IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/20888/2014
AA/08366/2014
AA/08375/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 July 2015	**On 24 July 2015**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MOHIUDDIN HOSSAIN
REBEKA SULTANA REBA
ANINDYA-TAJ JAYITA
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr P Turner, Counsel instructed by Direct Access Barrister
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of Judge of the First-tier Tribunal Wiseman promulgated on 23 January 2015. There are three appellants. The first appellant entered the United Kingdom on 20 October 2003 with leave to remain as a student until 31 October 2006. He made applications for further leave as a student, which were granted, and the last period of

leave granted to him was to expire on 15 January 2014. On 20 September 2007 the second appellant, who is the spouse of the first appellant, entered the United Kingdom as his dependant. They have two children, the third appellant being the oldest child who was born in the United Kingdom on 20 September 2008. The younger child was born in October 2014.

2. On 12 March 2013 the respondent curtailed the leave of the first appellant following the revocation of his college's licence. On 22 October 2013 the first appellant applied for indefinite leave to remain in the United Kingdom on the basis that he had completed ten years' continuous lawful residence. This application was initially refused on 16 March 2014. There was however a reconsideration in which the Secretary of State considered the position of the second and third appellants as well, but the applications were again refused on 1 October 2014. The Secretary of State reasoned that the first appellant had only accumulated nine years and seven months' lawful residence in the United Kingdom and so could not meet the requirements of the Immigration Rules. In her decision the Secretary of State considered Appendix FM and paragraph 276ADE and made reference to Section 55 of the Borders, Citizenship and Immigration Act 2009 in respect of the children. The Secretary of State was not however satisfied that the appellants met the requirements of the Immigration Rules; nor was the Secretary of State satisfied that there were any particular factors outside of the Immigration Rules that could justify a grant of leave to remain under Article 8.

The appeal before the First-tier Tribunal

3. At the appeal hearing before the First-tier Tribunal an adjournment application was made to obtain a consultant clinical psychological report in respect of the third appellant. She was 6 yeas old at the time. This was refused by the judge. At paragraph 57 of his determination the judge stated:

> "I would of course have considered such a report had it actually been prepared and available and I do understand that a date in January was being aimed at in that respect because it was initially thought that that was when the hearing was going to take place. Whilst no Tribunal would do anything other than consider carefully such a report, it is difficult to see what assistance it would have given in this particular case and indeed the process might actually be counterproductive. I was not told that the child was even aware of the appeal and its implications but I was certainly specifically and properly told by Mr Chipperfield that she has no psychiatric or psychological problems. I suspect that she is simply getting on with the life she has always known and any assessment of her would describe her as well and happy in her life here and likely to have some difficulty in adjusting to life in another country altogether."

The judge refused the adjournment application. The judge went on the hear evidence from the first and second appellant.

4. In dismissing the appeals the judge was of the view that the appellants' removal would not breach Article 8. The judge noted that the first appellant was not present in a category leading to settlement. The judge found there were no very significant obstacles to reintegration of the appellants, this being a reference to the test contained in paragraph 276ADE(vi) of the Immigration Rules even though no specific reference was made to this paragraph in the actual determination. The judge considered that the third appellant had started primary school but was at an age where her relationships with her own family were more important than relationships she may have established outside the family. The judge made reference to the case of **Azimi-Moayed (decisions affecting children: onward appeals) [2013] UKUT 197** and stated:

> "It has been made clear that it is in the best interest of the child to live with and be brought up by his or her parents; all the family would be returning to Bangladesh together and so there was no breach of family life rights at all although private life obviously changes. Assisted by parents with the full and lengthy knowledge of Bangladesh right through to significant adulthood, these children will have no real difficulty in that respect."

The appeal to the Upper Tribunal

5. The grounds to the Upper Tribunal are twofold. There is first a challenge to the fact that the judge made no reference to paragraphs 117A and 117B of the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Act 2014.

6. The second basis of challenge to the decision is the refusal of the judge to adjourn to enable the clinical report to be obtained. At the Upper Tribunal hearing I received a copy of a report by Dr Rozmin Halari. She is the same individual who was identified in the initial application to adjourn before the First-tier Tribunal as the expert who was going to be instructed. The date of the report is 5 May 2015.

Paragraph 117B

7. Paragraph 117B identifies a number of public interest considerations that are mandatory for any judge to consider when assessing the proportionality of an appealable decision. It is argued with some force by Mr Turner that the failure by the judge to identify or make any reference to the substantive considerations within paragraph 117B constitutes an error of law. I fully accept that the judge does not mention paragraph 117B or the English language proficiency of any of the appellants, although the judge does talk at length in respect of the first appellant's hopes to become a barrister, he already being a qualified solicitor. I accept that there was a legal error in the decision.

8. The question then arises as to the materiality of that error. Mr Turner submitted that it was such a fundamental error as to be fatal to the decision. I do not accept this submission. With respect to section 117B the first appellant was relying on his and his family's proficiency in English and

his ability to financially support his family. I am assisted by the authority of **AM (Section 117B) Malawi [2015] UKUT 0260 (IAC)**. Headnote 2 of that authority reads thus:

> "An appellant can obtain no positive right to a grant of leave to remain from either Section 117B(2) or (3) whatever the degree of his fluency in English or the strength of his financial resources."

I consider also head note 4 of the same authority which reads:

> "Those who at any given date held a precarious immigration status must have held at that stage an otherwise lawful grant of leave to enter or remain. A person's immigration status is precarious if their continued presence in the UK will be dependent upon their obtaining a further grant of leave."

Having regard to the clear principles enunciated in **AM** I cannot see how, had the judge made specific reference to all of the factors in 117B material to this appeal, it would have materially assisted the appellants, and I therefore find the Judge's omission does not constitute a material error of law.

The adjournment request

9. In relation to the adjournment request Mr Chipperfield, Counsel representing the appellants at the First-tier Tribunal, indicated that the third appellant had no psychological or psychiatric problems. There were various statements from the third appellant's parents in the bundles before the First-tier Tribunal. These disclosed no issue of concern with the third appellant's wellbeing or health. They stated, in effect, that she was settled and happy at school. The third appellant's school report of 2014 indicated that she was a pleasure to teach, had a great imagination, was a confident girl and a highly motivated learner, helped others, and was always full of enthusiasm. In respect of the various areas of learning, including listening and attention, understanding, speaking, moving and handling, self-confidence, managing feelings and behaviour, reading, making relationships, numbers and writing, she was exceeding expectations. Nothing in the evidence that was before the judge indicated that the third appellant was anything other than a happy and healthy girl doing well at school. The paper adjournment request to the First-tier Tribunal did not particularise why the report was specifically sought.

10. The case law relied on by the First-tier judge, such as **Azimi-Moayed**, indicate that, from the age of about 4 onwards, any significant period of residence by a child may generate relationships outside of their home potentially sufficient to resist removal. I note that the third appellant was only just 6 at the date of the hearing and there was nothing in the evidence before the judge to suggest that she had established any significant relationships outside her own family. I am very mindful of the case law relating to adjournments. I take into account the fact that the adjournment was for a relatively short period of time. The question

whether the judge's decision in relation to the adjournment was lawful is not a question of reasonableness but whether the refusal to grant the adjournment deprived the appellants of a fair hearing. I have also considered the authorities on the best interests of the child, in particular **JO (Section 55 duty) Nigeria [2014] UKUT 00517.** I am satisfied that the judge was properly informed of the third appellant's position. I am not persuaded, in the absence of any particular basis for believing that the third appellant would be significantly adversely affected by her removal, that the clinical psychological report would have been likely to have made any material difference to the Judge's conclusions. I am satisfied that the judge did properly carry out his Section 55 duty and that he did not err in law in refusing the adjournment application.

Alternative consideration of the clinical psychologist's report

11. However if I am wrong in the above assessment I will now consider that clinical psychological report. It is my view, and for the reasons that I will give, that the report would not have made any material difference to the judge's conclusions. I find that no judge properly directing themselves on the appropriate Article 8 test, and taking full account of the expert's findings, could have arrived at any different conclusion.

12. The expert report is the response to two particular questions posed by the appellant's solicitors. (i) Were the best interests of the children best served in the United Kingdom or in Bangladesh, (ii) what impact, if any, would there be on the children if the family were to be removed from the United Kingdom? By way of relevant background the expert noted that the first and second appellant strongly believed that the family will have a better quality of life if they were to remain in the United Kingdom, that they felt settled in the UK and had created a positive family life and they felt integrated within the community. It was noted by the expert that the children regularly visited their uncle, aunts and cousins with whom they had developed good attachments.

13. The expert noted that the third appellant was in year 1 of her primary school. The third appellant indicated to the expert that she loved school and described it as being very fun. She told the expert that she had lots of friends and named a few. The third appellant spoke positively about different teachers, she indicated that she worked hard during the week and at weekends she went out with her family. The expert considered the school reports and considered the parental relationship, finding that it was a close family.

14. When assessing the impact of deportation the expert noted the claim by the first and second appellants that removal would be devastating to the family. The first and second appellants were worried about their children and the disruption to their education. The third appellant indicated that she would feel very upset if removed because she would miss her friends and school. She said that she was very worried, if she left the UK, that she

would not get a proper education and she would miss out on opportunities such as entering competitions and having a chance to excel academically. She reported that everything would be different at another school and she did not want to leave London because she described it as “our home”. The first and second appellants stated that the political circumstances in Bangladesh had become worse and that this may impact adversely on the children. I note however that no evidence was provided as to how, as individuals, they would be affected. I find this to be a highly generalised and non-specific fear.

15. The first and second appellants informed the expert that the political unrest is causing a lot of disruption to schools and to travel and there was a lot of violence and disruption to the security systems in the country. No evidence however was adduced in support of these claims. The expert carried out a parenting stress index test and concluded, at paragraph 55 of her report, that the overall parental stress experienced by the first and second appellant fell within normal limits and there was no indication of difficulties in parent/child system. In relation to a child’s strength checklist which checks industrial capability, creative capability, self-coping and social interaction skills, the third appellant’s results were all within acceptable limits and there were no areas of concern noted. Towards the conclusions of her report the expert psychologist noted that the third appellant is settled socially, academically and emotionally in the UK, that leaving the UK would disrupt her education and achievements to date, her attachments to peers and extended family, and would negatively impact upon her confidence. It was the opinion of the expert that it is in the best interests for both children to remain in the United Kingdom. I accept this but the best interests of the children is a primary and not a paramount consideration. It is a significant factor in any proportionality assessment but it must be considered against the public interest factors, specifically those indentified in Section 117B, and through the prism of paragraph 276ADE of the Immigration Rules, which gives expression to Article 8 private life considerations. I find these are significant countervailing factors. I additionally note that the third appellant is not British, has never had any right to future education in the UK, and that her immigration status has always been precarious.

16. At paragraph 65 of her conclusions the expert notes that it is likely that disrupting the third appellant’s current developmental routine would predispose her to low mood and deterioration in her levels of motivation and positivity. The expert indicated that the third appellant would find it difficult to adjust to a different education or cultural system, her command of Bengali was said to be poor, although it is not clear on what basis this conclusion was reached. The expert claimed that a potential increase in the levels of stress experienced in the home can have a significant impact on a child’s overall development. The expert does not however indicate the particular degree of potential deterioration or difficulty that may be faced by the third appellant or how significant or lasting any impact would be. The third appellant will have the support of her parents who have lived

in Bangladesh all of their lives and who are very familiar with Bangladeshi society. The first appellant's qualifications would put him in good stead to financially support the family. It is recognised in the authorities I have already mentioned that a child of a young age is generally more adaptable. This is not considered in the report. I note that the third appellant is not at any critical stage of her education and that she has no medical difficulties. It is said by the expert that depriving the children of a good quality of education in the UK to perhaps an inadequate level of education in Bangladesh will have significant negative impact on their confidence as well as their emotional, social and academic development. There was no evidence before the judge in relation to the standard of education in Bangladesh. But in any event, the same could be said in respect of every child studying in the United Kingdom who relocates abroad. In **Zoumbas [2013] UKSC 74B** the Supreme Court noted, in the context of a family unit similar to the present being returned to the Democratic Republic of Congo, that the children were not British and they had no right to future education and healthcare, and it was concluded that there would be no breach of Article 8. The expert concludes, at paragraph 72, that a life in Bangladesh would disrupt these already developed systems and this could significantly impact on the overall psychological wellbeing of the appellants. I am not however satisfied, for the reasons I have given, that the expert report discloses compelling circumstances sufficient to entitle the appellants to remain in the United Kingdom. I therefore dismiss the appeal.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed

23 July 2015
Date

Upper Tribunal Judge Blum

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

23 July 2015
Date

Judge Blum

Judge of the First-tier Tribunal