



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

Appeal Numbers: HU/17094/2019 (V)  
HU/15584/2019 (V)

**THE IMMIGRATION ACTS**

**Heard at Cardiff Civil Justice Centre  
Working Remotely by Skype for Business  
On 11 February 2021**

**Decision & Reasons  
Promulgated  
On 2 March 2021**

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**MOHAMMAD KHYRUL BASSAR  
CHANDI AKTER MUKTA**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: In person (First Appellant speaking for both Appellants)  
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are citizens of Bangladesh who were born respectively on 28 October 1987 and 26 September 1993. They are husband and wife respectively.
2. The first appellant arrived in the United Kingdom on 28 December 2008 with entry clearance as a student and leave to enter valid until 31 July 2011. On 1 July 2011, the first appellant applied for further leave as a Tier 4 General Student. He was granted leave to remain until 30 March 2012.

That leave was subsequently extended until 30 January 2016 when his leave expired.

3. On 27 January 2016, the first appellant applied for a residence card as an extended family of an EEA national. That application was refused on 12 July 2016 and his subsequent appeal was dismissed on 30 January 2019 and he became appeal rights exhausted on 14 February 2019.
4. On 2 February 2019, the first appellant made an application for indefinite leave to remain based upon ten years lawful continuous residence under para 276B of the Immigration Rules (HC 395 as amended).
5. On 2 February 2019, the second appellant, who had entered the UK on 2 February 2015 as the dependent of the first appellant (a Tier 4 (General) Student), also made an application for leave based upon her private and family life under Art 8 of the ECHR.
6. The Secretary of State refused the first appellant's application on 4 October 2019 and the second appellant's application on 5 September 2019.
7. Both appellants appealed to the First-tier Tribunal. In a determination sent on 11 February 2020, Judge Bird dismissed both appellants' appeals. The outcomes of the appellants' appeals were, in effect, dependent upon each other. First, the judge found that the first appellant could not establish the required 10 years' lawful continuous residence. The first appellant's leave commenced on 28 December 2018 and expired on 30 January 2016: it, therefore, fell short of the required 10 years' lawful residence. The judge concluded, correctly, that the first appellant's application for an EEA residence card, made in time, did not extend his leave which would otherwise expire on 30 January 2006 under s.3C of the Immigration Act 1971. Secondly, the judge found that the appellants' removals to Bangladesh were not prohibited by para 276ADE(1)(vi) on the basis that it was not established that there were "very significant obstacles" to their integration on return. Finally, the judge found that the appellants' removals were not disproportionate and therefore a breach of Art 8 outside the Rules.
8. The appellants sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal (Judge Chohan) on 13 July 2020. However, on 17 August 2020, the Upper Tribunal (UTJ Coker) granted the appellants permission to appeal.
9. The appeal was listed for a hearing at the Cardiff Civil Justice Centre on 11 February 2020. The court worked remotely by Skype for Business. The appellants joined the hearing remotely by Skype and Mr C Howells, who represented the Secretary of State, also joined by Skype.
10. The first appellant made a number of oral submissions. In particular, he was concerned with the fact that, in the decision letter, the respondent

had refused his application, in part, because it was said he had fraudulently obtained a TOEIC certificate from ETS by using a proxy test taker. In granting permission, UTJ Coker emphasised that Judge Bird had not, in reaching her decision to dismiss the appellants' appeals, sufficiently taken into account the Presenting Officer's concession at the hearing that the respondent no longer pursued this basis for the refusal. Mr Howells confirmed, in his submissions before me, that the respondent did not now contend that the first appellant had obtained his TOEIC certificate by fraudulent means.

11. Mr Howells, having heard the first appellant's submissions, accepted that Judge Bird had erred in law in reaching her decision under para 276ADE(1)(vi). First, he accepted that in paras 26 and 27 of her determination, she had approached the issue under para 276ADE(1)(vi) on the erroneous basis of enquiring whether there were "insurmountable obstacles" to family life continuing in Bangladesh. This was the test applicable under the Rules when para EX.1 of Appendix FM was applicable. It was not the test under para 276ADE(1)(vi) which was "very significant obstacles" to integration. He conceded that the 'insurmountable obstacles' test was potentially a higher test than the "very significant obstacles" to integration set out in para 276ADE(1)(vi). Secondly, Mr Howells agreed that the judge's assessment under para 276ADE(1)(vi) failed properly to take into account all the circumstances of the appellants' young son. There was evidence before the judge concerning the health of their son who was born on 3 October 2017. In particular, there were GP records at pages 39 and 40 of the appellants' bundle. Mr Howells pointed out that the judge had referred to the appellants' child as suffering "from eczema" and having "breathing problems" and asthma at para 25 of her determination. However, in concluding in para 29 of her determination that it was in the child's "best interests" that he "remains with his parents", the judge made no reference to his health and the medical evidence concerned with it. Given these two points, Mr Howells invited me to set aside the judge's decision and remit the appeal for a fresh hearing before the First-tier Tribunal.
12. In the light of Mr Howells' concession, with which I agree, I am satisfied that the judge materially erred in law in reaching her finding that neither appellant met the requirements of para 276ADE(1)(vi). This is not to say that the appellants would (or will) inevitably succeed under para 276ADE(1)(vi) but rather that the judge's misdirection and assessment under para 276ADE(1)(vi), in particular in relation to their son's best interests amounted to an error of law and I am not persuaded that the error was immaterial to the judge's findings.

### **Decision**

13. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellants' appeals under Art 8 involved the making of an error of law. That decision cannot stand and is set aside.

14. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of these appeals is to remit them to the First-tier Tribunal for a *de novo* re-hearing before a judge other than Judge Bird.
15. In that context, Mr Howells confirmed that the respondent would not seek to re-open the issue of whether the first appellant had obtained his TOEIC certificate fraudulently. The respondent accepted that the first appellant had not obtained the TOEIC certificate fraudulently.
16. The first appellant indicated that, given that he lived in the West Country, he would ask that the remitted appeals be listed at the Newport Hearing Centre. He also indicated that the appellants would be available for a remote/video link hearing in the current circumstances.
17. Consequently, I remit the appeals to the Newport Hearing Centre to remake the decision under Art 8 of the ECHR on the above basis.

Signed

**Andrew Grubb**

Judge of the Upper Tribunal  
12 February 2021