Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12577/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 February 2018	**On 14 March 2018**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR OLADAYO OKOJIE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms U Dirie, Counsel instructed by Phil Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal P S Aujla dated 12 October 2017 which refused the Article 8 family and private life claim of the appellant.

2. The appellant is a national of Nigeria and was born on 4 August 1971.

3. The appellant came to the UK in 2009 with entry clearance as a spouse. The couple had a daughter born on 24 March 2009. The marriage broke down and the couple divorced on 8 June 2011. The appellant was granted leave to remain in the UK to exercise access to his daughter and then on family grounds until 15 January 2016. On 7 October 2015 the appellant

married a Turkish national with settlement. The appellant applied on 15 January 2016 for leave to remain as a spouse.

4. The respondent refused the application in a decision dated 29 April 2016, finding that the Immigration Rules concerning family and private life were not met and that it was proportionate to refuse leave on Article 8 ECHR grounds outside the Immigration Rules.

5. It is not disputed that the applicant indicated in the application for leave that his wife was pregnant. The refusal letter shows this to be so on page 3 of 9, under the heading EX.1, which refers to the pregnancy and to the potential consequences of that for the appellant and the spouse. The respondent's view was that it was reasonable in all the circumstances for the child to be born in Turkey or Nigeria.

6. Following the refusal the appellant appealed to the First-tier Tribunal. On 24 September 2016 the appellant's wife gave birth to their son.

7. Also, in the period leading up to the appeal hearing listed for 9 October 2017, the appellant and his wife separated. The appellant dealt with that in an appropriate manner, indicating in his witness statement that they had separated. There was also a letter dated 19 June 2017 from the wife at page 52 of the appellant's bundle before the First-tier Tribunal, stating that they were separated but they were working together to parent their child.

8. By the time of the hearing before Judge Aujla on 9 October 2017 the appellant's evidence was that the couple had reunited and were again in a genuine and subsisting relationship. Further, it is not disputed before me that the appellant's wife attended the hearing before the judge and it had been thought by the couple that she would give evidence both in support of the genuine and subsisting relationship between them and also regarding their child, albeit, as recorded at [15], she had not provided an updated witness statement.

9. The First-tier Tribunal did not hear evidence from the spouse. On the basis of the appellant's oral evidence and the written evidence, the judge did not accept that the couple had reunited and so found no genuine and subsisting relationship; see [28]-[32]. The Tribunal declined to consider the birth of the child as this was found to be a "new matter" precluded from consideration by s.85 of the Nationality, Immigration and Asylum Act 2002; see [34].

10. Before me, Mr Tarlow conceded for the respondent that a procedural error occurred where, as set out in the grounds, the wife was not allowed to give evidence on the basis that she had not provided updated written evidence. Given that a procedural error occurred, the parties were also in agreement that the appeal should be remitted to the First-tier Tribunal to be re-made *de novo*.

11. The appellant also challenged the decision of the First-tier Tribunal to refuse to take into account the birth of the couple's child. I also found this

to be a material error on a point of law where the proper procedure for establishing whether the Secretary of State would give consent to the issue of the new child being included in the factual matrix before the Tribunal was not followed. It is to some degree understandable that this was so given that there was no Presenting Officer at the hearing but this is not a situation where the respondent could be said to have refused consent as she was never asked. I note the comments of the Tribunal in the case of Mahmud (S.85 NIAA 2002 – "new matters") [2017] UKUT 00488 at paragraph 31 that the birth of a child "is likely" to be "a new matter". It appears to me that the circumstances here are slightly different, however, because the imminence of the child's birth was, as above, known to the Secretary of State at the date of decision and it was not an entirely new matter.

12. For all of these reasons, the decision of the First-tier Tribunal shows errors on material points of law and it is set aside to be re-made, the re-making to take place in the First-tier Tribunal.

Notice of Decision

13. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.

14. The remaking of the appeal will be in the First-tier Tribunal before a judge other than Judge Aujla.

15. The Secretary of State is put on notice that the Tribunal requests her to provide in writing **within 28 days of the date of this decision** whether or not she consents to the inclusion of the appellant's child as part of the evidence to be considered in the re-making of the appeal before the First-tier Tribunal and provide written reasons to the First-tier Tribunal if consent is refused.

Signed:  Date: 12 March 2018

Upper Tribunal Judge Pitt