph 1(iii), the Appellant through her representatives has not sought to argue that there is any deficiency in the educational system in Nigeria or that suitable schools are not available *per se*. No documentary evidence has been filed in this regard.

20. For the avoidance of any doubt I note that notwithstanding no such issue being raised in the witness statements or otherwise in any written submissions, and notwithstanding no relevant supporting documentary evidence being filed, the

sponsor under cross-examination did seek to suggest that there were general concerns within Nigeria as to standards of education. When asked if the Appellant's boarding school in Nigeria was academically successful, he replied that not all schools were, and that many people were challenging the schools and resorting to home-study. He also asserted that the downturn in school attendance resulted in an increase in kidnapping because some teachers attempted to help outsiders plan kidnappings to combat economic squeeze.

21. Given the nature of the Directions generally, and in particular paragraph 1(iii), and bearing in mind that the burden of proof is on the Appellant, I interrupted Ms Cunha's cross-examination to indicate that I did not consider it necessary for her to explore the sponsor's perceptions and opinions in respect of quality of education and the risk of kidnapping in circumstances where there was no independent documentary evidence on point. Indeed in the absence of such evidence I am not prepared to accept the sponsor's testimony in this regard as reliable to the standard of a balance of probabilities.

22. It is to be noted that the Appellant was previously educated at a private boarding school in Nigeria. The level of fees due in Nigeria were significantly less than the fees paid in the UK. There is no independent evidence that access to high-quality private education in Nigeria is not available to the Appellant in principle. There is no independent evidence before me, and there is no attempt by the Appellant's representatives to argue, that the quality of education that could be afforded for the Appellant in Nigeria is in any way inferior to the education she is receiving at school in the UK.

23. Rather, the emphasis in submissions is that there are practical difficulties because of the particular circumstances of the Appellant, with reference to the health of her mother.

24. In his witness statement dated 7 May 2019 the sponsor asserts at paragraph 7: "*On the issue of the Appellant having difficulty in continuing her education in Nigeria, I state that the Appellant cannot continue her education in Nigeria for the fact that there is no one to monitor her.*" (The same assertion is made in the Appellant's mother's witness statement – which is drafted in near identical terms to that of the sponsor.)

25. It is also asserted that the Appellant's mother "*is currently ill and she is facing a lot of medical challenges*" (sponsor's witness statement at paragraph 8, and see similarly the Appellant's mother's statement at paragraph 8).

26. In support of this latter assertion reliance is placed on two medical documents (Supplementary Bundle, pages 7-11).

(i) A medical report based on an examination on 3 August 2017 (pages 8-11). The patient (the Appellant's mother) presented with a complaint of generalised joint pain; on physical examination she was described as "*healthy looking*", and it was stated "*General physical examination is essentially normal*"; it was also noted by way of 'Occupational history' "*Charity activities*", and by way of 'Recreational history', "*Occasional light exercise*". Pursuant to tests a 'Conclusion' was stated in these terms:

> "*Obese, known hypertensive, history of deep vein thrombosis/pulmonary embolism lady with moderate cervical spondylosis. Has refractory error of the eyes, mildly elevated fasting blood sugar, erythrocyte sedimentation rate (ESR) and calcium while chloride is depleted. There are enlarged lymph nodes in both arm pits, a gall bladder stone. Mild first-degree atrio-ventricular conduction effect of the heart, trivial pulmonary regurgitation and asymmetric septal hypertrophy are noted, the latter hypertension induced.*"

In such circumstances it was recommended that there be some weight loss and active weight management, and that the patient would benefit from diuretic, physiotherapy and body kinetics expert services. Blood pressure management was characterised as "*vital to prevent possible complications*".

(ii) Report of a consultant radiologist at the Union Diagnostic & Clinical Services plc dated 4 May 2019. The patient presented with lumbar pains and "*inability to walk well*"; in consequence of the observations (which whilst not expressly stated are reasonably presumed to be consequent upon x-ray) the consultant offered the impression "*Multilevel degenerative disc disease with spinal/foraminal stenosis/mild nerve root involvement at L4 – L5*".

27. There is no medical or other documentary evidence subsequent to the report of August 2017 which gives any indication as to the extent to which the Appellant's mother followed the recommendations in respect of weight loss and management, blood pressure management, suggested therapies (diet, physiotherapy, body kinetics), or pursued regular guided exercise and daily enhanced physical activities (which were suggested as "*very beneficial*"). Under cross-examination the sponsor stated that the Appellant's mother had undertaken some exercise, in particular "*she goes to the swimming pool*"; however when asked if her circumstances had improved he replied "*not really*". I note there is no supporting evidence as to the extent to which the underlying concerns identified were remedied, remained the same, or deteriorated. The more recent document, whilst identifying the cause of back pain does not provide any meaningful information as to the extent of any consequent functional limitations.

28. In particular, and most pertinently, there is nothing in any of the medical evidence that explains why the Appellant's mother would be in any way inhibited in monitoring the Appellant's education in Nigeria, or indeed be inhibited in providing emotional and practical support to the Appellant - whether as a boarder or a day pupil. It is to be noted that the Appellant is 15 years old and as such is independent in such actions as washing, toileting, dressing, and eating.

29. In his oral evidence the sponsor was invited to expand upon paragraphs 7 and 8 of his witness statement. Ultimately, in the context of the Appellant's possible return to Nigeria and pursuit of education there, his main concern was in respect of transport. He said that the Appellant's mother could not walk, and could not really drive: he claimed that if she (the Appellant's mother) needed to go anywhere he would make arrangements through a friend or security officer for transport. He also asserted that the roads in Nigeria "*are really bad*", and that there were security issues in relation to kidnappings and killings, which he said were "*in newspapers every day*". He asserted that public transport was not good, did not really exist in Nigeria, and was not safe. He acknowledged that the Appellant had previously attended school in Nigeria, but stated whilst this had been achievable whilst living in Lagos, since the Appellant's mother had moved out of Lagos the schools were "*nothing to talk about*".

30. I do not accept that at the time the Appellant relocated to the UK and commenced schooling here, or at present, or at any time in between, the Appellant could not access education in Nigeria commensurate with the standard of education she has received in the UK. In particular I do not accept that it has been demonstrated that there is anything in her mother's medical circumstances that prevent her mother from 'monitoring' her education either as a day or boarding pupil, or otherwise providing her all the usual emotional support and practical advice that might be expected of a mother of a teenage girl.

31. It follows that I can identify no material difference between the nature of the education that the Appellant might receive in either the UK or Nigeria, and therefore no material difference to her best interests with regard to the place of education.

32. It also follows that I reject the notion that there was some expedient reason pertaining to the Appellant's mother's ill-health that led to the arrangement being made that she would remain in the UK and enter the education system notwithstanding that to do so contravened the system of immigration control. Indeed I find the protestations of the sponsor and the Appellant's mother in this regard to be entirely disingenuous and adverse to their credit and credibility. In this context, and notwithstanding that medical evidence has now been provided that was not before

the First-tier Tribunal Judge, I can find no reason to go behind my observations at paragraphs 12-16 of the 'error of law' decision, and my conclusion that the sponsor and the Appellant's mother have hitherto been disingenuous in the manner of presenting aspects of the Appellant's mother's immigration history.

33. Notwithstanding my conclusion in respect of the comparable quality of education available to the Appellant in the UK and Nigeria, there is a further aspect of education to be considered: consistency or continuity. In this context I acknowledge the importance of stability in a young person's life in relation to numerous aspects including education. In this context I am mindful of certain of the observations in the Cafcass report: for example "*[The Appellant] is entering into adolescence, this can be a challenging time, but is made easier by consistent and stable parenting*" (paragraph 10 of the report); similarly she "*requires stability and certainty with regards to the care that is afforded to her in the UK*" (paragraph 16) ; and that the Appellant felt settled in her first school in the UK (paragraph 11).

34. However, notwithstanding such ideals, it is manifestly the case that numerous children for all sorts of reasons experience temporary disruption to their education by reason of relocation, and absent any particular unusual circumstances are generally able adequately to cope. In this context notwithstanding that the Cafcass officer expressed surprise at the prospect (report at paragraph 12), it is to be noted that the Appellant changed schools whilst in the UK. The theoretical ideals of a completely stable upbringing are rarely matched by the vicissitudes of normal life to no particular detriment.

35. I have not been provided with any independent supporting evidence as to any possible differences between the curricula that the Appellant is pursuing in the UK and those available in private educational institutions in Nigeria. Accordingly I can only evaluate consistency/continuity with reference to the consistency/continuity of remaining in the same school as opposed to relocating to a different school.

36. I note that if the Appellant were to return to education in Nigeria she would be returning to an environment and system with which she already has familiarity: necessarily this would assist in coping with transition. Yet further, and perhaps of very particular significance, any return to education in Nigeria would also involve the Appellant making direct reconnection with her mother. Further, such reconnection would not be at the cost of losing connection with the sponsor who – as identified above – is a frequent visitor to Nigeria. As such the context of transition back into education in Nigeria would be in the context of no particular destabilisation in respect of contact with parental figures. (See further below in respect of best interests and parenting.)

37. In all the circumstances I find that the Appellant has not demonstrated that she would not be able to access education in Nigeria of a comparable standard to the education that she receives in the UK, has not demonstrated that there would be any disruption in respect of curriculum, and has not demonstrated otherwise that there would be any particular detriment arising by reason of changing educational institution per se to an extent any different from any other child changing schools.

Parenting

38. I have not been provided with any significant or meaningful evidence in relation to the Appellant's mother's parenting skills. Unless there was anything adverse, it is perhaps not to be expected that the Appellant would provide such evidence given that the objective in pursuing the appeal incidentally results in avoiding returning to the care of her mother in Nigeria. Nor can it be expected that the Respondent would have available any pertinent evidence. In this context the best evidence would appear to be that of the Cafcass report. I can identify nothing therein that would suggest that the Appellant's mother is anything other than entirely competent in her parenting of the Appellant. Indeed I note that it was the opinion of the Cafcass officer that the Appellant had "*confidence*" in her mother to make decisions for her (report at paragraph 9), and felt supported and cared for by her (paragraph 10) - although of course such observations must be considered through the prism of the Appellant's lack of objectivity and maturity.

39. I repeat the observation in the Cafcass report: "*[The Appellant] is entering into adolescence, this can be a challenging time, but is made easier by consistent and stable parenting*" (paragraph 10 of the report). See similarly: "*… [The Appellant] require stability and certainty with regards the care that is afforded to her in the UK*" (paragraph 16).

40. In this context and generally it is to be acknowledged that the Cafcass officer considered the sponsor to have been "*an active father, for all intents and purposes, to [the Appellant] for the past 7 years*" (report at paragraph 17). However, the officer expressed concerns about the Appellant "*possibly being cared for in the main by a guardian, and the impact that may have on [her] emotional well-being as she enters into adolescence*".

41. Even before the analysis of the sponsor's passport stamps, it is to be noted that he acknowledged in his witness statement that he had explored appointing a guardian "*due to the fact that I was not stable then as I was shuttling between Nigeria and the United Kingdom*" (witness statement at paragraph 14). It is also to be noted that in the Cafcass report the Appellant informed the Cafcass officer that the sponsor "*works*

away a lot visiting the US, Nigeria and China" (report at paragraph 12). The reference to China would suggest that the absences from the Appellant include periods in addition to those identifiable from his Nigerian passport as time spent in Nigeria.

42. The sponsor's absences from the UK were such that it was noted in the Cafcass report that if – as was contemplated at the time – the Appellant were to move from her boarding school to a day school she would have a guardian to look after her – whom she understood to be a local pastor (report at paragraph 12). Whilst it is to be noted that the Cafcass officer records the sponsor as "*not envisage[ing] working away a lot in the future, and the Guardian [being] utilised on a needs must basis*" (report at paragraph 15), the pattern of the sponsor's travel over the two years following the date of the report do not bear this out.

43. The sponsor's absences from the UK are of significance not merely by reason of the absence of immediate parental/family care, emotional support, and supervision, but also in a technical sense. As commented in the Cafcass report, (and necessarily I note irrespective of any potential outcome in the Family Court proceedings), the Appellant was left in the UK not only without her mother or her mother's partner, but with no person able to exercise parental responsibility for her in a legal sense (e.g. see report at paragraph 4).

44. Any reservations I have with regard to parenting only really arise out of the circumstances that have given rise to the appeal: the Appellant's mother and the sponsor engineering a situation where the Appellant commenced education in the UK without any prior appropriate regularisation of her immigration status, and the Appellant remaining in the UK notwithstanding the exclusion of her mother. However, it seems to me that the circumstances arose pursuant to the joint collaboration of the Appellant's mother and the sponsor: to that extent there is nothing to choose between them in respect of such reservations as to the effectiveness of their protection of the Appellant's best interests - and what I adjudge to be their perception of a short term sacrifice (loss of direct contact with mother) for a perceived potential long-term benefit (completing secondary education in the UK, and perhaps obtaining settlement).

45. Further to this – and picking up from the various references to the importance of stability – in my judgement the real threat to the present stability of the Appellant's home and educational life really arises by reason of the predicament that both the sponsor and the Appellant's mother have placed her in. Not only has a situation been engineered where she is without the direct contact of her mother, she has been presented with a circumstance where she has also had significant periods without the direct contact of the sponsor. Further, she finds herself unable to travel internationally and with a precarious immigration status that is necessarily a threat

to stability and otherwise contrary to her best interests. Her best interests and future stability require resolution of the current predicament: it does not follow that such resolution must inevitably be that she be allowed to remain in the UK.

The Appellant's Wishes

46. The Cafcass officer records the Appellant as having told her "*that she prefers the education in the UK*", albeit that she wished she was able to visit Nigeria to see her mother and return (report at paragraph 13). The officer concluded that it was "*clear*" that the Appellant "*wishes to remain in the UK*" (paragraph 13).

47. Although the report is dated from August 2015 there is nothing in any of the evidence before me to suggest that the Appellant's essential wishes in this regard have altered.

Best interests

48. Bringing the foregoing matters together, in my judgement looking solely at the issue of best interests the distinction between the Appellant remaining in the UK or returning to Nigeria is finely balanced.

49. Be that as it may, it seems to me clear that continuing separation from her mother is not in the Appellant's best interests. Were the Appellant to be allowed to remain in the UK, it is entirely unclear when and in what circumstances her mother would be permitted to enter – whether as a visitor or on some longer term basis. Of course, in such a circumstance, the Appellant would be able to visit Nigeria and return to the UK – but such visits would likely be limited to school holidays.

50. Alternatively, if the Appellant were to be required to return to Nigeria she would necessarily have as much direct contact with her mother as would be determined by the family with reference to whether the Appellant would be schooled as a boarder or a day pupil. Moreover, there would not appear to be a comparable limitation on the visits that the sponsor might make to the Appellant in Nigeria – his pattern of previous visits does not suggest that he would be limited to only seeing the sponsor outside term time.

51. In all of the circumstances, and bearing in mind that Nigeria is the country of the Appellant's nationality, the country of her early upbringing, that she has been away from Nigeria for a relatively limited period, and that by returning to Nigeria she would be able to enjoy a direct and stable relationship with her mother and continue

regular and extended periods of contact with the sponsor, I find the Appellant's best interests would be served by her returning to Nigeria to live with her mother. I am not persuaded that there would be any material difference in respect of education. In so far as a return to Nigeria is contrary to the Appellant's own wishes, this is outweighed by the significance of resuming a conventional direct relationship with her mother.

Article 8

52. I discussed the application of the Immigration Rules to the Appellant's case in the Decision on error of law: see at paragraphs 25-39, and see further the discussion in respect of sole responsibility at paragraphs 41 *et seq.* See further above at paragraph 5, and note Mr Sowerby's indication that the Appellant's emphasis in the appeal was now in respect of 'best interests' and how they informed proportionality under Article 8, in which context it was contended that schooling in Nigeria would be problematic for the Appellant because there would be nobody to look after her.

53. Mr Sowerby directed my attention to provisions within the Immigration Rules pertaining to children seeking to be present in the UK for the purposes of education. He acknowledged that the so-called 'short-term' student Rules (paragraphs A57A - A57H) would not likely avail the Appellant because their scheme was such as to impose a maximum period of 6 months study for an applicant under 16. However longer periods of study in the UK were possible pursuant to the Rules in respect of a Tier 4 (Child) migrant. The Appellant could not switch into the Tier 4 (Child) category because she had not last been granted leave in a prescribed category: see paragraph 245ZZC. However, Mr Sowerby submitted that the Appellant might potentially qualify for entry clearance in this category, and argued pursuant to the **Chikwamba** principle that no good purpose would be served by requiring the Appellant to return to Nigeria simply to reapply to come back to the UK: such a procedure would involve a disruption at a critical stage of her education. In this regard my attention was directed to paragraphs 51 and 52 of **Agyarko [2017] UKSC 11**.

54. For the avoidance of any doubt I find that the first two **Razgar** questions are to be answered in the Appellant's favour: she has established private life in the UK by reference to her education, and has established family life by reference to her relationship with the sponsor (notwithstanding his periods of absence abroad). In the event that the Appellant is required to leave the UK in consequence of the Respondent's decision the interference with her protected Article 8 rights in the UK would be of a significance to surpass the relatively low threshold of the second **Razgar** question.

55. There is no particular issue between the parties in respect of the third and fourth **Razgar** questions.

56. In considering the fifth **Razgar** question – proportionality – I am duty bound to have regard to the statutorily defined public interest considerations pursuant to section 117B of the 2002 Act.

57. I acknowledge the public interest in maintaining effective immigration control. I note that this is generally achieved by a consistent adherence to the published Rules. The Appellant does not meet the requirements of any identifiable in-country Rules.

58. In respect of a potential application for entry clearance as a Tier 4 (Child) migrant it seems to me that Mr Sowerby put the case no higher than there being potential for the Appellant to satisfy the requirements of entry clearance, but I was not directed to any materials that were consistent with required evidence whether, for example, in respect of a sponsoring educational institution or proof of availability of funds. (It is a feature of this case that notwithstanding the apparent availability of significant funds to meet the cost of school fees either in Nigeria or in the UK, and the sponsor's frequent travel, no specific financial evidence has been filed as to the quantum or source of any available funds.)

59. Be that as it may, there is a more fundamental reason why I am not prepared to conclude that the **Chikwamba** principle should avail the Appellant on the facts of this particular case. This is because, on my findings, the effect of allowing the appeal would be contrary to the Appellant's best interests. The Appellant's best interests, I find, are served by returning to live with her mother in Nigeria. In this context it is to be noted that on the facts in **Chikwamba** and in the wider discussion one of the informing factors was the importance of protecting family life (as distinct from private life) between a parent and child: e.g. see paragraphs 42, 44 and 46 of **Chikwamba**. In my judgement the effect of allowing the appeal would not achieve such an aim, but would perpetuate the unsatisfactory disconnection between the Appellant and her mother. Accordingly, and notwithstanding the Appellant's own wishes in this regard, it seems to me that the invitation to allow the appeal by reference to the **Chikwamba** principle is in substance an invitation to make a decision that not only runs contrary to the public interest in maintaining effective immigration control by a consistent application of the structure and scheme of the Immigration Rules, but also runs contrary to the best interests of the Appellant.

60. For completeness I note there are no language issues likely to be an obstacle to integration (section 117B(2)); indeed it seems to me that the Appellant's engagement in schooling in the UK has given resulted in a significant degree of

integration. Further, although no specific financial evidence has been filed the Appellant, through the sponsor, appears to be essentially financially independent (section 117B(3)).

61. The Appellant's presence in the UK has been for the main part unlawful, and otherwise 'precarious': as such section 117B(4) and (5) require that little weight should be given to her private life. However, it seems to me sensible that in the overall balance this is to be ameliorated by the fact that the Appellant, as a minor, is not personally responsible for her immigration status and general predicament.

62. I have rejected the matters upon which the Appellant has placed particular reliance in support of her appeal. I do not accept that it has been shown that the Appellant would face any significant disruption to her education in the process of relocating to Nigeria. I do not accept that her best interests are served by remaining in the UK; indeed I consider her best interests are served by returning to live with her mother in Nigeria. Moreover, I do not accept that the **Chikwamba** principle should avail her.

63. In all of the circumstances I find that the Appellant's case has no element or elements either individually or collectively sufficiently exceptional, or compelling, to render the Respondent's decision incompatible with the Article 8 rights of the Appellant, or the sponsor, or anybody else. In my judgement the Respondent's decision accords adequate respect to the rights of the Appellant and sponsor, and is in all the circumstances proportionate.

64. Finally I note that nothing in the foregoing - including my findings in respect of best interests - prevents the Appellant, together with her mother and the sponsor, exploring ways in which she might be granted entry clearance for the purpose of being privately educated in the UK.

Notice of Decision

65. The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any

member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: Date: **8 November 2019**

Deputy Upper Tribunal Judge I A Lewis

To the Respondent
Fee Award *(This is not part of the determination)*

I have dismissed the appeal and accordingly there can be no fee award.

Deputy Upper Tribunal Judge I A Lewis Date: **8 November 2019**
(*qua* a Judge of the First Tier Tribunal)

ANNEX

TEXT OF 'ERROR OF LAW' DECISION AND DIRECTIONS PROMULGATED ON 11 APRIL 2019.

1. This is an appeal against the decision of First-tier Tribunal Judge Abebrese promulgated on 29 November 2018 dismissing on human rights grounds the appeal against a decision of the Respondent dated 26 February 2018 to refuse leave to remain in the United Kingdom.

2. The Appellant is a minor born on 2 June 2004. She is a citizen of Nigeria. She is the daughter of Ms O.M.A., a citizen of Nigeria born on 1 June 1968. It is said that the Appellant does not now know the whereabouts of her biological father, and has had little or nothing to do with him during her childhood. The Appellant's mother is in a relationship with Mr A.A.O., a British citizen born on 20 May 1966 ('the sponsor').

3. It has not been disputed that the Appellant's mother and the sponsor are partners. The exact nature of that relationship is perhaps less clear: in a covering letter with the Appellant's application solicitors acting for the sponsor described the relationship as "*a common-law relationship*"; a witness statements filed in the appeal by the sponsor stated he was married to the Appellant's mother "*under the native law and customs in Nigeria*"; the Appellant's mother's witness statement is silent on the issue; no evidence has been filed in respect of any customary marriage in Nigeria. Further and in any event, it is unclear - and seemingly was not explored before the First-tier Tribunal - the extent to which they have resided together in either Nigeria or the United Kingdom.

4. The Appellant last entered the United Kingdom on a visit visa on 13 July 2014. She was accompanied by her mother. Her mother returned to Nigeria, but the Appellant remained in the United Kingdom. Indeed, it appears that within two months of her arrival she had been enrolled at, and started at, a boarding school in the United Kingdom.

5. No steps were taken at this time to regularise the Appellant's immigration status, and her leave to enter – which pursuant to her visit visa would have been limited to 6 months - expired. She became an overstayer.

6. It was not until 4 October 2016 that an application was made on the Appellant's behalf by the sponsor to seek to regularise her status. The application for leave to remain was made on the basis that she was enjoying family life with a British citizen step-parent in the United Kingdom.

7. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 26 February 2018.

8. The Appellant appealed to the IAC.

9. The appeal was dismissed for reasons set out in the decision of First-tier Tribunal Judge Abebrese promulgated on 29 November 2010.

10. The Appellant made an application for permission to appeal which was granted (together with a grant of extension of time) by First-tier Tribunal Judge Murray on 7 January 2018.

Preliminary contextual observations

11. Before considering the substance of the challenge to the decision of the First-tier Tribunal, I refer to three matters that form some of the context of these proceedings. (There is nothing significant in the order in which I set out these three matters, and nothing should be inferred to the contrary.)

12. First, there is on file a Notice of Immigration Decision ('NoID') dated 26 July 2016 refusing the Appellant's mother a visit visa for the United Kingdom. The NoID states that the Appellant's mother wanted to visit the UK for tourism, for a family visit, and to see friends - and that she had submitted a letter in support from her British citizen partner (the sponsor herein). She had also provided evidence that she was a director and shareholder in her own company in Nigeria. The application was refused for the following reasons, as stated on the NoID:

> *"I am aware that you have previously visited the UK and that you were refused entry when you arrived in the UK on 11 February 2015. Although you state in your application that you were refused because you had visited the UK for a total of more than* 6 *months, our records show that there were concerns regarding your daughter [the Appellant], who was attending school in the UK even though she did not hold a visa or valid leave for that purpose. In your current application you show that your daughter is residing in the UK at an address in Essex. You have provided no further information about your daughter and her status in the UK. Given the reasons for your refusal of entry in 2015 I would have expected you to cover this point in some detail. As it is our*

records show that your daughter was issued with a visa on 21/4/2011 to accompany you, as the adult responsible for her care, on a visit to the UK. It is apparent that the true purpose of her travel was to stay in the UK for more than just a visit and this leads me to doubt that the reasons you now give for your travel to the UK have been accurately and entirely stated in your application. Because of these doubts I am not satisfied that you are genuinely seeking to travel only for the visit stated or that you will leave the UK at the end of the period stated."

13. By way of further context, I have been told - and see no reason to doubt - that when the Appellant's mother arrived in the United Kingdom in February 2015 although she was refused leave to enter she was nonetheless granted a short period of temporary admission, and was present in the United Kingdom for approximately two weeks before returning to Nigeria. It would appear that that is the last time that the Appellant and her mother had direct contact.

14. I mention this matter at the outset because the Appellant's mother's claim in her visa application that the refusal of leave to enter in February 2015 had been because she had been a too frequent visitor spending a total of more than 6 months in the U.K., is in substance repeated in the witness statements of both the Appellant's mother and the sponsor. See for example the sponsor's witness statement at paragraph 15, "*…I wish to state that on one of the occasions when she was coming to the United Kingdom she was queried at the airport on the frequency of her journey into the United Kingdom on the 11th day of February 2017.*" – (in context the reference to 2017 is plainly a simple error or slip). See similarly the Appellant's mother's own statement at paragraph 8 – "*…I was queried at the airport on frequency of my journey into the United Kingdom…*". The NoID makes it plain that this was not the basis of refusal of leave to enter.

15. I note the following from the foregoing:

(i) Both the sponsor and the Appellant's mother appear to be disingenuous in their witness statements in representing the reason for the Appellant's mother encountering difficulties on seeking to enter the UK in February 2015. The problem is presented by both of them as being an issue in respect of the frequency and duration of the Appellant's mother's visit to the UK, whereas in reality the problem was rooted in the unlawful presence of the Appellant in the UK and also the role of the Appellant's mother in bringing her to the UK. Even if it might be said that this was not clear to them or fully understood by them in February 2015, it must have been plain and manifest at the time of the refusal of entry clearance in July 2016 because it is expressly so stated in the NoID.

(ii) It must have been manifest to both the sponsor and the Appellant's mother in February 2015 that the Appellant had no basis to be in the UK, and that her lack of status was problematic. No steps were seemingly taken to remedy this situation.

(iii) Similarly it must have again been manifest to both the sponsor and the Appellant's mother in July 2016 that the Appellant had no basis to be in the UK, and that her lack of status was problematic. A little over two months later the current application was made.

16. Further, the sponsor's observation in his witness statement – "*Regarding the Appellant's mother, a settlement visa will be processed for her when she is medically fit*" (paragraph 15) – must be seen in light of the above. On its face this statement seems to suggest that the only reason the Appellant's mother is not also in the UK is because she is in some way unwell. No supporting evidence of any illness was presented to the Tribunal. In reality it would appear that the Appellant's mother does not presently have any prospect of obtaining a settlement visa because of the irregular circumstances surrounding her daughter's immigration position. It seems to me that in all of the circumstances this must be plain both to the sponsor and to the Appellant's mother. Accordingly, again, the sponsor has been, at best, disingenuous.

17. In this latter regard, and generally, it is to be noted that the First-tier Tribunal Judge noted the absence of any medical evidence (paragraphs 22 and 26), and did not accept that there was anything to establish any inability on the part of the Appellant's mother in looking after the Appellant (paragraph 26 and 31).

18. The second feature of the appeal upon which I make some preliminary observations is the slightly unusual circumstance that the sponsor brought an application in the Family Court in the United Kingdom in respect of arrangements with regard to the Appellant. This culminated in an Order of the court on 13 August 2015 that "*There be no order on the [sponsor]'s application for a Child Arrangement Order*".

19. The 'no-order order' is the only specific document on the file that relates to the proceedings before the Family Court. The Appellant, before both the First-tier Tribunal and the Upper Tribunal, has placed very particular reliance upon some passages of this document. In the circumstances it is helpful to set out the contents of the document in full:

> "*UPON hearing Solicitor for the Applicant*
> *AND UPON the Cafcass officer, [named] being present in court*
>
> *Upon the evidence and information available to the Court*
>
> *IT IS RECORDED THAT:*

1. *Since February 2015 the child has been in the sole care of the Applicant, who the court is informed is her step-father, with the consent of the mother [O.M.A.].*

2. *The court has read the Cafcass officer's report dated 04.08.15 and the response from the UK Home Office dated 29.07.15.*

3. *The child appears to be well cared for by the Applicant.*

4. *The child's Nigerian passport has expired in March 2015 but a visiting visa is valid until 2016. There has been no application for its renewal nor has there been any application made to regularise the child's immigration status in the UK.*

5. *An appeal by the mother against a decision preventing any further entry by her to the UK is pending and due to be heard in March 2016.*

6. *The Applicant is intending to travel for work purposes and move the child to a new school. She will be cared for by a "guardian" just as she is stated to have been cared for previously.*

7. *The court has been informed that the local authority is currently undertaking a private fostering assessment of the child in the care of the Applicant.*

8. *The child is being well cared for by the Applicant but the court is of the view that in circumstances where there is no disagreement with the mother and there has been successful delegation of parental responsibility by the mother to the Applicant in respect of the child's welfare and decisions about her care including her schooling and her "guardian", the principle of no order shall apply. The Cafcass officer has today confirmed that this court is appropriate and consistent with the child's welfare.*

9. *The Court will forward a copy of this order to the Home Office.*

IT IS ORDERED THAT:

1. *There be no order on the Applicant's application for a Child Arrangement Order.*

2. *There be no order for costs."*

20. I make the following brief observations in respect of the contents of the 'no-order order':

(i) It does not provide any independent corroboration of the nature of the relationship between the sponsor and the Appellant's mother, merely recording that "*the Court is informed*" that the sponsor is the Appellant's stepfather.

(ii) The observation that the Appellant has been in the sole care of the sponsor since February 2015 raises the question of whose care she was in between July 2014 and February 2015.

(iii) No information has been provided by either party before the Tribunal as to the Home Offices response of 29 July 2015. It is also to be noted that it is curious that this is purportedly a response to the Cafcass officer's report but is dated prior to the date of the report – although it is possible that it was a response to a draft of the report. Be that as it may, it does suggest that the Respondent was aware of the Appellant's circumstances some considerable time prior to the application of 4 October 2016.

(iv) Insofar as it is perhaps to be inferred that the Family Court Judge thought that the Appellant's "*visiting visa*" being valid until 2016 conferred leave to remain, this would be inaccurate. Whilst the entry clearance vignette may have been valid until 2016, and the entry clearance could be used to secure entry during its validity, any particular entry would have been limited to 6 months leave to enter irrespective of a longer period of validity of the entry clearance. It seems likely that the Family Court may not have fully understood the Appellant's immigration position.

(v) Neither party was able to clarify to me whether the Appellant's mother pursued an appeal in March 2016; nonetheless it was confirmed by the sponsor that she had not overturned the refusal of a further visit visa.

(vi) Nothing seemingly was said in the evidence before the First-tier Tribunal – whether written or oral – in respect of any 'guardian', or in respect of a private fostering assessment.

21. Further to the above, it is not manifest when the sponsor's application for a Child Arrangement Order was initially made, or what specific order was being sought, or why. The order was referenced in the immigration application covering letter of 4 October 2016 – but necessarily the immigration application was made over a year after the order was made. The approximate timing of the proceedings – bearing in mind that it will have taken some time to prepare the Cafcass report of 4 August 2015 - and the reference to the sponsor having had care of the Appellant since February 2015, suggest that the application may have been prompted by the refusal of leave to enter to the Appellant's mother in February 2015; however, there is no direct evidence on this point

22. I should also just say a very few brief words about the concept of parental responsibility in the Family Courts.

(i) 'Parental responsibility' is defined by section 3 of the Children Act 1989 as "*the rights, duties, powers and responsibilities that go with being a parent*".

(ii) Parental responsibility can be lost only by order of the court. A parent does not lose parental responsibility merely because a child lives elsewhere on a daily basis.

(iii) A step-parent does not automatically have parental responsibility. Section 4A of the Children Act 1989 allows a step-parent to acquire parental responsibility either with the agreement of the parents or by order of the court. 'Step-parent' is defined as "*married to or a civil partner of*" a parent of the child.

23. As I have noted above, although it has not been disputed that the sponsor is the partner of the Appellant's mother, there is a lack of clarity as to whether this is pursuant to a marriage recognised in Nigeria (and thereby recognised in the UK), or on any other basis that would bring the sponsor within the definition of a step-parent for the purposes of the Children Act 1989. The Family Court in observing that it had been "*informed*" that the sponsor was the Appellant stepfather, did not seemingly make a finding on this - and indeed it was unnecessary so to do in circumstances where the application was dealt with in the manner indicated.

24. I return below to the words in paragraph 8 of the 'no-order order' - "*… there has been successful delegation of parental responsibility by the mother to the [sponsor]…*".

25. <u>The third matter</u> to mention by way of preliminary observation is the Immigration Rules.

26. The appeal is based on human rights grounds, and accordingly there is no available ground of appeal that the decision was not in accordance with the Immigration Rules. However, the Rules are a relevant consideration in respect of Article 8 both in the context of the public interest in maintaining effective immigration control – which may be promoted and protected by the consistent application of a set of published rules, and as an indicator as to the benchmark of proportionality.

27. At the hearing I had a brief discussion with the representatives as to what appeared to be a misconception on the part of the First-tier Tribunal Judge as to the basis of the Respondent's decision in respect of the 'relationship requirements' of Appendix FM and the status of the sponsor. The Judge had seemingly concluded that the concerns expressed in the RFRL in respect of paragraph E-LTRC.1.6 were answered by reason of the – undisputed - fact that the sponsor is a British citizen (Decision at paragraph 21).

28. In the RFRL the Respondent stated the Appellant did not to satisfy the 'Eligibility Relationship Requirement' with particular reference to paragraph E-LTRC.1.6 (pages 2-3 of 6 of the RFRL). In part the RFRL states:

> "***Eligibility Relationship Requirement***
>
> *You do not meet the eligibility relationship requirement of paragraphs E-LTRC.1.2. to 1.6. because your step father has not been granted indefinite leave to remain under the Appendix FM Rules.*
>
> *E-LTRC.1.6 states: one of the applicant's parents (referred to in the section as the "applicant's parent") must be in the UK and have leave to enter or remain or indefinite leave to remain, or is at the same time being granted leave to remain or indefinite leave to remain, under this Appendix (except as an adult dependent relative) ..."*

29. The substance of this is repeated in the RFRL under the heading 'Parent's Immigration Status'

> "*Your mother is not in the UK and your biological father's whereabouts are unknown. Your step-father has not applied for or been granted leave under Appendix FM. Therefore you are unable to meet E-LTRC.1.6 for this reason as well."*

30. I pause to note that the Respondent also concluded that the Appellant did not meet the 'eligibility relationship' requirement because he was not satisfied that the sponsor had sole responsibility for the Appellant; however, this is not the focus of the present comments.

31. On its face it seems to me that the RFRL is correct in identifying that the sponsor did not "*have leave to enter or remain or indefinite leave to remain, or is at the same time being granted leave to remain or indefinite leave to remain, under … Appendix [FM]*". His status as a British citizen is not an answer to this. The Judge's approach is thus erroneous.

32. During the discussion with the parties I noted that there was no cross-challenge to this aspect of the First-tier Tribunal Judge's evaluation of the case, whether pursuant to a Rule 24 response or otherwise. I indicated that in circumstances where there had been no challenge, and given that the real focus in the appeal both under the Rules and in respect of Article 8 was the issue of the sponsor's 'responsibility' for the Appellant - and also where the wider consideration of Article 8 meant that any strict requirement of the Rules need not necessarily defeat an application – no further point should be taken in this regard.

33. However, upon further consideration in the writing of this Decision - and with the caveat that I have not heard argument on the issue – it seems to me that scrutiny of this point reveals a more fundamental problem with the consideration of the application by both the Respondent and the First-tier Tribunal. It would seem that Appendix FM did not apply to the application.

34. The Appellant's application was made using form FLR(FP) (Version 05/2016). At Section 2 – 'Which category? - two boxes were ticked – 'Family Life as a Parent (10 year route)', and 'Private Life in the UK (10 year route)'. Necessarily the former did not apply to the Appellant, although the latter was of potential application. (The other available categories on the face of the form were 'Family life as a Partner (10 year route)' and 'Family life as a Parent (5 year route)' - neither of which were applicable to the Appellant.) As such, the form completed did not expressly relate to an application based on family life as a child – although in its contents reference was made to the Appellant's relationship with the sponsor. Further to this, the covering letter (which is drafted on the basis that the sponsor rather than the Appellant is the client of the solicitors) declares the intent "*to regularise [the Appellant's] stay in the United Kingdom on the ground of family life with our client*". The sponsor's status as a British citizen is expressly declared, and his passport was enclosed with the application. The letter concludes with a request that the Appellant "*be granted leave to remain without client on the basis of family life*". Nothing is expressly stated as to any limit in the length of leave sought, and there is no indication that leave is sought for temporary purposes, or that any departure date is envisaged.

35. The section of Appendix FM dealing with children has the heading 'Family life as a child a person with limited leave as a partner or parent', followed by this introductory paragraph:

> "*This route is for a child whose parent is applying under this Appendix for entry clearance or leave, or who has limited leave, as a partner or parent. For further provision on a child seeking to enter or remain in the UK for the purposes of their family life see Part 8 of these Rules.*"

36. Further to paragraphs A277 and A280 of Part 8 of the Rules, paragraph 298 applies to applicants seeking leave to remain on the basis of a relationship with a parent who is present and settled in the UK – such as a British citizen ordinarily resident in the UK.

37. Whilst there may be difficulties in the Appellant satisfying the requirements of paragraph 298 – both in respect of 298(i), and also in any event in respect of 298(ii) by reason of her immigration history – it does appear to be the applicable Rule, rather than Appendix FM.

38. I return to the implications of this error of approach further below.

39. This is a convenient juncture to note that I also raised with the parties the question of whether any consideration had been given to the Appellant's circumstances with reference to the Rules relating to study (Part 3 of the Immigration Rules), which include provisions for a child student. It appeared not – either in the context of the appeal, or as an alternative basis of regularising the Appellant's status.

The Challenge to the Decision of the First-tier Tribunal

40. Mr Sowerby has broadly pursued four bases of challenge to the Decision of the First-tier Tribunal: that the Judge erred in respect of the issue of sole responsibility; that the Judge erred in respect of 'best interests' of the Appellant as a child; that undue weight was put on the Appellant's immigration history/status in circumstances where as a minor it was not her responsibility; and that the Judge erred in consideration of the Appellant's 'private life'.

'Sole responsibility'

41. The First-tier Tribunal Judge identified that "*The main issue concerns the eligibility criteria and the issue of sole responsibility*" (paragraph 21). In so far as it was claimed that the sponsor had assumed parental responsibility because the Appellant's mother was not capable of looking after her in Nigeria because she had a medical condition, the Judge observed that there was no supporting medical evidence (paragraph 22). Moreover, in respect of general credibility, the Judge found that the arrangement whereby the Appellant was left in the UK by her mother "*was contrived*" by the mother and the sponsor (paragraph 23). The Judge found that the sponsor did not have sole responsibility for the Appellant while she was living with her mother in Nigeria (paragraph 23), and further concluded that he was not satisfied that the sponsor had acquired sole responsibility since (paragraph 25 and 26). In this latter regard the Judge gave consideration to the order of the Family Court (paragraph 25).

42. The Appellant challenges the conclusion in respect of sole responsibility in significant part by repeating the substance of the case as presented before the First-tier Tribunal – e.g. see paragraph 4 of the grounds. However, more pertinently in the context of error of law, Mr Sowerby emphasised paragraph 8 of the Family Court order, and the following passage at paragraph 25 of the decision of the First-tier Tribunal:

> "*Paragraph 8 states that the court made no order because there was no disagreement between the sponsor and the appellant's mother and there had been successful delegation of parental responsibility. It is not in dispute that the appellant was placed with the sponsor while she is this country by her mother but this does not amount to sole responsibility.*"

43. Mr Sowerby contended that the only sensible interpretation of paragraph 8 was that there had indeed been a transfer of responsibility from the Appellant's mother to the sponsor, and the sponsor thereby had become solely responsible for the Appellant.

44. I do not accept that submission.

45. Mr Sowerby placed reliance in particular upon the words "*there has been successful delegation of parental responsibility by the mother to the Applicant in respect of the child's welfare and decisions about her care including her schooling and her "guardian""* in the 'no-order order'. It seems to me that that passage must be understood in the context both of the application being made (and the decision to make no order on it), and, necessarily, the context of family law proceedings. In this latter context it is be noted that in family law terms a step-parent has no parental responsibility absent either an order of the court or consent of the child's parents. Moreover a parent cannot lose parental responsibility absent an order of the Court. The Court made no order, so there was no act that recognised the Appellant's mother had given up her parental responsibility. In my judgement the reference to a 'delegation' of parental responsibility was no more than a recognition of the Appellant's mother's consent that the sponsor should be able to exercise parental responsibility. In such circumstances I do not accept that the Family Court Order amounts to recognition of, or is otherwise reliable evidence of, the fact of a transfer of parental responsibility negating the mother's own responsibility. As Ms Cunha put it, this was not a case where there was any evidence that the Appellant's mother had given up her interest in being a mother to the Appellant; this was a delegation not an abdication of parental responsibility.

46. Further, a wider consideration of the issues and evidence in the appeal do nothing but reinforce this notion.

47. As indicated above, the Appellant's application for leave to remain was made on the basis of her family life with the sponsor in the United Kingdom. The application form (reproduced in the Respondent's bundle before the First-tier Tribunal) was forwarded to the Secretary of State with a covering letter dated 4 October 2016. It was stated in the covering letter that the sponsor and the Appellant's mother were in a relationship which had commenced in 2008. It was asserted that the sponsor was

"*the sole carer of the child in the United Kingdom*"; however, nothing further was raised in the application or the covering letter that in terms asserted that the Appellant's mother no longer acted in a parental capacity - whether as sole responsible parent or a jointly responsible parent. Nor was anything asserted to suggest that the Appellant's mother would be unable to continue to exercise a role in respect of directing the life of the Appellant whilst she was in the UK, or would be unable to care for the Appellant if she had to return to Nigeria. In particular, there was no suggestion that there was any ill health on the part of the Appellant's mother.

48. Following the refusal of the application, grounds of appeal lodged with the Notice of Appeal again made no assertion or reference to any limitations in the capacity of the Appellant's mother - either to be involved, even at a distance, in directing the upbringing of her daughter or to be able to care for her daughter were the Appellant to return to Nigeria. Again, no specific reference was made as to any medical problems or issues of illness in respect of the Appellant's mother.

49. There was, however, an assertion that the sponsor was exercising sole parental responsibility (paragraph 12 of the grounds of appeal). The grounds note this is "*especially evident as her mother is unable to enter the UK presently*".

50. I observe that the inability to enter the United Kingdom does not equate with an inability to exercise control over the direction of the Appellant's upbringing.

51. As regards responsibility for the upbringing of the Appellant, the mother says this at paragraphs 11 and 12 of her witness statement:

> "*11. Since the Appellant stayed back in the United Kingdom with her sponsor, he has been solely taking care of her without my contribution. He is responsible for everything that affects the Appellant as a child.*
>
> *12. The Appellant's sponsor had my unreserved consent in the Appellant staying with him. I wish to state that due to the Appellant's sponsor's fantastic fatherly role, I (as sole biological parent) have done a change of name for the Appellant to bear his name.*"

52. I note that paragraph 11 is drafted in terms of the exercise of day-to-day care rather than parental responsibility in its wider sense in immigration jurisprudence of 'exercising control and direction' – e.g. see **TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 49**.

53. Whilst paragraph 12 might at first blush appear to suggest that 'responsibility' for the Appellant has been passed exclusively to the sponsor, in my judgement ultimately it cannot bear that meaning. The first thing to observe is that the Appellant's mother has provided consent to the Appellant staying with the sponsor: implicit is that she could, if she so wished, withdraw consent. The decision that the Appellant stay with the sponsor is a decision in respect of which the Appellant's mother has taken a role. The decision that the Appellant remain in the UK to pursue the proceedings herein, is contingent upon the Appellant's mother's continuing consent – and in continuing to provide that consent the Appellant's mother continues to control and direct the Appellant's upbringing.

54. More particularly, plainly and obviously the decision to change the Appellant's name to accord with that of the sponsor is a decision that impacts upon the upbringing of the Appellant and is relevant to the shape and direction of her life. This is a decision that the Appellant's mother says that she has taken: in my judgement that is a concrete admission of a continuing exercise of parental responsibility.

'Best interests'

55. The Judge addresses best interests in the final paragraph of the decision before announcing that the appeal was dismissed:

> "*I am also of the view that it is in the best interest of the appellant to be with her mother who has been refused a visa to enter the UK. I consider that Section 55 of the BCIA 2009 in this instance should be interpreted because I am not persuaded that the appellant's biological mother is unable to look after the appellant in Nigeria. The appellant is attending boarding school in this country and there is no reason in my view why this could not continue in Nigeria.*" (paragraph 31)

56. It is argued on behalf of the Appellant that paragraph 31 is inadequately reasoned. Mr Sowerby submits - it seems to me with some force and merit – that the sentence "*I consider that Section 55 of the BCIA 2009 in this instance should be interpreted because I am not persuaded that the appellant's biological mother is unable to look after the appellant in Nigeria*" quite simply does not make sense. The notion that it is in the Appellant's best interests to be with her biological mother is based on no more than an assumption, and is not reasoned against the context of the role of the sponsor in the Appellant's life. Moreover, it is argued, there is no reasoned consideration to the impact on best interests of the disruption to the Appellant's education in the event that she is required to change schools (as well as countries).

57. I remind myself that 'best interests' is a primary consideration. To that extent it is dubious that it appears only at the conclusion of the Judge's decision. I acknowledge

that the position in a Decision of any particular factor need not automatically be an indicator of the significance accorded to the factor in the overall consideration of a case. However, in the instant circumstance the opening words of paragraph 31 – "*I am also of the view…*" – reinforce the notion that this factor was only given consideration after the otherwise seemingly determinative factors referred to in the preceding paragraphs. In my judgement this circumstance compounds the concern in respect of the incomprehensible sentence in respect of section 55, and what I accept to be otherwise a paucity of reasoning.

58. Had it not been for other factors in this appeal, which I have discussed herein and also find further expression in the Directions set out below (including an apparent confusion as to the applicable Rules), I might have been minded to conclude that this error did not justify an exercise of the discretion under section 12(2) of the Tribunal, Courts and Enforcement Act 2007 such as to set aside the decision in the appeal. On balance, however, I am persuaded that in consequence of this error of law the decision in the appeal requires to be remade.

The other grounds of challenge

59. I do not consider there to be substance in the other lines of challenge pursued by the Appellant.

60. I do not accept that the consequence of the Respondent's decision, and in turn the Judge's decision was to 'penalise' or 'punish' the Appellant for the wrongdoing of others, as is submitted at paragraph 1 of the grounds of appeal. The consequences of her predicament for the Appellant in the event that she is unable to secure leave to remain in the UK (as the Judge found) arise, in immigration terms, not as a penalty or punishment for the wrongdoing of others but because she is unable to establish a basis to remain under the Rules and it is considered that her consequent removal would not be disproportionate. In considering proportionality a decision-maker is obliged to take into account the public interest in the maintenance of effective immigration control, and to that extent is entitled to have regard to the overall circumstances in which a minor applicant comes to be in the United Kingdom. The obverse position – which appears to be that contended on behalf of the Appellant in the grounds – is that in so far as the Appellant is an innocent in the wrongdoing of others, she should not be removed from the UK. I do not accept that there is any principle in immigration law that creates a right to remain as a consequence of a minor's innocent unlawful presence.

61. Further to this, and also with reference to the criticisms in respect of private life, I find that the Judge was entitled to consider that the Appellant's immigration status in the UK was 'precarious' for the purposes of section 117B(5); accordingly the Judge

was entitled to attach little weight to the private life established by the Appellant during her time in the UK – see paragraph 28. I do not accept that there is any substance to the submission pleaded in the grounds to the effect that the Judge also used this provision to attach little weight to the Appellant's family life with the sponsor. The Judge is overt at paragraph 28 in relating the Appellant's precarious status to the weight to be attached to her private life. Nor do I consider that this particular reference to private life is indicative of the Judge failing to have regard to the Appellant's family life with the sponsor: plainly that was at the core of the Appellant's case, and it is addressed in substance in the decision of the First-tier Tribunal.

Conclusion on error of law

62. Further to the above, I am persuaded that there was a material error of law in the Judge's approach to the issue of the Appellant's best interests.

Remaking the decision in the appeal

63. The decision in the appeal requires to be remade accordingly. However, I do not consider that a full rehearing is required: I have not impugned any aspect of the Judge's decision-making in respect of primary findings of fact. In my judgement it is appropriate that the decision in the appeal be remade before the Upper Tribunal on the foundation of the primary findings of fact of the First-tier Tribunal, and pursuant to the Directions set out below.

Directions

To the Appellant:

1. The Appellant is to file and serve any further statements and supporting evidence upon which she wishes to rely within 28 days of the date shown as the date of promulgation of this document.

So far as possible such evidence should include:

(i) Clarification of the status of the relationship between the sponsor and the Appellant's mother, together with a history of their cohabitation (including in particular periods at which the sponsor has lived in the same household as the Appellant prior to her entry to the UK in July 2014). Supporting evidence might include passport stamps, bank statements, travel tickets, and any other documents which might show the whereabouts of the sponsor.

(ii) Clarification of the Appellant's educational history both in Nigeria and in the UK - preferably by way of a schedule detailing name of school, dates of attendance, whether a boarding school or day school, and whether fee-paying or not (and if fee paying to include the level of fees).

(iii) In the event that it is contended that there is any difficulty in the Appellant continuing her education in Nigeria because of the educational system or the unavailability of a suitable school, all evidence upon which such a claim is based.

(iv) Clarification of the matters arising from the contents of the Family Court order as discussed above. In particular

(a) When such proceedings were commenced, why, and with what purpose/s.
(b) In whose care, and where, the Appellant resided between July 2014 February 2015.
(c) The references to a guardian or guardians.
(d) The references to a private fostering arrangement;

(v) Clarification of whether or not any appeals were pursued by the Appellant's mother against the refusal of leave to enter on 11 February 2015, and/or the refusal of entry clearance on 26 July 2016 – and in the event that there were any such appeals copy/copies of the Tribunal's Decision/s.

2. The Appellant is also to use her best endeavours to obtain permission from the Family Court to disclose the Cafcass report of 4 August 2015, and the Respondent's response to the Cafcass report (supposedly dated 29 July 2015). In the event of obtaining such permission the Appellant is to file and serve both within the same timescale - or otherwise as soon as available. In the event that permission is not obtained, the Appellant is to file all evidence as to the attempts made to obtain such permission. (The Tribunal is aware of the protocol between the IAC and the Family Courts, but at this stage does not consider it necessary to resort to its use in circumstances where there is no obvious reason apparent as to why permission to disclose the report should be denied to the Appellant and/or the sponsor – bearing in mind that there was no contest between any parties in the Family Court proceedings.)

<u>To the Respondent:</u>

3. The Respondent is to file and serve within 28 days of the date shown as the date of promulgation of this document:

(i) Clarification of whether or not any appeals were pursued by the Appellant's mother against the refusal of leave to enter on 11 February 2015, and/or the refusal of entry clearance on 26 July 2016 – and in the event that there were any such appeals copy of the Tribunal's Decision/s.

(ii) Clarification of any knowledge / involvement with the Appellant's case prior to the application of 4 October 2016 – together with any relevant disclosable materials, (bearing in mind apparent involvement in the Family Court proceedings).

(iii) Any available evidence as to process times for entry clearance applications from Nigeria, either under Part 8 of the Immigration Rules or as a child student. (If such information is not available by category, then evidence as to general waiting times should be provided.)

To the Appellant and the Respondent:

4. The parties are not expressly directed to file and serve written submissions save in this respect:

(i) Both parties are invited to indicate whether they agree or disagree with the discussion above in respect of the applicable Immigration Rules (paragraph 25-37, and in particular at paragraphs 33 *et seq*.)

(ii) In the event that there is disagreement, brief written submissions are to be provided as to the contended applicable rules.

5. Both parties are otherwise at liberty to file and serve written submissions in the appeal. Whether or not any written submissions are presented, the Appellant will be expected to address in submissions at the next hearing:

(i) Any claimed difficulties in respect of being schooled in Nigeria.

(ii) If it is to be contended that the Appellant could satisfy the requirements of Part 8 of the Immigration Rules, or the Rules in respect of a child student, why the Appellant could not reasonably be expected to return to Nigeria (possibly during the long summer vacation) and make an application for entry clearance from abroad.

6. Both parties are at liberty to file and serve any further evidence in response to the evidence filed by the other party in accordance with the Directions above, within 42 days of the date shown as the date of promulgation of this document

Relisting

7. The appeal is to be relisted at Field House on the first available day after 49 days of the date shown as the date of promulgation of this document, with a time estimate of 2.5 hours. (It is not anticipated that it will be necessary to hear any live evidence – or alternatively any live evidence at length.)

8. The appeal is reserved to me.

>>>>> *End of Annex* <<<<<