



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-001066 & UI-2024-
000887
First-Tier Tribunal No: HU/58470/2021
IA/18373/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 16th April 2024**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

**Onyeyminke Harley Johnson
(NO ANONYMITY ORDER MADE)**

Appellant

and

Secretary of State for the Home Department

Respondent

DECISION AND DIRECTIONS

1. By the decision of the First-tier Tribunal (Judge Monaghan) issued on 29.2.24, the appellant, a national of Nigeria who came to the UK as a student but has overstayed since 2013, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Hussain) promulgated 17.1.24 dismissing his appeal against the respondent's decision of 11.3.20 to refuse his application made on 9.2.18 for Leave to Remain (LTR) on family and private life grounds.
2. The original grounds of appeal to the Upper Tribunal argued (i) that the First-tier Tribunal erred in failing to consider the statutory presumption of paternity given that the appellant is named as the father of the child, and failed to consider other legislation and the respondent's policy on DNA testing; and (ii) erred in the proportionality assessment with reference to s117B of the 2002 Act and whether it would be reasonable to expect the child to leave the UK, and failed to consider the Section 55 of the Borders, Citizenship and Immigration Act 2009 best interests of the child for both parents to remain in the UK.
3. However, the grant of permission by the First-tier Tribunal considered the first ground not arguable given that the First-tier Tribunal Judge went on to consider the position in the alternative that the appellant is the father of the child in

question. Judge Monaghan considered only the second ground arguable and limited permission to that ground only.

4. By my decision issued on 5.4.24, I granted permission to the appellant to pursue his appeal to the Upper Tribunal on both grounds, on the basis that the issue of paternity was relevant to both grounds of appeal. I also issued listing instructions for the matter to be listed as an error of law hearing.
5. However, by email sent on 5.4.24, the appellant's legal representatives drew to the attention of the Upper Tribunal that by the Rule 24 Reply of 13.3.24 the respondent does not oppose the application for permission to appeal, and invited the Upper Tribunal to "determine the appeal with a fresh oral hearing to consider whether the appellant's removal from the UK would breach his protected rights under Article 8 of the ECHR." Effectively, the respondent concedes that the decision of the First-tier Tribunal is flawed for material error of law and needs to be set aside to be remade. I am satisfied that the concession is properly made and well-founded. I agree that the decision is vitiated by material error of law and so find.
6. The appellant's legal representatives now submit that the appropriate course is to set aside the impugned decision of the First-tier Tribunal as one vitiated by errors of law, preserving no findings, and remitting the matter to the First-tier Tribunal to be determined de novo.
7. By Rule 22(2)(c) of The Tribunal Procedure (Upper Tribunal) Rules 2008, the Upper Tribunal may, with the consent of the appellant and each respondent determine the appeal without obtaining any further response.
8. In the circumstances, I determine the appeal to the Upper Tribunal by allowing the appellant's appeal and setting aside the decision of Judge Hussain, to be made afresh with no findings of fact preserved.
9. The respondent has invited the Upper Tribunal to remake the decision in the appeal but has not provided any indication as to whether that remaking should take place in the Upper Tribunal or be remitted to the First-tier Tribunal, as the appellant suggests.
10. In all the circumstances, I am satisfied that this is a case falling within paragraph 7.2 of the Practice Direction and unless the respondent indicates opposition to the course of action within 14 days of the issue of this decision and the directions below, the matter will be remitted to be remade de novo in the First-tier Tribunal.

Notice of Decision

The appellant's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside in its entirety with no findings preserved.

Directions

If the respondent objects to this appeal being remitted to the First-tier Tribunal, it must so indicate in writing to the Upper Tribunal and to the appellant within 14 days of this decision and directions.

If such opposition is indicated, the matter of remittal or retention in the Upper Tribunal for a continuation hearing will be reconsidered by the Upper Tribunal.

On the respondent's consent to the matter being remitted, or in the absence of any response within 14 days, the matter will be forthwith remitted to the First-tier Tribunal for the appeal to be remade de novo with no findings preserved.

I make no order as to costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 April 2024