



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12111/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 1 June 2018

Decision & Reasons Promulgated  
On 4 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

GOUSUL [A]  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr N Khan, of Counsel

For the Respondent: Ms S Kiss, Home Office Presenting Officer

**REMITTAL AND REASONS**

**Introduction**

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Lucas promulgated 1 November 2017, dismissing his appeal, against the decision of the Respondent, dated 16 April 2016, refusing his application for leave to remain under the long residence provisions of the Immigration Rules (the Rules). It is relevant to note that the Appellant is present in the UK with his wife and their three children.

All are nationals of Bangladesh. The eldest child has been living in the United Kingdom since the age of two and for a period of twelve years.

### **Hearing before the First-tier Tribunal**

2. The First-tier Tribunal ("FtT") heard evidence from the Appellant. The Appellant's claim is set out at [8] to [21] and the FtT's findings are at [28] to [40]. The FtT noted that the Appellant could not establish his case under the long residency provisions of the Rules as he had not had lawful leave for a continuous period of 10 years. The FtT noted that the appeal focused on the best interests of the eldest child who had been resident in the United Kingdom for more than seven years. The eldest child while born in Bangladesh moved to the United Kingdom aged two and was now aged twelve; his two siblings whilst born in the United Kingdom in 2014 and 2017, respectively, were considerably younger. While the FtT noted that the children had not spent much time, if any, in Bangladesh he noted that they would return with their parents who were nationals of their country of origin and spoke Bengali as their main language. The FtT found that it was inconceivable that the children would not have a good understanding of Bengali. The FtT concluded that the best interests of the children were not adversely affected by them remaining in a family unit with their parents in Bangladesh. The FtT acknowledged that while removal would entail a temporary disruption while the children readjusted to life in Bangladesh they could do so with the support of their parents and other family members there. Finally, the FtT noted that there was a developed system of education in Bangladesh.
3. The FtT thus concluded that removal was not unreasonable or disproportionate. Accordingly, the FtT dismissed the appeal.
4. The Appellant sought permission to appeal claiming that the FtT misdirected himself in law; failed to consider material issues and failed to adequately consider the best interests of the child.
5. On 30 January 2018, Upper Tribunal Judge McWilliam granted permission on the basis that it was arguable that the assessment of the children's best interests was deficient.
6. Thus, the matter came before me to decide in the first instance whether the FtT materially erred in law. Mr Khan made brief submissions in-line with the grounds and Ms Kiss in consideration of the grounds and submissions indicated that she had nothing further to add, albeit, she did not formally concede the appeal. I announced my decision at the hearing that I was satisfied that the FtT materially erred in law, the reasons for which I give below.

### **Discussion and Decision**

7. It is not necessary to traverse the grounds in any detail given that the Respondent has not opposed this appeal with any enthusiasm. The following is sufficient to establish a material error of law has been committed in respect of the FtT's assessment of the children's best interest which is plainly deficient.

8. The FtT's entire basis for dismissing the appeal on human rights grounds appears to be that the children's best interests would not be adversely affected on return to Bangladesh as they would have the support of their parents and could access education in their country of nationality. While the factors referred to by the FtT are all relevant factors to be considered in the balancing exercise, in my judgement, the balance was all weighted to the Respondent's side of the balance without adequate consideration being given to relevant factors that were relevant to the Appellant's side. In particular, the FtT's assessment of proportionality is flawed by its failure to give "significant weight" to the fact that the eldest child is a qualifying child who may have qualified for leave under the Rules in his own right. The established starting point in such cases is that leave should be granted unless there were "powerful reasons" to the contrary (MA (Pakistan) at [46] & [49]). This error is further compounded by the FtT's failure to have regard to section 117B(6) of the Nationality, Immigration and Asylum Act 2002, and/or to perform an adequate consideration of its substance. All these matters were relevant to a proper assessment of whether the refusal of leave to remain was disproportionate as well as other matters.
9. I find, therefore, that the FtT erred in its assessment of proportionality. The errors clearly impinge on the FtT's lawful assessment of whether the Respondent's decision to refuse leave to remain breached Article 8 of the ECHR.
10. In the circumstances, I set aside the FtT's decision and remit the appeal with the consent of the parties to the FtT to consider afresh.

### **Notice of Decision**

The decision of the FtT is set aside.

The appeal is remitted to the FtT to be determined afresh by a judge other than Judge Lucas.

Signed:

Deputy Upper Tribunal Judge Bagral

Date: 20 June 2018