



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

Appeal Numbers: HU/06825/2019  
HU/06835/2019, HU/06838/2019  
HU/06842/2019, HU/06847/2019  
HU/06852/2019, HU/06856/2019  
HU/06858/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 January 2020**

**Decision & Reasons Promulgated  
On 31 January 2020**

**Before**

**THE HON. LORD UIST  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**NADIA [D]  
HIJRATULLAH [D]  
HASIBULLAH [D]  
NAZIA [D]  
GULLALAY [D]**

**[S D]**

**[T D]**

**[N D]**

**(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellant: Ms E. Daykin, Counsel, instructed by Makka Solicitors Ltd  
For the Respondent: Ms A. Fijiwala, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants appeal against a decision of First-tier Tribunal Judge Grimmett promulgated on 14 August 2019 dismissing their appeals against the linked decisions of the respondent dated 27 March 2019 refusing their human rights claims for leave to remain in the United Kingdom.

#### *Factual background*

2. The appellants are a large family unit. They are all citizens of Afghanistan. The first appellant, Mrs Nadia [D], was born on 30 August 1974. She is married to a British citizen, who is the sponsor in these proceedings. The remaining seven appellants are the children they have together. The sixth to eighth appellants are still under the age of majority; their dates of birth are 29 July 2002, 26 June 2003 and 21 March 2006.
3. The appellants claim to have entered the United Kingdom via Ireland, where they lived with the sponsor, ostensibly pursuant to his exercise of his rights as a citizen of the Union under EU law. They initially sought a right to reside in this country under the so-called *Surinder Singh* route, on the basis that the sponsor had exercised Treaty rights in Ireland, prior to his return here. Their applications for residence cards on that basis under the Immigration (European Economic Area) Regulations 2016 were refused by the respondent, and an appeal against the refusal of those applications was dismissed by Judge Lodge in a decision promulgated on 17 May 2018. The appellants subsequently applied to the respondent for leave to remain on the basis of their human rights. Those applications were refused and the appeals against those refusals were heard by Judge Grimmett.
4. Judge Grimmett dismissed the appellants' appeals on the basis of what he considered to be inconsistencies in their evidence. The judge found that the appellants retained property in Afghanistan and still had close family members there. He was accordingly satisfied that there would be no "insurmountable obstacles" to the return of the appellants to Afghanistan. He found that family life would be able to continue in Afghanistan, or, alternatively, "their family lives can continue in Ireland where all family members currently have the right to live."
5. Permission to appeal was granted by First-tier Tribunal Judge Feeney on the basis that it was arguable that the judge had not made any findings concerning the best interests of the children concerned. In addition, it was arguable that the judge erred by applying the "insurmountable obstacles" test, rather than the quite different "very significant obstacles test", under paragraph 276ADE(1)(vi). It was also arguable that the judge erred by concluding that the family could return to Ireland, as it was not clear on what basis they would continue to enjoy a right to reside there.

#### *Discussion*

6. It was common ground that the judge's failure to consider the best interests of the three children concerned was an error of law. In addition, it

was also common ground that, in light of the judge's application of the "insurmountable obstacles" test, which originates in EX.1 of Appendix FM of the Immigration Rules, rather than the "very significant obstacles" test contained in paragraph 276ADE(1)(vi) of the Immigration Rules, was also an error. Finally, the judge erred by concluding that the family enjoyed a right to reside in Ireland, when Judge Lodge had found that they did not.

7. Ms Fijiwala, who appeared for the respondent, realistically accepted that this was a decision infected throughout by material errors. Although there were some credibility concerns that appear to be within the range of legitimate findings open to the judge on the evidence, given the overall erroneous approach of the judge to the above matters, she submitted, it would not be appropriate to preserve any of the judge's findings, and the matter should be remitted to the First-tier Tribunal.
8. We agree. The judge failed to consider the best interests of any of the three children concerned. He did not engage with the extensive background materials concerning the security situation in Afghanistan, which had been part of the submissions put to him. Alternatively, if he did engage with those materials, he did not say that he had, or what his reasons for dismissing the relevance of the material were. He applied the wrong test under the Immigration Rules, and erroneously concluded that the family enjoyed a right to reside in Ireland. Of course, it may be that, in time, the sponsor would be able to take employment in Ireland and resume residing there pursuant to his rights under EU law. However, that is not what the judge found; the judge's operative finding on this issue was that Ireland was a place, "where all family members currently have the right to live" (see [15]).
9. The judge's errors of law were such that the decision must be set aside with no findings preserved.
10. The appropriate course is for the decision to be remitted to the First-tier Tribunal to be reheard before any judge other than Judge Grimmett.

### **Notice of Decision**

The decision of Judge Grimmett involved the making of an error of law and is set aside with no findings preserved.

The matter is remitted to the First-tier Tribunal to be reheard by any judge other than Judge Grimmett.

No anonymity direction is made.

Signed *Stephen H Smith*

Date 27 January 2020

Upper Tribunal Judge Stephen Smith