



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

Appeal Number: HU/06596/2018

**THE IMMIGRATION ACTS**

**Heard at Birmingham CJC  
On 3<sup>rd</sup> July 2019**

**Decision & Reasons Promulgated  
On 19<sup>th</sup> July 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**M U H L  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr A Islam (Solicitor)

For the Respondent: Mr D Mills (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge Broe, promulgated on 13<sup>th</sup> August 2018, following a hearing at Birmingham on 31<sup>st</sup> July 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

**The Appellant**

2. The Appellant is a male, a citizen of Bangladesh, and was born on 6<sup>th</sup> August 1975. He appealed against the decision of the Respondent dated 28<sup>th</sup> February 2018, refusing him leave to remain in the UK.

### **The Appellant's Claim**

3. The basis of the Appellant's claim is that he seeks leave to remain in the UK as the parent of his two sons, who were born on 31<sup>st</sup> April 2005 and 15<sup>th</sup> August 2006 respectively. Both are British citizens. They are living with their mother, who is the ex-wife of the Appellant. The Appellant maintains that he plays an active role in their lives, through their school activities.
4. He has secured orders from the court that gave him contact with the children. This has been frustrated by his ex-wife. He has worked hard to see them because of the unreasonable behaviour of his ex-wife. He would not be able to play such an active role in their lives if he had to go to Bangladesh. This would have long-term consequences for his life with them.

### **The Judge's Findings**

5. The judge observed that there was "little dispute about the factual background to this matter", in that the Appellant was divorced from his wife and they have two children, who are British citizens, but with whom he has not had direct access since 2014. He maintains now "contact by cards and letters sent monthly and on special occasions" (paragraph 18). The judge concluded that,

"I have given careful consideration to the best interests of the two children. They live with their mother and I am satisfied, as the family court must have been, that it's in their best interests that they remain with her. Such contact as they have with the Appellant can continue from Bangladesh" (paragraph 29).

### **Grounds of Application**

6. The grounds of application state that the Appellant's direct access with his children ended in 2015. Prior to that he did have direct access but this had been frustrated by his ex-wife. He has secured leave as a parent previously and now had indirect contact. If he is removed his relationship with his children will be directly impacted upon. The judge had failed to give proper consideration to this.
7. On 23<sup>rd</sup> October 2018, permission to appeal was granted by the Tribunal.
8. On 22<sup>nd</sup> November 2018, the Upper Tribunal in a Rule 24 response accepted that the judge had arguably erred in law and invited the Tribunal to determine the appeal with fresh oral (continuance) hearing to consider where the Appellant had established the relationship to his children and shown the existence of previous periods of leave.

## **Submissions**

9. At the hearing before me on 3<sup>rd</sup> July 2019, Mr Mills, appearing on behalf of the Respondent Secretary of State, submitted that he would have to concede that there was an error on the part of the judge below (although the Rule 24 response was inelegantly drafted in this regard). This is a case where the Appellant did have direct access with his children until 2014. Thereafter, he has had indirect access. The Appellant could not succeed under the Immigration Rules. However, he could succeed under freestanding Article 8 jurisprudence, but this had to be demonstrated by the judge undertaking a proper proportionality exercise, which he had not done. This was not a case of someone who forges relations with his children when faced with removal.
10. This was a case of someone who had sought contact for a long time, and had been granted “direct” access by a family court. Significantly, the arrangement was then interfered with by his ex-wife, and the CAF/CASS report is clear from the officer there that it is in the interests of the children to have access to the father, and the only reason this was not happening is because of the mother who has poisoned the minds of the children. This case was quite different from many others of this kind. Therefore, the appropriate course of action was for this matter to be remitted back to the First-tier Tribunal for it to consider what future prospective contact arrangements could now be made for the Appellant. Mr Islam, appearing on behalf of the Appellant, agreed that this was the right course of action in these proceedings.

## **Notice of Decision**

11. The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Broe, pursuant to Practice Statement 7.2(b) of the Practice Directions.
12. An anonymity direction is made.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

13. This appeal is allowed.

Signed

Date

Deputy Upper Tribunal Judge Juss

12<sup>th</sup> July 2019