



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

Appeal Numbers: IA/17713/2015

THE IMMIGRATION ACTS

**Heard at: Field House
On: 20 October 2017**

**Decision and reasons
Promulgated
On: 27 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

**MOSHOOD ABIOLA AGORO
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Walker of Counsel

For the Respondent: Mr P Corben, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 3 April 1986. He appealed against the decision of the respondent dated 28 April 2015 to refuse to grant him further leave to remain in the United Kingdom under Appendix FM and paragraph 276 ADE of the immigration rules and pursuant to Article 8 of the European Convention on Human Rights.
2. The First-tier Tribunal dismissed the appellant's appeal in a decision dated 15 January 2016. Permission to appeal was granted by First-tier Tribunal Judge Doyle in a decision dated 14 August 2017, stating that it is arguable that the

Judge fell into error by not granting the appellant an adjournment to establish his paternity not having had fair notice that paternity would be an issue at the hearing. The issue of paternity was not raised by the respondent in her refusal notice but by the Judge at the hearing and which became determinative of the appeal. It is arguably erroneous that the appellant's application to adjourn to allow further time to prepare led to unfairness.

3. It was argued on behalf of the appellant by Mr Walker that the respondent did not challenge paternity of the appellant but it was the Judge who raised it for the first time at the hearing. He said that at the hearing, when he made an application for an adjournment to address this issue, the Judge refused his application. He submitted that the Judge fell into material error by only considering the oral evidence in determining whether the appellant was the biological father of the children.
4. Mr Walker on behalf of the respondent stated that he relies on the Rule 24 submission but accepted that an adjournment would have given the appellant an opportunity to prove parentage.
5. I agree with the submissions of Mr Walker that the Judge who raised the issue of paternity for the first time at the hearing should have granted an adjournment to the appellant for him to address the issue of paternity given that the Judge pounced the issue of paternity at the hearing. Procedural fairness dictated that the appellant should have been given an opportunity to produce a DNA report to prove paternity.
6. I have my reservations that such a report will be produced at the hearing because the appellant who has had sufficient time to commission a DNA report has not done so. If the appellant was confident that he was the biological father and his continued residence in this country dependent on commissioning such a report, he would have done so. It was said on his behalf that a DNA report requires funds and he was waiting for the decision on the error of law hearing before he commissioned the DNA report.
7. I do not understand this argument because the appellant would always have to spend the money and produce a DNA report to prove paternity given the adverse credibility findings by the First-tier Tribunal Judge that the appellant was not the biological father of the children. Only DNA evidence showing paternity, would prove otherwise.
8. Be that as it may, Justice must not only be done but it must also appear to be done. The upshot is that there is a material error of law in the decision of the Judge in respect of procedural fairness by failing to grant an adjournment for the appellant to produce a DNA report to prove paternity.
9. I was informed by Mr Walker that a DNA report will be commissioned before the fresh hearing before the First-tier Tribunal. In the circumstances, I have no

other alternative but to remit this appeal to the First-tier Tribunal to consider the DNA report, if produced.

10. In the event that no DNA report is produced at the fresh hearing before the First-tier Tribunal confirming that the appellant is the biological father of the two children, all findings of fact of the First-tier Tribunal Judge Fletcher Hill will be maintained. Judge Fletcher Hill's decision was without arguable error on the evidence before him, which did not include the DNA report, that the appellant could not be the biological father of the children. The decision on the evidence before the Judge, is sound, cannot be faulted and free of material error.
11. For the avoidance of any doubt, if no DNA report is produced to the First-tier Tribunal, confirming the appellant's biological parentage to the children upon whom he is relying for further leave to remain, First-tier Tribunal Judge Fletcher Hill's findings of fact must be upheld.

DECISION

Appeal be remitted to the First-tier Tribunal.

Signed by,

A Deputy Judge of the Upper Tribunal
Ms S Chana
day of October 2017

Dated this 25th