**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/08602/2019 (V)**

**THE IMMIGRATION ACTS**

| **Heard at Field House (by remote video means)** | **Decision & Reasons Promulgated** |
|---|---|
| **On 17th May 2021** | **On the 17th June 2021** |

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**ELIZABETH OLUWAYEMISI SALAMI OGUNLADE**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**And**

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

Respondent

**Representation:**
For the Appellant: Mr S Karim of Counsel, instructed on a direct access basis
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Skype. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. There were technical difficulties at the outset with a strong echo, which was resolved by the Appellant using a different device to access the hearing, following

which everyone could see and hear each other clearly. The file contained the documents in paper format.

2. In an error of law decision promulgated on 18 January 2021 and annexed to this decision, I found an error of law in the decision of First-tier Tribunal Beg promulgated on 20 November 2019 in which the Appellant's appeal against the decision to refuse her human rights claim was allowed. That decision was set aside with preserved findings of fact.

3. The Appellant is a national of Nigeria, born on 13 November 1949, who entered the United Kingdom on 23 July 2003 as a visitor with leave to enter as such for a period of 6 months to 17 December 2003. The Appellant has remained in the United Kingdom unlawfully ever since, only seeking to regularise her status by making an application on human rights grounds on 6 June 2018 (which was rejected due to payment issues) and again on 11 August 2018. The application was for indefinite leave to remain outside of the Immigration Rules on the basis of the Appellant's length of residence in the United Kingdom, her private life here, including with her children and grandchildren; and compassionate circumstances.

4. The Respondent refused the application in a decision dated 26 April 2019 on the basis that the Appellant did not meet any of the requirements of the Immigration Rules for a grant of leave to remain and in particular that having spent the majority of her life in Nigeria there would not be any very significant obstacles to her reintegration there. Further, there were no exceptional or compassionate circumstances to warrant a grant of leave to remain outside of the Immigration Rules; the Appellant's family and other relationships established in the United Kingdom were not considered as sufficiently strong evidence for a grant of leave to remain and there would be no unjustifiably harsh consequences for the Appellant in refusing the application.

5. The Appellant's appeal is to be remade on Article 8 grounds with the following preserved findings of fact:

- The Appellant lived the majority of her life in Nigeria and worked there.
- The Appellant is familiar with the customs and traditions of society in Nigeria.
- There would not be very significant obstacles to the Appellant's reintegration in Nigeria, where she would be able to operate on a day-to-day basis in that society, form and build up relationships. The Appellant does not therefore meet the requirements of paragraph 276ADE of the Immigration Rules.
- The Appellant is a widow, her husband, brother and niece being deceased.
- The Appellant is in contact with her nephew in the United States of America.

- The Appellant has extended family in Nigeria, but they would not be able to accommodate or support her. The Appellant does not have a family home to return to in Nigeria.
- The Appellant has established family life in the United Kingdom with her daughter for the purposes of Article 8 of the European Convention on Human Rights, but not with her son or any grandchildren. The Appellant has a close-knit family in the United Kingdom.
- The Appellant has looked after her grandchildren in the United Kingdom, including taking them to school. The Appellant's children would be able to arrange alternative childcare in the Appellant's absence.
- The Appellant is financially supported and accommodated by her daughter in the United Kingdom and would be financially supported by her family on return to Nigeria.

6. There was no further evidence submitted by the Respondent. The Appellant submitted a supplementary bundle, including an updated written statement from her and her daughter, both of whom gave oral evidence at the hearing before me.

7. In her written statement signed and dated 22 January 2021 (which updated her statement before First-tier Tribunal), the Appellant states that she has lived in the United Kingdom continuously for over 14 years and without recourse to public funds. The Appellant's son and daughter reside permanently in the United Kingdom with their families; which include six grandchildren for whom the Appellant has provided care and support and continues to look after two of them, including taking J to school and specialist support groups. The Appellant lives with her daughter and her family. She states that her contribution to her family has enabled her children and their partners to be financially self-sufficient and not rely on public funds.

8. The Appellant states that separation from her grandchildren will have a detrimental impact on her and their mental, physical, emotional state and well-being. The Appellant does not have any family in Nigeria and has lost contact with friends and family there since 2003, such that it would be difficult, if not impossible to reintegrate, endangering her health and life.

9. The Appellant attended the oral hearing, confirmed her details and adopted her written statement. In oral evidence she stated that her children would not be able to pay for childcare or financially support her on return to Nigeria without recourse to public funds. The Appellant's son was out of work for part of 2020 but has now started a new job, otherwise the family financial circumstances were no different to that before the First-tier Tribunal and there was no evidence that they were worse off now.

10. The Appellant stated that there was no proper healthcare in Nigeria for people who had Covid-19 and there would be no one in Nigeria to support

her. The Appellant has no family in Nigeria, her husband and brother both died in 2016. The Appellant was notified of her husband's death through church members in the United Kingdom who travelled to Nigeria and informed her on their return.

11. The Appellant has not yet had a Covid-19 vaccine, a previous appointment being cancelled due to swelling in her legs but this has been rebooked. The Appellant has high blood pressure and arthritis, which restricts her mobility and for which she is prescribed pain relief through her GP.

12. The Appellant takes her grandson J to and from school, helped with home schooling during lockdown and helps him with extra-curricular activities on zoom. The Appellant also used to take him to the clinic and for appointments when he had them.

13. In her written statement signed and dated 22 January 2021, Ms Ifeoluwa Akinyemi (the Appellant's daughter) gives details of her family, including four children, all of whom are British citizens. Ms Akinyemi is employed in the NHS and her husband is employed as a rail track maintenance operative. The family are described as self-sufficient, using earnings to meet their basic needs and place themselves in the lower middle class of the population.

14. Ms Akinyemi describes the support given to her and her family by the Appellant and in particular, her care for J, who has Autism and who the Appellant assists in accessing and attending specialist support and facilities as well as home schooling during lockdown. J has a comfortable and trusting relationship with the Appellant, struggling to settle with anyone outside of his immediate family and he displays significant withdrawal from unfamiliar people and environments. J has significant dietary limitations, eating restricted food prepared by a family member only. The Appellant has a close relationship with her other grandchildren who she has cared for over the years and they would be traumatised if she had to return to Nigeria.

15. Ms Akinyemi has only returned to Nigeria once in 2016 for her father's burial and has no ties there or reason to return. Her children have never been to Nigeria. The family are all concerned about the state of affairs in Nigeria and consider that returning the Appellant there would be sending her to an early death, without access to adequate medical care and being unable to integrate given covid restrictions and lack of family support. Ms Akinyemi states that the Appellant would face extreme difficulty meeting her everyday needs in Nigeria due to a lack of home delivery services and that Ms Akinyemi would be placed in undue hardship and financial strain as she has no reserve funds or investment to ensure a standard livelihood for the Appellant's care and well-being in Nigeria.

16. Ms Akinyemi attended the oral hearing, confirmed her details and adopted her written statement. In oral evidence she stated that although

her brother had been out of work for a period during the pandemic, the family were currently in the same financial circumstances as they were before the First-tier Tribunal; being financially self-sufficient but without excess funds. When asked about why the family would be under financial strain if the Appellant returned to Nigeria, Ms Akinyemi stated that at present, the Appellant does not need to pay rent as she lives and eats with her family and is supported for things like clothing. In Nigeria they would need to provide an additional home which would be a strain and additional burden on the family finances. Bank statements and financial information could be provided if needed but had not been submitted so far.

17. In relation to J, Ms Akinyemi thought the only issue that needed to be addressed was evidence of his ASD diagnosis which was provided and that document outlined the additional services and support he required. Since diagnosis he has entered mainstream school and most additional support is provided through school, with some groups on zoom after school as no one can currently attend in person due to Covid-19. During lockdown, the Appellant cared for J and supported his home schooling for him to complete work set by school. Once school reopened fully after February half-term, J returned to full-time education at school. The Appellant is J's main source of care, is known to his school (as she is from the older children) and was the main person attending specialist appointments such as speech and language therapy with J. There is no documentary evidence of current specialist support provided outside of school but a community team report is awaited following a visit on 6 May 2021.

18. The Appellant attended church in the United Kingdom (pre Covid-19) and the church is connected to the one she used to attend in Nigeria; with some families from there having children attending in the United Kingdom. Ms Akinyemi and the Appellant were informed of her father's/husband's death in 2016 through the church and the funeral itself was supported by members of the church in Nigeria. Ms Akinyemi stated that relatives of her father attended his funeral but she has no connection with them or contact details and did not have any even in Nigeria before she left. The Appellant has no family or connections left in Nigeria and although she could try to involve herself in the church community on return, this is not the same as having family there; may not include anyone she knew from before and it would be difficult to integrate due to her age.

19. Ms Akinyemi stated the Appellant has high blood pressure and arthritis, managed by medication and checked at home. She stated that the healthcare system in Nigeria is not easily accessible and is not good even for a third world country measured against other African countries, being in a poor state. Ms Akinyemi knows about this from Nigerian news and through networks working in the NHS; she is aware that there are problems and gaps in healthcare in Nigeria.

20. The Appellant did not originally have a Covid-19 vaccine after research on risk factors as she had a history of serious DVT as a teenager; but she is now booked in for her first injection on Sunday with the second to follow.

It was not known if the second injection could be administered in Nigeria but Ms Akinyemi stated that it would be risky with standard advice in the United Kingdom to have the same vaccine at the same location for the second dose. There would be a high risk to the Appellant from Covid-19 in Nigeria and even when vaccinated, protection is still needed. There are no home delivery services for food in Nigeria for the Appellant to use. Ms Akinyemi had not investigated any possible housing options for the Appellant in Nigeria. It would be hard, particularly financially, for Ms Akinyemi to visit the Appellant in Nigeria and there are security concerns.

21. In addition, there was written evidence from the Appellant's family members in the United Kingdom (including her grandchildren) which spoke of her care and positive support to family; and from friends and her church. In addition, there is a letter from J's school, some bank statements, family photographs, death certificate for the Appellant's husband and NHS report dated 3 May 2018 regarding J's diagnosis of ASD.

22. In closing submissions on behalf of the Respondent, Mr Clarke referred to the preserved findings of fact and raised no objection to the new evidence relied upon, nor to the requirements of paragraph 276ADE of the Immigration Rules being revisited as at date of this hearing. However, it was submitted that the new evidence was inadequate to go behind or alter any of the findings previously made; even though certain parts were now in dispute.

23. In relation to whether the Appellant has extended family in Nigeria, the First-tier Tribunal found that she did but this is now denied by her and her daughter; although there was no challenge to that finding of fact previously. Nor was there any challenge to the finding that the Appellant had family life for the purposes of Article 8 of the European Convention on Human Rights with her daughter, but not with her son or other family members in the United Kingdom.

24. In relation to finances, the Appellant's daughter says that if the Appellant returned to Nigeria, she would become reliant on public funds, but there is no evidence to support that assertion. There is no updated evidence from the Appellant's son, no evidence of earnings or outgoings or any financial documents. The preserved finding of the First-tier Tribunal that the Appellant's children are in well paid employment and would be able to arrange and pay for childcare as well as financially support the Appellant on return to Nigeria should therefore stand.

25. The test for reintegration for private life purposes is set out in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813. In accordance with that, the Appellant has spent the majority of her life in Nigeria where she has continuing links through the church she attends in the United Kingdom and receives news from Nigeria (including of the death of her husband) and notwithstanding the impact of Covid-19, the Appellant could re-establish private life in Nigeria through the church and her knowledge of culture there. Even if she does not know individuals

there, she can form new friendships. The Appellant has simply not identified any very significant obstacles to reintegration in Nigeria and the circumstances and restrictions from Covid-19 are not enough.

26. The Appellant is about to receive her first vaccine and there is no evidence beyond speculation that she could not receive her second dose on return to Nigeria and a lack of medical evidence generally about the Appellant's health, current treatment received or needed and its availability and accessibility in Nigeria.

27. There is also a lack of any up to date medical evidence in relation to J and lack of any detail or supporting evidence of the Appellant's role in his care. The information in the witness statements is now to some extent out of date as it refers to the situation of home schooling during a period of lockdown which has since eased. In these circumstances, there is also no reason to go behind the finding that the Appellant does not have family life with J for the purposes of Article 8 of the European Convention on Human Rights.

28. Overall Mr Clarke submitted that the Appellant does not meet the requirements of the Immigration Rules and that there would be no unjustifiably harsh consequences or disproportionate interference with her right to respect for private and family life for the purposes of Article 8. The factors in section 117B of the Nationality, Immigration and Asylum Act 2002 must be considered. The Respondent accepts that the Appellant speaks English and is financially independent to the extent that she is supported wholly by family members. The importance of immigration control is particularly strong in circumstances where the Appellant has remained unlawfully in the United Kingdom, persistently in breach of immigration control and in full knowledge that she had no right to remain, such that only little weight can be attached to her private life.

29. On behalf of the Appellant, Mr Karim submitted that the Appellant met the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules on the basis that there were very significant obstacles to reintegration and that in any event there would be a breach of Article 8 of the European Convention on Human Rights.

30. Mr Karim highlighted in particular that there were no adverse credibility findings made by the First-tier Tribunal in relation to the Appellant or her daughter and no challenge was made to their credibility before the Upper Tribunal. The witnesses have given consistent and credible evidence, including as to the lack of any family remaining in Nigeria and as to J's care needs and the Appellant's involvement with those. In these circumstances, there is no need for corroborative or documentary evidence, the credible witness evidence is sufficient on the balance of probabilities and the lack of specific evidence should not be held against the Appellant.

31. The Appellant is in her seventies, she is from an ethnic minority and has health conditions, such that she is particularly susceptible to Covid-19 and has not yet been vaccinated. During the course of closing submissions Mr Karim forwarded links to two websites about Covid-19 in Nigeria stating that this poses a high risk there and travel to Nigeria is not advised. The Appellant would be required to self-isolate on return for 7 days and would have no one to support her in that period and no other support, such as a food delivery service available. This would be a very significant obstacle to her reintegration.

32. In relation to Article 8, there must also be an assessment of the best interests of J pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009 which goes beyond a binary assessment of being with his parents. Mr Karim submitted it is in his best interests for the Appellant to remain in the United Kingdom given his needs, that his parents are both employed and the care given by the Appellant.

33. Mr Karim submitted that the earlier finding that family life existed for the purposes of Article 8 only between the Appellant and her daughter but not between the Appellant and J or other family members who are all part of the same household is bizarre and in any event there is evidence to show more than normal emotional ties between the Appellant and J. It must also be noted that section 117B does not penalise the Appellant in relation to this type of family relationship developed whilst here unlawfully.

34. Overall, the Appellant's removal to Nigeria would result in unjustifiably harsh consequences to the Appellant and her family members and grandchildren in particular. The Appellant lacks any family or meaningful connections in Nigeria, has resided in the United Kingdom for a long time and is at risk due to Covid-19. The Appellant's removal would result in the severance of meaningful family ties in the United Kingdom, without any family or other support in Nigeria. The Appellant's removal would be a disproportionate interference with her right to respect for private and family life.

## Findings and reasons

35. This appeal is under Article 8 of the European Convention on Human Rights, for which the five stage approach set out in Razgar v Secretary of State for the Home Department [2004] UKHL 27 is followed. Although there is a preserved finding from the First-tier Tribunal that the Appellant does not satisfy the requirements of the Immigration Rules for a grant of leave to remain on private life grounds, the Appellant submits that she does and the Respondent has no objection to this matter being revisited as at the date of hearing. In any event, the date of hearing is the relevant date for assessment of all circumstances in a human rights appeal.

36. For the purposes of this appeal, the only potentially relevant requirement of the Immigration Rules is that contained in paragraph 276ADE(1)(vi) which requires a person not to fall for refusal on suitability grounds; to

have made a valid application for leave to remain on the grounds of private life in the United Kingdom, is aged 18 years or above, has lived continuously in the United Kingdom for less than 20 years and there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the United Kingdom.

37. In Kamara, Sales LJ commented on the "very significant obstacles" test (in the context of section 117C(4)(c) of the Nationality, Immigration and Asylum Act 2002 but which is the same as set out in paragraph 276ADE(1)(vi) of the Immigration Rules) as follows:

> "14. In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) … is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for 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."

38. The Appellant's claim to satisfy paragraph 276ADE(1)(vi) of the Immigration Rules is a convenient starting point as it is uncontroversial that if she does, that is likely to be determinative of her appeal under Article 8 of the European Convention on Human Rights.

39. The Appellant has lived the majority of her life in Nigeria, she has worked there and is familiar with the customs and traditions of society in Nigeria. There is a preserved finding that the Appellant has extended family in Nigeria which was challenged before me, with no specific family members being identified in that country by either the Appellant or her daughter and their evidence was that all close family members were either deceased or outside of Nigeria; albeit there were at least some family members of the Appellant's husband present in Nigeria in 2016 who attended his funeral. I find that even if the Appellant has extended family members in Nigeria, there is nothing to suggest any current or close contact and the First-tier Tribunal found that such family members would not be able to accommodate or support the Appellant on return. However, I do find that the Appellant has continuing ties and links to Nigeria through her church. The church that she has attended (pre-Covid-19) is linked to the church she and family members attended in Nigeria and some other families have members in the church in both countries. Whether or not the congregation in Nigeria is the same as it was when the Appellant left in 2003, there are clear established links and this would be an obvious route to assist with reintegration on return.

40. On behalf of the Appellant, a number of obstacles to reintegration have been identified and relied upon; including the Appellant's age, lack of support or services on return (including medical treatment) and the risks from Covid-19.

41. The Appellant would not have direct (as in face to face) support within Nigeria from a family member, although beyond financial support and accommodation in the United Kingdom there is no suggestion that the Appellant is in need of nor receives any personal care or direct physical support from her family in the United Kingdom. There is a preserved finding of fact that the Appellant would be financially supported by her family on return to Nigeria and there is a lack of any evidence before me to depart from that finding. The Appellant has two adult children in the United Kingdom who are in work, as are at least her son-in-law and all are financially self-sufficient. There is an assertion that if the Appellant returned to Nigeria, her daughter's family would have to have recourse to public funds, which is wholly unsupported by any evidence. Whilst the financial support currently given to the Appellant may be different to what is needed on return to Nigeria (for example because she currently shares accommodation likely with no additional cost to the family) there is simply no evidence of likely living costs on return for the Appellant or as to the family income and outgoings in the United Kingdom (for her daughter or her son) to show that the latter would not be sufficient for the former. This is not just a lack of documentary evidence but extends to an almost complete lack of any detail in the witness evidence on this issue. I find that the Appellant would be adequately financially supported by her family on return to Nigeria.

42. It is reasonable to expect that the Appellant would not take up any or any significant employment on return to Nigeria due to her age, but she would be financially supported on return in any event. The Appellant's daughter's evidence was that there had not yet been any consideration of accommodation for the Appellant on return to Nigeria, but there is nothing to suggest that suitable accommodation could not be obtained.

43. The Appellant relies on health concerns, both in terms of her own conditions and more generally in relation to Covid-19 (and associated practicalities related to daily living because of this) as an obstacle to reintegration on return. In relation to her own health conditions, the Appellant has not provided any medical evidence of diagnosis or treatment and at its highest, the witness evidence refers to home monitoring and pain relief only as current and needed treatment. Although the Appellant's daughter asserted in her evidence that there is no effective healthcare system in Nigeria; there is no background country evidence available as to this and nothing to suggest that the Appellant would not have access to healthcare and medication as needed, particularly at the relatively basic level of what she currently receives.

44. In relation to Covid-19, the Appellant relies on various websites which advise that there is a high risk of exposure to Covid-19 in Nigeria and

there are some restrictions on return. The information on those websites show that Nigeria is on the UK amber travel list, that return is possible with certain safeguards and procedures for travel and that within Nigeria, there are public health measures in place and a vaccination programme is underway there. There is no direct comparison of the situation in Nigeria compared to the United Kingdom and this is a global pandemic with risks and restrictions also in the United Kingdom and nothing to suggest that the situation is any worse for the Appellant in Nigeria than it is or has been for her in the United Kingdom. It was stated in submissions that there is a period of quarantine or self-isolation required on return to Nigeria and the Appellant would not be able manage because of the lack of food delivery services in Nigeria, but again there was no background country evidence in relation to this nor anything to suggest that the Appellant had even considered what preparations could be made on return for this as required, or whether, for example, this could be in a hotel with catering such as the way that compulsory quarantine is available for arrivals in the United Kingdom. In any event, a short period of self-isolation or quarantine is not a very significant obstacle to reintegration, the measure is reintegration within a reasonable period, not within the first week or two of return.

45. The Appellant had not yet received any Covid-19 vaccine at the time of hearing, but was booked in to have had her first dose by the time of writing and under current guidelines would expect her second dose within 8 weeks and in any event, a vaccination programme is currently underway in Nigeria. There is no background country evidence in relation to the specifics of this or what vaccines are available, nor any medical evidence specifically about the need for a particular vaccine or dose; such that there is nothing to suggest that the Appellant, if needed, could not obtain an appropriate second dose on return to Nigeria if she had not already received this in the United Kingdom. Although the Appellant has a number of risk factors for Covid-19, including age and ethnicity; this is not in all of the circumstances set out above, a very significant obstacle to reintegration in Nigeria, alone or cumulatively with all other factors.

46. Taking all of the above into account individually and cumulatively, I find that the Appellant will not face very significant obstacles to her reintegration in Nigeria. Although she has been away from the country for approximately 18 years, she remains familiar with life and customs there, has some continuing links through her church, would be financially supported on return and would be able to operate on a day-to-day basis in Nigeria and within a reasonable period, build up private life there. The Appellant does not meet the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules.

47. I turn next to the Appellant’s private and family life established in the United Kingdom. There is a preserved finding of fact that the Appellant has established family life with her daughter in the United Kingdom for the purposes of Article 8(1) of the European Convention on Human Rights, but not with her wider family (her son, grandchildren and in-laws) although in

submissions the finding of no family life with other members of the same household and J in particular has been challenged.

48. The Appellant lives with her daughter, son-in-law and grandchildren and is financially supported by her daughter. There is evidence of a close family relationship between all members, with letters from the grandchildren showing involvement and support from the Appellant whilst they have been growing up, including in school drop-offs and pick-ups. With the possible exception of J, this evidence demonstrates what would often be expected in a relationship between grandparent and grandchild; with no additional emotional ties or dependence such as to bring these relationships within the ambit of family life for the purposes of Article 8(1).

49. The evidence before the Tribunal focused mostly on the relationship between the Appellant and J and his particular circumstances and needs. J has been diagnosed with autism (of which there is evidence dating from 2018 of this and possible support needs at that time) and the witness evidence is that the Appellant has had a significant role in his care, taking him to appointments and activities, taking him to and from school and assisting from home during periods of home schooling and online activities/groups when covid restrictions have been in place. There is however no up to date medical or other evidence about J's current needs and the witness evidence was that the support he currently requires was now provided through mainstream schooling as opposed to any specific regular support outside of school (needed or currently in place) nor that the Appellant any longer provides specific support beyond school pick-up and drop-offs. There is some evidence of J having a very restricted diet and eating only certain foods prepared by a family member, but the evidence is not specific to the Appellant as opposed to any other family member. Whilst in the past it seems that the Appellant may have played a greater role in the practicalities of looking after J, including attending appointments with him; there is little to suggest that continues to date beyond the role the Appellant has played for her other grandchildren in terms of school drop offs/pick ups and general support as a grandparent. There is a lack of evidence as to what, if any impact there would be on J of the Appellant returning to Nigeria, either specifically in relation to his autism or otherwise; albeit it can be inferred that there is likely to be some negative impact and disruption to the relationship caused by removal. There is a preserved finding of fact that alternative childcare could be arranged for the Appellant's grandchildren in her absence and there was no further evidence before me to suggest otherwise, including for J.

50. In light of the above and the lack of specific evidence available, including from the Appellant and her daughter as well as from any external sources; I do not find that the Appellant has established family life with any of her grandchildren for the purposes of Article 8(1) of the European Convention on Human Rights. The best interests of the grandchildren, including J, are as a primary matter to remain in the United Kingdom with their parents and each other. I also find that given the close family relationship, it is also in the best interests of the grandchildren, including J for the Appellant

to remain in the United Kingdom. However, relatively, this is of lower importance than their primary best interests to remain here with their parents and I do not find that the relationships would be severed if the Appellant were to return to Nigeria; just that contact would be more indirect and less frequent than it is currently with most living together in the same household.

51. In relation to private life in the United Kingdom, this comprises primarily of the Appellant's relationships with her wider family members not included as family life for the purposes of Article 8(1) (with her son and grandchildren) and her involvement with her church. There is little, if any evidence of any other significant private life established in the United Kingdom.

52. There would be an interference with the Appellant's private and family life if returned to Nigeria; such interference being in accordance with the law and the legitimate aim of immigration control, given that she does not meet any of the requirements of the Immigration Rules for a grant of leave to remain. The final question is whether the interference is a proportionate for the purposes of Article 8(2) of the European Convention on Human Rights.

53. In assessing proportionality, I am required to take into account the factors in section 117B of the Nationality, Immigration and Asylum Act 2002 as follows. First, the maintenance of immigration control is in the public interest and in this case, there is a very strong public interest in removing the Appellant who entered the United Kingdom as a visitor in 2003, has remained here unlawfully ever since and only made an attempt to regularise her status in the United Kingdom in 2018 – fifteen years after her arrival. Secondly, I am required to attach little weight to the Appellant's private life in the United Kingdom because she has not been lawfully present here for almost all of the time since her arrival.

54. Thirdly, the Respondent accepts that the Appellant can speak English and is financially independent to the extent that she is supported here by family members and not by public funds; these factors being neutral in the assessment.

55. Using the balance sheet approach to the assessment, in summary, the following factors are weighed in the Appellant's side. First, the close relationship with her family in the United Kingdom, including her children and grandchildren, for whom their best interests include the Appellant remaining in the United Kingdom. Secondly, the Appellant's length of presence in the United Kingdom and absence from Nigeria since 2003. Thirdly, that the Appellant's ties in the United Kingdom are currently greater than her ties in Nigeria.

56. In summary, the factors weighed on the other side are primarily the maintenance of immigration control and the Appellant's lengthy unlawful presence in the United Kingdom without any attempt until relatively

recently to regularise her status here (meaning little weight is attached to private life established in the United Kingdom) together with the Appellant's ability to reintegrate on return to Nigeria and maintain family relationships from there (albeit in a more indirect manner than currently).

57. Taking into account all of the matters set out above, I find that the Appellant's removal would not be a disproportionate interference with her right to respect for private and family life for the purposes of Article 8 of the European Convention on Human Rights. The Appellant retains knowledge of life and culture in Nigeria where she has spent the majority of her life, where she would within a reasonable period of time be able to reintegrate and re-establish herself and private life there, would be financially supported on return and from where she could maintain contact with family in the United Kingdom. The Appellant's family in the United Kingdom are able to provide for and care for themselves without the Appellant's contribution (however valuable and useful this has been over the years) and although the closeness of their relationship currently would be adversely affected; neither they nor the Appellant could have had any reasonable expectation of lawful leave to remain and those relationships were strengthened and established during a time when the Appellant was here unlawfully.

**Notice of Decision**

For the reasons set out in the decision annexed, the making of the decision of the First-tier Tribunal did involve the making of a material error of law and as such it was set aside.

The appeal is remade as follows.

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed G Jackson Date 7th June 2021
Upper Tribunal Judge Jackson

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/08602/2019(V)

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**On 23rd December 2020**

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For the Respondent: Mr S Karim of Counsel, instructed on a direct access basis

**DECISION AND REASONS**

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Skype. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. The file contained the documents in paper format.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Beg promulgated on 20 November 2019, in which

Ms Ogunlade's appeal against the decision to refuse her human rights claim dated 29 April 2019 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Ms Ogunlade as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a national of Nigeria, born on 13 November 1949, who entered the United Kingdom with valid entry clearance as a visitor on 23 June 2003 and states that she has remained in the United Kingdom since the expiry of that entry clearance on 17 December 2003. The Respondent's records however show that the Appellant applied for entry clearance as a visitor from Nigeria in 2004, following which she was granted a multi-visit visa from 22 October 2004 to 22 October 2006; although there are no further records of entry to the United Kingdom.

4. The Appellant applied for indefinite leave to remain outside of the Immigration Rules on 6 June 2018, which was rejected due to payment issues and then submitted a further application on the same basis on 11 August 2018, the refusal of which is the subject of this appeal. The Appellant's application was based on her length of residence in the United Kingdom since 2003, her private and family life established here (with her two children and grandchildren) and for compassionate reasons.

5. The Respondent refused the application the basis that there was no provision for or exceptional circumstances to warrant a grant of indefinite leave to remain outside of the Immigration Rules as sought, refusing the application under paragraph 322(1) and (3) of the Immigration Rules as the application was for a purpose not covered by the Immigration Rules and as the Appellant had failed to comply with the conditions attached to her previous entry clearance. In any event, the Respondent also considered the Appellant's circumstances under Appendix FM of the Immigration Rules (albeit there was nothing to indicate any partner, parent or dependent child in the United Kingdom) and under paragraph 276ADE of the Immigration Rules. With respect to private life, the Respondent noted that the Appellant had lived the majority of her life in Nigeria, up to the age of 53 and had been in the United Kingdom for less than 20 years. The Respondent considered that the Appellant would be able to re-integrate into society in Nigeria and that there would not be any significant obstacles to doing so. Friendships and relationships in the United Kingdom could be maintained and there were no exceptional or compassionate factors to warrant a grant of leave to remain.

6. Judge Beg allowed the appeal in a decision promulgated on 20 November 2019 on Article 8 human rights grounds. The First-tier Tribunal found that the Appellant had lived the majority of her life in Nigeria, had worked there, had her children and raised them there and is familiar with the customs and traditions of society in Nigeria. As such, although she had been outside of Nigeria for a significant number of years, there would not be very significant obstacles to her integration and she would be able to operate on a day-to-day basis in society, form and build-up relationships. The Appellant did not therefore meet the requirements of paragraph

276ADE of the Immigration Rules, although this provision was not expressly referred to in the decision as part of the findings.

7. The First-tier Tribunal went on to consider Article 8 outside of the Immigration Rules in accordance with the five stage approach in *Razgar*. In relation to family members, the First-tier Tribunal accepted that the Appellant's husband, brother and niece were deceased but found that it was implausible that she was not in contact with her nephew in the United States of America and that the Appellant has other relatives in Nigeria. Those relatives are more distant and it was accepted that they would not be in a position to provide the Appellant with accommodation or support.

8. In the United Kingdom, the Appellant was found to have established family life for the purposes of Article 8 with her daughter (whom she lives with and who provides financial support for her) and that she also had a role caring for her grandchildren (although childcare could be arranged in the Appellant's absence) and a relationship with her son and his children but that those additional relationships did not constitute family life for the purposes of Article 8. The First-tier Tribunal acknowledge that the Appellant established private life in the United Kingdom at a time when she was here unlawfully and any such private life must therefore be given little weight.

9. The First-tier Tribunal's conclusions are in the final two paragraphs of the decision, which state as follows:

> *"21. In conclusion, for the reasons I have already given, I find that the appellant is a widow who has no home or means of financial support in Nigeria. She has not worked since before 2003 and is now aged 70. Whilst her children gave evidence that they would be willing to financially support their mother in Nigeria, I find that sending the Appellant to live alone in Nigeria would be a disproportionate interference in her family and private life.*
>
> *22. I find that she is settled in the United Kingdom where she has lived since 2003. She clearly has the love and support of a close-knit family. I accept the evidence of her granddaughter Faith Akinyemi that her grandmother has provided considerable support to her and other family members. I take into account the letters of support from the appellant's other grandchildren and from her church community. In conclusion I find that any interference in the appellant's Article 8 rights while legitimate, would be disproportionate in all the circumstances. I find that the interference will result in unjustifiably harsh consequences for the appellant."*

## The appeal

10. The Respondent appeals on the grounds that the First-tier Tribunal materially erred in law in (i) failing to take into account the mandatory

public interest considerations in section 117B of the Nationality, Immigration and Asylum Act 2002 which affected the proportionality balancing exercise undertaken; (ii) failing to place little weight on the Appellant's private and family life established when she was living illegally in the United Kingdom as an overstayer; failing to consider the Appellant's financial independence (or otherwise) and English language ability; and failing to take into account in the proportionality balancing exercise the Appellant's inability to satisfy the requirements of the Immigration Rules; and (iii) as a result, failing to correctly consider the public interest when allowing the appeal.

11. At the oral hearing, Mr Clarke clarified the grounds of appeal pursued on behalf of the Respondent. He accepted at the outset that the First-tier Tribunal expressly referred to attaching little weight to the Appellant's private life established while she was in the United Kingdom unlawfully and that is was difficult to pursue the points in relation to financial independence when there were findings that the Appellant was financially supported by her family and where there was no suggestion that she could not speak English (having given evidence without an interpreter at the First-tier Tribunal). Further, Mr Clarke accepted that section 117B(4)(b) of the Nationality, Immigration and Asylum Act 2002 referred only to family life with a qualifying partner and therefore did not expressly cover the Appellant's family relationship with her daughter; but submitted that the issue of the weight to be attached to such a relationship was wider than the express terms of section 117B which was not an exhaustive list. The First-tier Tribunal was required to take into account the public interest, including the Appellant's failure to meet the requirements of the Immigration Rules and failing to do so is a material error of law.

12. Mr Clarke highlighted the adverse findings as to the Appellant's circumstances and early reference in the decision to the failure to meet the Immigration Rules but the lack of any reference when considering proportionality to the public interest. With reference to the European cases referred to in Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin), including Rodriguez da Silva and Hoogkamer v Netherlands [2007] 44 EHRR 34, Mr Clarke submitted that it was only in exceptional circumstances that removal would breach Article 8 when family life had been created when a person was in the United Kingdom unlawfully. It was accepted that this point was not expressly in the grounds of appeal, but was a further example of a relevant factor that should have been taken into account in the proportionality balancing exercise but was not.

13. The First-tier Tribunal failed to give any consideration to the weight to be attached to the Appellant's family life or the circumstances of it. The First-tier Tribunal found that the Appellant would be financially supported by her family, that she would be able to build up relationships and integrate on return to Nigeria but in the conclusion found to the contrary that the Appellant would be returned without accommodation to live alone and without any balance of the public interest.

14. Although the adequacy of reasons was raised by Upper Tribunal Judge Perkins in the grant of permission to appeal, Mr Clarke was not confident that he was permitted to pursue this point which was not raised in the grounds of appeal and submitted that in any event there were already sufficient grounds to find a material error of law and set aside the decision of the First-tier Tribunal.

15. On behalf of the Appellant, Mr Karim relied on his rule 24 response and made supplementary oral submissions. It was submitted that when read as a whole, the First-tier Tribunal's decision was a thorough, balanced and careful one, with factors for and against the Appellant being weighed up. The weight to be attached to the competing factors is primarily a matter for the First-tier Tribunal and it can not be said that the conclusions were perverse or not open to the Tribunal on the evidence available. The rule 24 response also relies on points in relation to the factors in section 117B of the Nationality, Immigration and Asylum Act 2002 as now accepted by Mr Clarke at the hearing.

16. Mr Karim emphasised that to set aside the decision there must be a material error of law and not simply a disagreement with the findings even if the First-tier Tribunal decision was an unusually generous one; relying on the Court of Appeal's decision in KB (Jamaica) v Secretary of State for the Home Department [2020] EWCA Civ 1385 in which caution is advised against simply finding a different conclusion on the facts.

17. The First-tier Tribunal's decision expressly sets out the Appellant's overstaying since 2003, that she does not meet the requirements of the Immigration Rules for a grant of leave to remain and in substance considers all of the factors in section 117B of the Nationality, Immigration and Asylum Act 2002; including the public interest.

18. In relation to family life, the weight to be attached to it is a matter for the First-Tier Tribunal and there is nothing to mandate that little weight should be attached to it in a case such as this. The Appellant's family life with her children was established at birth and only re-established in the United Kingdom, not created here for the first time; making this case distinct from those who have entered into a new relationship with a partner when in the United Kingdom unlawfully.

19. Mr Karim sought to support the findings and conclusions of the First-tier Tribunal by reference to evidence before it in relation to the broader public interest, albeit not expressly referred to at all in the decision. This included that the Appellant worked for the NHS and had been able to complete her training to do so with the support of the Appellant; and that the Appellant's grandchild possibly had autism.

20. Overall, it was submitted that the First-tier Tribunal had given adequate reasons for its decision, with multiple references to the public interest and matters adverse to the Appellant and no need to refer to the same again in the final conclusion at the end. Mr Karim submitted that this was not a

one sided decision, it was balanced and much of the Appellant's claim was rejected. Short of perversity, there were simply no grounds which identified any error of law in the decision.

21. In reply, Mr Clarke referred to this as a case being presented as a fait accompli, with family life having been created and strengthened during a period of significant overstaying whilst the Appellant was here unlawfully and which must therefore reduce the weight to be attached to private and family life and which requires exceptional circumstances to achieve a fair balance.

22. Further, although there are a number of references to adverse matters and the public interest in the decision, there is nothing to suggest that these have been taken into account in substance or applied to the facts of the case in the final balancing exercise. This is particularly so given the inconsistent findings in the decision as to the failure to satisfy the Immigration Rules because of the ability to form relationships and reintegrate but an overall conclusion that returning the Appellant to live alone would be disproportionate and unjustifiably harsh.

## Findings and reasons

23. Although it has been put in a number of different ways in the context of this appeal, the sole issue in essence is whether the First-tier Tribunal materially erred in law in conducting the final proportionality balancing exercise for the purposes of assessing whether there is a disproportionate interference with the Appellant's right to respect for private and family life for the purposes of Article 8 of the European Convention on Human Rights.

24. Mr Karim appears to accept that this is a case which could be categorised as an overly generous result in favour of the Appellant but not one in which there was any error of law in the findings or the outcome and not one which reached the high threshold of perversity (nor was this relied upon by the Respondent) and as such the Upper Tribunal has no basis to interfere with the decision.

25. However, I find that the decision of the First-tier Tribunal is not simply a very generous one to the Appellant but one in which, despite early adverse findings in the decision, simply fails to properly conduct a balancing exercise between the public interest and the Appellant's right to respect for private and family life. It is trite that decisions must be read as a whole and that there is no need to refer to each and every matter, nor repeat matters in a conclusion; but in the present case, the conclusion makes no reference at all to the public interest, nor how weak or strong it is on the facts of the case and objectively, the public interest in immigration control is strong in circumstances where a person has overstayed in the United Kingdom for over 15 years before making any application at all to regularise her stay. The First-tier Tribunal also gives no reasons as to how this has been balanced against the Appellant's circumstances and is outweighed by those given the express earlier

findings relied upon in which the First-tier Tribunal has found that the Appellant has family life only with her daughter, where her private life (which includes the relationships she has with her son and grandchildren which did not constitute family life for the purposes of Article 8) can not meet the requirements of the Immigration Rules because she has continues to have ties to Nigeria with extended relatives, cultural ties and the ability to form and build relationships, as well as a finding that she would be financially supported on return. Whist this appeal has not been pursued on the basis of lack of adequate reasons, the failure to give any at all in addition to the failure to even refer to the public interest or the need to balance this against the Appellant's circumstances supports the finding that there simply has not been a proper balancing exercise conducted.

26. The conclusions reached in paragraph 21 that the Appellant has no means of financial support in Nigeria is expressly contrary to the finding which immediately follows that her children would financially support her and is inconsistent with the earlier finding that she would not face very significant obstacles to reintegration for the purposes of paragraph 276ADE of the Immigration Rules. The further reason that sending the Appellant to live alone in Nigeria would be disproportionate, is also inconsistent with the earlier findings of extended family in Nigeria (albeit they would not be able to accommodate the Appellant) and that she would not face significant obstacles to reintegration, including inter alia, that she had the ability to form and build relationships. There is also no consideration at all as to whether the Appellant could maintain a relationship with her children and grandchildren in some form from Nigeria and there was no suggestion that family and private life in this regard would be permanently severed and that appears unlikely given the findings of a close-knit family. In these circumstances, the First-tier Tribunal has failed to identify what the unjustifiably harsh consequences would be for the Appellant. These matters show that reading the decision as a whole does not assist in the way submitted by Mr Karim but only further undermines the inadequacy of the conclusion which fails to show a lawfully conducted balancing exercise.

27. This is not a case where I simply disagree with an overly generous result in the First-tier Tribunal but one in which I find the First-tier Tribunal has materially erred in law in its assessment of the proportionality of the decision by failing to balance the public interest against the Appellant's private and family life, particularly where it is accepted that little weight can be attached to her private life and the conclusions which state that they rely on earlier findings, are at least in part, contrary to those earlier findings. In this case, although the decision does include references to the public interest and matters adverse to the Appellant, there is simply nothing in the final paragraphs in conclusion or in the decision read as a whole to show that these have been balanced against the matters in the Appellant's favour. Although not compulsory, this is clearly a case where the First-tier Tribunal's decision would have benefitted from using the balance sheet approach advocated by the higher courts.

28. For these reasons, I find that the First-tier Tribunal materially erred in law and as such it is necessary to set aside the decision. At the oral hearing, I invited the parties' submissions as to case management of this appeal if an error of law was found. Mr Karim submitted that the appeal should be remitted to the First-tier Tribunal for a de novo hearing as new, up to date evidence may be required (although he was unable to specify what evidence was required or any change of circumstances since the previous hearing in the First-tier Tribunal). Mr Clarke submitted that the appeal could be re-made on the findings of fact available, particularly as no Rule 15(2A) application had been made prior to the error of law hearing as would be required.

29. In this case, no application to adduce any further evidence has been made and Mr Karim was unable to identify any likely further evidence required for the re-making of this appeal. There has been no challenge to the findings of fact made by the First-tier Tribunal and nothing to suggest that any further findings of fact are needed at all, or if they are, that they would be significant or extensive. In these circumstances, a de novo hearing is not required and the appeal is retained in the Upper Tribunal for re-making with the following findings of fact preserved:

- The Appellant lived the majority of her life in Nigeria and worked there.
- The Appellant is familiar with the customs and traditions of society in Nigeria.
- There would not be very significant obstacles to the Appellant's reintegration in Nigeria, where she would be able to operate on a day-to-day basis in that society, form and build up relationships. The Appellant does not therefore meet the requirements of paragraph 276ADE of the Immigration Rules.
- The Appellant is a widow, her husband, brother and niece being deceased.
- The Appellant is in contact with her nephew in the United States of America.
- The Appellant has extended family in Nigeria, but they would not be able to accommodate or support her. The Appellant does not have a family home to return to in Nigeria.
- The Appellant has established family life in the United Kingdom with her daughter for the purposes of Article 8 of the European Convention on Human Rights, but not with her son or any grandchildren. The Appellant has a close-knit family in the United Kingdom.
- The Appellant has looked after her grandchildren in the United Kingdom, including taking them to school. The Appellant's children would be able to arrange alternative childcare in the Appellant's absence.

- The Appellant is financially supported and accommodated by her daughter in the United Kingdom and would be financially supported by her family on return to Nigeria.

30. Unless an application to adduce further oral evidence is made in accordance with the directions below, this appeal is suitable for re-making on the basis of submissions only in accordance with the preserved findings of fact. Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, and having considered all the material on file, I have determined that the forthcoming hearing can and should be held remotely, by Skype (or by other remote video means).

Listing Directions

(i) No later than 7 days after these directions are sent by the Upper Tribunal:

(a) the parties may file and serve by email any objection to the hearing being a remote hearing, giving reasons; and

(b) without prejudice to the Tribunal's consideration of any such objections, each party shall also notify the Tribunal and the other party of the email address to which the electronic invitation to join the hearing should be sent.

(ii) If no email address is furnished under paragraph i(b) above, the invitation to the party concerned will be sent to the email address to which these Directions are sent by way of service.

(iii) Any application to submit further written evidence must be accompanied by the proposed evidence and must be filed and served no later than 21 days after these directions are sent out by the Upper Tribunal.

(iv) Any application to call further oral evidence must be accompanied by a witness statement capable of standing as the evidence in chief and must be filed and served no later than 21 days after these directions are sent out by the Upper Tribunal and must indicate whether an interpreter would be needed for that evidence and if so in what language or dialect.

(v) If an application is granted for the Appellant to call further oral evidence, the parties will have a further 7 days thereafter to file and serve any objection to the hearing being a remote hearing, giving reasons.

(vi) A notice of hearing will follow in due course.

Documents and submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.

**Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

No anonymity direction is made.

Signed G Jackson Date 17th January 2021

Upper Tribunal Judge Jackson