



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

Appeal Number: HU/26128/2016

THE IMMIGRATION ACTS

**Heard at Manchester
On 8th January 2019**

**Decision & Reasons
Promulgated
On 8th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MOHAMMED [H]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Maih, (Counsel)

For the Respondent: Mr C Bates (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Cary, promulgated on 31st January 2018, following a hearing at Taylor House on 5th January 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Bangladesh, and was born on 2nd March 1986. He appealed against the decision of the Respondent Secretary of State dated 15th November 2016, rejecting his application to remain here on the basis of his family and private life rights.

The Appellant's Claim

3. The essence of the Appellant's claim is that he is married to Mrs [SH], a British citizen who is settled in the UK, and has a son by her, who was born to them on 16th April 2016, who is also a British citizen. They cannot be expected to return back to Bangladesh with him. This would violate his Article 8 rights.

The Judge's Findings

4. The judge held that the Appellant could not establish a insurmountable obstacle to his wife and himself continuing their life together outside the United Kingdom. There were now two children of the marriage. However, the children were young. And there would be no significant degree of hardship which would amount to insurmountable obstacles, although it was accepted that there would be significant hardship at a lower level. (See paragraph 25).
5. The appeal was dismissed.

The Grant of Permission

6. The grant of permission states that the Appellant was the father of two British citizen children. Even if it was accepted that the Appellant could not rely on EX(1A), it was arguable that the approach that he had taken to the "reasonableness" of the family life continuing abroad was flawed, especially given that the Respondent's own policy made it clear that a British citizen child could not be expected to leave the UK, which was endorsed in the decision of **SF**.

Error of Law

7. At the hearing before me on 8th January 2018, Mr Bates, appearing on behalf of the Respondent Secretary of State, conceded that there was an error of law in the judge's determination, particularly in the light of the recent Supreme Court Judgment in **KO (Nigeria) [2018] UKSC 53** because on the question of "undue harshness" only the best interests of the child remains a relevant consideration, and the public interest in favour of removal is not a factor to be considered. For his part, Mr Maih referred to the case of **SR (subsisting parental relationship - s.117B(6)) Pakistan [2018] UKUT 00334**, where the Upper Tribunal stated that, it was not the case that a qualifying child had to leave the UK, because what Section 117B(6) does is not require a consideration of whether the Appellant's child will in fact or practice leave the UK, but only

poses a straightforward question: would it be reasonable 'to expect' the child to leave the UK? In this case this was plainly so. Moreover, given that the essential findings of the fact in relation to the family life of the Appellant with his wife and two children have not been challenged by the Secretary of State, Mr Bates conceded that, I should make a finding of an error of law and allow the appeal.

Notice of Decision

Given the concession made by Mr Bates before me, the decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. I am allowing this appeal on the basis of the findings of the original judge, the evidence before him, and the submissions I have heard today. In particular, I note Mr Bates concession that this appeal should be allowed and I so decide.

No anonymity direction is made.

This appeal is allowed.

Signed

Date

Deputy Upper Tribunal Judge Juss

29th January 2019

**TO THE RESPONDENT
FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award of any fee which has been paid or may be payable.

Signed

Date

Deputy Upper Tribunal Judge Juss

29th January 2019