



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/12496/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 January 2015**

**Determination Promulgated  
On 3 February 2015**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL DRABU CBE**

**Between**

**N I A**

**and**

Appellant

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M L Youssefzan of Counsel instructed by D J Webb & Co, Solicitor

For the Respondent: Mr S Walker, Senior Presenting Officer.

**DETERMINATION AND REASONS**

1. The appellant is a national of Nigeria whose date of birth is 4 December 1976. His appeal against the decision of the respondent refusing him further leave to remain on the basis of his relationship with a British citizen dependent child was heard by Judge Perry, a Judge of the First Tier Tribunal at Hatton Cross on 21 October 2014. The Judge dismissed the appeal for reasons set out in the determination promulgated on 5 November 2014. The appellant sought and was granted permission to appeal to the Upper Tribunal by Judge Robinson, a Judge of the First Tier Tribunal on 18 December 2014. The Judge was satisfied that the grounds

of appeal submitted by the appellant raised arguable errors of law in the determination.

2. In the grounds in support of the application for permission to appeal, the appellant had contended that the Judge had made material errors of law in that the Judge had attached weight to immaterial facts in finding that the appellant did not have sole responsibility for his 2 year old British citizen daughter; that the Judge had made no findings on family life enjoyed by the appellant in the UK with his daughter and the assessment of best interests of the child was in error of law and furthermore in concluding that the principles set out in the case of **Ruix- Zambrano** did not apply in this case.
3. At the hearing before me Counsel for the appellant amplified his written grounds of appeal most ably making appropriate references to the relevant parts of the determination as well as the case law. Mr Walker in his submission said that the determination of the First Tier Judge was “confusing” and that the Judge had indeed given weight to irrelevant matters in finding that the appellant was not solely responsible for the upbringing of his infant child. He drew attention to a letter in the bundle of documents from Evolution Health, which the First Tier Judge had failed to consider and which in his view was very favourable to the claim of the appellant that he was the sole carer of the child. He agreed with the submissions of Counsel that the principles of law established by case law namely **ZH (Tanzania) [2011] UKSC, Sanade [2012] UKUT 00048(IAC), Moayed [2013] UKUT00197 (IAC)** and **Ruiz-Zambrano** when properly applied to the facts of this case, made the decision of Judge Perry unsustainable. Mr Walker quite rightly conceded that the decision was in material error of law for the reasons identified in the appellant’s grounds of appeal. The parties asked that I remake the decision on the facts before me as neither party wanted to submit any fresh evidence. I remake the decision as follows:
4. The appellant first entered the UK on 10 October 2009 as a Tier 4 (General) Migrant with leave to remain valid until 12 December 2012. He joined the HM Armed Forces and took the oath of allegiance on 23 February 2010. In September 2011 he volunteered for an operation in Afghanistan and on 23 September 2011 he was granted residence permit with exempt status. He narrowly missed the selection to be mobilised to Afghanistan but continued to serve in the HM Forces as a territorial soldier assisting with security operations during the 2012 Olympics and attending annual training exercise in Cyprus. It was in recognition of his service to the country that his daughter became a British citizen.
5. I have read the witness statement of Mrs I E with care and I accept it to be a truthful account. She states that she came to the UK from Nigeria on 1 September 2007. She met her husband, W K, in 2008 and they were married on 28th of March 2009. Mrs I E had an affair outside of marriage, which led to her unplanned pregnancy with the appellant who she met whilst working at the Drive Care Home. On 24th of October 2012 S was born. Mrs E lived at home with her husband and S for a few months but her husband was very unhappy. Her husband insisted that, for their

marriage to work, S had to live elsewhere. Mrs E informed the appellant of this and he was happy to have S to live with him.

6. According to Mrs E, S loves her Dad, the appellant, and that she is “actually quite impressed by how good a father the appellant is. He is gentle with her. He is always thinking of ways to make her happy. He decided that the daughter should be in a playgroup so that she can make friends and interact with as many people as possible. She says in her statement that she visits the appellant’s house from time to time, contributing in their life in her own way. She loves her daughter so much that she cannot live without or bear to see her live outside of the United Kingdom. She states that she is in a very difficult position and should she has to find a balance between being there for her daughter and being there for her husband. The current arrangement, according to her, is the best possible option. Her relationship with her daughter is loving and caring and she knows that if separated from her it would have a huge adverse impact upon S. I find the evidence of Mrs E wholly credible, as I do the evidence of Mr W K who, *inter alia*, says in his witness statement that he does not want to be responsible for another man’s baby. He states that his wife can have contact with the baby so that the baby can grow with the love of the mother.
7. On the evidence before me, I have no doubt that the appellant has the sole responsibility in the upbringing of his British citizen daughter. She lives with her father and he makes all the important decisions in her life. He has made adjustments to his own life to ensure that S gets the best possible care from him. I give due weight to the letter from Evolution Health dated 26 September 2014, confirming that the appellant is the main carer for the child: letters from doctors and from NHS addressed to the child residing with the appellant.
8. Upon a proper application of principles set out in **ZH** and **Zambrano**, I find that the best interests of S lie with her continued stay in the United Kingdom with both her parents. It is completely unreasonable to expect a two-year-old child who is a British citizen to be removed from the United Kingdom to Nigeria, thus denying her access to her mother who will continue to live in the United Kingdom.
9. I note that the appellant has never been a burden on the state and that he has no criminal record. He has sole responsibility for a British citizen infant. His record of service to the United Kingdom has been exemplary.
10. Taking all the facts together, I find that the appellant qualifies for leave under E-LTRPT 2.3 of Appendix FM. I also find that for the exceptional reasons set out hereinabove the appellant meets the Appendix FM. I agree with Judge Perry that the correct approach to applying Article 8 is the well-known 5-stage **Razgar** test. However unlike him, I find that whilst the interference with his rights under Article 8 may well be legitimate, it is surely not proportionate to remove the appellant and his infant child to the legitimate public end sought to be achieved.
11. I allow the appeal under the Immigration Rules as well as under Article 8 of the ECHR.

K Drabu CBE  
Deputy Judge of the Upper Tribunal.  
30 January 2015

**DIRECTIONS REGARDING ANONYMITY:**

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymously. No report of these proceedings shall directly or indirectly identify him or any member of the family. This direction applies both to the appellant and to the respondent. Failure to comply with the direction could lead to contempt of court proceedings.

K Drabu CBE  
Deputy Judge of the Upper Tribunal