



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/04143/2015

THE IMMIGRATION ACTS

Heard at Manchester
On 7 March 2016

Decision & Reasons
Promulgated
On 25th April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

[R R]
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ndubuisi of Drummond Miller LLP
For the Respondent: Ms Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me pursuant to permission having been granted by First-tier Tribunal Judge Dineen dated 5 August 2015. The appeal relates to a

decision by First-tier Tribunal Judge Myers promulgated on 13 July 2015. The Judge at the First-tier Tribunal had dismissed the Appellant's appeal against the Respondent's decision to refuse leave to remain based on family life. The asylum claim had been abandoned.

2. The Judge had considered the written and oral evidence of the Appellant, his British wife and other witnesses. At paragraphs 18 and 23 of her decision she noted the concession by the Respondent that the Appellant and his wife were in a genuine and subsisting relationship. The Judge fully and extensively considered Appendix FM and case law in respect of it. The Judge then went on to make important findings at paragraph 27,

“...If I just had to consider the Appellant and his wife there would be no insurmountable obstacles to them continuing family life in Bangladesh.....It is very different, however, when the child is added to the equation. I have found above that it is unreasonable to expect him to leave the UK, and it follows therefore that there are insurmountable obstacles to his mother leaving as she must remain to care for her son at an important time in his development”.

3. The Appellant's grounds of appeal are very detailed but paragraph K at page 3 encapsulates the Appellant's position. The contention was that paragraph 27 (which I have referred to above) of the Judge's decision ought to have been the end of the matter and the appeal allowed. It was an error of law for the Judge to then go on to decide whether the Appellant could or should return to Bangladesh.
4. Permission to appeal was specifically granted in respect of this ground, but not in respect of ground two which related to a claimed error of law in respect of the proportionality assessment relating to Article 8 of the European Convention on Human Rights.
5. The Respondent by way of a Rule 24 Reply dated 19 August 2015 opposed the Appellant's appeal but said at paragraph 3 that it was accepted that the Judge had erred in finding that the requirements of EX.1 were met at paragraph 27 but then applied a further irrelevant test at paragraph 28.
6. It was said at paragraph 4 of the Rule 24 Reply that the Judge had not adequately reasoned her findings in respect of the reasonableness of the Appellant's step-son leaving the United Kingdom.
7. In his written submissions and in his oral submissions, Mr Ndubuisi submitted that:
 - (a) In light of the concession made by the Respondent at paragraph 3 of the Rule 24 Reply that was sufficient to dispose of the appeal and for it to be allowed under Appendix FM of the Immigration Rules;

- (b) That the challenge to the Judge's decision was "not competent" and cannot be made in a Rule 24 response;
- (c) Reliance was placed on the Upper Tribunal's decision in **EG and NG (UT Rule 18: withdrawal; Rule 24; scope) Ethiopia** [2013] UKUT 00143.
8. Ms Johnstone in her submissions said that the error was material and it affected the whole of the determination. Was it reasonable for the child to relocate? Paragraph 28 refers to insurmountable obstacles. The error identified by the Appellant was inconsistency. These factors are relevant to EX.1. Notice was given on how it was intended to appeal. It was said that there was inadequate reasoning and on proportionality. It was submitted that the error identified means that the decision as a whole was unsafe. The decision would have to be remade with the facts of the case. As for the case law, Ms Johnstone said that the Home Office would not challenge a dismissed decision. It was agreed though that the reasons given by the Judge were inconsistent.
9. I had reserved my decision.
10. A three Judge Upper Tribunal in **EG and NG** had considered issues in respect of Rule 24 Notices. The decision makes clear at paragraph 46 that,
- "... In short rule 24 does have a meaning that does not depend on Ms Dubinsky's premise and we reject the construction that she urged on us. Rule 24 does not create a right of appeal to a party who has not asked for permission to appeal. Rule 24 is not in any way to do with seeking permission to appeal and it is not an alternative to seeking permission where permission is needed. It is to do with giving notice about how the respondent intends to respond to the appeal that the appellant has permission to pursue. If a respondent wants to argue that the First-tier Tribunal should have reached a materially different conclusion then the respondent needs permission to appeal."
11. The Upper Tribunal went on to say at paragraph 57 that,
- "57. A party is not entitled to rely on points raised in a rule 24 Notice. The notice merely records an intention. A party that wants to exercise a right to appeal a decision must obtain the permission required by section 11(3) of the Tribunals, Courts and Enforcement Act 2007."
12. In my judgment, although attractively put, Ms Johnstone's submission that the reliance on matters in the Respondent's Rule 24 was not seeking to raise a ground of appeal cannot stand. There were only two issues raised in respect of the Appellant's relationship with his wife. Firstly was the relationship genuine and subsisting? This was conceded by the Presenting Officer at the hearing before the Judge. Secondly, were there insurmountable obstacles? This was found to be so by the Judge. Indeed clearly found to be so at paragraph 27 of the Judge's decision. This too was later conceded in the Rule 24 Reply from the Respondent.

13. Therefore the Appellant's appeal has to be allowed pursuant to the Appendix FM to the Immigration Rules as there was a genuine and subsisting relationship and there were insurmountable obstacles to the family living in Bangladesh. As the Judge noted, the Rules specifically required her to consider the minor child. As set out in the Judge's decision and during the hearing before me, all other parts of the Rule were met and indeed conceded by the Respondent. It is clear that the Judge did materially err in law by going beyond Paragraph 27 of her decision. Once she had found that there were insurmountable obstacles that ought to have led to the appeal being allowed. It was an error of law to then apply a further requirement of assessing whether there were insurmountable obstacles in the Appellant returning to Bangladesh on his own. That additional test is not what Appendix FM requires.
14. Even if I am wrong and the Respondent can raise issues in respect of the Appellant's step son in the Rule 24 Reply, it is to be noted that in fact the Judge did consider the position in respect of the step son. For example at paragraph 25 of her decision the Judge referred to the step son currently undertaking his GCSE's at school. There were also letters from the step son's school. This is therefore a British child at school during an important time in his life. Expecting him to leave the United Kingdom for Bangladesh is simply unrealistic. Therefore, it is clear that there were insurmountable obstacles to the teenage step son leaving the United Kingdom and living in Bangladesh during this important and crucial stage in his schooling and life. In turn his mother had to stay with him. Therefore so would the Appellant. As a consequence, in any event, the Appellant's appeal would still have succeeded, even if the Respondent was permitted to raise the matters raised in paragraph 4 of the Rule 24 Reply.
15. I therefore allow the Appellant's appeal under Appendix FM of the Immigration Rules.

Notice of Decision

The decision of the First tier Tribunal Judge contains a material error of law. That decision dismissing the appeal is set aside.

I remake the decision allowing the Appellant's appeal under the Immigration Rules.

An anonymity direction is made.

Signed

Date: 21 March 2016

Deputy Upper Tribunal Judge Mahmood