



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-000379

First-tier Tribunal No: HU/53538/2023  
LH/03762/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 22<sup>nd</sup> April 2024**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**Adebayo Oduwole  
(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer  
For the Respondent: Mr R McKee of Counsel, instructed on a direct access basis

**Heard at Field House on 14 March 2024**

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Sweet promulgated on 13 December 2023, in which the Appellant's appeal against the decision to refuse his application for entry clearance on human rights grounds dated 9 February 2023 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Oduwole as the Appellant and the Secretary of State as the Respondent.
2. The Appellant is a national of Nigeria, born on 10 September 1983 who made an application for entry clearance to join his spouse (the "Sponsor") in the United Kingdom on 20 October 2022.
3. The Respondent refused the application the basis that the Appellant did not meet the requirements of Appendix FM to the Immigration Rules as his spouse only has limited leave to remain in the United Kingdom. The other requirements as to language and finances were met. The Respondent did not consider that there

were any exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules.

4. Judge Sweet allowed the appeal in a decision promulgated on 13 December 2023 on human rights grounds. Reference was made to the Sponsor having arrived in the United Kingdom in 2000 at the age of fifteen and having been granted leave to remain here from 28 January 2022 to 27 July 2024. There was no dispute as to the relationship between the Appellant and the Sponsor. There was evidence of the Sponsor having fibroids and fertility issues, with IVF recommended which would be available to her free on the NHS but at a prohibitive cost in Nigeria, such that the Appellant needs to be in the United Kingdom to be able to access this treatment. Overall, it was found that there were exceptional circumstances such that the refusal of entry clearance was a disproportionate interference with the right to respect for family life contrary to Article 8.

### **The appeal**

5. The Respondent appeals on a single ground, that the First-tier Tribunal erred in law in considering the evidence of fertility issues which had not been raised previously with the Respondent and constituted a new matter for the purposes of section 85(5) of the Nationality, Immigration and Asylum Act 2002 which the Respondent did not consent to being considered as part of the appeal. Mr Tufan submitted that this was a new matter as opposed to new evidence because it was reliance on a new medical condition. Mr Tufan expressly accepted that he was unable to make any further arguments as to the merits of the decision given that there was no express challenge to these in the grounds.
6. The Appellant resisted the ground of appeal on the basis that the fertility issues were not a new matter, but were further and better evidence relating to the relationship already relied upon and went only to that same issue.

### **Findings and reasons**

7. In this case, the evidence about the Sponsor's fertility issues and recommended treatment were not raised within the initial application or appeal (having arisen since) and not raised prior to the Respondent's review. As such, the Respondent had not had the opportunity to consider this evidence at that stage, however it was filed with the First-tier Tribunal and served on the Respondent in August 2023, some four months prior to the appeal hearing. There was no attendance at the appeal hearing itself on behalf of the Respondent.
8. However, the evidence in relation to fertility issues was directly related to the nature and quality of the relationship between the Appellant and the Sponsor, a relationship which was already the basis of the appeal on the grounds of Article 8 of the European Convention on Human Rights and did not constitute a new ground of appeal (under Article 8 or otherwise) such that it would not meet the definition of new matter in section 85. It was further and better evidence relating only to the ground of appeal and basis for it that had already been pursued by the Appellant. In accordance with Mahmud (s.85 NIAA 2002 - 'new matters') [2017] UKUT 488 IAC and the cases that followed it, there was no new matter on the facts of this appeal. There was therefore no requirement for the Respondent to consent to the evidence being considered and no error of law by the First-tier Tribunal in considering it and reaching a decision based upon it.

**Notice of Decision**

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to allow the appeal is therefore confirmed.

G Jackson

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**18th April 2024**