



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/40167/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On the 11th December 2015

Decision & Reasons Promulgated
On the 5th January 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MS MUKTHERUN NESA KHATHUN CHOUDHURY

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant Mr N.Ahmed (Solicitor)

For the Respondent Mr Norton (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Ian Howard promulgated on the 29th June 2015, in which he dismissed the Appellant's Human Rights appeal under Article 3 and Article 8.
2. Permission to appeal has been granted by First-tier Tribunal Judge Nicholson on the 29th September 2015 on the ground that the Judge appeared to have accepted at paragraph 26 that the Appellant had an Article 8 family life with her son, her daughter and their families and

that the decision to remove the Appellant would "substantially change the way in which that family life is currently enjoyed" and would amount to an interference with that family life, but had found that it was not an interference of such gravity as to engage Article 8 on the basis that it would "merely serve to restore it to what it was before march 2012". Judge Nicholson considered that there was an arguable material error of law in that having found that family life would be substantially changed, the Judge ought to have found that Article 8 was engaged, and gone on to consider the question of proportionality.

3. At the start of the appeal, Mr Norton on behalf of the Respondent indicated that he wished to withdraw the Rule 24 response that had been submitted. He told me that he conceded that there was material error of law and the case should be remitted back to the First-tier Tribunal for reconsideration.
4. In light of the concession quite properly made by Mr Norton on behalf of the Respondent, I do find that First-tier Tribunal Judge Howard did materially err in his consideration of Article 8 at [26] of the decision. Having found that "to remove her to Bangladesh would substantially change the way in which that family life is currently enjoyed", to then go on to find that "given my findings above it would be to return it to the way it was before she came to the UK in March 2012" and that this would not amount to an interference of such gravity as to engage Article 8 is a clear material error of law. The threshold that has to be crossed as to whether or not Article 8 is engaged is not a specially or indeed exceptionally high, as was made clear by Lord Justice Sedley in the case of AG (Eritrea) v The Secretary of State for the Home Department [2007] EWCA Civ 801. The question as to whether or not an interference would simply return the position back to the way it was prior to the Appellant coming to the UK in March 2012 was a question for the final stage of the Razgar test, the question of proportionality, rather than as to whether or not Article 8 was actually engaged. If there was going to be a substantial change in the way that family life as currently enjoyed, even if reverting it back to the way it was previously, Article 8 would have been engaged, and the Judge should therefore have gone on to consider proportionality. The First-tier Judge has set the bar for the engagement of Article 8 too high. I therefore agree with the concession made by Mr Norton on behalf of the Respondent that the Judge's decision does contain a material error of law. The decision of First-tier Tribunal Judge Ian Howard does contain a material error of law in respect of the way that he dealt with Article 8 and is therefore set aside. The case is to be remitted back to the First-tier Tribunal for rehearing de nova, to be heard by any Judge other than First-tier Tribunal Judge Ian Howard.

Notice of Decision

The decision of First-tier Tribunal Judge Ian Howard does contain a material error of law and is set aside;

The case is to be remitted back to the First-tier Tribunal for rehearing, to be heard by any Judge other than First-tier Tribunal Judge Ian Howard.

Signed

Dated 14th December 2015

Handwritten signature of RF McGinty in black ink.

Deputy Judge of the Upper Tribunal McGinty