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

**Appeal Numbers: HU/01433/2017**
**& HU/01878/2017**

**THE IMMIGRATION ACTS**

**Heard at Field House in London**
**On 3 June 2019**

**Decisions & Reasons Promulgated**
**On 26 July 2019**

**Before**

**UPPER TRIBUNAL JUDGE HEMINGWAY**

**Between**

**R**
**H**
**(ANONYMITY DIRECTED)**

Appellants

**and**

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

Respondent

**Representation:**
For the Appellants: Mr H Shamsuzzoha (Counsel)
For the Respondent: Mr S Kotas (Senior Home Office Presenting Officer)

**Notice of Decision and Reasons**

1. This was to have been an appeal, brought by each claimant, from decisions of the Secretary of State, of 10 April 2017, refusing to grant either of them leave to remain outside the Immigration Rules. Each of them had been granted permission to appeal to the Upper Tribunal by a Judge of the First-tier Tribunal. However, on 28 March 2019 one of the appellants (the one I shall call R) was granted indefinite leave to remain. In looking at the content of rule 17(A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and

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Section 104(4A) of the Nationality, Immigration and Asylum Act 2002, that meant R's appeal was to be treated, by operation of law, as having been abandoned. There was no dispute between the parties that that was so. In light of the content of rule 17(3) of the above Rules, the Upper Tribunal is required to notify each party, in writing, that a withdrawal of the appeal has taken effect and that the proceedings are no longer regarded by the Upper Tribunal as being pending. Accordingly, this part of the decision of the Upper Tribunal constitutes such notice under rule 17(3) with respect to the claimant I have called R.

2. When the tribunal heard the appeals of R and H, which it did at a hearing of 1 November 2018, it heard from both of them. By way of background, both are nationals of Bangladesh, both are adults, and, it is accepted, they are partners. They have a child who was born in the United Kingdom (UK) on 30 September 2017. The birth certificate records R as being the mother and H as being the father of that child. Both of the appellants and the child are nationals of Bangladesh. R has been in the UK since 30 September 2007 and H since 28 August 2009.

3. R and H, having been refused leave on 6 January 2017, appealed to the tribunal. Both were treated as appellants before the tribunal but the appeals were considered at a joint hearing. Essentially, it was contended that they should succeed under article 8 of the European Convention on Human Rights (ECHR) outside the Immigration Rules.

4. The tribunal received much evidence as to difficulties it was said would await both R and H if they had to return to Bangladesh. The tribunal took much time and care, in its written reasons of 28 February 2019, in setting out the detail of that evidence. It performed a similar function with respect to evidence about claimed ties to the UK. Having assessed the evidence, the tribunal resolved matters against each claimant and said this:

> "24. There was no substantive challenge by Ms Javed [the Presenting Officer before the tribunal] to the claims but rather Ms Javed relied upon the Reasons for Refusal Letter dated 6 January 2017. There was no general discussion or calling of evidence concerning the length of time that they had been in the United Kingdom but Ms Javed's submissions did not ultimately take any point on the matter, save to recognise that there was a child and the best interest of the child lay in being with her parents in Bangladesh. Secondly, she said that their status had become precarious in the United Kingdom and even if the appellants had been here over ten years lawfully that was not a complete answer to the point. For the appellants it was submitted that article 8 was engaged and that there were difficulties in showing that they could succeed under the Rules. It was generally argued that the presence of the child was not determinative of the issues and that the general issues of ability and willingness to work, English language skills and the period of time in the UK did not, on an article 8 ECHR basis, demonstrate that the appeal should succeed. Rather it was said that of those and all those facts and those that related to the difficulties faced on the return, that the respondents' decisions were disproportionate.
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> 25. The ten years presence of the First Appellant in the United Kingdom which appeared on the face of it likely to be established was a significant factor to weigh on the issue of proportionality. In doing so I follow the thinking in the cases of Mostafa [2015] and TZ [2018]. It is clear that there will only be a few cases which can succeed on article 8 grounds. It seems me, at the date of, the respondent's decision was right in respect of the basic factual matters. Taking into account the length of time the First Appellant has now been here; it is plain that that is a factor which I have to weigh up. I do not and cannot on the evidence from the appellant's father resolve the issue of what is the current status of dispute between the families and /or appellants in Bangladesh.

> 26. I, taking the appellants case at its highest, accept that there would be a measure of hardship on a return and assume a lack of family support from the families in Bangladesh. It seemed to me that hard as it might be there are not very significant obstacles nor would it be unduly harsh to a return to Bangladesh. Both the appellants grew up for a long period of their life and whilst they may well have difficulties finding employment, although whether it is as bad as the first appellant said again the evidence does not support her view, I take the view that on the basis of the application when made in 2016 it is not disproportionate to require them to leave. They have an application yet to be determined and they can through that process advance further material and information which may bear on compliance with the provisions of the rules, particularly paragraph 276".

5. Permission to appeal was sought and in those grounds, it was contended that the tribunal had conducted an inadequate factual analysis, that its findings did not demonstrate that the evidence had been considered, that having decided the appellants had certain points in their favour it should not have then ultimately resolved matters against them, and that it had failed to consider the best interests of the child. Permission to appeal was granted and the granting judge relevantly said this:

> "The judge had set out in some detail the evidence in this case. The judge was essentially looking at that factual matrix in terms of A8 ECHR where the issue was one of proportionality. It is further the case the judge needed to examine S117B 2002 Act and the best interests of the child. The consideration of the lengthy evidence was short and arguably the judge applied the test of whether there were very significant obstacles to re-integration. It is also arguable that there needed to be rather more analysis of the factual background perhaps best set out in terms of the balance sheet exercise as noted in Hesham Ali. It is arguable the analysis of the evidence in this case was not sufficiently detailed nor the correct test applied."

6. The matter was then listed before me, for a hearing, so that consideration could be given to the question of whether or not the tribunal had erred in law and, if it had, what should flow from that. At the time the hearing was listed it was no doubt anticipated that I would be dealing with appeals from each appellant. However, as noted, there had been developments which had led to R being granted indefinite leave to remain and to her appeal now being treated as being having withdrawn. That, of course, left the appeal of H. I heard from the parties as to how I should proceed. Mr Shamsuzzoha raised the possibility of my adjourning the proceedings. He explained that an application had been made on behalf of the child for British citizenship and that it was expected (absent something not currently anticipated) that that application would succeed. So, there might some benefit, he thought, in the proceedings being adjourned until that application had been dealt with. He also argued that a relevant consideration as to how I should proceed was that, as he put it "the main refusal doesn't exist" on the basis of the decision which had now been taken with respect to R. He also contended, as I understand it, that the new circumstances should be taken into account, even with respect to a consideration as to whether the Tribunal had erred in law or not, under rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr Kotas argued that there was no necessity for an adjournment. The appeal of R had been abandoned but that of H remained in place. Matters with respect to H were simply at the error of law stage, new material should not be admitted as to the question of error of law because matters had to be assessed on the basis of how they stood when the tribunal had made its decision, and there was nothing to prevent me from going ahead dealing with the appeal of H.

7. I decided that, since there were two appeals one relating to R and one relating to H, and that since R's appeal was treated as abandoned, H's appeal remained in place before me. I decided that whilst the new developments and evidence of it which Mr Shamsuzzoha wanted to adduce, was in front me, it could not be relevant to the question of whether the tribunal had erred in law. That had to be assessed on the basis of the material before that tribunal and the circumstances as they then stood. On that basis I heard submissions from the representatives as to whether or not there was an error of law in the tribunal's decision relating to H.

8. Mr Shamsuzzoha relied largely upon the tribunal's failure to consider and decide what was in the best interests of the child. As to the materiality of any such error, his contention was that if there was an of error of law materiality was irrellevant. He also said that, with hindsight, it had been shown that the best interests of the child would be to remain in the UK. Mr Kotas, suggested that the written grounds had merely amounted to a contention that the tribunal had failed to make proper or sufficient finding of fact. The tribunal, though, had taken the case of the then two claimants before it at its highest but had still concluded requiring them to leave the UK would not have unjustifiably harsh consequences. Whilst the tribunal might not have specifically referred to Section 117B of the Nationality, Immigration and Asylum Act 2002, those would, from the perspective of H, be only neutral factors at best. It was an error not to consider the best interest of the child but that was not a material error because the child was not a qualifying child, there was nothing to suggest that the child had health concerns, and there was no basis upon which the tribunal could have concluded that the child's best interests would impact upon the outcome.

9. As set out above, I have asked myself whether, on the material before it, the tribunal erred in law with respect to its consideration of and dismissal of the appeal of H. I have summarised the written grounds of appeal, and I have summarised what was said to me by the parties at the hearing.

10. The tribunal, as Mr Kotas points out, decided to take the claim advanced by each claimant, at its highest. That obviated the need for any more detailed fact finding with respect to claims which had been made concerning family links to the UK and difficulties that the couple were likely to face if they were to have to return to their home country of Bangladesh. The tribunal did not, in the section of its written reasons given over to explaining its decision, specifically refer to the criteria it was required to consider as result of the content of section 117B of the Nationality, Immigration and Asylum Act 2002. It is right to say that it ought to have addressed those considerations. However, it was not argued before me nor in the written grounds that H would be able to benefit from the content of that section of that Act. On the basis of my own scrutiny and bearing in mind that Mr Kotas's point as to that was not specifically opposed, I conclude that the tribunal did not err in law or at least not materially, in failing to, as perhaps as it should have done, go through each and every one of those requirements.

11. As to any suggestion that the tribunal might have applied the wrong test with respect to Article 8 of the ECHR outside the Rules it did, as the granting Judge points out, talk of "very significant obstacles" at paragraph 26 of its written reasons. But it also made reference to the question of undue harshness. In my judgment it was not simply asking itself, for the purposes of an outside the rules article 8 consideration, whether there were very significant obstacles to reintegration. It was also clearly asking itself whether such was unduly harsh.

12. The most concerning aspect of the tribunal's decision is that which relates to R and H's child. Indeed, Mr Kotas accepts that it did err in law in failing to give proper consideration to the interests of that child. But he says such error was not, in the circumstances of this case material. I did ask Mr Shamsuzzoha to deal with that specific contention. His response was really (as I understand it and as I have already touched upon) to the effect that if an error of law has been made then its materiality is not relevant when considering whether a decision should be set aside for legal error. If that was his contention then I do not agree with it. Once error of law is established the Upper Tribunal has a discretion as to whether or not to set aside a decision. It does not follow that once such an error is established a decision must be set aside. So, materiality is a relevant consideration. In this case the child was, at the time the tribunal was considering matters, very young. The child's focus would, therefore, inevitably have been upon his parents and immediate surroundings. It had been decided that his parents could return to Bangladesh without offending the provisions of article 8. Ordinarily, as a matter of logic, if parents can be expected to return to their home country (at least absent something unusual) the child would be expected to go to and, not only that, it would surely be in the child's best interest to do so. In those circumstances I accept the submission of Mr Kotas to the effect that whilst the tribunal did err in that specific regard, the error it did make was not a material one because it could not have impacted upon the outcome.

13. In light of the above H's appeal to the Upper Tribunal is dismissed.

14. Of course, there are now on going matters regarding the family's situation in the sense that citizenship is being sought for the child. I would simply say, by way of observation, I would find it surprising in those circumstance if the Secretary of State were to take any enforcement action against H whilst that citizenship application was pending. It seems to be sensible for the situation with respect to H to be reviewed once the citizenship has been decided and of course it is always open to H to make a fresh application for leave anyway in view of R being given status. But that is not a matter for me.

**Decision**

The appeal of the claimant I have called R is treated as abandoned.

The decision of the First-tier Tribunal concerning the claimant I have called H, did not involve in the making of an error in law. Accordingly, that decision shall stand.

The claimants were each granted anonymity by the First-tier Tribunal. Nothing was said about that before me. However, I have decided to continue that grant pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) 2008. Accordingly, no report of these proceedings shall name either of the original claimants to this appeal or any member of their family. This applies to all parties to the proceeding. Failure to comply may lead to contempt of court proceedings.

Signed Date 25 July 2019

Mr Hemingway
Judge of the Upper Tribunal