Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04385/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 December 2018	**On 20 December 2018**

Before

Deputy Upper Tribunal Judge MANUELL

Between

Master S H

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Khan, Counsel (Direct access)
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Permission to appeal was granted by Designated First-tier Tribunal Judge McCarthy on 25 October 2018 against the decision to dismiss the Appellant's Article 8 ECHR appeal made by First-tier Tribunal Judge Khawar in a decision and reasons promulgated on 29 June 2018. The Appellant is a national of Bangladesh, a minor who had sought entry clearance to join his father and sponsor who had migrated to the United Kingdom and was now settled.

2. Judge Khawar heard the appeal in the sponsor's absence, the sponsor having failed without good reason

to attend. The judge went on to find that the paternal relationship relied on (questioned by the Entry Clearance Officer) was not conclusively proved by the DNA evidence or birth certificate produced. There was no Article 8 ECHR disproportionality in such circumstances. Hence the appeal was dismissed.

3. The late permission to appeal application was refused on all of the procedural fairness grounds which had been advanced (alleged absence of notice of the hearing), but time was extended and permission was granted because it was considered arguable that the judge had made speculative comments on the DNA evidence when dismissing the appeal.

4. Mr Khan for the Appellant relied on the grounds submitted and the grant of permission to appeal. The judge had speculated. In fact the Appellant had been born prematurely. The sponsor had tried to reunite his family at the earliest opportunity, but the Appellant's mother had had to return to Bangladesh to take care of the Appellant. If the sponsor had known of the appeal hearing he could have dealt with the issues which the judge had raised. The DNA report was reputable, from Kings College, London and there was no suggestion by the Secretary of State that it could not be relied upon. Since the First-tier Tribunal hearing a further DNA report had been obtained from Cellmark, slightly differently worded, which also proved the paternal relationship. It was a difficult situation for the family who should not have to make another entry clearance application with the delay and expense which would inevitably arise. Post hearing DNA evidence should be admitted to enable justice to be done: see Anderson v Spencer [2018] EWCA Civ 100, where this had been permitted. The appeal should be allowed and the decision remade in the Appellant's favour.

5. Mr Lindsay for the Respondent informed the tribunal that he was instructed that the appeal could not be conceded in the light of the fresh DNA evidence. There was no material error of law in the First-tier Tribunal's determination and the judge's observations had all been proper. The Appellant had the option of making a fresh entry clearance application and there was no pressing reason for any other approach. The appeal should be dismissed.

8. The grant of permission to appeal was in the tribunal's view a somewhat generous one. The procedural fairness issues had been carefully considered before

permission to appeal on those grounds was refused. There had been no renewed application to the Upper Tribunal on procedural fairness grounds. That meant that the First-tier Tribunal Judge had been right to proceed with the hearing in the Appellant's sponsor's absence.

9. In the tribunal's judgment the First-tier Tribunal Judge had guarded against speculation when considering the DNA evidence which went to the questioned paternal relationship issue. The problem was that the DNA report, although from a reputable source, had left open a plausible alternative father, which was highly relevant given the obvious problem with the birth date and the period of the sponsor's declared presence in Bangladesh. The sponsor's absence from the hearing without sufficient reason meant that the judge was left to do the best he could with the evidence before him.

10. The latest DNA report (also from a reputable source) is significantly more positive than the original report. That for present purposes only serves to underline the sound basis of the First-tier Tribunal Judge's conclusions. The tribunal has considered whether the latest report should be admitted and treated as a reason to set aside the First-tier Tribunal's decision in the interests of justice, with reference to Anderson v Spencer (above). Apart from the problem that the Upper Tribunal is a creature of statute and has no inherent jurisdiction (save arguably when exercising its judicial review powers), the Appellant has the obvious alternative and simple remedy of making a fresh entry clearance application addressing all of the problems with the previous application. The facts are far removed from those in Anderson v Spencer.

11. The First-tier Tribunal Judge produced a meticulous and balanced determination, which securely resolved the issues. Another less careful judge might have taken a broader view. The tribunal accepts the submissions made by Mr Lindsay. Any future concession is matter for the Entry Clearance Officer and Secretary of State, but the tribunal encourages a prompt decision on any fresh entry clearance application which may be made. The tribunal finds that there was no error of law and the onwards appeal must be dismissed.

DECISION

The appeal to the Upper Tribunal is dismissed.

There was no material error of law in the First-tier Tribunal's decision and reasons, which stands unchanged.

Signed Dated 12 December 2018

Deputy Upper Tribunal Judge Manuell