Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: **IA 09044-13**

<u>THE IMMIGRATION ACTS</u>

At	**Field House**	Decision signed:	**18.07.2014**
on	**26.03.2014 & 15.07.2014**	sent out:	**31.07.2014**

Before:

Upper Tribunal Judges
John FREEMAN and **AM KOPIECZEK**

Between:

RESNA Begum

appellant

and

Secretary of State for the Home Department

respondent

<u>Representation</u>:

For the appellant: the sponsor (Mr Masud Ahmed)
For the respondent: Mr Tom Wilding (on 26 March) & Mr Tony Melvin (on 15 July)

DETERMINATION & REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Jeffrey Cameron), sitting at Taylor House on 25 November 2013, to dismiss a wife's appeal by a citizen of Bangladesh, born 12 August 1994. The appellant arrived in this country on 25 March 2012 on a visit visa, valid till 6 September; but on 12 August went through an Islamic marriage ceremony with the sponsor, who was by then a British citizen, and on 3 September applied for leave to remain as his "unmarried partner". This was refused, with notice served on 8 March 2013; but on 23 May last year the appellant gave birth to a son by the sponsor, whom we shall call F.

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2. Permission was given on the basis that

(a) the sponsor's difficulties in maintaining contact with his two children by a former marriage, if he, the appellant and F could only live together in Bangladesh, did not amount to 'exceptional' or 'compelling' circumstances (see *Shahzad* (Art 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC) and authorities discussed there); and

(b) F's best interests should not have been treated as effectively a 'trump card' for the appellant.

There has been no suggestion at any stage that the parties could meet the funding requirements of the Immigration Rules: though Mr Wilding sought to raise another point of challenge to the judge's decision, on the extent to which they fell short of them, we have not found it necessary to consider this.

3. There had been a previous appeal against the Home Office decision of 8 March, which was allowed by another first-tier judge; but on 15 October the Upper Tribunal (McCloskey J, President, and Judge Warr) set that decision aside, and we need not return to it. We dealt on 26 March with the Home Office's appeal on the law, and on 4 April our ruling on that, substantially reproduced in the present decision, went out to the parties; on 15 July we heard oral evidence on the point set out at **12** below. On each occasion, the appellant told us she would prefer the sponsor to speak for her, which he did through a Bengali interpreter: we made sure he understood everything Mr Wilding and Mr Melvin said (in simple terms, as we asked them), including the gist of any authorities referred to, and had a full opportunity to reply to it. We shall start by considering the 'best interests' point, since that must always be a primary consideration.

4. F is of course a British citizen, through his father: on this we remember the well-known passage in *ZH (Tanzania)* [2011] UKSC 4 (*per* Lord Hope at paragraph 41)

> The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood.

5. Mr Wilding reminded us of *MK* (best interests of child) India [2011] UKUT 475 (IAC), and we have in mind the principles set out in the judicial head-note, which there is no need to repeat here, beyond that the 'best interests' consideration forms "a distinct inquiry", separate from the public interest concerns which must be weighed against them.

6. Turning to the judge's decision, Mr Wilding began by referring us to his consideration of F's best interests in staying here, and particularly being with his parents wherever they are, and of the sponsor's difficulties in keeping in touch with his other children, if he, the appellant and F all had to go to Bangladesh. While Mr Wilding challenged what the judge said on the last point at paragraphs 60 – 61 as speculative, we took the view that this was a point on which the judge was entitled to find as he did for the future, having accepted the history given by the sponsor.

7. There was nothing else in the judge's treatment of that side of the equation to which Mr Wilding took exception, except for his finding on the difficulties the sponsor would have in satisfying the funding requirements of the Rules on any future entry clearance application by the appellant. There is well-established authority that neither a prospective good case for entry clearance nor a bad one is to be taken into account in deciding in principle whether that route ought to be taken.

8. The real difficulty with the judge's decision on the basis he gave it, though, came with the way he balanced the public interest against F's and his parents'. He dealt with this at paragraphs 64 – 67. At 64 he analysed the situation in terms of the appellant and the sponsor's both having known when they got together that her status here was precarious, and would have found the decision under appeal proportionate to the legitimate purpose of immigration control, if that had been all. However at 65 he noted the birth of F, and said this:

> Although he could go with his mother this would deprive him of the benefits of growing up in this country and would also remove him from his father. His removal would also have the consequence of depriving him of the genuine enjoyment of … his status as an EU citizen.

9. At 66 – 67 the judge concluded that, given he had found it would be unreasonable to expect the sponsor to go back to Bangladesh with his new family, and F's consequent best interests in having both his parents with him here, the balance of proportionality came down in favour of the appellant's being allowed to stay. Naturally the sponsor supported the judge's decision, though at the same time he relied on points where the judge had *not* found in his favour, such as his contention that he and his family would be without means of support in Bangladesh.

10. In our view, the judge's proportionality finding was one he would have been entitled to make, on the considerations he mentions, if he had first considered whether there were such 'exceptional' or 'compelling' features in the case (see *MF (Nigeria)* [2013] EWCA Civ 1192, *Gulshan* (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC), and *Shahzad* (Art 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC)) as to require any free-standing consideration of article 8. However, a lawful decision required consideration of that point, and, if there were such features, it seemed to us they must turn on the position of F.

11. Nevertheless, we could not deal with the question of F as if a stork had suddenly brought him down to his parents on 23 May 2013: elementary knowledge of human biology suggests that he must have been conceived around the end of August 2012. We were conscious that we had not heard evidence from the sponsor or the appellant as to their motives in taking their family life forward so rapidly, on any view of the history.

12. Unless explained, the plain facts raise an obvious case with which the parties, and the judge had needed to deal: was their going through a marriage ceremony and conceiving a son within a month of the expiry of the appellant's visit visa an attempt to present Her Majesty's Government with a *fait accompli*, which would make her removal practically impossible? While the marriage ceremony had no legal effect in this country, and the appellant might well have been unable, in her situation, to contract one which did, no

doubt it was a prerequisite in their custom to living and having a child together; and as it has turned out so far, it was the birth of that child which led to the appellant's appeal being allowed.

13. Mr Wilding referred us to, without being able to cite it, what turned out to be *Hayat* (Pakistan) [2012] EWCA Civ 1054, where the Court of Appeal summarized the principles to be applied as follows:

> a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.
> b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.
> c) Whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in *Chikwamba*. They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK.
> d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance.
> e) It will be a very rare case where it is appropriate for the Court of Appeal, having concluded that a lower tribunal has disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. *Chikwamba* was such an exceptional case. Logically the court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question.
> f) Nothing in *Chikwamba* was intended to alter the way the courts should approach substantive Article 8 issues as laid down in such well known cases as *Razgar* and *Huang*.
> g) Although the cases do not say this in terms, in my judgment if the Secretary of State has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise.

Whether there is a 'sensible reason' or not for requiring this appellant to go back to Bangladesh, no doubt taking F with her, to apply for entry clearance from there, was in our view likely to depend on the answer to the question we have posed at **12**.

14. That was not however an answer that could be given on the judge's findings, and this is why we took the view that his decision must be re-made. That was to take place following a fresh hearing before the two of us on 8 May, for which directions were given on a separate sheet. The appellant and the sponsor were encouraged to seek legal advice from a solicitor, a law centre or an immigration adviser regulated by the Office of the Immigration Services Commissioner, but chose not to do so. As it turned out, the hearing of 8 May had to be adjourned to 15 July, on the basis of difficulties which the appellant said she had had on the previous occasion.

15. In our ruling of 4 April, we said a little about the form of that hearing. Clearly oral evidence about the circumstances of their marriage from both the appellant and the sponsor would be crucial. We made it clear, that, in the event that he had not only got the taxi-driving opening he told us about, and were able to produce either tax and National Insurance paid wages slips, or audited accounts (if he were in business for himself) which showed he could comply with the funding requirements of the Rules, then, subject to any argument to the contrary from the Home Office, we might be prepared to re-open that side of the case; but not otherwise. On 15 July, the sponsor produced a letter from a car hire firm, showing he worked for them at a 'rent' (in fact a form of advance commission, as he said he used his own car) of £100 a week; but with none of the evidence of income which we had required.

16. While we do not see anything legally wrong with the judge's findings on the sponsor's difficulties in seeing his first family, on the evidence with which he was presented, we were conscious not only that their best interests too would have to be considered, but that no decision about children is ever completely final. We required evidence from some independent source, giving the children's names and ages, and dealing with their present welfare, as well as the history of the sponsor's contact with them. This need not have been long, and should not have been hard for him to get, in view of his own evidence that contact was achieved through a contact centre, presumably run by the local authority: a short letter from any responsible person there was all that was needed. However in a letter dated 11 June, the sponsor declined to produce any such evidence, and on 15 July he confirmed that this remained his position.

EVIDENCE

17. We shall now go on to the evidence given on 15 July. Both the appellant and the sponsor gave evidence in Bengali, with no interpretation problems: each of them preferred to be taken through the relevant history by us, which we did in as neutral a manner as possible, of course with a full opportunity for them to add anything they wanted. The appellant complained at the start of her evidence of a stiff neck; but we could not see that she had any difficulties in giving it, for that reason or any other. She had arrived in this country on 25 March 2012 with her mother: although she had finished her education two years before, she said she had no plans to do anything but visit her brother over here, and then go home.

18. The appellant, then not yet 18, and her mother went to stay with her brother: about the end of April her brother had a small party at his house, just for some of his friends. The sponsor, by then 39, who had parted from his wife in 2009, dated this party in June or July: he said he had been asked along by a friend of his, who knew the appellant's brother; but his friend had said nothing about who else would be there, and he had no idea they had any visitors from Bangladesh, or any girls in the house. The appellant said she had equally little idea that the sponsor would be there.

19. Both the appellant and the sponsor said it was quite usual to have mixed parties in Bangladeshi society in this country, and there was no inhibition against speaking to someone of the other sex, without first having been introduced. This was what happened in their case: each said they were the first to greet the other, and they started talking. According to the appellant, they exchanged mobile phone numbers, and the sponsor rang her the next day.

20. The sponsor's account of their next contact was rather different: just over a fortnight after the party, he was in a local shopping centre, and saw the appellant out with her mother. They spoke to each other, and the sponsor also spoke to her mother. It was only on this occasion that he asked the appellant for her mobile number, and he spoke to her afterwards.

21. Both said their liking for each other went on from their first phone conversation, to the point where (six weeks later according to the sponsor, and after about two weeks by the appellant's account) they decided to get married. The appellant said she knew her family wouldn't approve, as the sponsor was so much older than her, and had been married before; so they decided to get married without telling anyone. The appellant was well aware that her visa would run out on 6 September, and was afraid that, if she went back with her mother to Bangladesh, her family would have married her off to someone else.

22. The sponsor also mentioned the appellant's family's disapproval: he said he had asked the friend who brought him to the party to sound her brother out about a marriage; but her brother would not agree, and so the plan for a secret marriage was arranged. This took place on 12 August, at a house some way from the appellant's brother's. The appellant said she didn't know where the house was: the sponsor had taken her there. The sponsor however said it was about two or three miles from her brother's: he didn't know how the appellant had got there, but thought an aunt (not mentioned by the appellant) had brought her to the ceremony, probably in a Bangladeshi cab.

23. The sponsor said he had arranged the *qadi* who was to perform the ceremony: they didn't know each other, but the *qadi* was content to marry them without any of the appellant's relations being present: there was no-one to represent her, in accordance with custom. The appellant said she had been represented, by a friend of the sponsor's: she said that after the ceremony, she went back to her brother's to begin with. The sponsor however said they had gone to her aunt's.

24. Both the appellant and the sponsor agreed that they had started living together, and having sexual relations, at the sponsor's flat about a fortnight after the ceremony. That would have been about 26 August On 3 September, the appellant made her application for leave to remain: just in time before her visit visa ran out on the 6th. That application however has them not only living together already, but the appellant saying, in answer to Q. 6.31 "I support my partner by way of house keeping, cooking, cleaning and make sure he goes to work on time".

25. Both the appellant and the sponsor stoutly maintained that there had been no pre-arranged plan for them to marry: they simply fell in love, went through the Islamic ceremony (since neither then nor later had they been able to arrange a registered civil wedding, without showing the appellant's passport, with some evidence of her status here), and then nature had taken its course. As the sponsor put it, the conception of F was the will of Allah.

26. The sponsor said he had been settled in this country (of which he is now a citizen) for many years: it follows that F is also a British citizen, and he objected to the disruption of their life here together with the appellant which would be caused by her returning to apply for entry clearance in the ordinary way. Besides, he said she was at odds with all her family, in Bangladesh or here; and he had been here too long to have anyone to turn to over there.

27. The sponsor said he saw his children by his wife at his local mosque, to which she and they also went. He produced copies of birth certificates for them both: a boy A, born 23 November 2000; and a girl, N, born 8 August 2002. There was however no other documentary evidence about these children, except for a summary of the sponsor's maintenance payments for them, with which he was slightly in arrears as of 20 May 2014. The appellant has not met the children, and knew nothing about them, except that the sponsor did see them, as he says at the mosque; but she could not say whether or not he ever spoke to them on the phone.

SUBMISSIONS

28. The sponsor's position was that he could disclose no further details about his children or his ex-wife, not by order of any family court, but because he was not authorized to do so, under the arrangements he had made with her. Written submissions, contained in letters of various dates, and clearly drafted for the appellant and the sponsor by others with some knowledge of English, and the law, insisted that, the sponsor and F being British citizens, the family were entitled to stay together, come what might. However we are content to take the law from *Hayat*, as set out at 13.

29. Mr Melvin maintained that the appellant could not satisfy the provisions of the Rules relating to 'unmarried partners', and so must show such 'exceptional' or 'compelling' features in the case (see *MF (Nigeria)* [2013] EWCA Civ 1192,*Gulshan* (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC), and *Shahzad* (Art 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC)) as to require free-standing consideration of article 8, if she were to succeed on this appeal.

DISCUSSION

30. Looking at the provisions of paragraph 295D of the Rules, this appellant could clearly not satisfy the following requirements:

(i) she must have had valid leave for a period of more than six months; and

(vi) she and the sponsor must have been living together for two years or more.

It is also clear that the sponsor is unable to show satisfactory evidence of his income as a taxi-driver, so cannot satisfy the maintenance requirements of the Rules, recently upheld in *MM* [2014] EWCA Civ 986. It follows that they do need to show exceptional circumstances, as argued by Mr Melvin.

31. In our view, if we were to accept the appellant and the sponsor's account of having simply fallen in love, without any previous arrangement, and terminally fallen out with her family, as a result of their clandestine marriage, so that there would be no source of support for her, if she had to go back to Bangladesh, taking F, who is clearly too young to be without her, then because of F, this would be capable of amounting to 'exceptional circumstances'. On the other hand, if we were not to accept their evidence, but to find that everything must have been arranged in advance, then that might amount to a 'sensible reason' (see *Hayat*), for requiring her to return and apply for entry clearance from there.

32. This is not of course because there is anything wrong, at least in the eyes of the law, with arranged marriages; but because parties who enter into such an arrangement may reasonably be expected to apply for entry clearance in advance. We are content to accept that the appellant, the sponsor and F now have a happy settled family life here, which, other things being equal, would make her return to seek entry clearance disproportionate to the legitimate purpose of immigration control. There was no evidence before us as to how long that process might take; so much will depend on our findings about the history of the marriage.

33. On the other hand, if parties to such a marriage, whether legally recognized or not, were encouraged to think that the early birth of a child would be treated as a 'trump card', then both the principles set out in *ZH (Tanzania)* (see **4**), and Parliament's policy in approving the Rules would effectively be defeated. The result of this appeal in our view must depend, for the reasons already set out, on our findings of fact about how this marriage came about.

<u>FINDINGS OF FACT</u>

34. The appellant was clearly of marriageable age, in Bangladeshi eyes, even when she arrived in this country: there is no suggestion that the *qadi* who performed the ceremony had any concerns on that score, and of course the Qu'ran itself allows marriage for girls much younger than she was. We do not accept that, two years after she had finished her education, her family would have let her go to this country on a six months' visit with her mother without having some plans for her future, whether those were known to her or not.

35. Those plans need not have, and perhaps did not involve plans for any specific marriage; but we think her family would have been ready to consider marriage for her, if a suitable opportunity came forward. Of course the appellant and the sponsor say they did not consider him suitable, being so much older and married before. On the other hand, he did have the unquestionable advantage of a British passport. What the original motives for their marriage were, we shall have to do our best to decide on the evidence.

36. The appellant and the sponsor disagree about the date of the party where they first met: a party in June or July, as the sponsor had it, would not have left much time for the history of events leading up to the marriage as he gave it. If it had been in late April, as the appellant said, then they would have had a good deal more time to get to know each other. While we should not expect anyone to be too exact on dates a couple of years old, it is a little surprising to find differences as large as this.

37. There may not be too much difference in their account of their first meeting, except for how it ended. The appellant's account of exchanging mobile numbers there and then would pass without remark in an all-English context, either for young or not so young people: but we question whether it is probable in the context of a young Bangladeshi girl with no English, meeting an older man for the first time. However, we do not attach any significant importance to our own view on that, compared to the contrast between the appellant's account, and the one given by the sponsor. If they hadn't exchanged numbers till the end of their meeting out shopping, then we can't think why the appellant shouldn't have mentioned that meeting at all, in dealing with how they got together after the party.

38. The next point in the history is the marriage itself. If the appellant were faced with a disapproving family and an expiring visa, then there might have been nothing surprising in her slipping off from them to go through a ceremony arranged by the sponsor, and unknown to them. We are surprised by the *qadi*'s apparently being prepared to conduct it with only one side present; but again, we attach no significant importance to our view on that, or to the disagreement as to whether the appellant was represented at the ceremony, in accordance with custom, compared to what we regard as the significant discrepancy between the appellant as to where she went afterwards, back to her brother's, or, according to the sponsor, away to the house of a co-operative aunt, who for some reason she hadn't mentioned at all.

39. While both the appellant and the sponsor agree that she moved in with him about a fortnight after the ceremony, and only began marital relations from then, the question remains as to whether she moved from her brother's, and if so how she got away; or from the aunt's. Needless to say, we make every possible allowance for the limitations imposed by lack of representation, and their having to be taken through their accounts by us. However, in our view there are three crucial sticking-points, where these cannot be reconciled.

40. These are about

(a) how the appellant and the sponsor got in touch again after the party,

(b) where she went after the ceremony; and (consequently)

(c) how and from where she went to live with him; and

(d) why her application of 3 September should have presented her as already well settled in with him, when both of them agreed that she did not move in till about a fortnight after the ceremony, on 26 August.

41. The reason all these points are important is because they do not involve what might be called discrepancies for their own sake: there was no question of Mr Melvin trying to catch these witnesses out, by eliciting contrasting answers on points not important in themselves. These were significant disagreements, inherent in the appellant and the sponsor's own accounts; and on which their history of a love-match very much depended.

42. We do not accept that the appellant and the sponsor simply pursued whatever relationship they may have had by the end of the party, either by immediately exchanging mobile numbers; or by doing so after he met her by chance out shopping with her mother, who does not seem to have raised any objection at the time. As for their different accounts of where the appellant went after the ceremony, and so from where she went to live with the sponsor at his flat, they either require more explanation than they got from the appellant as to how she got away from her own family; or (if the sponsor's account were right) how she came not to mention the apparently crucial involvement of the co-operative aunt.

43. Taken together, the effect of these significant points of difference is that we cannot accept the appellant and the sponsor's account of a relationship which developed spontaneously, and a marriage ceremony carried out in the teeth of objection from her family. The only reasonable conclusion is that the appellant's family must have arranged her meeting with, and subsequent marriage to the sponsor. We agree that, in accordance with custom in the Indian sub-continent, and no doubt to some extent elsewhere, they would have had some reason to disapprove of him, as a much older man who had been married before. Nor, on his own account, was he able to compensate for this through his financial position; in fact the sponsor's only conspicuous advantage as a match for the appellant was in his British citizenship.

44. We conclude that this was indeed why the marriage was arranged, and why the parties were presented as already settled in together by the time the application was made for her to have leave to remain on that basis, when on both their accounts she had not moved in till 26 August, only just over a week before. The fact that they chose to give us an entirely different account of what happened shows as well as anything else that they (or at least the appellant's family, in her case) must have realized that the truth would not get them what they wanted from the Home Office.

45. We repeat that there is nothing wrong with an arranged marriage in itself, and that the appellant and the sponsor, following the birth of F, now clearly have a happy settled family life together. However, the way we have found their marriage was brought about in our view begs the question as to why the appellant should not have applied for a fiancée visa from Bangladesh, in the normal way. We cannot see any satisfactory answer to that question.

46. It follows in our view that the lack of any such answer both negates the 'exceptional circumstances', which might have been provided by a love-match, opposed by the appellant's family, followed by the timely birth of F; and provides a 'sensible reason' as to why she should now be required to go back to Bangladesh and through the entry clearance process. That might well be troublesome for her; but not by any means

impossible or likely to cause her undue hardship, since, on our findings of fact, she would have the support of her family there, who would no doubt be prepared to look after both her and F for the limited time necessary. There are no exceptional circumstances, in our view, to be found in the private and family life enjoyed by the appellant and the sponsor themselves.

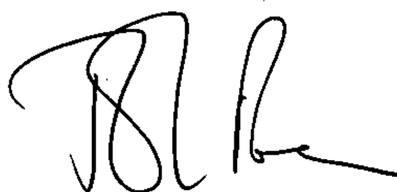
47. However, we have not forgotten F, or the sponsor's children A and N, all of whose best interests must be a primary consideration for us. It may be that F's best interests would be in favour of his being able to go on living with his mother and father, just as he has been doing since he was born just over a year ago; but, at his age, we do not think they would be significantly threatened by his having to go with the appellant (as no doubt he would), while she went through the entry clearance process in Bangladesh; in fact, since they would both have the support of her family over there, it would be a good chance for him to meet them.

48. To the extent that his best interests might require anything else, that would not be to any significant extent: he is a long way off going to school, and in reality needs most to be with his mother. While no doubt it would be better for him to be with his father too, we do not regard temporary separation from him as a serious invasion of his best interests. We are not in any case satisfied, given our findings about the attitude of the appellant's family that it would be impossible for the sponsor to go with her for a limited time, while she applied for entry clearance.

49. As for A and N, there is no question, in our view, of their being deprived of such contact as they have with their father, amounting in any case to no more than occasional meetings in the mosque, for more than a relatively short time; he, like F, is a British citizen, and there is no reason why either of them should have to go to Bangladesh for longer than needed to see the appellant through the entry clearance process. We don't think that would involve anything significantly contrary to their best interests.

50. While there is certainly some public interest in the appellant and the sponsor being allowed to go on bringing up F without any interruption at all, in our view there is a much stronger one in making it quite clear that the grant of leave to remain to people who do not qualify under the Rules approved by Parliament is only to happen in exceptional circumstances, and cannot be relied on by those who might choose to try and get round them. That exception provides, following the decision in *MF (Nigeria)*, all the necessary scope for real hard cases, of which this is not one.

Home Office appeal allowed
Decision re-made: appeal against refusal of leave to remain dismissed



(a judge of the Upper Tribunal)