



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/11963/2015  
IA/11959/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 8 July 2016

Decision Promulgated  
On 18 July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

GU  
(Anonymity Direction Made)

First Appellant

TP  
(Anonymity Direction Made)

Second Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms C Robinson (counsel) instructed by Wilsons Solicitors LLP  
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the

appellants or their daughter because this appeal turns to a large extent on the welfare of the appellants' minor child.

2. These are appeals by both Appellant against the decision of First-tier Tribunal Judge Abebrese promulgated on 23 December 2015, which dismissed the Appellants' appeals on all grounds.

### Background

3. The First Appellant is the second appellant's husband. The first appellant was born on 24 April 1982. The second appellant was born on 21 February 1984. Both appellants are Mongolian nationals. The first appellant has lived in the UK since 2008, the second appellant has lived in the UK since 2009. The appellants' have one daughter, who was born in the UK on [ ] 2011.

4. On 23 January 2015 both appellants submitted applications for further leave to remain in the UK on article 8 ECHR grounds. The respondent refused their applications on 16 March 2016.

### The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Abebrese ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 24 May 2016 Judge Heynes gave permission to appeal stating inter alia

"3. The grounds of appeal complain that the Judge failed to determine a ground specifically lodged; that the decision was not in accordance with the law, applied the wrong test (in referring to insurmountable obstacles), gave inadequate reasons, misapplied Razgar and failed to address a submission that a short period of discretionary leave should be granted.

4. It is arguable that the Judge applied the wrong test."

### The Hearing

7. (a) Ms Robinson, counsel for the appellants, moved the grounds of appeal. She told me that the Judge failed to deal with a ground of appeal which was competently before him. She told me that both in the skeleton argument produced to the First-tier and in counsel's submissions it had been argued that the respondent's decision is not in accordance with the law. At [30] the Judge makes passing reference to that ground of appeal, but does not deal with that ground of appeal anywhere else in the decision.

(b) Ms Robinson move to the second ground of appeal and told me that the Judge had applied the wrong test when considering whether or not the appellants fulfil the

requirements of paragraph 276 ADE(1)(vi) of the immigration rules. She reminded me that the appellants concede that they cannot fulfil the requirements of appendix FM and that the test under paragraph 276 ADE(1)(vi) is consideration of whether or not there are very significant obstacles to integration. She told me that eight times in the decision, between [30] and [38], the Judge refers to a test of whether or not there are insurmountable obstacles to return, which is, of course, a completely separate test.

(c) In moving the third ground of appeal, Ms Robinson was critical of the Judge for failing to deal with part of the case pled by the appellants and ignoring the appellants' positive contribution to society in the UK. She argued that the Judge had failed to take account of the dicta in UE (Nigeria) [2010] EWCA Civ 975. She argued that adequate evidence was placed before the Judge to counterbalance the public interest in immigration control.

(d) The fourth ground of appeal is that, although the Judge refers to the five stage test set out in Razgar at [41] of the decision, (it is argued that) the Judge considered only the right to respect for family life and did not give adequate consideration to the private life created by the appellants in the UK, so that the proportionality assessment carried out by the Judge was inadequate.

(e) Ms Robinson told me that, at the First tier, counsel for the appellants had argued an alternative case on article 8 ECHR grounds - that discretionary leave should be granted until further investigations into the needs of the appellants' daughter could be brought to a conclusion. Ms Robinson argued that neither the evidence to support that submission nor that submission are recorded, discussed, or considered in the Judge's decision. She told me that the decision contains material errors of law and urged me to set the decision aside and to remit the case to the First-tier to be considered afresh, because the case turns on questions of the welfare of young child; time has moved on and further evidence is available.

8. For the respondent, Mr Walker adopted the terms of the respondent's rule 24 response dated 20 June 2016, but told me that there is force in the appellant's argument that the wrong test was applied when considering paragraph 276 ADE of the immigration rules. "Insurmountable obstacles" is referred to eight times by the Judge and, he conceded, "Insurmountable obstacles" are irrelevant in this case. Mr Walker told me that the argument that the decision is not in accordance with the law is an argument which was placed before the Judge and has not been dealt with by the Judge. He did not concede the appeal, but he told me that the use of the wrong test in law and a failure to engage with one of argued grounds of appeal were factors which materially affect the Judge's findings.

## Analysis

9. Although the argument that the respondent's decision is not in accordance with the law does not feature in the grounds of appeal which supported the notice of appeal against the respondent's decision, it is conceded that it features in the

skeleton argument placed before the First-tier tribunal, and counsel for the appellants made submissions to the Judge that the respondent's decision is not in accordance with the law.

10. That ground of appeal is only briefly referred to by the Judge at [30] of the decision. Having recorded that the appellant argues that the respondent's decision is not in accordance with the law, the Judge does not make findings of fact about the legality of this decision nor does the Judge reach a conclusion in relation to that ground of appeal. In short, the Judge acknowledges that one of the matters before him was an argument that the respondent's decision is not in accordance with the law, but the Judge does not specifically deal with that aspect of the appellant's case at all.

11. At [30] the Judge finds that the appellants cannot fulfil the requirements of appendix FM, and moves on to consider paragraph 276 ADE of the rules. It is easy to see that, because of the ages of the appellants and the length of time they have been in the UK, they cannot fulfil the requirements of paragraph 276 ADE(1)(i) to (v) of the rules. It is clear that between [30] and [38] of the decision the Judge is considering paragraph 276 ADE(1)(vi) of the rules.

12. In order to meet the requirements of Paragraph 276ADE(1)(vi) the appellant must meet the following requirement,

(vi) subject to paragraph 276ADE(2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

13. Parties are agreed that between [30] and [38] the Judge repeats eight times the test he applies when considering paragraph 276 ADE(1)(vi) of the rules involves a search for insurmountable obstacles. Nowhere in the decision does the judge ask whether or not

there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the United Kingdom.

14. At [38] the Judge reaches his conclusion and records

"Therefore the tribunal makes a finding that there are no insurmountable obstacles preventing the appellants and their child being removed to Mongolia as a family unit for the reasons expressed above."

15. The Judge manifestly applied the wrong test in law to the facts and circumstances of the appellant's case.

16. I find that these errors are material errors in law because of the Judge did not engage with every ground of appeal and then applied the incorrect test, the outcome

to the appellants' appeals may have been different. As the Judge's decision contains material errors of law, I must set it aside.

17. The determinative issues in this case relates to a child born in 2011. She is now approaching her fifth birthday. At the date of the respondent's decision she was only 3½ years old. At the date of the Judge's decision, she was just over four years of age. In the intervening period her circumstances have changed. I am told that fresh evidence is now available. They are matters on which the appellant should have the opportunity of leading up-to-date evidence.

#### Remittal to First-Tier Tribunal

18. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25<sup>th</sup> of September 2012 a case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

*(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*

*(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.*

19. In this case I have determined that the case should be remitted because of the nature and extent of the fact finding exercise necessary to reach a just decision in this appeal. None of the findings of fact are to stand. A complete re-hearing is necessary.

20. I remit the matter to the First-tier Tribunal sitting at Taylor House to be heard before any First-tier Judge other than Judge Abebresse.

#### **CONCLUSION**

##### **Decision**

**21. The decision of the First-tier Tribunal is tainted by material errors of law.**

**22. I set the decision aside. The appeal is remitted to the First Tier Tribunal to be determined of new.**

Signed

Date 18 July 2016

Deputy Upper Tribunal Judge Doyle