



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/22892/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19 October 2017

Decision & Reasons Promulgated
On 3 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MR MOHAMMED ABDUL GAFFER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss N Parsons

For the Respondent: Mr L Tarlow, HOPO

DECISION ON ERROR OF LAW

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Callender Smith who, in a decision promulgated on 27 January 2017, dismissed the appellant's appeal against the respondent's decision to refuse him leave to remain on human rights grounds.
2. Miss Parsons relied on the grounds of appeal upon which permission was granted.

3. I found, following her submissions, that the judge did err in law, such that his decision could not stand.
4. I find that in relation to insurmountable obstacles, the judge at paragraph 40 applied the wrong test. The judge said as follows:-

“In terms of EX.1 and the Immigration Rules, I cannot see that there are insurmountable obstacles that prevent him returning to Bangladesh ...”.

5. I agreed with Miss Parsons that this was not the correct test. The correct test is whether there are insurmountable obstacles to family life continuing outside the United Kingdom, in this case Bangladesh. I find that the judge’s application of the wrong test amounted to a material error of law.
6. Miss Parsons further argued that the rest of the judge’s findings at paragraph 40 were perverse and irrational. The judge had said that “... given the flexibility and persistence he has already shown in making his life here in the UK and the potential support that he has both from his brother and, more generally, his parents”, he could not see that there are insurmountable obstacles that prevent him returning to Bangladesh. Miss Parsons argued that this finding was irrational because in his witness statement and oral evidence, the appellant said he was unable to rely on his brother who supports his parents and his wife and two children. This means that the brother is already supporting five people in Bangladesh and it is irrational for the judge to say that the brother would be able to support the appellant, his wife and two children in a home which he owns which is already crowded. I was not persuaded by this argument as I am of the view that the judge’s finding was open to him on the evidence.
7. I find that in his application of the balancing exercise, the judge erred in law in finding at paragraph 54 that there are no qualifying children in this case. The appellant has two children who are both British citizens. Evidence was provided of their British passports. The children are aged 5 and 1½ years old. As the children are British they are qualifying children. I find that the judge gave inadequate consideration to the best interests of the two British children. It was insufficient for the judge to say at paragraph 54 that there was no move in this appeal to remove the wife of the appellant and their children. The judge was required to consider the best interests of the children and, even if there was no move in the appeal to remove his wife and their children, what impact his removal would have on the family left behind in the UK.
8. It appears from the decision that paragraphs 45 to 53 were part of the same quotation in **MA Pakistan** which the judge relied on. Because of what the judge said at paragraph 54, I find that he failed to consider as part of the balancing exercise whether it was reasonable to expect the British born children and their mother to accompany the appellant to Bangladesh. I accept that there was no recognition given by the judge to the fact that the children were qualifying children and that by virtue

of being British nationals, enjoy the benefits that accrue to British nationals. I accept that this important area was completely overlooked by the judge.

9. I also find that there was some confusion in the judge's decision. At paragraph 46 he said "*Applying the reasonableness test*" and at paragraph 50 stated "*The best interests of the child*". However, I find that these are not considerations. They appear to form part of the judge's quotation of **MA Pakistan**. It appears to me that the judge's findings on those two issues are stated in two short paragraphs at paragraphs 54 and 55. These two short paragraphs do not adequately deal with the issues the judge had to consider.

Notice of Decision

10. For the reasons given above, I find that the judge's decision discloses material errors of law. The judge's decision cannot stand. It is to be remade.
11. The appeal is remitted to Taylor House for rehearing by a First-tier Judge other than First-tier Tribunal Judge Callender Smith.
12. No anonymity direction is made.

Signed

Date: 2 November 2017

Deputy Upper Tribunal Judge Eshun