Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/22788/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 December 2021	**On the 22 December 2021**

Before

UPPER TRIBUNAL JUDGE BLUM
DEPUTY UPPER TRIBUNAL JUDGE NAJIB

Between

BS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms K Reid, counsel, instructed by Signature Law
For the respondent: Ms Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a decision remaking the decision of Judge of the First-tier Tribunal Brewer promulgated on 18 June 2019, dismissing BS's (the appellant) appeal on human rights grounds against the decision of the Secretary of State for the Home Department (the respondent) dated 23 October 2018 refusing her human rights claim.

Background

2. The appellant is a national of Nigeria born in 1978. She has two children fathered by OS in Nigeria who were born in March 2004 and January 2007. These two children remain in Nigeria. OS is a Nigerian national and was and continues to be married to the appellant.

3. The appellant entered the United Kingdom in November 2010 with entry clearance as a visitor. She overstayed. OS, who was also present in the UK, fathered a further child with the appellant, IS, who was born in September 2013. The appellant's relationship with OS soured and he left the appellant following IS's birth. The appellant has had no further contact with OS.

4. The appellant met AO in August 2015. AO is a British citizen. The appellant maintains that he fathered a child (JO, a daughter) born in August 2016. The appellant's relationship with AO broke down soon after she fell pregnant. The appellant maintains that a "late friend", AF, intervened on her behalf to persuade AO, who otherwise had no interest in the child, to obtain a British passport for JO. A passport for JO issued by Her Majesty's Passport Office (HMPO), identifying her as a British Citizen, was issued on 27 January 2017.

5. The appellant made an Article 8 ECHR human rights claim on 11 October 2017 based primarily on her parental relationship with her son IS and her daughter JO. In refusing the human rights claim on 23 October 2018 the respondent noted that the appellant was still married to OS and that, for the purposes of the British Nationality Act 1981 (BNA), JO was considered to be Nigerian and was not considered to be a British Citizen. Although not clearly articulated within the Reasons for Refusal Letter, the respondent was relying upon s.50 (9A) of the BNA which, at the time of the decision, provided:

> For the purposes of this Act, a child's father is –
>
> (a) the husband, at the time of the child's birth, of the woman who gives birth to the child;" or
>
> (b) where a person is treated as the father of the child under section 28 of the Human Fertilisation and Embryology Act 1990 or section 35 or 36 of the Human Fertilisation and Embryology Act 2008, that person, or
>
> (ba) where a person is treated as a parent of the child under section 42 or 43 of the Human Fertilisation and Embryology Act 2008, that person, or
>
> (c) where none of the paragraphs (a) to (ba) applies, a person who satisfies prescribed requirements as to paternity.

6. As AO was not the appellant's husband at the time of JO's birth, the respondent was not satisfied that he could be considered, for the purposes of establishing British citizenship, as the child's father. In

her Reasons for Refusal Letter the respondent did not make any express allegation that JO's passport was obtained by means of dishonesty or subterfuge, or suggest that AO was not JO's biological father.

7. Nor was the respondent satisfied that the appellant could meet the requirements of Appendix FM of the Immigration Rules, which sets out the requirements for permission to remain in applications involving family members, because neither of her children were British and neither had lived in the UK for 7 years preceding the date of the appellant's application. Nor was the respondent satisfied that the appellant met the requirements of paragraph 276ADE(1) of the Immigration Rules, relating to private life rights. The respondent was not satisfied there were any exceptional circumstances such that the refusal of the application would result in a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for her or her children.

8. The appellant appealed the respondent's refusal of her human rights claim pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). In his decision promulgated on 18 June 2019 Judge Brewer dismissed the human rights appeal. In an 'error of law' decision promulgated on 27 November 2020 the Upper Tribunal agreed with the views of both representatives that Judge Brewer materially erred in law in his approach to the issues relating to the British passport issued to the appellant's daughter, JO, and, in particular, the manner in which the judge reached his conclusions that the appellant had essentially been dishonest in her dealings with HMPO and his concerns expressed in respect of JO's paternity. The Upper Tribunal set aside Judge Brewer's decision and indicated that it would remake the decision afresh at a further hearing. The Upper Tribunal's 'error of law' decision included, *inter alia*, the following directions:

    (1) The respondent is to set out in writing her position with respect to the passport issued to JO, supporting that position with any relevant documents (including any obtained from HMPO), to be filed and served on the Upper Tribunal and the appellant's legal representatives no later than 6 weeks after this decision is issued.

    (2) The appellant is to file and serve on the Upper Tribunal and the respondent any documentary evidence relating to the application to HMPO that resulted in the issuance of JO's passport, including the evidence that accompanied the application.

9. The remaking hearing was listed for 21 July 2021. Neither party complied with the Upper Tribunal's directions. The hearing had to be adjourned. At the date of the adjourned hearing the applicant's oldest child, IS, had been residing in the UK for a continuous period of 7 years. It was the Upper Tribunal's view that this did not constitute a

'new matter' under s.85 of the 2002 Act, but Ms A Everett, representing the respondent at this hearing, confirmed that, in any event, the respondent would give her consent to the Tribunal being entitled to consider that fact that IS now met the definition of a 'qualifying child' under s.117D of the 2002 Act.

10. The Upper Tribunal issued further directions reflecting those previously issued. The Upper Tribunal additionally directed that both parties were to file written representations pursuant to s.29 of the Tribunals, Courts and Enforcement Act 2007 and rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 relating to the Upper Tribunal's consideration of whether the conduct of the parties in failing to comply with the directions issued in the decision promulgated on 27 November 2020 warranted a costs order being made against them.

11. The adjourned hearing was relisted for 23 September 2021. On this occasion the respondent, again represented by Ms Everett, again failed to comply with the directions previously issued, and the appellant partially failed to comply with the directions, although she had provided a new bundle of documents containing *inter alia*, two further statements from the appellant, various documents relating to IS, and a letter dated 26 August 2021 and supporting documents (many of which were redacted) from HMPO. The HMPO letter indicated that JO's passport had been cancelled and revoked on 19 November 2018. In her most recent statement, dated 16 September 2021, the appellant stated that she had never received any letter from HMPO communicating that JO's passport had been revoked.

12. The Upper Tribunal considered that the overriding objective of dealing with cases fairly and justly required a further adjournment to enable the respondent to provide from her own records and from her communication with HMPO details of the information provided by the appellant in support of JO's passport application and details of the service of the revocation decision, which Ms Everett indicated, with reference to a document in her file, had been occasioned by special delivery, and for the appellant to contact her previous legal representatives to ascertain their knowledge or involvement, if any, with the issuance and revocation of JO's passport. Directions were issued to this effect. A further direction was again issued requesting the parties to make written representations in relation to their failure, again, to comply with the earlier directions.

The hearing to remake the decision

13. At the hearing on 1 December 2021 Ms Ahmad, the Presenting Officer, informed the Upper Tribunal that no further documentary evidence had been provided by the respondent pursuant to the directions issued. The applicant's solicitors, Signature Law, had

provided a letter dated 6 October 2021 asserting that the appellant lodged the passport application for JO herself and that she did not retain a copy of the passport application, and that the only document she could recall submitting with the application was JO's birth certificate. The solicitors apologised for their failure to comply with the earlier directions.

14. Ms Ahmad indicated that she was unable to confirm whether there was any further relevant information relating to the issuance and revocation of JO's passport on the Home Office 'system', and that she had only spoken to Mr Clarke, not Ms Everett, who informed her that he had telephoned the relevant team in the Home Office who liaises with HMPO. In the absence of any further relevant evidence or information, and in light of the previous failures by the respondent to comply with the Tribunal's directions and the consequential adjournments, and having regard to the overriding principles set out in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we considered it appropriate to proceed with the hearing.

15. We had before us the bundles of documents prepared by each party for the First-tier Tribunal hearing. The appellant's original bundle included a statement from her dated 20 March 2019. The bundle additionally contained a photocopy of the appellant's Nigerian passport (valid until 8 October 2022), copies of her children's birth certificates, a letter from the parish priest of St John's vicarage, Angell Town dated 13 May 2019, a letter dated 15 May 2019 from the reverend Arnold Anthony of the Glorious Family Church in Camberwell, certificates of baptism in respect of IS and JO, and documentation from St John's Angell Town C of E Primary School confirming IS's attendance since 14 November 2016 and his placement on a Learning Support Register. The bundle additionally contained a letter dated 8 May 2019 from the London Borough of Lambeth confirming that the appellant and her children were being supported by the 'No Recourse to Public Funds Team' under s.17 Children's Act 1989. The letter indicated that the family were, current to the date of its issuance, placed in temporary accommodation and that they received £119.84 a week. The bundle additionally contained NHS documentation in respect of IS's diagnosis of asthma including discharge summaries and appointments and details of his asthma medication and asthma plans. There were also NHS documents indicating that IS had been referred for a Speech & Language Therapy assessment (including a letter dated 8 February 2017). Other NHS documents indicated that the appellant had received physiotherapy appointments.

16. A further bundle of documents provided for the aborted hearing on 23 September 2021 included two further witness statements from the appellant, one dated 16 July 2021 and the other dated 16 September 2021, a further letter of support from a different parish priest of St John dated 23 June 2021, school reports for IS, three letters, one

typed on 27 March 2020, another typed on 7 November 2018, and the 3rd typed on 9 July 2018 by a Nurse Specialist in Paediatric Respiratory Medicine at the Kings College Hospital NHS Foundation Trust concerning IS's asthma and addressed to the appellant's GP, a further asthma treatment plan in respect of IS, a letter dated 2 May 2018 from a Speech and Language Therapist in respect of a follow up speech and language therapy session for IS, and further letters of appointment in respect of Lung Function tests for IS. The bundle additionally included a letter from HMPO confirming the issuance and cancellation of JO's passport. This letter was accompanied by a redacted Case Running Sheet which provided a 'snapshot' view of relevant actions undertaken by HMPO in respect of the revocation of JO's passport. This made it clear that JO's passport was revoked on 19 November 2018 because the appellant was not divorced from OS.

17. A 3rd bundle contained a further witness statement from the appellant dated 14 October 2021, and email correspondence between the appellant's current solicitors (Signature Law) and her two previous solicitors (Apex Solicitors and Dynamic Immigration Consultants)

18. The respondent relied on a bundle of documents prepared for the First-tier Tribunal hearing. Ms Ahmad provided a 'Response to an Information Request', 2 July 2019, relating to speech and language therapy in Nigeria, and a Country Policy and Information Note (CPIN) on 'Nigeria: Medical and healthcare issues', January 2020. She additionally provided a copy of NA (Bangladesh) & Ors v SSHD [2021] EWCA Civ 953.

19. The appellant gave her evidence in English and adopted her statements. There was no examination in chief and the appellant underwent cross-examination. We recorded the oral evidence from the appellant and the oral submissions from both Ms Ahmad and Ms Reid. We have read and considered with care all the documents before us even if they are not specifically identified later in this decision. Both parties are aware of the evidence, both written and oral, that was before the Tribunal. This evidence is, in any event, a matter of record. We shall refer to this evidence only in so far as it is necessary for us to lawfully determine the appellant's human rights appeal.

20. Ms Reid, fairly and appropriately in our opinion, indicated that her submissions would focus on whether it would be reasonable to expect the appellant's eldest child, IS, to leave the UK. We nevertheless remind ourselves that in all cases we must go on to determine whether, in the circumstances of a particular case, the respondent's decision would breach the freestanding rights protected under Article 8 ECHR such that the respondent's refusal of the human rights claim constitutes disproportionate interference with the relevant Article 8 ECHR rights.

21. The relevant Immigration Rules for our consideration are paragraph 276ADE(1)(iv) (that IS is under the age of 18 and has lived continuously in the UK for at least 7 years and it would not be reasonable to expect him to leave the UK), and paragraph 276ADE(1)(vi) (that there would be very significant obstacles to the appellant's integration into Nigeria if she was required to return). We must also take into account, when considering the public interest in respect of the proportionality under Article 8 ECHR of the respondent's decision, the factors listed in s.117B of the 2002 Act.

22. In Article 8 ECHR appeals it is for the appellant to discharge the burden of proof and the standard of proof to be applied is a balance of probabilities.

Findings of fact and conclusions

23. There is no dispute that the applicant is a 43-year-old woman who entered the United Kingdom aged 32. She therefore spent the majority of her life in Nigeria, including all her formative years. There is no dispute that she overstayed her initial grant of entry clearance as a visitor. The appellant has produced JO's birth certificate, and we are aware that JO was initially issued a passport as a British citizen on the basis that her biological father was British. The respondent has failed to produce any evidence from HMPO relating to the information and documentation that accompanied JO's passport application or the service of the decision revoking JO's passport. Nor was it suggested to JO during cross-examination that AO was not JO's biological father or that he was not a British citizen. In these circumstances we accept that JO's biological father is AO, and that AO is a British citizen.

24. The email correspondence between the appellant's current firm of solicitors and her two previous firms of solicitors indicate that the previous solicitors had not entered into any correspondence with HMPO and that neither firm were aware of any revocation letter issued by HMPO in respect of JO's passport. The respondent has failed to produce any evidence relating to the service of the HMPO revocation letter on the appellant and this aspect of the appellant's account was not challenged by the Presenting Officer. In these circumstances we proceed on the basis that the appellant did not become aware of the revocation of JO's passport until she was informed of the letter from HMPO dated 26 August 2021.

25. The written submissions provided on behalf of the appellant acknowledged the revocation of JO's passport. It was not submitted, either in the most recent written submissions or by Ms Reid in her oral submissions, that JO was a British citizen or that she should be treated in a manner akin to that of a British citizen. The written submissions maintained that it was open to the appellant to register

her daughter as a British citizen and that she intended to proceed with this application as early as it was practical to do so. No oral submissions were made by Ms Reid on this point. Neither the written submissions produced for the remaking hearing nor Ms Reid in her oral submissions referred to or relied in any way on the decision in K (A Child) v SSHD [2018] EWHC 1834 (Admin) in which Helen Mountfield QC (sitting as a Deputy High Court Judge) held that section 50(9A) of the BNA breached Article 14 ECHR (relating to non-discrimination) in conjunction with Article 8 ECHR. In the circumstances we proceed in our consideration on the basis that neither child is a British citizen. It was accepted by the respondent that IS now met the definition of 'qualifying child' in s.117D of the 2002 Act as he has been living in the UK for a continuous period of 7 years.

26. The appellant maintains that she and her children have no contact with either of their biological fathers. In the absence of any cross examination on this point we proceed on the basis that neither IS nor JO have any contact with their biological fathers.

27. Having regard to the documentation from the London Borough of Lambeth we accept that the appellant and her children are being supported by Lambeth's No Recourse to Public Funds Team under s.17 of the Children's Act 1989.

28. Ms Reid's submissions centred on whether it is reasonable to expect IS, a qualifying child, to leave the UK. It is therefore necessary to first determine the best interests of IS, as well as his sister, pursuant to s.55 of the Borders, Citizenship and Immigration Act 2009. The assessment of the children's best interests does not take into account any public interest considerations and is focused purely on the impact on the children. When assessing the best interests of IS and JO we have applied the guidance given in EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874 (at [35]), and Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197.

29. In EV (Philippines) (at [35]) the Court of Appeal explained that a decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

30. At paragraph 58 of EV(Philippines) Lewison LJ stated,

> "In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?'"

31. The first headnote of Azimi-Moayed reads,

> "*As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary*."

32. Headnote (ii) reads,

> "*Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.*"

33. Headnote (iv) of the same case indicates,

> "*Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life.*"

34. Both children were born in the UK and have never visited Nigeria. They would therefore be unfamiliar with the actual conditions in the country itself. We additionally take into account the appellant's oral evidence that it was only recently that she explained to IS that he was Nigerian, although we bear in mind at the same time that both children must have had some awareness of their Nigerian ancestry given the appellant's oral evidence that they regularly spoke to their siblings and to their grandparents and their mother's siblings in Nigeria. There is no direct evidence from the children themselves, but we are prepared to accept that they are likely to enjoy a sense of settlement in this country, that they are likely to be familiar with English customs and culture, and that they are likely to regard the UK as their home.

35. The children are however young, the oldest, IS, being only 8 years old. Neither could be said to be at a critical stage of their education. IS is not yet in secondary school. IS's school reports indicate that he has made good progress in respect of his relationships and in respect of his general academic achievement. He is a hard worker and works well with others. We don't doubt that IS has settled well into his

schooling but there is little independent evidence that he has established private life relationships with his friends and schoolteachers of an unusually strong nature. The appellant stated that IS and JO did not really understand Yoruba but we take judicial notice of the fact that English is the official language of Nigeria and is widely spoken. Although we have taken full account of the evidence relating to IS's speech and language therapy (see below) there was no specific evidence that he would encounter any particular difficulty in learning Yoruba. We note that he and his sister would be supported in learning Yoruba by their mother and their extended family in Nigeria.

36. In her oral evidence the appellant claimed that she had never encountered free education for children in Nigeria. There was however no independent evidence provided to us that primary and secondary education was not freely available for children in Nigeria or that the appellant's children would be unable to access educational services in Nigeria. In the absence of any independent evidence on this point we do not accept the appellant's assertion that education for her children would not be freely available. Even if primary and secondary education was not freely available, we find, for the reasons given below, that the appellant and her family will be able to afford to educate IS and JO. We note by way of observation that the appellant's two other children were in education in Nigeria.

37. We have considered the letters from the parish priests of St John, Angell Town, who indicate that the appellant and her children have been attending the church for over 5 years and that they were "very much part of" the church family and that their world was "very much centred on school, church and local community." The two letters were relatively brief and provided little detail as to the particular quality or nature of the children's association or interaction with the local church and the local community, or of the impact on the children if they were removed to Nigeria. The letter from Glorious Family Church indicated that the appellant was a regular member and was "a very involved person" and had volunteered in at least 3 departments in the church. The appellant and her children were said to "contribute immensely to the vision and purpose of the ministry in the local community", but no particular details were provided. This letter was again lacking in detail in respect of the nature and quality of the appellant's attendance and voluntary work with the church, and in respect of the relationship the children have with the church and its members or the impact on both children if they were removed to Nigeria. We observe that there appears to be nothing preventing the appellant's children from engaging in a church community in Nigeria if they so wished.

38. Although neither child has been to Nigeria, they have both been in contact with their various family members in Nigeria. Ms Reid

submitted that the appellant would be returning to Nigeria as a single mother and she and the children would be in a more vulnerable position in comparison to a two-parent family. Whilst we are prepared to accept, as a very general submission, that a single parent family headed by a mother may be more vulnerable than a family with two parents, there was no background evidence before us giving details of any such vulnerability in the specific context of Nigeria, and we note, for the reasons given below, that the appellant and her children would, in any event, have the support of her various family members. In her oral evidence the appellant stated that she spoke with her parents and siblings once or twice a week and that both IS and JO also speak to her parents and her siblings. The appellant also indicated that she spoke to her two other children living in Nigeria once or twice a week and that IS and JO also speak with their siblings in Nigeria. The children therefore have a network of family members with whom they are on good terms in Nigeria. We further note that the appellant's First-tier Tribunal bundle contains a number of parenting certificates issued to the appellant indicating that she is capable of ensuring the welfare and safety of her children. The children have no contact with their biological fathers or with any member of their biological fathers' families. The children have no other relatives in the UK.

39. In her statement of 16 July 2021, the appellant asserts that her elderly parents are living in Nigeria with one of her brothers who works in a private hospital as a phlebotomist, that another brother is a full-time student living in a hostel, and that the 3rd brother is unemployed. One of her sisters is said to be "currently training", another works as a hairdresser, and another sister is supported financially by her husband (this same sister is caring for the appellant's two children in Nigeria). In her oral evidence the appellant said that none of her family members are now working. She claimed that her hairdresser sister was not working because she had malaria, and that her brother who worked at the private hospital was made unemployed because of the Covid-19 pandemic. The appellant has produced no documentary evidence to confirm the same. If, for example, the appellant's brother, who worked as a phlebotomist, became unemployed we would reasonably expect to see documentary evidence of this. The appellant also described how her aged father was sick and had failed to recognise her, and that there was no money to take him to hospital, but there was no independent evidence of any kind in support of this assertion, and no evidence from any of the appellant's other family in Nigeria confirming the same. The appellant has not provided any independent evidence relating to the financial circumstances of her family in Nigeria (such as bank account statements or mortgage/rent agreements). Nor has the appellant produced any statements or letters from any of her family members in Nigeria confirming her assertions and providing details of their respective incomes and expenditures.

40. The appellant further claims that none of her family have any space to help her and her children but there was no independent evidence relating to their respective properties and there were no photographs of the properties. Whilst there is no requirement for corroborative evidence in this jurisdiction we are entitled to take into account the absence of evidence that would reasonably be expected to be available. We note that the appellant said in oral evidence that she was never asked to produce such evidence, but she is represented by competent solicitors who would have been aware of the need to evidence her assertions. We do not consequently accept that the appellant's family will be incapable of supporting her and her children either financially or practically, at least in the short term, should they be returned to Nigeria.

41. We fully accept that IS has, in the past, been admitted to hospital because of asthma attacks (although the appellant claimed that she had to call an ambulance for IS this year the most recent documentary evidence of a hospital admission relating to acute asthma occurred on 28 March 2019, with a discharge on 29 March 2019,). The most recent documentary evidence in respect of IS's asthma is a letter from King's College Hospital NHS Foundation Trust relating to a telephone consultation on 16 March 2020. The letter noted that IS's asthma "… has been properly controlled, manifested by coughing at night, but not every night, and also exertional symptoms." The letter referred to IS's medication and indicated that the appellant had not been complying with a plan in respect of the frequency of the puffs. The letter further noted that IS's formal lung function tested at a clinical appointment was sub-optimal and that this was "a further reflection of poor asthma control." The letter indicated a further appointment would be made in 6 months' time. There is no more recent independent medical evidence in respect of IS's asthma. Whilst we do not doubt that his asthma is acute, the most recent medical evidence suggests that IS's asthma was not being properly controlled but that this would change if the appellant complies with the asthma plans. There is little if any evidence before us that IS's asthma would deteriorate if he was removed with his family to Nigeria by reason of the geographical move alone.

42. The January 2020 CPIN indicated that the majority of medication prescribed to IS was available in Nigeria including Cetirizine, Prednisone, Salbutamol and Sertraline. We acknowledge the references in the CPIN's overview that basic medical shortages have hindered medical practice and training, that Nigerians have poor access to health care and pure health outcomes, particularly outside major urban centres, and that access to and availability of quality medical services is inadequate, with most Nigerians unable to afford healthcare.

43. We are not however satisfied, for the reasons already given, that the appellant's family in Nigeria would be unable to provide practical and financial support to her and her family. We are not consequently satisfied that IS would be unable to afford and access the medication that is clearly available in Nigeria for the treatment of his asthma, or that he would be unable to continue to undertake a treatment plan to control his asthma. The appellant has not, in any event, produced any evidence relating to the relative cost of the asthma medication in Nigeria. We additionally note that the CPIN, at 6.12.4, states that a few states, including Lagos where the appellant's two children in Nigeria currently live, "offer free paediatric health care services to children of parents who pay taxes." Based on our findings later in this decision, we find that the appellant will be capable of looking for and undertaking employment in Nigeria, and that both her children may therefore be able to benefit from such healthcare services as the appellant, if employed, would be a tax payer.

44. We have considered the evidence relating to IS's speech and language issues. we note the letter of June 2017 from St John's Angell Town C of E Primary School indicating the decision to place IS on the Learning and Support Register, and an 'Offer of Speech & Language Therapy' dated 2 May 2018 in respect of IS. There is however no report on the nature or seriousness of IS's language and speech issues, and IS's more recent school reports suggest that he is making good progress and that his 'Subject attainment' for speaking & listening, reading and writing all fall within the 'Securely within' category. In her statement of 16 July 2021 the appellant stated that IS was receiving one-on-one treatment for his speech "until last year." She notes that his speech "has really improved" but maintains that it is not at the same level as his friends. There is however no independent evidence to support this assertion. The 'Response to an Information Request', 2 July 2019, relating to speech and language therapy in Nigeria, indicates, in any event, that there are speech therapists available in Nigeria.

45. Whilst we accept that the transition to life in Nigeria may be difficult for both IS and JO, we find, for the reasons stated above, applying the approach and the non-exhaustive factors identified in EV (Philippines), that the best interests of both children, and in particular IS, are that they remain with their mother, and that if she is removed to Nigeria it is in their best interests to stay with her and relocate to Nigeria where they have a range of family members, including siblings (or half siblings in respect of JO), who can support them emotionally, financially and practically in their transition.

46. We now consider whether it is reasonable to expect IS to leave the UK. We remind ourselves that, when considering the reasonableness issue, the focus should only be on factors relating to the child and the conduct of the appellant is irrelevant (KO (Nigeria) [2018] UKSC 53).

In determining the reasonableness issue we are guided by the recent judgment in NA (and Ors) v SSHD [2021] EWCA Civ 953. At [26] Underhill LJ stated, with reference to Lord Carnwath's judgment in KO (Nigeria) [2018] UKSC 53:

> "At the risk of spelling it out over-laboriously, Lord Carnwath's point is that, notwithstanding his conclusion that the parents' conduct is not material as such, to the extent that it has led to their not having leave to remain it will still have been "indirectly" material to the reasonableness question because:
>
> (a) the reasonableness question has to be considered on the "hypothesis" that the parents will have to leave (that is the so-called "real world" point supported by the citation of *SA (Bangladesh)* and *EV (Philippines)*), and
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> (b) "it will normally be reasonable for a child to be with [their parents]"."

47. And at [28] Underhill LJ held:

> "The upshot is that the effect of Lord Carnwath's reasoning in *KO (Nigeria)* is that, even on the narrower approach, in a case falling under the seven-year provision where neither parent has leave to remain the starting-point for a decision-maker is the common-sense proposition that it will be reasonable to expect the qualifying child to leave the UK with their parents. That is necessarily inconsistent with the so-called "powerful reasons doctrine" apparently endorsed by Elias LJ in *MA (Pakistan).* Although Lord Carnwath does not specifically spell that out, that is unsurprising since he had in para. 14 of his judgment made it clear that he was going to side-step detailed commentary on the earlier case-law and propose a more straightforward approach."

48. We adopt the 'common-sense approach' proposition that, as a starting point, it will be reasonable for IS to leave the UK with his mother. We note however that this represents no more than a common-sense starting-point, and that KO (Nigeria) does not provide for a presumption in the opposite direction, and that it remains necessary to evaluate all the relevant circumstances to determine the reasonableness question (see NA at [30]).

49. As discussed below, we find that there are no very significant obstacles to the appellant's integration in Nigeria and that she does not have a right to remain in the UK. This is the background against which we must determine the reasonableness question. We treat IS's best interests as a primary consideration. Much of the assessment undertaken above in evaluating IS's best interests is equally applicable when determining the reasonableness issue. We will not repeat our assessment made above in evaluating the bests interests of the children, and we adopt that reasoning. The fact that it is in the best interests of IS to remain with his mother is a particularly relevant consideration in determining whether it is reasonable for IS to leave

the UK. We take full account of the difficulties and disruption that IS is likely to encounter, including the unfamiliarity of being in a new country, the fact that he will be unfamiliar with Yoruba, and the loss of his friends (although there was no evidence before that that he could not continue to maintain contact through remote means). We additionally take account of the appellant's evidence that IS regards the UK as his home. We find however that, given his age, his stage of education, our assessment of his health needs, and in light of the family support that will be available to him in Nigeria, it would not be unreasonable to expect him to leave the UK.

50. We are not persuaded there are very significant obstacles to the appellant's integration in Nigeria as understood by paragraph 276ADE(1)(vi). In reaching this conclusion we have applied the well-known test in SSHD v Kamara [2016] EWCA Civ 813 which requires a broad evaluative judgment to be made;

> "… as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

51. The evidence before us indicates that the appellant is a fit and healthy 43-year-old who lived in Nigeria for the first 30 years of her life. Although the appellant claims that she is taking medication for depression there is no independent evidence to support this assertion. In any event, there is no independent medical evidence that the appellant is incapable of ensuring the safety and welfare of her children, or that she is incapable of undertaking employment based on medical grounds. There is no medical reason why she would be unable to look for employment in Nigeria in order to support IS and JO. We note the appellant's assertion that, following the award of her ordinary diploma she mainly stayed at home and that she had only worked for about 6 months in a small local shop in Nigeria. The appellant has not however produced any independent documentary evidence relating to employment situation in Nigeria. We do not accept that the appellant is incapable of undertaking employment or that the employment situation in Nigeria is such that she would be unable to find a job. The appellant will have her family network to rely on for any support that is needed in the short-term. She speaks Yoruba and is clearly familiar with the culture and the way of life in Nigeria.

Assessment of Article 8 ECHR outside the Immigration Rules

52. We are satisfied that the decision refusing the appellant's human rights claim is sufficient to trigger the protection of Article 8 ECHR as

it impacts on the private life relationships the appellant and her children have established in the UK. It was not suggested that the decision was not in accordance with the law or that it was unnecessary in a democratic society. The issue with which we need to grapple relates to the proportionality of the decision. We must consider whether, although the appellant and her children cannot meet the requirements of the Immigration Rules, the refusal of her human rights claim would breach GEN.3.2 of Appendix FM such that it would result in unjustifiably harsh consequences and therefore be disproportionate under Article 8 ECHR (applying the approach identified in Razgar [2004] UKHL 27, as further considered in (R (on the application of MM (Lebanon) and Others) (Appellants) v SSHD (Respondent) [2017] UKSC 10)).

53. In assessing the proportionality of the respondent's decision we have considered the factors set out in section 117B of the 2002 Act. We note that the maintenance of effective immigration controls is in the public interest, and that the appellant cannot meet the requirements of the Immigration Rules. We note that the appellant is not financially independent as she and her children are being supported by the 'No Recourse to Public Funds Team' under s.17 Children's Act 1989. The appellant gave her evidence in English and we are satisfied that she is proficient in English. This however is a neutral factor.

54. We must attach little weight to the private life established by the appellant in the UK given that all but 6 months of her residence has been without lawful permission and precarious. We remind ourselves however that children must not be blamed for matters for which they are not responsible, such as a parent's conduct (Zoumbas [2013] 1 WLR 3690). We have already concluded that it would be reasonable to expect IS to leave the UK. We have considered the position of JO together with that of IS and the appellant. JO is only 4 years old and there is no evidence that she has developed any significant private life relationship of her own outside that of her own immediate family. Nor is there any evidence that JO has any health issues. As already discussed, both she and IS would have the support of a family network in Nigeria and there is no persuasive evidence that their mother would be unable to ensure their welfare and safety. The appellant has not identified any specific Article 8 ECHR private life relationships that either of her children have developed with particular individuals outside of their immediate family unit. Even taking account of the private life relationships the appellant has established in the UK by reference to her involvement with the identified churches and their members, and the length of her residence, and the fact that the children have lived in the UK all their lives, we do not find, having considered all the evidence before us both cumulatively and holistically, that the respondent's decision would constitute a disproportionate with their Article 8 ECHR rights.

Notice of Decision

The appellant's human rights 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 in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his 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.

D.Blum 16 December 2021

Signed Date
Upper Tribunal Judge Blum