



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

Appeal Number: HU/20208/2016

THE IMMIGRATION ACTS

Heard at Field House

On 5th March 2018

**Determination &
Promulgated**

On 27th March 2018

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**SM
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Basith (Solicitor), Taj Solicitors

For the Respondent: Ms A Brocklesby-Weller (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Brunnen, promulgated on 23rd June 2017, following a hearing at Manchester on 22nd May 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Bangladesh, who was born on [] 1984. He appealed against the decision of the Respondent dated 2nd August 2016, refusing his application for leave to remain under the 10-year parent route in Appendix FM and on Article 8, laying claim to his family and private life rights.

The Appellant's Claim

3. The essence of the Appellant's claim is that he has a son, [MM] born to him in the United Kingdom, as a result of his relationship with a [CB], a Portuguese national, whom he married on 27th September 2011, who he is caring for. He had entered the UK illegally in 2002 when he was 17 years of age. He came seeking a better life. He already had relatives in this country. In 2009 he attempted to regularise his stay by applying for leave to remain but this was refused in 2010. After his marriage to [CB], he applied for an EEA residence card but his application was refused in February 2012. The Family Court granted him a residence order in respect of his two stepchildren, who are the children of [CB], from a previous relationship. When, however, his appeal came on for hearing at this Tribunal in April 2012, the Respondent withdrew her decision, with a view to reconsidering the Appellant's family position. Thereafter, on 16th September 2013, the Respondent granted the Appellant leave to remain until 15th March 2016. The Appellant was found at the time to satisfy the requirements of Appendix FM for leave to remain as a parent. In December 2013, however, the Appellant's wife left him, and she took two of the older stepchildren with her, but she left the Appellant's own son, [MM], with him. He has no contact now with her since she left. The Appellant is, with sole responsibility, in the care of his son and is his son's primary carer. His sisters in the UK also help him, because he has difficulty coping on his own given that he has to work, and his son accordingly now has moved in with his sister [TY] and her family, while the Appellant runs his own takeaway food business.

The Judge's Findings

4. The judge noted that the Appellant had lived in the UK for over fifteen years, but had returned in 2014 to Bangladesh when his father was ill, and he maintains that contact with his mother and tries to maintain contact with his siblings there (paragraph 17). The judge did not accept that the Appellant had strayed away from his Muslim culture and did not accept that he would suffer discrimination as a single parent if he returned to Bangladesh. The Appellant's mother owned a family home where the Appellant had grown up and he and [MM] could go and live there. It was true he had established a business in this country and had four employees (paragraph 20), and he maintained that he would have to start all over again, and the four employees would lose their jobs, but the judge concluded that the Appellant may be able to sell the business as a going concern (paragraph 20). The Appellant would have made friendships in

the UK but there was nothing to suggest that these were particularly close or special (paragraph 21).

5. The judge had regard to the established case law, and the requirement to demonstrate that there were “very significant obstacles” under paragraph 276ADE, referring to the case of **Kamara [2016] EWCA Civ 813** and **Treebhawon [2017] UKUT 30**, but the judge held that the Appellant would have no real difficulty in reintegrating and that neither he nor [MM] would face discrimination in Bangladesh (paragraph 33). With respect to his child, [MM], the judge held that he would not face so great a language barrier as the Appellant claims. It was true that [MM] had a need for speech therapy, “but there is no professional evidence to show that this represents a very significant obstacle to him (and therefore to the Appellant), integrating in Bangladesh” (paragraph 36).
6. The appeal was dismissed.

Grounds of Application

7. The grounds of application state that the judge gave adverse reasons for refusing the appeal. He had concluded that the Appellant “has a close relationship with his sisters in the UK” (paragraph 33). He had also found that “[MM] has a close relationship with his cousins” (paragraph 33). He had found that “[MM] has been found to need speech therapy” (paragraph 36). He wrongly concluded that [MM] would be able to remain in the care of his father “whatever the outcome of this appeal, so this aspect of his best interests is not threatened by the Respondent’s decision” (paragraph 46).
8. On 13th December 2017, permission to appeal was granted on the basis that the judge had found (at paragraph 42) that the Appellant had been deserted by his wife and left caring for a 2 year old child, but that “they had been taken into the home and family of his sister and have lived for three years as an integrated part of the household, relying heavily on the practical and emotional support that this remit had provided”. In these circumstances it was arguable that the judge did not accord adequate weight to this finding when resolving the issue of proportionality in favour of the Respondent.
9. On 30th January 2018, a Rule 24 response was entered to the effect that the judge did give adequate reasons at paragraphs 31 to 37.

Submissions

10. At the hearing before me on 5th March 2018 Mr Basith, appearing on behalf of the Appellant, submitted that despite favourable findings made by the judge throughout the determination, and especially at paragraph 42, the conclusion that was then reached by the judge was contrary to the weight to these findings. The Appellant’s son also had speech therapy needs (paragraph 36). Moreover, at paragraph 50, the judge had come quite

close to expressly finding that the Appellant's 2 year old child would not be able to integrate into Bangladeshi society, and that when it comes to a consideration of his position this "makes the case more difficult" because "there is a clear tension between his best interests and the public interest in immigration control" (paragraph 50).

11. For her part, Ms Brocklesby-Weller submitted that she would rely upon the Rule 24 response. The judge had considered all the evidence. It was true that the Appellant had been granted leave to remain previously, but this was done outside Article 8, because of the children. At paragraph 33 the judge considered that there were no "very significant obstacles" given the decision in **Kamara [2016] EWCA Civ 813**. At paragraph 33 the judge factored into the equation the return of the Appellant to Bangladesh in 2014, such that it could not be said to be strange from the culture of that country. Moreover, paragraph 276ADE was perfectly adequately dealt with by the judge, as was the Section 55 consideration under the BCIA 2009 with respect to the "best interests" of the child. It was true that the Appellant had integrated into life in this country with his son (paragraph 42), but the child would be looked after by the Appellant's father, and there is no reason why this could not be done in Bangladesh. The decision was perfectly well-reasoned and there was no error of law.
12. In reply, Mr Basith submitted that the judge's decision did not make sense when regard is had to what was said at paragraph 46, namely, that, "I find that it would be in [MM]'s best interests to continue to live in his existing family surroundings" (paragraph 46).

Error of Law

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
14. First, this is a case where the Appellant had already been granted, by the Secretary of State, leave to remain from 16th September 2013 to 15th March 2016, expressly on the basis that he was a parent of children living in the UK, and particularly his own son, [MM].
15. Second, it remains the case, that although in December 2013 his wife left him and took two older children with her, he is still a parent who has the care of his son [MM], and indeed is the primary carer.
16. Third, it does not end there, because, given the Appellant's responsibilities with his own takeaway food business, he has found it necessary for [MM] to live with his own sister. The judge expressly found that, the Appellant and his son "have been taken into the home and family of his sister and have lived for three years as an integrated part of the household, relying heavily on the practical and emotional support that this arrangement has provided" (paragraph 42).

17. Fourth, the judge has also found that “it would be in [MM]’s best interests to continue to live in his existing family surroundings” (paragraph 46).
18. Finally, it is clear that the judge was driven to conclude precisely so, except for the fact that in applying the test of proportionality, where the judge observed that, “there is a clear tension between his best interests (i.e. that of the child) and a public interest in immigration control” he concluded that “it cannot properly be said that [MM]’s best interests are such a weighty factor as to outweigh the public interest in this case”. This is plainly wrong given that the judge had already stated in the same paragraph that, “the involvement of [MM] makes the case more difficult” insofar as the question of his being “able to reintegrate socially” in Bangladesh was concerned (paragraph 50).
19. In the end the balance of proportionality in this case fell, as it did as far back as September 2013 when leave to remain was given to the Appellant, in favour of the Appellant remaining in the UK with his child, and this balance was even stronger by the time of this decision because, although the Appellant’s wife had by that stage departed in December 2013, the child was now integrated and living in the family of the Appellant’s sister, where the judge had held that his best interests would be most properly maintained (paragraph 42).
20. In the case law on this subject, ultimately the question is one of fair balance as was recognised in **Agyarko [2017] UKSC 11** where the Supreme Court stated that “The ultimate question in Article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying the proportionality test”.
21. Given that the judge had already found “that it would be in [MM]’s best interests to continue to live in his existing family and surroundings” (paragraph 46), it was simply not the case that [MM] would be cared for only by his father, the Appellant, so that wherever the Appellant went, [MM] would go with him, on the assumption that this was in [MM]’s “best interests”, which was an assumption that the judge had plainly found against (at paragraph 46).

Remaking the Decision

22. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today.
23. I am allowing this appeal for the reasons that I have set out above.

Notice of Decision

24. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

25. An anonymity order is made.

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.

Signed

Date

Deputy Upper Tribunal Judge Juss

24th March 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a whole fee award of any fee which has been paid or may be payable.

Signed

Date

Deputy Upper Tribunal Judge Juss

24th March 2018