Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/20094/2014**

At Field House
on 17th April 2015

Decision and Reasons
Promulgated On 26th June 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between
MRS TAHERA BEGUM JHORNA
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Bexson, Counsel instructed by Novells Legal Practice.
For the Respondent: Ms A Everett, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. I refer to the parties as they were in the First tier Tribunal though it is the respondent who is appealing in the present proceedings.

2. The appellant, born on the 10th March 1984, is a national of Bangladesh. She came to the United Kingdom on 10 January 2007.She had a six-month visit Visa valid until 9 July 2007. She was accompanied by her son, Master Nahin Munker Rafid, who is also a Bangladeshi

national. He was born on 7 November 2004 which means he was just less than three years of age when he arrived and is now ten years old.

3. The appellant and her child lived with her sister, Mrs Mazed Khanom and her family in London. Her sister holds British nationality. She has other family members in the country, including a brother.

4. The appellant did not leave before her visit Visa expired. Instead, she made a series of applications to remain, all of which were unsuccessful. Time passed and on 18 December 2013 application was made for her to remain on the basis of article 8.

5. On 9 April 2004 June the respondent considered the immigration rules relating to private life and family life and concluded these were not met and that there were no exceptional circumstances warranting a grant of leave outside the rules. The respondent had regard to section 55 of the Borders, Citizenship and Immigration act 2009 as well as freestanding article 8 rights.

Proceedings in the First-tier Tribunal

6. Her appeal against the decision was heard by Immigration Judge Pears at Richmond on 18 December 2014. In a decision promulgated on 6 January 2015 her appeal was allowed. It was allowed under both the immigration rules, namely paragraph 276 ADE and appendix FM, as well as under article 8.

7. In the decision the First-tier Judge said:

> 31. Looking at the Appellant *alone* I conclude that she cannot meet the requirements of the immigration rules as she has been here neither long enough, nor a sufficient proportion of her life and she has not shown that she has lost all her ties with Bangladesh…
>
> 36 I would have no hesitation therefore in concluding that she alone has not met the requirements of the immigration rules and an arguable basis for the exercise of discretion has not been put forward and the decision of the Respondent was proportionate.
>
> 37. It is the appellant *with her son* that makes a difference…
>
> 39. I find that the consequences of that are that the Appellant meets the requirements of the immigration rules.
>
> 46. I find in consequence that as his mother on the basis set out above meets the immigration rules or alternatively it would be disproportionate to remove her, her appeal must be allowed.

8. Permission to appeal to the Upper Tribunal was granted on the basis there was an apparent contradiction in the First-tier Judge concluding

the appellant could not meet the immigration rules and the statement at paragraph 46 that she does. No explanation was provided as to the basis for the conclusion the rules were met. A further issue was whether the judge gave proper consideration to the position of the appellant's child.

9. At hearing, Ms Everett relied upon the contradictory statements in the decision as to whether the immigration rules were met or not. She also submitted that the immigration judge failed to properly explain what was compelling about the situation of the appellant's child that would result in the appeal being allowed. In response, Ms Bexson submitted that the decision should be upheld and that the judge was clearly influenced by the position of the appellant child bearing in mind the length of time they had been in this country.

Error of law.

10. It is my conclusion that the decision contains material errors of law and cannot stand. It is patently contradictory, with the judge saying at one point the appellant cannot meet the immigration rules nor is she assisted by article 8 and then concluding she meets the requirements of the rules and in the alternative, succeeds on human rights grounds.

11. It may be that the immigration judge meant to convey that the appellant succeeded under the rules as a parent and that EX 1 applied in respect of him.Similar considerations apply in respect of paragraph 276ADE(1)(iv). That being so, it is not apparent why the judge then went on to consider article 8.

12. The decision is muddled because it does not clearly distinguish when the immigration rules are being dealt with and what rule is being dealt with. This is compounded by not making it clear when or why the matter is being considered outside the rules on traditional article 8 grounds.

13. Furthermore, the judge does not adequately explain why EX1 or 276ADE (1) (iv) applied in relation to the appellant's child. The child is from Bangladesh. He lives with his mother who would be returned with him. She can help him with any linguistic and cultural adjustment. The judge referred to paragraphs 20, 23 and 25 of the determination. This consists of generalities applicable to any child that has lived here for a number of years. Reference is made to linguistic issues arising on return to Bangladesh; the benefits for the child of living in Britain; his friendship with his cousins here and his progress at school. The judge does not adequately set out why it would not be reasonable to expect her child to leave the United Kingdom. The respondent had made the point that there are schools in Bangladesh and the appellant's siblings could provide financial support.

14. The decision also fails to adequately explain what it is about the family dynamics which have resulted in the appeal being allowed on

traditional article 8 grounds. The judge relies upon the decision of ZH Tanzania but does not allude to the fact that the child in that case was a British national. The advantages of British nationality which would be lost by removal were highlighted in Lord Kerr's judgement. The child in the present appeal is a Bangladeshi national.

15. ZH Tanzania highlighted the child's interest being a primary consideration. However, it is not the only consideration and the judge does not adequately explain how the public interest in immigration control is outweighed. His mother always had a precarious, and according to the judge, unlawful immigration status. Her original status was as a visitor and she then overstayed.

16. I had considered remaking the decision but on reflection have decided against this. I have borne in mind the material provided before the First-tier tribunal and the findings of fact which will have to be made.

Decision

The decision of the First-tier Tribunal contains material errors of law and cannot stand. The appeal is to be re-heard afresh in the First-tier with none of the facts preserved.

FJ Farrelly
A Deputy Judge of the Upper Tribunal