



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02008/2017**

Appeal Numbers:

HU/

02014/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 9th January 2019**

**Decision & Reasons Promulgated
On 15th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR BABLU DEY (FIRST APPELLANT)
MRS SHARMISTA DEV (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Karim, Counsel

For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Bangladesh born respectively on 5th May 1973 and on 10th December 1982. They both have extensive immigration histories. The first Appellant first entered the United Kingdom on 11th January 2002 and the second Appellant on 18th October 2009. Their applications for leave to remain on human rights grounds based on the ten year partner route and on their private and family life were refused by Notice of Refusal dated 20th January 2017.

2. The Appellants appealed and the appeal came before Judge of the First-tier Tribunal Bart-Stewart sitting at Taylor House on 10th April 2018. In a decision and reasons promulgated on 18th May 2018 the Appellants' appeals were dismissed.
3. On 31st May 2018 Grounds of Appeal were lodged to the Upper Tribunal. On 15th August 2018 Immigration Judge Lambert refused permission to appeal. Renewed Grounds of Appeal were lodged on 3rd September 2018.
4. On 26th November 2018 Deputy Upper Tribunal Judge Chapman granted permission to appeal. Judge Chapman noted the grounds amounted to a considerable challenge to the decision of the First-tier Tribunal and sought to set out a substantial number of material errors of law. It was contended in the Grounds of Appeal:
 - (i) that the judge erred in applying the incorrect test to her consideration of paragraph 276ADE(vi) of the Rules (insurmountable obstacles rather than very significant obstacles);
 - (ii) in making an erroneous finding of fact that the second Appellant had overstayed the last three years when he made an in-time application to vary his leave to remain on 7th September 2015;
 - (iii) in finding that non-compliance with the Rules is relevant to consideration of Articles 3 and 8, when this is not the case in respect of Article 3 and the Rules are largely irrelevant to consideration of whether there will be a breach of human rights;
 - (iv) in failing to properly address the best interests of the Appellants' child;
 - (v) in failing to make a credibility finding in respect of the evidence of the second Appellant;
 - (vi) in failing to engage with or make sufficient findings in respect of Article 3;
 - (vii) in finding that Dr Thompson's opinion that the first Appellant might consider suicide is speculation;
 - (viii) in finding at paragraph 54 that the first Appellant's illness is not life threatening, contrary to the evidence;
 - (ix) in finding at paragraph 54 that the first Appellant's inability to travel on a plane is not relevant to consideration of Articles 3 and 8 and is a matter for the Respondent, when the forced placement of the first Appellant on a plane would have serious implications on his mental health which would be in breach of his human rights.

5. In considering those Grounds of Appeal Judge Chapman considered that they raised arguable errors of law in the decision of the First-tier Tribunal Judge, in particular the first seven Grounds of Appeal.
6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellants appear by their instructed Counsel, Mr Karim. Mr Karim is familiar with this matter. He appeared before the First-tier Tribunal and he is also the author of the Grounds of Appeal. The second Appellant personally attends. I am advised that the mental health of the first Appellant is such that he is not in a position to be present. The Secretary of State appears by her Home Office Presenting Officer, Mr Walker.

Submission/Discussion

7. I am considerably assisted in this matter by the approach adopted at the outset by Mr Walker who advises that the second Ground of Appeal is not challenged and that the judge has erred in making a finding that the second Appellant was an overstayer when in fact this is not the case and an in-time application had been made. He is of the view that this may well have coloured the considerations of the judge and may also have been a contribution to errors, particularly with regard to the credibility findings in respect of the second Appellant and with regard to whether or not there has been compliance with the Rules in relation to Articles 3 and 8. In such circumstances he is prepared to concede that there are material errors of law and he would have no objection to the matter being remitted back to the First-tier Tribunal for re-hearing.
8. Mr Karim indicates that clearly on his clients' behalf he is grateful for the approach adopted by the Secretary of State and submits that the strongest grounds upon which he seeks to rely are the first and second grounds raised by Judge Chapman. He too considers that the correct approach is for the matter to be returned for a complete re-hearing before the First-tier Tribunal.

The Law

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as

being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

11. There are a substantial number of assertions made in the Grounds of Appeal. Some are clearly stronger than others, however the finding by the judge that the second Appellant was an overstayer is it is conceded not only an error of fact but as a result of the manner in which it perhaps understandably clouds the approach adopted by the First-tier Tribunal Judge leads on to being an error of law. The question thereafter remains as to whether that is material and I am satisfied that it is because it affects and taints the whole approach to which the judge has adopted towards consideration of the human rights claim and with regard to the credibility findings to be made against the second Appellant. In addition, it is accepted that the judge has applied the wrong legal test to a consideration of paragraph 276ADE(vi) of the Rules. This too is a material error of law and both the above cited grounds are, as Mr Karim emphasises, the two main grounds upon which he seeks to rely.
12. In such circumstances I find there are material errors of law. The correct approach is to remit the matter back for complete re-hearing with none of the findings of fact to stand. There is one further aspect upon which I would comment. There is reference made within the grounds to the emphasis given to the mental state of the first Appellant. He does not attend before me today nor do I understand from Mr Karim is it clear as to whether he will be able to attend before the First-tier Tribunal on the re-hearing. Mr Karim however does assure me that he will be in communication with the Appellants' instructed solicitors, that a decision will be taken and that the matter will be raised with the Secretary of State prior to the matter being restored before the First-tier Tribunal.

Decision and Directions

The decision of the First-tier Tribunal contains material errors of law and is set aside. The following directions are to apply.

- (1) On finding that the decision of the First-tier Tribunal Judge contains material errors of law the decision of the First-tier Tribunal is set aside with none of the findings of fact to stand.

- (2) The appeal is remitted to the First-tier Tribunal sitting at Birmingham on the first available date 28 days hence with an ELH of two hours.
- (3) That the appeal is to be before any Judge of the First-tier Tribunal other than Immigration Judge Bart-Stewart.
- (4) That there be leave to either party to file and serve a bundle of such further subjective and/or objective evidence upon which they seek to rely at least seven days prior to the restored hearing.
- (5) That the first Appellant's solicitors do notify the Secretary of State and the Tribunal as to whether the mental health of the first Appellant means that he will be in a position to attend the remitted hearing and if he is unable to attend that they produce medical evidence in support of that.
- (6) In the event that an interpreter is required at the restored hearing, then it is for the Appellants' instructed solicitors to notify the Tribunal of the language requirements of that interpreter within seven days of receipt of these directions.

No anonymity direction is made.

Signed

Date: 24th January 2019

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date: 24th January 2019

Deputy Upper Tribunal Judge D N Harris