



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07701/2018  
HU/07704/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 8<sup>th</sup> January 2019

Decision & Reasons Promulgated  
On 15<sup>th</sup> February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR K M (FIRST APPELLANT)  
MASTER F R (SECOND APPELLANT)  
(ANONYMITY DIRECTION MADE)

Respondents

**Representation:**

For the Appellant: Ms J Isherwood, Home Office Presenting Officer

For the Respondents: Ms T Srin dran, solicitor

**DECISION AND REASONS**

**EX TEMPORE JUDGMENT**

1. The appeal is brought by the Secretary of State against the decision of the First-tier Tribunal promulgated on 1<sup>st</sup> November 2018 with permission granted at the First-tier Tribunal. In that decision First-tier Tribunal Judge Devittie allowed the Appellants' appeal brought on human rights grounds against a refusal of leave to remain.

2. The adult Appellant is the father of the second and minor Appellant who was born in Indonesia on 1<sup>st</sup> September 2010. The grounds on which permission were granted are essentially that the judge has allowed the appeal based on a conclusion that there are insurmountable obstacles to the family continuing their family life in Indonesia, and that although the judge has correctly self-directed as to the test of insurmountable obstacles at paragraph 6, his decision subsequently: that there are insurmountable obstacles is unreasoned.
3. I find no merit in the grounds. To my mind the grounds misread the judge's decision. A careful reading shows that at paragraph 9 the judge concludes that there would be no insurmountable obstacles to the parties continuing family life outside the United Kingdom. In that and, contrary to the position in the grounds, the judge agrees with the respondent. The reasoning for allowing the appeal is that despite that position there are exceptional circumstances operating which mean that nonetheless the appeals should succeed. As Ms Isherwood has pointed out it was not said on behalf of the Appellant in the skeleton argument that the rules were satisfied, and it is clear from the skeleton the basis upon which the case was put was the exceptional or compelling reasons.
4. I am satisfied the judge has found, contrary to the grounds, that these Appellants do not satisfy the requirements of the Immigration Rules and the judge has moved on to take those findings forwards when concluding that immigration control represents the public interest, and at paragraph 13(1) of the decision treated control as a compelling consideration to be weighed in the balance against the circumstances of the family life in the United Kingdom. It is in that context he has considered the best interests of the child, and concluded, in the context of a family which, and it appears there was no challenge to that position, there is certainly none raised in the grounds of the application for permission to appeal, that would succeed in an application for entry clearance from abroad.
5. An important point to note is that the Home Office Presenting Officer on the day has placed no reliance on the suitability requirements in the context of the parent's adverse immigration history. That is relevant to the rules in terms of Appendix FM and the gateway requirements to EX1 for the father, but also in the overall Article 8 balancing exercise, including the weight to be given to the assessment of weight to give the best interests of the child vis a vis the public interest.
6. Accordingly what the judge was assessing on the case as it was presented on the day was whether or not it would be proportionate to expect the family to either be separated or leave as a unit in order that an application be made from abroad, and in this context assessed whether or not the public interest required there should be disruption to the child for that process to take place, and the judge has concluded that it would not be proportionate to expect the child to return to Indonesia for that purpose. You can see that that is the way in which the judge has reasoned this case because he refers at the final paragraph to the issue as being that described in the decision of Chikwamba [2008] UKHL 40

7. For those reasons I am satisfied that the challenge to the decision based on misdirection or misapplication of the insurmountable obstacles Rule is simply unwarranted. I mentioned to the parties at the beginning of the hearing that on its face the outcome is not inconsistent, as the grounds imply, with the case of Agyarko, because that case at 51 and 52 makes provision for the fact that in these circumstances the question of whether or not it would be right to expect a family to relocate in order to make an application is something that the judge could properly take into account, so that it is not a decision which in terms of its outcome is perverse in the context of current jurisprudence.
8. I am satisfied that the judge did not make any material error of law and the decision allowing the appeal stands.

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

Anonymity having previously been ordered in the First-tier Tribunal and there being no application to remove the order, I see no reason to do so and the order remains in place. 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 order applies both to the Appellant and to the Respondent. Failure to comply with this order could lead to contempt of court proceedings.



Signed

Date 08 January 2019

Deputy Upper Tribunal Judge Davidge

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and no issue of fees arises.



Signed

Date 08 January 2019

Deputy Upper Tribunal Judge Davidge