



IAC-AH-SC-V1

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

**Appeal Numbers: HU/17431/2016  
HU/18827/2016  
HU/18828/2016**

**THE IMMIGRATION ACTS**

**Decided On the Papers Pursuant to Rule 34  
On 22<sup>nd</sup> July 2021**

**Decision & Reasons Promulgated  
On 05 August 2021**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**N A (FIRST APPELLANT)  
N H (SECOND APPELLANT)  
L H (THIRD APPELLANT)  
(ANONYMITY DIRECTIONS MADE)**

**Appellants**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal)  
Rules 2008**

*Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.*

**DECISION AND REASONS**

## **Introduction**

1. This decision in respect of the appellants' appeals is made on the papers pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The context in doing so is set out in the background below.

## **Background**

2. The appellants' appeals and the history of this litigation is set out in my decision and reasons dated 4<sup>th</sup> November 2020. The summary is that I set aside the error of law decision of Deputy Upper Tribunal Judge Chana dated 7<sup>th</sup> November 2018. The consequence is that the remaining three appellants' appeals against the decision of a Judge of the First-tier Tribunal Wyman, heard on 19<sup>th</sup> December 2017 at Hatton Cross, in which he dismissed the appellants' human rights appeals, remains to be decided. Summarising Judge Wyman's decision, he had considered the appeals of three appellants and a fourth appellant, whose appeal has subsequently been treated as abandoned because he has been granted indefinite leave to remain.
3. The remaining appellants comprise the wife of the original first appellant and their children, both born in the UK. The appellants had sought leave to remain based on their article 8 rights, having, in the adults' cases, entered the UK in 2007/2008 and not returned to their country of origin, Bangladesh and the two children never having returned to that country. The genuineness of the relationships between the couple and their children was not disputed but in his decision, the FtT Judge concluded that the family could return to Bangladesh as a family unit. The FtT Judge regarded the limited evidence as to any obstacles to the family's integration in Bangladesh where they had a large family and noting their professional qualifications as lawyers. The FtT Judge turned, at §88 of his decision, to consideration of the three children, the eldest at the date of the hearing being now aged 8. The question was therefore whether it was reasonable to expect her to leave the UK. The FtT Judge considered factors under section 117B of the Nationality, Immigration and Asylum Act 2002 and the cost of the NHS care to the couple in the context of childbirth and also the wife's medical conditions. There was no reason in the FtT Judge's view why the children could not be educated in Bangladesh.

## **The Appellants' appeals**

4. The appellants appealed and on 25<sup>th</sup> June 2018, permission was granted by Deputy Upper Tribunal Judge Norton-Taylor, as he then was, on 30<sup>th</sup> August 2018. He did not recite in full the five grounds which he regarded as unnecessarily lengthy but instead granted permission focusing, whilst not limiting the grant of permission, on two particular aspects which caused him concern. The first was the arguable error in the FtT Judge's failure to address the first appellant's immigration history (see paragraph 276B of the Rules, which had been raised at the hearing) and also an apparent conflation at paragraph 276ADE(1)(iv) with section 117B(6) of the 2002 Act. Nationality, Immigration and Asylum Act 2002. Moreover whilst the FtT Judge had stated that significant weight had been attributed to the residence factor it was noted

as only being of “some weight” and it was difficult to discern whether the FtT Judge had posed and then answered the core question relating to “powerful reasons” which might have outweighed the eldest child’s eight and a half years’ residence.

### **Progress of Litigation**

5. Having set aside the decision of Deputy Upper Tribunal Judge Chana I issued directions canvassing the views of the parties as to whether it was appropriate to decide whether there had been an error of law on the papers noting the COVID restrictions at the time. Highly regrettably, the appellants’ representatives, MRKS Solicitors, have repeatedly failed to comply with those directions and it was only in response to a Case Management Review hearing scheduled for Monday 12<sup>th</sup> July 2021 that finally, a few days before that hearing on 8<sup>th</sup> July 2021, the appellants’ solicitors confirmed that they were content for the decision to be resolved on the papers. However even then there appears to be some confusion as they consent to the decision being decided on the papers but then recite various parts of evidence without addressing the question of whether Judge Wyman had erred in law.
6. For her part, some months previously, on 3 December 2020, the respondent had conceded that Judge Wyman had materially erred in law. The concession reads as follows:
  - “4. [The grounds] in essence take issue with the manner in which FTTJ Wyman dealt with the issue of the qualifying child (in terms of Section 117B(6)) at the date of the hearing. The [respondent] concedes that the FTTJ’s reasoning is insufficiently clear to be sustainable and accepts, therefore that this amounts to a material error. In light of this concession which requires a further hearing (either before the FTT or UT) a subsequent material change of circumstance of the children’s father being granted ILR can be addressed. It is for this reason that the other grounds are now considered immaterial.
  5. To assist the Tribunal in clarifying the nature and nature and scope of the above concession the SSHD observes:
    - (1) It is accepted as being insufficiently clear what the actual Section 55 ‘best interests’ finding was for the children (particularly the qualifying child). It is accepted that the appellants contended the optimal best interests would be for the children to remain in the UK with their parents (the status quo outcome). Whilst it was of course open to the FTTJ even if accepting this (if that is what they intended to do) to find nonetheless that the best interests were outweighed by other factors it is conceded that the FTTJ has not made a clear and sufficiently reasoned finding on this starting point.
    - (2) Whilst the FTTJ was clearly aware that the elder child was qualifying at the date of the hearing (the author considers the FTTJ at §90 to be recognising at the date of the hearing the Immigration Rules would be satisfied if an application were then made, rather than finding they were met at the actual application date) and stated the question was “whether it would be reasonable to expect her to leave the UK” this being the correct test at the

date of the hearing via Section 117B(6). The FTTJ appears not thereafter to have made a finding under the threshold of reasonableness.

- (3) Whilst the FTTJ did consider many of the relevant factors identified in Home Office policy and endorsed in **KO (Nigeria) v SSHD [2018] UKSC 53** the FTTJ does rather confusingly import into the section headed "Children" a series of considerations unconnected to the issue of reasonableness. The self-direction to the test posed by paragraph 276ADE(1)(vi) further confuses the matter given it occurs before the FTTJ concludes dealing with the issue of the children. ...
- (4) In light of the above, the SSHD concedes that the grounds (2) to (5) disclose material error such that the decision should be set aside. The SSHD has no strong view on the disposal (whether before FTT or UT) given it is likely the appellant would wish to provide an updated evidence relating to Article 8. The SSHD would draw attention to the facility for the appellant to request a reconsideration of the refusal decision in light of updated evidence via submissions."

### **Discussion and Conclusions**

7. Central to this appeal is the FtT Judge's consideration of the reasonableness of the return to Bangladesh of the minor children. The respondent has expressly conceded, in my view correctly, that not only did the FtT confuse consideration of the date by which the oldest minor appellant had become a qualifying child, but it appears to me that there has been no clear conclusion on the key issue of the reasonableness his return. The respondent concedes, and I accept, that the errors are material. In the circumstances, the FtT's conclusion is unsafe and cannot stand.

### **Decision on an Error of Law**

8. In light of the respondent's concessions there are material errors of law in the FTT's decision and I must set it aside, preserving the findings that the relationships between the appellants are those as claimed, namely that the first appellant is the mother of the two minor appellants with whom she has a genuine and subsisting parental relationship and she is the wife of a person no longer party to these proceedings, who has indefinite leave to remain in the UK.

### **Disposal**

9. I have not been assisted by the late and confusing communication from MKRS Solicitors, who do not make clear what their view is, if any, on remittal of remaking back to the First-tier Tribunal. Whilst I have preserved some findings I am very conscious that the delay caused in part by MKRS Solicitors will have meant that the family's circumstances may well have materially changed. In the circumstances and by reference to paragraph 7.2 of the Senior President's Practice Statement and the necessary updated fact-finding, I have formed the view that this is a case that should be remitted to the First-tier Tribunal for remaking.

**Notice of Decision**

10. The decision of the First-tier Tribunal contains material errors of law and I set it aside.
11. I remit this appeal to the First-tier Tribunal for a rehearing subject to the findings of fact as set out in paragraph [9] above.

**Directions to the First-Tier Tribunal**

12. This appeal is remitted to the First-tier Tribunal for a re-hearing subject to the preserved findings set out above.
13. The remitted appeal shall not be heard by First-tier Tribunal Judge Wyman.
14. The anonymity directions continue.

Signed

Date 22<sup>nd</sup> July 2021

*J Keith*

Upper Tribunal Judge Keith