UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: IA/43192/2013**

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 8 January 2015	**On: 13 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MISS IJEOMA JOY NWEKE
NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: **Mr J Plowright, counsel (instructed by Perera and Co)**
For the Respondent: **Mr S Whitwell, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The appellant is a national of Nigeria, born on 23 December 1981. Her appeal against the decision of the respondent dated 1 October 2013 to refuse to vary her leave to remain in the UK and to remove her by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006 was dismissed by First-tier Tribunal Judge Clayton on 28 August 2014.

2. The background facts are as follows. She initially entered the UK in April 2010 on a visit visa. She re-entered on 6 November 2010 with a visa valid until 5 February 2011. Finally she re-entered the UK on 2 May 2011 with a visa valid from 11 April 2011 until 11 April 2013.

3. On 9 July 2012 she applied for leave to remain in the UK. Her application was considered under the family life provisions under Appendix FM of the rules and was refused. She failed to meet the eligibility requirements as she was in the UK as a visitor. She accordingly failed to qualify for leave by virtue of E-LTRPT 3.1 of Appendix FM. She could not benefit from the criteria set out in EX.1.

4. Her application was also refused under the private life provisions as she did not meet the requirements under paragraph 276ADE (iv) and (v). She had spent at least 29 years of her life in Nigeria and had not lost ties to that country. Nor did her application raise any exceptional circumstances warranting consideration by the respondent of a grant of leave to remain outside the rules.

5. The appellant was also issued with a decision to remove her by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006. A one-stop warning was issued in relation to that decision. That is the basis upon which the appellant also relied on a ground of appeal based on the Zambrano principles.

6. Judge Clayton noted [34] that the appellant entered the UK from time to time. On the first two occasions she returned to Nigeria, but on the third she entered on 2 May 2011 and simply failed to leave. Although it was contended that the appeal should be allowed under EX.1, Judge Clayton did not consider the appeal under that provision but on the basis of Article 8 in which he also invoked s.117B (3)(a). That could only relate to an appeal raising Article 8 grounds.

7. On 7 October 2014, First-tier Tribunal Judge Page granted the appellant permission to appeal: Judge Clayton had rejected the submission of the appellant that she was not claiming any benefit and was no burden upon the taxpayer. This was taken into consideration when she considered s.117B(3)(a) of the 2002 Act. That was in error, because the appellant had bills to show that she had paid for her NHS treatment whereas her child, a British citizen, was entitled to receive NHS treatment. Further, Judge Page found that it was arguable that the Judge's assessment of the Article 8 rights of the appellant, her child and the child's father, was "seriously flawed and unsustainable."

8. On 27 November 2014 the Upper Tribunal found that the determination of the First-tier Tribunal involved the making of an error on a point of law and it was thus set aside. The parties agreed that the decision would be re-made by the Upper Tribunal at a resumed hearing.

Hearing on 8 January 2015

9. Mr Plowright provided a skeleton argument on behalf of the appellant. It was submitted that there were two issues, the first relating to an assessment of Article 8 and the second relating to the "Zambrano" issue.

10. At the hearing, however, Mr Plowright indicated that he proposed to rely on the provisions of sections EX.1 of Appendix FM. He stated that his written submissions relating to Article 8 would constitute his submissions in respect of EX.1 (b), namely that the appellant has a genuine and subsisting parental relationship with a child under 18, a British citizen who is in the UK. He submitted that it would be unreasonable to expect Daniel to leave the UK.

11. Mr Plowright submitted that E-LTRPT .3.2 applied. The appellant was in the UK in breach of immigration laws "unless paragraph EX.1 applies." Mr Whitwell accepted that the appellant was entitled to raise EX.1 on the basis that the appellant did not have leave to remain when she made her application. Accordingly, paragraph E-LTRPT.3.2 applied.

12. It is the appellant's case that she arrived in the UK on 23 May 2011 under a visit visa valid for six months and overstayed during this time as she was pregnant. She gave birth to Daniel on 25 October 2011 in the UK.

13. For her appeal to succeed I must be satisfied on the balance of probabilities, the burden being on the appellant, that she satisfied the relevant requirements under the Rules.

The appellant's case

14. The appellant attended the hearing and gave evidence. She adopted her witness statement dated 30 June 2014, at pages 3-5 of the bundle. She is a Nigerian national, born on 23 December 1981. She came to the UK on two occasions in 2010 under "visiting visas". She returned to Nigeria before the visa expired on both occasions.

15. Her former partner, Mr Bethel Chikodi Anele, a British citizen, visited her in Nigeria in January 2011. She became pregnant "through him" on this occasion.

16. She arrived in the UK on 23 May 2011 on a visit visa valid for six months and this time overstayed as she was pregnant. She gave birth to Daniel Anele, a British citizen, on 25 October 2011 in the UK. He was ill at birth and there were severe medical complications which needed intense medical treatments. She started living together with his father in the first week of November 2011.

17. Her former solicitors made an application for leave to remain in July 2012 based on her son and his health. Mr Bethel Anele was her sponsor.

18. A year later in July 2013, her relationship with Mr Anele broke down and she moved out of his house. The Home Office was informed. She then commenced living with a relative.

19. The application was refused on 1 October 2013.

20. Daniel is in regular contact with his father. He stays with him during weekends but ultimately she is Daniel's primary carer. He continuously undergoes medical treatment. She regularly takes him for medical appointments and takes care of him. He has numerous future medical appointments.

21. He was to commence nursery education in September 2014.

22. She does not have anyone to return to in Nigeria. She would face "traumatic financial difficulties" as she would not be able to afford the necessary medical treatments in Nigeria. Her father is deceased and her mother would not be able to support her and Daniel. Her other relatives were initially supportive when she came to the UK but they would no longer support her as they were not happy with her pregnancy.

23. In her oral evidence, she said that Daniel stays with his father on the weekends. This is regular staying contact. He sees him every weekend. His father picks him up and spends time with him on Saturday. He stays overnight and returns Daniel on Sunday. If she is going to church he will return him at 9 am. If not, however, he will be returned at 4 pm.

24. Daniel who is now three years old, sees his father every weekend. Daniel is "slow in speech". He is genuinely happy to see his father.

25. She moved out of Mr Anele's house in May 2013. Apart from staying contact, Daniel's father also calls during the week to see how he is doing. This is by telephone. Daniel knows and recognises his father when he speaks to him on the phone.

26. Mr Anele pays money into her account. He also buys Daniel clothes on occasion when she informs him that he has outgrown his clothes. He also buys toys and gifts for him. He puts about £80 a month into her account.

27. She referred to page 241 of her bundle, containing a bank statement from Barclays with regard to her account. There is reference to a deposit of £80 into the account on 21 August 2013. At page 239, there is also a reference to a deposit in the amount of £360. This has the words "BC Anele" printed in manuscript next to the transaction.

28. Mr Plowright asked her how Daniel would deal with the prospect of accompanying her to Nigeria. She stated that Daniel would be upset. He is "fond" of his father. He says "Dad". He has a speech problem.

29. The second "scenario" put to her was whether Daniel could stay with his father in the UK were she to be returned to Nigeria. She said that his father works Mondays to Fridays. Moreover, she had taken care of Daniel from birth. She is very close to Daniel. She would not want to do that to him. He would be upset at being separated from her.

30. Daniel's father has family in the UK. He said he has a wife. He also has two children with her. One is nine and the other is six, although she is not sure of their exact ages. She has not met them. He does not live with her. Daniel's father lives alone. The two children do not live with him. They live with their mother.

31. Ms Nweka was cross examined. She said that Mr Anele provided her with money before he moved out. Whenever she needed something, she would tell him and he would give her cash. She cannot remember whether he made transfers into her account.

32. Mr Whitwell referred her to page 210 of her bundle. That contains her Barclays current account for the period 21 February to 20 March 2013. He took her to the entry dated 6 March 2013 where the amount of £180 was paid into her account. The description by the bank is "ref: Bethel Anele". This related to money paid in 'regarding what was needed in the house'.

33. At page 214 there is a deposit by way of a transfer into her account in the amount of £3,000 from Mr Garth Wadswor. She explained that she helped a friend who was shopping. She was purchasing clothes and the like. Her friend was Remi. Remi was not living in the UK, but lived in Nigeria. The child was born in March or April 2013. The friend was travelling back to Nigeria and they bought items which the friend could take back. Mr Wadswor is Remi's husband. He transferred the amount into her account. Remi's friend who came here was Tony. She only met him once.

34. She denied that she works in the UK. Mr Whitwell took her to page 239, in which a bank statement is produced for the period 20 July to 20 August 2013. There are several deposits into her account from an account, 63776832, described as "Ref: Mobile Channel". There are transfers of £10, £650, £10 and £30 on 22 and 24 July 2013. There are also transfers from her account to Mobile Channel in the amounts of £315 and £700 on 24 July 2013.

35. Mr Whitwell put to her that from his own research Mobile Channel is a market research company. He also took her to other pages of her bank statements including that at page 241, where there is a transfer from Mobile Channel to her account on 22 August 2013 in the amount of £950. She said she does not know about Mobile Channel. She referred to a friend from Nigeria, whose name is Ohuidye. It is possible that she has transferred the money. The account to which she sent money is her friend's account. She does not know whether Ohuidye has an account in the UK.

36. She was asked whether she did not know where the amount of £1015 was sent to on 24 July 2013 from her account [239]. She was also referred to other payments from the account identified as Ref: Mobile-Channel on 24 February 2014.

37. She said that most of her friends want to save their salary. She thinks that this is a deposit relating to one of her friends.

38. Mr Whitwell again put it to her that she has been working in the UK. She denied that. She has never worked here at all.

39. Mr Whitwell took her to paragraph 37 of Judge Clayton's determination. The Judge had not been persuaded that medical treatment would not be available for Daniel in Nigeria should he require it. Mr Whitwell asked whether there were any ongoing medical issues. She said that he was supposed to have had an operation on his tonsils. However, he would not sit still and it had to be postponed. He also has a nasal difficulty.

40. She was referred to page 85 where there is an extensive medical report on Daniel. There are references to chest infections and the fact that he has "a stuffy nose." This was in November 2012. There are also references since then to chest infections and coughs.

41. Mr Whitwell referred her to an entry dated 7 March 2014, referred to as "DNA Hospital Appointment DNA Memorial Hospital". Ms Nweke stated that at birth Daniel had jaundice. He was subject to a blood transfusion at the time. The doctor informed her that Daniel needed her partner's blood "to show what caused it."

42. Mr Whitwell referred her to paragraph 4 of her witness statement where she stated that her son was ill at birth and had severe medical complications. She was taken to a letter from Guys and St Thomas's Hospital dated 2 January 2014 referring to Daniel's feet problems. There it is recorded that he is the only child who was born after a complication-free full term pregnancy with caesarean section. The mother had to be induced. He was cephalic presentation and had to go to special care as he had neonatal jaundice. He is otherwise fit and healthy and is not on any medication and does not have any allergies.

43. She said that she had an emergency caesarean birth, having been in labour for three days.

44. It was put to her that she has been embellishing her son's medical condition in the light of this report. She denied that.

45. She was referred to paragraph 6 of her witness statement where she stated that on 21 July 2013, her relationship with Mr Anele broke down and she moved out of his house. She had earlier stated that it was in May 2013. She explained that before July 2013, she did leave the house for a month or so and then came back. Finally, she left permanently in July 2013.

46. There was no re-examination.

47. Mr Bethel Chikodi Anele attended the hearing and gave evidence. He adopted the contents of his letter sent to the First-tier Tribunal dated 9 May 2014 which he confirmed he signed on that date. The letter and its contents are "all true." He also provided a further letter dated 12 December 2014 which he confirmed was also true and correct.

48. In his earlier letter, he stated that he is a British citizen. The appellant is the mother of his son, Daniel Anele, born 25 October 2011. Daniel lives with his mother, as a result of the break up with the appellant since 21 July 2013.

49. He supports the appellant financially 'for Daniel's upkeep'. He has a good relationship with him. He spends time with him on weekends. He works from Monday to Friday. The appellant is the sole carer of Daniel. She looks after him and has seen to his daily care and needs, ever since he was born.

50. She is the only one who knows what Daniel has been through from birth. It is she who takes him to various hospital appointments. Nobody else can take better care of him than his mother. He cannot devote 100% care to him as he has to work. He needs Daniel to remain in the UK where he, Mr Anele, lives and works. This is in order to enable him to continue contributing to his upbringing as he is part of his life and he sees him regularly.

51. In his subsequent letter, he stated that he and Daniel have "a great connection and bond." He makes sure that he sees him and spends time with him every weekend. He also calls his mother on weekdays to know how he is doing.

52. He supports the appellant financially. He and the appellant have a common goal 'towards Daniel' which is to take good care of him irrespective of their relationship.

53. In his oral evidence he said he sees Daniel every weekend. He picks him up on Saturdays and drops him off on Sundays, usually at 4pm. Once in a while, when he goes to church, he takes him home earlier.

54. When asked to describe his relationship with Daniel, he said he has a father/son relationship. He wants to help him improve his speech. He reads to him and talks to him. He also sings to him, plays with him in the park and teaches him the alphabet. He mainly speaks to him in English.

55. He has seen him every weekend. They moved out in May 2013 and have lived at his elder brother's house since then. In all that time he has tried to see Daniel at that house. The address is in Hackney.

56. He speaks to his brother to find out how they are doing. When he calls, he usually sings to Daniel on the phone. He also talks to him on the phone. He has begun to call him "Daddy" recently.

57. Mr Anele has a wife and two children in the UK as well as a brother. He does not live with his wife and two children. The children are 8 and 6 years old. His wife is a British citizen. Her parents are Jamaican.

58. His wife has been to Nigeria before they got married. This was only on one occasion in the nine years they have been married. His children have been there once.

59. He was asked whether he would go to live in Nigeria if the appellant was removed there and took Daniel with her. He said he would not. He would lose his job. He has no way of knowing the situation in Nigeria in order to support himself. He has two children. Although they live apart, he often sees his other children. He picks them up sometimes from school. This is sometimes each day and on occasion 'after two days'.

60. He was asked whether, if the appellant went to Nigeria, he could look after Daniel. He said it would be difficult. Daniel's mother has looked after him since birth. He has other children. She has responsibility. Daniel has speech and health problems.

61. He is employed as a cleaner supervisor. He works from morning until evening, occasionally at night as well. His hours are 6am to 6pm. This is five days a week and sometimes he has overtime shifts.

62. In cross-examination it was put to him that his claim that he could not care for Daniel because of his employment meant that he has prioritised the employment. He denied that. It was again put to him that he is unwilling to look after Daniel because of his employment. He again denied that.

63. It was put to him that he could change employment so as to adapt to Daniel's needs and provide full time care. He cannot guarantee this. If he had to look after Daniel, this might mean he would have to resign. This would not necessarily lead to other employment. The relationship with his wife is not over. He is supporting those children as well. He cannot rule out that they might yet live together.

64. He has no relationship with the appellant other than through their son.

65. He confirmed that he was born in Nigeria. He provides money for the appellant at the rate of £80 a month. That is for the two of them.

66. She lives with his brother. He is not aware whether she works. He usually picks Daniel up at 9am. He normally telephones and speaks to Daniel as well. It is only very seldom that he actually sees him during the week as well.

67. It was put to him that all the evidence from the hospital goes to the Eltham address. He said that he still receives reports relating to Daniel. A GP took a test regarding diabetes last year.

Submissions

68. Mr Whitwell submitted that the appellant's credibility is in issue. First, she is an overstayer. Secondly her evidence with regard to the deposits of monies into and out of her account regarding Mobile Channel was not satisfactory. Sometimes large sums are paid in.

69. He noted that Mobile Channel is a market research firm which he established from his own research on the Internet. The appellant has chosen to accept payments and is making efforts to pay some back.

70. He submitted that this was not a case of Zambrano right of residence. He referred to the European Operational Policy Team notice dated 12 December 2012 which provides guidance to the UK Border Agency staff when considering applications from persons claiming a derivative right of residence as the primary carer of a British citizen residing in the UK.

71. He referred to paragraphs 24-29 which dealt with the issue as to whether the British citizen would be forced to leave the EEA if the primary carer was forced to leave. He relied on paragraph 29. A lack of financial resources or an unwillingness to assume care responsibility would not, by itself, be sufficient for the primary carer to assert that another direct relative or guardian is unable to care for a British citizen. The case workers must start from the assumption that where there is another direct relative in the UK, they can care for the British citizen unless there is sufficient evidence to the contrary.

72. He referred to the Court of Appeal decision in Heines v The London Borough of Lambeth [2014] EWCA Civ 660. Lord Justice Vos in construing Regulation 15A(4A) of the 2006 Regulations stated at paragraph 23 that he had no doubt that the test applicable under that regulation is clear and can be given effect to without contravening EU Law. The reviewer has to consider the welfare of the British citizen child and the extent to which the quality or standard of his life will be impaired if the non-EU citizen is required to leave. This is all for the purpose of answering the question whether the child would, as a matter of practicality, be unable to remain in the UK. This requires a consideration, amongst other things, of the impact which the removal of the primary carer would have on the child, and the alternative care available for the child.

73. There was discussion as to the kind of alternative care that might be required to avoid the conclusion that the child would be forced to leave. Lord Justice Vos stated that it was undesirable to lay down any guidelines in this regard. It was common ground that an available adoption or foster care placement would not be adequate for this purpose. That is because the quality of the life of the child would be so seriously impaired by his removal from his mother to be placed in foster care that he would be effectively compelled to leave. He did not however think that, all things being equal, the removal of a child from the care of one responsible parent to the care of another responsible parent would normally be expected so seriously to impair his quality and standard of life that he would be effectively forced to leave the UK. Apart from anything else, he would even if he did leave, still only have the care of one of his previously two joint carers [24].

74. The reviewer was not obliged to consider the child's interests as paramount, although his interests were indeed to be taken into account [23-25].

75. Mr Whitwell submitted in the circumstances that Daniel would not be forced to leave the UK should his mother be removed.

76. Mr Whitwell submitted with regard to whether or not it would be reasonable to expect Daniel to leave the UK, that the appellant's immigration history had to be taken into account. In particular, family life was established when her status was precarious and unsettled. The appellant has family members in Nigeria. She has lived in Nigeria for a substantial majority of her life.

77. He referred to the Court of Appeal decision in EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 and in particular paragraph 58. Lord Justice Lewison stated that 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?

78. He submitted that at this stage of his life, Daniel is in the continual care of the appellant. It is artificial to cast his best interests wider.

79. On behalf of the appellant, Mr Plowright confirmed that he no longer seeks to rely on Article 8.

80. With regard to credibility, whilst it was correct that there has not been any clear answer given in respect of the transfers into and out of the appellant's bank account, the Internet search showing that Mobile-Channel is a market research company may be correct as far as it goes. However, there is also a reference to Yahoo which he researched which refers to the transfer of funds by a mobile telephone. There is thus no clear evidence that explains the reference to Mobile Channel as referred to in the bank statement.

81. With regard to the issue under Regulation 15A(4A), the position is not so clear cut. The father in Heines, supra, was a national of the Ivory Coast who had the EU right to permanent residence in the UK. In that case, the Court of Appeal took the view that the child would still have the care of one of his previously two joint carers.

82. He submitted that here the question is whether the father of Daniel, Mr Anele, would be in a position to "allow" Daniel to reside in the UK with him if the appellant is returned to Nigeria. His evidence was that Daniel has not been staying with him because he is not in a position to do this. He is not capable of looking after him as he is working long hours. In the circumstances he would have to resign that job and find another one, or rely on unemployment benefit in order to look after Daniel.

83. He submitted with regard to EX.1 that it would not be reasonable to expect Daniel to leave the UK. Daniel is a British citizen. The difficulty is that the appellant would

not be relocating with Daniel. His father is present in Daniel's life and has an effective and established relationship with him, including contact each weekend. Whilst telephone contact could continue, this would in no sense be meaningful and can never be equated with the benefit to the child of having staying contact each weekend. Accordingly there would be a substantial impact on Daniel resulting from his relocation with his mother to Nigeria.

84. His father has also helped Daniel with regard to his speech and language difficulties. All that would go if he had to relocate. It would therefore not be reasonable to deprive Daniel of that meaningful contact.

Assessment

85. I have borne in mind Mr Whitwell's submissions relating to the credibility of certain aspects of the appellant's evidence. In particular, as recognised by Mr Plowright, there has been no adequate explanation as to payments into and out of her account of substantial amounts of money for a lengthy period with regard to a bank account identified in the description contained in the appellant's bank statement as "Ref Mobile-Channel".

86. On the one hand it is asserted by Mr Whitwell that he discovered on the Internet that Mobile-Channel is a market research firm and he therefore contends on that basis that this shows the appellant has been working illegally in the UK. On the other hand, Mr Plowright submits that his Internet search showed that Mobile-Channel is also referred to as a facilitator of payments made into and out of accounts by a mobile telephone.

87. Neither party has produced any evidence substantiating their alternative theories. In particular, no attempt has been made to ascertain from the bank itself what the references contained in the bank's description relate to and in particular the name of the account holder described and identified.

88. The appellant has asserted that monies were paid in from time to time by various persons in the expectation that she would permit the use of her account to facilitate the purchase of items of clothing and presents for transport by a visitor to Nigeria – although no supporting evidence was produced in that regard.

89. It is true that the appellant's evidence relating to payments into and out of her account is vague and uncorroborated. She has however firmly denied that she has been employed by Mobile Channel. There has been no evidence adduced by the respondent that she has in fact been employed by Mobile-Channel or that she is in receipt of an income from that source.

90. Nor do I find her explanation that friends might find it useful to use her account to facilitate the purchase and payment of gods in the UK to be fanciful or improbable.

91. I have also had regard to the evidence which has not been challenged. That includes the fact that the appellant's son, Daniel, is a British citizen who was born here on 25 October 2011. Moreover, his father, Mr Bethel Anele, is himself a British citizen.

92. Evidence relating to regular contact between Daniel and his father has not been challenged. I note that the father did not appear before the First-tier Tribunal and understandably Judge Clayton felt that a positive finding relating to his relationship with Daniel could not be made.

93. However, before the Upper Tribunal, Daniel's father has written two letters in support of the appellant's appeal. The first is dated 9 May 2014 which was in the original bundle. The second is dated 12 December 2014.

94. Mr Anele has been subjected to cross-examination by Mr Whitwell. It is not contended that he does not have a meaningful relationship with Daniel, which includes giving him assistance during the course of any week regarding Daniel's speech problems. He regularly reads, talks and sings to him. This is evidently beneficial to Daniel.

95. I accordingly find that Daniel has a positive and meaningful relationship and bond with his father.

96. I have also had regard to the appellant's immigration history, including the fact that she entered the UK as a visitor and stayed when she was already pregnant with Daniel. The child was born in the UK.

97. I have in that respect had regard to the evidence in the appellant's bundle that the costs of the caesarean birth was, and is, being borne by the appellant who has been making small repayments over the years.

98. I have also had regard to the undisputed evidence that Mr Anele has been providing some financial support to the appellant each month. This takes the form of payments into her account. In addition, Mr Anele provided the appellant with money in order to purchase clothes and other items for the benefit of Daniel.

99. I have also had regard to the appellant's claim under Regulation 15A(4A) of the 2006 Regulations.

100. Whilst I am satisfied that on the evidence presented the appellant is the primary carer of Daniel, I do not find on the evidence that Daniel would be unable to reside in the UK if the appellant were required to leave.

101. It is clear that Mr Anele has regularly had his son reside with him every weekend. Moreover, he has been in contact with Daniel during the course of the week, albeit by telephone.

102. Mr Anele has two other children who live in the UK, with their mother. He has a relationship with them as well.

103. Mr Anele is the sole occupant of the premises where he resides. This is where Daniel lives at weekends. There is accordingly available accommodation for Daniel.

104. Mr Anele stated during his evidence that he could if necessary look after Daniel. However, he contended that he would presently not be able to as he is working five days a week, from about 6am until 6pm. Accordingly, if he were not able to obtain a position with his employer which could be adapted to Daniel's needs on a daily basis he would be required to resign that employment and find other employment which could adapt to Daniel's timetable.

105. No evidence, however, has been produced by Mr Anele as to any discussion with his employer in that respect. He has contended that he is consequently unwilling to assume care and responsibility for Daniel should his mother be returned to Nigeria.

106. However, I find that his claimed lack of financial resources and his asserted unwillingness do not by themselves constitute a sufficient basis for concluding that there is not another direct relative who is able to care for Daniel. The appellant has not adduced sufficient evidence to the contrary.

107. I thus do not find that Daniel would, as a matter of practicality, be unable to remain in the UK. I do not find that the removal of Daniel from the care of the appellant to the care of his father would so seriously impair his quality and standard of life that he would effectively be forced to leave the UK. Even if he did leave, he would still have the care of the appellant. The interests of Daniel must be taken into account, which I have. However, they are not paramount, but constitute a primary consideration along with other relevant factors.

108. I have also considered the appellant's claim under EX.1 of the rules. The issue is whether or not it would be reasonable to expect Daniel to leave the UK. The appellant obviously has a genuine and subsisting parental relationship with Daniel, a British citizen in the UK.

109. I have had regard to the medical evidence relating to Daniel's medical care over the years. I have also had regard to the respondent's contention that Daniel would be able to receive appropriate medical attention, assistance and services in Nigeria.

110. I have had regard to the decision in EV (Philippines), *supra*, and the need to assess the best interests of children on the basis of the facts as they are in the real world. In that case, however, neither parent nor child had the right to remain and accordingly that is the background against which the assessment had to be considered.

111. The ultimate question is whether it would be reasonable to expect the child to follow the appellant, who has no right to remain, to Nigeria. Both the appellant's son, Daniel, and Daniel's father, are British citizens. I accordingly assess the best interests of Daniel as they are "in the real world." The facts are that both he and his father are British citizens with an unqualified right to remain in the UK.

112. I have also had regard to the ZH (Tanzania) v SSHD [2011] UKSC 4. In that case the appellant was the mother of the child. She was a national of Tanzania. Both her children were British citizens. So was their father. There was accordingly no question of removing the father. Nor did the respondent have any power to remove the children. There was only power to remove the mother alone. If therefore the children were to stay in the UK, they would be separated from their mother. On the other hand, if they followed her to Tanzania, they would be separated from their father and deprived of the opportunity to grow up in the UK of which they were citizens.

113. In fact, at paragraph 59 of EV, Lord Justice Lewison stated that ZH was a long way from the facts in EV, where none of the family was a British citizen. None had the right to remain here. If the mother were removed the father would have no independent right to remain. If both were removed, it is reasonable to expect the children to go with them. The best interests of the children were obviously to remain with their parents. The desirability of their being educated at public expense in the UK could not outweigh the benefit to the children of remaining with their parents [60].

114. I have found that Daniel has a strong relationship with his father. He is very much a part of his daily life and existence.

115. I accordingly find that there is a close and genuine bond between Daniel and his father. There is no suggestion that Daniel's father could reasonably be expected to follow the appellant to Nigeria. He has in fact stated that he would not be prepared to return. In one way or another, the effect of an order to remove the appellant would be to sever a genuine and subsisting relationship either between the appellant and Daniel, or between Daniel and his father.

116. Moreover, if Daniel were to follow his mother to Nigeria, not only would he be separated from his father, but would also be deprived of the opportunity to grow up in the UK in which he is a citizen, with all its attendant benefits.

117. I accordingly find that, notwithstanding the appellant's poor immigration history, that paragraph EX.1 applies in the circumstances. In particular, I find that it would not be reasonable to expect Daniel to leave the UK. Despite the fact that the appellant has been in the UK in breach of immigration laws, paragraph EX.1 applies.

118. Having regard to the evidence as a whole, I accordingly find that the decision of the respondent was not in accordance with the law and the immigration rules.

Notice of Decision

Having found that the decision of the first-tier tribunal involved the making of an error on a point of law, and having set it aside, I remake the decision allowing the appellant's appeal under the immigration rules

No anonymity direction is made.

Signed Dated 6 April 2015

Deputy Upper Tribunal Judge Mailer