



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

Appeal Number: IA/25065/2013

THE IMMIGRATION ACTS

Heard at Field House

On 29 July 2014

**Determination
Promulgated**

On 08th Aug 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR K M

(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr A Melvin a Senior Home Office Presenting Officer
For the Respondent: Ms F Shaw of counsel instructed by Shanaz & Partners solicitors

DECISION AND DIRECTIONS

1. The appellant is the Secretary of State for the Home Department. I will refer to her as the Secretary of State. The respondent is a citizen of Bangladesh who was born on 24 May 1971. I will refer to him as the claimant. The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Majid. I will refer to him as the FTTJ. The FTTJ

allowed, on Article 8 human rights grounds, the claimant's appeal against the Secretary of State's decisions of 3 June 2013 to refuse to vary his leave to remain in the UK and that he should be removed from the country by way of directions under s 47 of the Immigration, Asylum and Nationality Act 2006.

2. The claimant was given leave to enter as a spouse on 22 August 2007 for a period expiring on 22 August 2009. On 3 September 2008 this leave was curtailed because the marriage had broken down and was no longer subsisting. On 21 August 2009 the claimant applied for leave to remain on compassionate grounds outside the Immigration Rules. This application was refused on 9 January 2010, but on 1 March 2010, the claimant was granted leave to remain outside the provisions of the Immigration Rules until 1 September 2010 in order to await the outcome of court proceedings to determine the question of access to his children.
3. On 21 October 2010 the claimant was served with a notice of liability to removal and a decision to remove him from the UK, after having been found allegedly working illegally in a restaurant. A further human rights claim was submitted by his representatives but rejected by the Secretary of State in a letter dated 9 January 2010.
4. On 2 February 2011 the Family Court made a residence order in respect of the three children of the family in favour of the mother.
5. On 21 March 2011 the appellant was detained pending removal to Bangladesh and the following day was served with a notice that his removal was due to take place on 26 March 2011. On 24 March 2011 the claimant's solicitors submitted a letter requesting temporary admission and leave to remain. The application was rejected by the Secretary of State and a notice of decision to remove was served on 3 May 2011. The claimant appealed against that decision and his appeal was heard by First-Tier Tribunal Judge Cooper on 7 July 2011. The judge allowed the claimant's appeal on Article 8 human rights grounds.
6. On 26 April 2012 the Family Court granted the claimant indirect monthly contact with the children. On 4 October 2012 the claimant was granted discretionary leave until 4 January 2013. On 23 October 2012 the Family Court continued the order for the claimant to have indirect monthly contact with the children recording that direct and telephone contact was not in their best interests at that time.
7. On 2 January 2013 the claimant applied for further leave to remain. On 24 April 2013 the Family Court continued the order for monthly indirect contact and the mother was ordered to provide the claimant with school reports and photographs.
8. Following the Secretary of State's decision of 3 June 2013 the claimant appealed to the FTTJ who heard the appeal on 30 April 2014. Both parties

were represented and the claimant gave evidence. The FTTJ allowed the appeal on Article 8 human rights grounds outside the Immigration Rules for reasons which are not entirely clear.

9. The Secretary of State applied for and was granted permission to appeal, submitting that the FTTJ erred in law by failing to take into account the claimant's lack of progress in obtaining access to his children following the decision of First-Tier Tribunal Judge Cooper, the fact that he could exercise the contact order from Bangladesh and had provided no documentary evidence of his claimed ability to obtain public funding in order to seek mediation. Furthermore, there were no exceptional or compelling circumstances which would justify considering the appeal on Article 8 human rights grounds outside the Immigration Rules.
10. Ms Shaw accepted that the FTTJ erred in law and that the decision should be set aside for the reasons set out in the grounds of appeal. She also accepted that there were no findings of fact which could be preserved. She asked that the appeal be sent back to the First-Tier Tribunal. Mr Melvin suggested that I should rehear the appeal on the basis of the evidence before the FTTJ. However, in response to my question, he was not able to point to any record of the oral evidence given by the sponsor or any clear findings of credibility or fact.
11. I find that the FTTJ erred in law. In paragraph 29 he made reference to the referral for mediation of the claimant's wish to have more access to his children as if the referral had taken place. However, at that stage, there had been no referral for mediation nor had the claimant claimed that there had been. His evidence was that he was trying to obtain funding in order to seek mediation. There was no documentary evidence of this. There was no evidence to support the FTTJ's conclusion that there was the possibility of a further County Court hearing. In the same paragraph the FTTJ said that the decision of First-Tier Tribunal Judge Cooper allowing the claimant's appeal "remains unimplemented". That was not correct. Following First-Tier Tribunal Judge Cooper's decision the claimant was granted further leave.
12. The FTTJ also erred in law by failing to consider the claimant's Article 8 human rights grounds under the Immigration Rules before deciding whether they needed to be considered outside the Immigration Rules following the principles set out in Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640 (IAC). The FTTJ should have considered whether there were arguably good grounds for granting leave outside the Immigration Rules and, if so, whether there were compelling circumstances not sufficiently recognised under the Immigration Rules. This is the point raised in paragraph 2 (b) of the Secretary of State's grounds.
13. I find that there are other errors of law not raised in the grounds of appeal. I cannot find in the determination any record or even a summary of the claimant's oral evidence given at the hearing. There is no finding as to

his credibility or findings of fact in relation to his evidence. The FTTJ's reasons for his conclusion are not clear.

14. I have not been asked to make an anonymity direction but I consider it necessary to do so in order to protect the interests of the mother and the children.
15. I make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify any member of the claimant's family
16. Having found that the FTTJ erred in law I set aside his decision. There are no clear findings of fact which can be preserved. The appeal should be reheard in the First-Tier Tribunal.

DIRECTIONS

- 1) A hearing date has been fixed in the First-Tier Tribunal at Taylor House on 16 December 2014.
- 2) Time estimate - one hour 30 minutes
- 3) The hearing is with all issues at large. No findings of credibility or fact are preserved
- 4) Bengali Sylheti Interpreter required.

Signed:.....
Upper Tribunal Judge Moulden

Date: 30 July 2014