Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/21323/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 9 December 2015

Decision & Reasons Promulgated
On 4 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS SUMAIA AKTER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr K Norton, a Home Office Presenting Officer
For the Respondent: Mr M Hussan, a legal representative instructed by Universal Solicitors

DECISION AND REASONS

Introduction

1. This is a resumed hearing to consider the Article 8 claim of Mrs Akter ('the claimant').

The History of the appeal

2. The claimant, a citizen of Bangladesh, applied for an extension of stay in the UK as the partner of a person present and settled in the UK. The application was refused by the Secretary of State for the Home Department (the 'Secretary of

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State') under appendix FM of the Immigration Rules HC395 (as amended) ('the Immigration Rules') because the Secretary of State was not satisfied that the claimant was in a subsisting relationship and that she did not meet the financial requirements of appendix FM.

3. The claimant appealed to the First-tier Tribunal. In a determination promulgated on 13 May 2015 First Tier Tribunal Judge Quinn ('the judge') allowed the claimant's appeal. The First-tier Tribunal found that the claimant was exempt from the financial requirements under appendix FM because she had transitional protection at the time of her application on 27 February 2014 on the basis that she had been granted leave as a Tier I (post study work) dependant in May 2012. The judge also found that the claimant was in a subsisting genuine relationship and was living with her husband. The judge considered Article 8 of the European Convention on Human Rights ('the Convention') outside of the Immigration Rules and found that removal of the claimant would be a disproportionate interference with her rights under the Convention.

4. The Secretary of State sought permission to appeal to the Upper Tribunal. On 31 July 2015 First-tier Tribunal Judge Pirotta granted permission to appeal. The grounds of appeal were essentially that the judge erred in finding that the claimant was exempt from the financial requirements of appendix FM because her original application was granted pre 9 July 2012 so that transitional protection applied and that the Article 8 assessment was wholly inadequate.

5. The hearing of the appeal was listed on 30 September 2015 before me. Both representatives invited me to adjourn for a further hearing if I found a material error of law. After the hearing I made my decision and provided my reasons in writing. Having found that there were material errors of law in the First-tier Tribunal's decision I set-aside the decision. I decided to adjourn for a further hearing on the Article 8 issue. I re-made the decision on the transitional protection and failure to meet the financial requirements issues.

6. The parties were provided with a copy of my decision the relevant parts of which were that:

> "The claimant in this case applied in May 2012 for leave to enter as a dependant of a Tier 1 migrant. On 2 April 2013 she applied for leave to remain as a dependant of a Tier 4 migrant. The current application is different again. It is for leave to remain as a dependant of a person settled in the UK. The leave granted prior to 9 July 2012 is no longer extant. I find therefore that the judge erred in law by finding that the transitional provisions applied to the claimant.
>
> I have considered Appendix FM and the evidential requirements under Appendix FM-SE and Paragraphs E-LTRP 3.1 of the Immigration Rules. They, as relevant to the claimant, provide that the claimant must provide, in the form of specified evidence, a gross income of £24,800 (this includes amounts for 2 children). Paragraph E-LTRP 3.2 provides that the only sources that can be taken into account are income from legal employment or self-employment (there is no evidence in this case of savings).

> The claimant has not provided any evidence that she meets this requirement. The claimant's appeal against the Secretary of State's decision on the failure to meet the financial requirements is dismissed.
>
> The Secretary of State's appeal on Article 8 grounds is to be considered at a further hearing."

Attendance at the hearing on 9th December 2015

7. The claimant attended the hearing with her representative Mr Hussan. Mr Norton appeared on behalf of the Secretary of State. Mr Hussan handed up a bundle of documents at the beginning of the hearing. Directions had been given that any evidence must be served 14 days in advance of the hearing. Mr Hussan said that he had received late notice of the hearing and had been waiting for a letter from the claimant. I note that the notice of hearing was issued on 18 November 2015, 3 weeks before the date of the hearing. I reluctantly admitted the bundle of documents into evidence and allowed a brief adjournment to enable Mr Norton to consider the bundle.

Summary of the Submissions

8. Mr Norton submitted that the statutory provisions in s117B of the Nationality and Immigration Act 2002 (the '2002 Act') must be taken into consideration. Whilst the Immigration Rules are not a complete code what remains outside of them is narrow. It has to be shown that it would not be reasonable to expect the children or the claimant's partner to leave the UK or in other words that there would be insurmountable obstacles to their integration in Bangladesh. The children are young and could integrate easily. The claimant's husband is from Bangladesh. He submitted that unless the individual circumstances of the case raised issues not already considered under the Immigration Rules, such as a life threatening health condition, then the fact that the claimant cannot meet the requirements of the Immigration Rules must factor into any free standing Article 8 assessment. There was nothing in this case that had been identified as a factor to consider in addition to the factors considered under the Immigration Rules.

9. In this case Mr Norton submitted the claimant does not fulfil the requirements of appendix FM and that it essentially comes down to a matter of choice. The claimant and her partner wish to remain together in the UK with their children but there is nothing to prevent them from living together in Bangladesh. The fact that the claimant's partner is now a British citizen as are her children is only relevant if, as a consequence of the claimant returning to Bangladesh, they would be forced to leave the UK. Article 8 does not provide that Member states must accede to a choice of domicile. The best interests of the children in this case are to be with their parents. It is open to the family to return to Bangladesh as a family unit.

10. Mr Norton, in response to the claimant's citation of the case of VW (Uganda) ('VW') [2009] EWCA Civ 5 referred to paragraph 46 of the decision submitting that it is the individual circumstances that must be considered. The VW case

relied on is different to the instant case. In VW the partner had no connection to Uganda where VW was from. It was the lack of connection that was unreasonable in that case. In this case the husband is a British citizen but also is a citizen of Bangladesh.

11. Mr Hussan referred me to pages 12-17 of the bundle provided at the beginning of the hearing. He submitted that these pages showed that the claimant's children were attending pre-school. He referred me to page 4 of the bundle which was a letter from the claimant's husband's employer to say that he was now working part time. He referred me to paragraphs 24-55 of the grounds of appeal which sets out the grounds in relation to the welfare of the children.

12. Mr Hussan took me to paragraphs 30 and 37 of the First-tier Tribunal's decision. He submitted that the judge took into account section 117B. He submitted that s55 does not support removal of the claimant. The claimant's two children deserve to grow up in the UK. If the claimant were removed it would not be in the best interests of the children. It would be disproportionate to remove her. In relation to VW Mr Hussan submitted that the facts in that case were similar and in that case the judge allowed the appeal so the appeal should also be allowed in this case.

Legislative Provisions

13. As from 28 July 2014 statutory provisions in a new Part 5A of the 2002 Act (inserted by s.19 of the Immigration Act 2014) requires, in legislative form for the first time, the Tribunal to take certain factors into account when determining whether a decision made under the Immigration Acts breaches respect for private and family life. The decision in the instant case is a decision made under the Immigration Acts. The relevant provisions provide:

14. Section 117A sets out the scope of the new Part 5A headed "Article 8 of the ECHR; Public Interest Considerations" as follows:

    117A Application of this Part

    (1) This Part applies where a court or tribunal is required to determine
    whether a decision made under the Immigration Acts—
    (a) breaches a person's right to respect for private and family life
    under Article 8, and
    (b) as a result would be unlawful under section 6 of the Human
    Rights Act 1998.

    (2) In considering the public interest question, the court or tribunal must
    (in particular) have regard—
    (a) in all cases, to the considerations listed in section 117B, and
    (b) in cases concerning the deportation of foreign criminals, to the
    considerations listed in section 117C.

    (3) In subsection (2), "the public interest question" means the question of
    whether an interference with a person's right to respect for private and

family life is justified under Article 8(2).

15. The considerations listed in s.117B are applicable to all cases and are:

    117B Article 8: public interest considerations applicable in all cases

    (1) The maintenance of effective immigration controls is in the public interest.

    (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
    (a) are less of a burden on taxpayers, and
    (b) are better able to integrate into society.

    (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
    (a) are not a burden on taxpayers, and
    (b) are better able to integrate into society.

    (4) Little weight should be given to—
    (a) a private life, or
    (b) a relationship formed with a qualifying partner,
    that is established by a person at a time when the person is in the United Kingdom unlawfully.

    (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

    (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
    (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
    (b) it would not be reasonable to expect the child to leave the United Kingdom.

16. Section 117D provides the definition of a number of terms used in Part 5A. A "qualifying child" means a person under the age of 18 who is either a British citizen or who has lived in the UK for a continuous period of seven years or more. The definition of "qualifying partner" is also included. The court or Tribunal is required to give the new Rules (see Dube (ss.117A – 117D) [2015] UKUT 90 (IAC) at [47]): "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights" (see also SSHD v SS (Congo) and Others [2015] EWCA Civ 387).

17. Relevant Immigration Rules

    EX.1. This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

Paragraph 276ADE (in force from 9 July 2012 to 27 July 2014)

The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

…

(vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

Re-making the Decision

Article 8 private and family life under the Immigration Rules

18. The claimant married Mr Naser on 13 September 2011 in Bangladesh. Her husband, at that stage, had limited leave to remain in the UK. In May 2012 the claimant applied for entry clearance as a dependant of her husband who had been granted limited leave as a Tier 1 post study student. The claimant entered the UK on 21 July 2012. The claimant made a further application for leave to remain on 15 February 2013 as a dependant of her husband, who had limited

leave as a tier 4 general student which was granted to 28 February 2014. On 27 February 2014 the claimant made a further application for leave to remain as a partner of a person settled in the UK. The claimant's husband's application for settlement was pending at that stage. He was granted indefinite leave to remain on 16 April 2014. He has since, on 4th November 2015, been granted naturalisation as a British citizen. The claimant has two children both born in the UK. ('M') was born on 13 April 2013 and ('MS') on 19 September 2014. Both children are British citizens.

19. In my decision of 9 October 2015, having found that the transitional provisions did not apply, I found that the claimant did not meet the financial requirements of appendix FM. Although I note that the claimant's husband is now working part-time his income is far below the requirements. I do not need to summarise the substantive provisions of Appendix FM. The Secretary of State considered the requirements of EX.1 (b) under the 'Partner – Ten Year Route'. The Secretary of State decided that there were no insurmountable obstacles to the claimant and her partner relocating to Bangladesh. The Secretary of State did not consider EX.1(a) because the claimant had not mentioned her first born child (M) in the application (her second child (MS) was born subsequent to the application having been made). The Secretary of State also gave consideration to the claimant's private life under paragraph 276ADE of the Immigration Rules. The Secretary of State considered in the absence of evidence to the contrary that the claimant had not lost her ties to Bangladesh having spent 18 years in Bangladesh and 2 years in the UK.

Paragraph EX.1.(b) Insurmountable obstacles

20. Considering EX.1(b) first, it is not now disputed that the claimant is in a relationship with a qualifying partner. The issue is whether or not there would be insurmountable obstacles to family life with that partner continuing outside the UK. In R (on the application of Agyarko and others) v Secretary of State for the Home Department [2015] EWCA Civ 440, (2015) ('Agyarko') the Court of appeal held:

> '[21] The phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an Applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.
>
> [22] This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase "insurmountable obstacles" has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under art 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see eg Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34, para 39 (". . . whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them . . ."). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a

> stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para 117: there were no insurmountable obstacles to the family settling in Suriname, even though the Applicant and her family would experience hardship if forced to do so).
>
> [23] For clarity, two points should be made about the "insurmountable obstacles" criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way …
>
> [25] …The mere facts that Mr Benette is a British Citizen, has lived all his life in the United Kingdom and has a job here – and hence might find it difficult and might be reluctant to re-locate to Ghana to continue their family life there- could not constitute insurmountable obstacles to his doing so.'

21. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) it was held that the term 'insurmountable obstacles' in provisions such as Section EX.1 are not obstacles which are impossible to surmount: they concern the practical possibilities of relocation.

22. It was submitted in the grounds of appeal before the First-tier Tribunal[1] that the claimant has no connections left in Bangladesh and she has no support financially and emotionally in Bangladesh (paragraphs 52 and 53). At paragraph 36 it was submitted that the claimant does not have any home or property in Bangladesh to go back to and no financial resources to survive. It is not clear in this paragraph if it is the claimant or her husband who is being referred to as 'the appellant' is used but the reference is to 'he' throughout. I have therefore considered the submissions on the basis that it is either or both that are referred to. In this paragraph it is also submitted that there is no hope of finding a job, shelter, medication and other life saving support should they be forced to return to Bangladesh. It would be extremely difficult for them to go back and settle. They would have to live in very degrading and inhumane conditions.

23. At paragraph 38 it is submitted that the claimant arrived in the UK under extenuating circumstances. 'He' was living a degrading life and did not have any shelter or food or anyone to support. After his arrival he used to work in the cleaning sector. At paragraph 57 it is submitted that the Secretary of State failed to consider that Bangladesh is not a welfare state and is unstable. The claimant suffers fear of a future degrading life and 'he' would face extreme hostility from the regime and rivals which will put his life in serious danger.

24. No evidence to support these assertions has been submitted. There was nothing in the claimant's witness statement to support these assertions. There is no detail as to why in a matter of only just over 3 years the claimant has no hope of finding a job or ability to re-integrate in Bangladesh. With regard to the claimant's husband

[1] The grounds of appeal are lengthy, rambling and in parts very unclear as to who is being referred to. I have attempted to extract the points made doing so in the most favourable manner to the claimant that I can.

he is now 35 and lived in Bangladesh for the majority of his life some 25 years. He returned to Bangladesh in 2012 to marry the claimant.

25. The claimant's husband has had the benefit of an education in the UK which would provide an enhanced opportunity to find work. There are no language difficulties for either the appellant or her husband. I also consider that in terms of obstacles to continuing family life outside the UK there is a world of difference between a British citizen who has spent their entire life in the UK relocating to another country that they have never visited and a person who is a National of the country having lived the vast majority of his life in the country that it is expected that he can re-locate to.

26. As held in Agyrako the test of insurmountable obstacles imposes a high hurdle to be overcome by an Applicant for leave to remain under the Rules. Whilst there may be some hardship for the claimant and her husband in re-locating, in the absence of any evidence to support the wide ranging assertions made I find that the claimant has not discharged the burden upon her to demonstrate that there would be insurmountable obstacles to either her or her husband continuing family life outside the UK.

Paragraph EX.1.(a) Whether it would be reasonable to expect the children to leave the UK

27. EX.1(a) was not considered by the Secretary of State because M (MS not having been born at the date of the application) was not mentioned in the application. There was no consideration by the Secretary of State of the best interests of the children pursuant to her duty under s55 of the Borders, Citizenship and Immigration Act 2009. There is no criticism of the Secretary of State. She was not made aware of the claimant's child. In AJ (India) and Others v SSHD [2011] EWCA Civ 1191 the Court of Appeal concluded, at paragraph 24, that the Tribunal can deal with Section 55 even where the respondent has not and that is not necessary to remit the matter. In MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 223 (IAC) in the headnote at (v) the Upper Tribunal considered that:

> 'In considering the appropriate order, Tribunals should have regard to their adjournment and case management powers, together with the overriding objective. They will also take into account the facilities available to the Secretary of State under the statutory guidance, the desirability of finality and the undesirability of undue delay. If deciding not to remit the Tribunal must be satisfied that it is sufficiently equipped to make an adequate assessment of the best interests of any affected child.'

28. The grounds of appeal before the First-tier Tribunal set out, from paragraph 24 – 33, submissions on the welfare of the children. Mr Hussan made submissions at the hearing on the s55 duty and the best interests of the children in this case. The hearing was adjourned on the first occasion so that full consideration could be given to Article 8 and any further evidence could be provided. A small bundle of documents was provided at the commencement of the hearing. In Azimi-Moayed

and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) the Upper Tribunal considered that a judge primarily acts on the evidence in the case. I am satisfied that the claimant has had every opportunity to provide all the relevant information. Given the very young ages of the children ascertaining their views is not possible. I am of the view that I am sufficiently equipped to make an assessment of the best interests of M and MS.

29. The second limb of Paragraph EX.1.a. is essentially a proportionality exercise. The question asked is whether it would be reasonable for M and MS to leave the UK. In ZH (Tanzania) v SSHD [2011] UKSC 4 the Supreme Court noted that s 55 of the Borders, Citizenship and Immigration Act 2009 was enacted to incorporate the UK's obligation under article 3(1) United Nations Convention on the Rights of the Child that, *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'*

30. The court held:

> 26 'This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first…
>
> 33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that.'

31. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) the Upper Tribunal in considering the case law in relation to decisions affecting children identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

> 'i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
>
> ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to

disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases.

32. In EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 it was held that a decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

33. I have considered the factors identified in ZH (Tanzania), Azimi-Moayed and EV Philippines set out above. M is now aged 2 years 8 months and MS is aged 15 months. These are very young children. No private life can be said to have built up in the United Kingdom. At paragraph 28 of the grounds of appeal before the First-tier Tribunal it is asserted that the children are studying in the UK and at paragraph 39 that they are attending school in the UK. It is plainly incorrect to say that the children are studying in the UK. Only M had been born at the date that these grounds were drafted and he would have been 14 months old. He is now 2 years 8 months of age. He attends a Local Authority Children's day centre part time 5 afternoons a week. It cannot be considered to be disruptive in any long-term sense for him to be have to leave the day centre if he were to move to Bangladesh.

34. Mr Hussan submitted that s55 does not support removal of the claimant. The two children deserve to grow up in the UK. If the claimant were removed it would not be in the best interests of the children. Relying on VW Uganda Mr Hussan submitted that the facts of this case were very similar. In that case the appeal was allowed and so in this case it ought to be allowed also. The grounds assert (at paragraph 24) that the children's welfare will be in serious danger should the claimant be forced to return to Bangladesh. At paragraph 27 it is asserted that the decision has a fundamental impact on the future of the child and at paragraph 28 that for the welfare of the children they should not be sent to Bangladesh and that Bangladesh is not a welfare state. The children are emotionally dependant on the claimant.

35. None of the above submissions or grounds have been particularised. No detail is given as to why the children's welfare would be in serious danger. Although the decision will have a fundamental impact on the future of both M and MS that does not equate with it not being in their interests. No particulars are provided.

36. In the bundle of documents submitted at the hearing there were two documents from Barts and the London Hospital Trust. I was not taken to these documents by Mr Hussan. However, I have considered them. The documents recorded that M had been admitted into hospital on 3 March 2015 with tonsillitis and a chest infection and that MS had been admitted on 28 February 2015 with bronchiolitis. They were both treated for the conditions and after a few days were discharged. It is indicated that MS might be having follow up investigations and possibly treatment for anaemia. There is nothing to suggest that either M or MS has any long term serious medical conditions. It does not appear that they have subsequently been admitted to hospital.

37. Having considered the evidence and submissions outlined above I take into consideration that seven years from age four is likely to be more significant to a child than the first seven years of life, that very young children are focussed on their parents rather than their peers and are very adaptable and as a starting point it is in the best interests of children to be with both their parents. M is 2 years 8 months and MS is 15 months of age. They are not in education. I do not have any information as to the language ability of M but at 2 years 8 months, even if he speaks and understand only English, there would not be any great difficulty in adapting to another language. MS is unlikely to have developed any significant language skills. Both M and MS are not at a stage in their lives when they will have developed a social awareness and built up independent friendships. Both children are at a very young age and are very adaptable and would be able to quickly integrate into the culture in Bangladesh. It would be reasonable to expect that the claimant and her husband would be able to assist both M and MS to integrate fully in Bangladesh so any difficulties which M and MS encounter will be mitigated. There are no serious medical difficulties. With regard to the best interests of both M and MS, at this very young age, their interests are predominantly met by being cared for by their parents.

38. Both parents are from Bangladesh (this factor distinguishes this case from the VW case relied on by Mr Hussan). The claimant only left Bangladesh in 2012. Being cared for by both parents can be facilitated if the claimant's husband chose to move to Bangladesh with the children if the claimant were removed. The best interests of both M and MS are to be cared for by both parents but this does not require that the children live in the UK.

39. There is a further consideration which is the children's rights as British citizens. I accept that the children's nationality is of particular importance and must be given proper recognition because British children '*have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing*

up and being educated in their own country, their own culture and their own language', ZH (Tanzania) para 32. In this case no-one is **requiring** the children or the claimant's husband to re-locate. In Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048 (IAC) in the headnote the position was summarised as:

> 6. Where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the Zambrano principle, see C-256/11 Murat Dereci. The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union.

40. In this case the claimant is being refused leave to remain. This will not deprive the children in this case of effective residence in the United Kingdom as their father is not being removed. It will be a matter of choice for the claimant's husband if he chooses to re-locate to Bangladesh with his wife and children.

41. M and MS are British citizens but their mother is a citizen of Bangladesh and although the claimant's husband is now a British citizen he is also a citizen of Bangladesh. Nationality is not a trump card (paragraph 30 ZH Tanzania). In this case there are countervailing factors. The claimant and her husband are in receipt of benefits and cannot meet the financial requirements of the Immigration Rules. They entered into their relationship and marriage at a time when the immigration status of the claimant's husband was precarious and the claimant was not in the UK. They conceived their children when they knew that neither of them had an entitlement to remain in the UK. In R (on the application of Mahmood) v Secretary of State for the Home Department [2001] INLR the court held:

> "Article 8 does not impose on the state any general obligation to respect the choice of residence of a married couple".

42. These factors cannot be held against the children in assessing their interests as they had no knowledge of their parent's immigration status. However, this does not mean that these factors are irrelevant. In MH (Pakistan) [2011] CSOH 143, at Paragraph 56, the court held:

> 'The propriety of taking account of immigration history, the precariousness of the position when a relationship was entered into, and the need to maintain immigration control is confirmed by Lady Hale at paragraph 33 in ZH (Tanzania).

43. At Paragraph 10 of MH Pakistan the court held:

> "None of this was a matter of controversy between the parties and I noted that in one of the cases to which I was referred, ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 WLR 148, Baroness Hale of Richmond considered how these

factors would apply in an ordinary immigration case where a person was to be removed because he has no right to be or remain in the country. At paragraph 18 she noted that the Convention jurisprudence recognised that the starting point was the right of all states to control the entry and residence of aliens…"

44. I find that the best interests of both M and MS are to be cared for by both parents. However, to safeguard those interests does not require that they live in the UK. The level of integration of the children in the UK is limited. The children are unlikely to encounter any serious difficulties in Bangladesh. It is reasonable, on the facts of this case, to expect the family to leave with the claimant. Further, there are countervailing factors in this case as set out above. However, even without those factors, taking into consideration the best interests of the children I am satisfied, on the evidence, that it would be reasonable to expect the children to leave the United Kingdom.

Private Life

45. The Secretary of State considered the claimant's private life under paragraph 276ADE concluding that the claimant could not, in the absence of other evidence, be considered to have lost her ties to Bangladesh. The grounds of appeal assert that the claimant has fully adapted to the way of life in the UK and has become accustomed to the norms and values of British society (paragraph 23). In that paragraph it also asserts that the claimant has also developed very strong ties with 'his wife's' parents in law, other relatives and friends in the UK. It is not clear if this is a reference to the claimant or her husband. It is asserted that all ties have been lost.

46. The test is whether or not the claimant has lost her ties to Bangladesh. In YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292 the court of appeal approved the construction of the concept set out by the Upper Tribunal in the case of Ogundimu (Article 8 – new rules)(Nigeria) v SSHD. In that case the Upper Tribunal stated, at paragraph , that:

> "The natural and ordinary meaning of the words 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation and removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless".

47. There has been no evidence submitted as to why the claimant who has lived in Bangladesh for 18 years and in the UK for just over 3 years has lost her links to Bangladesh. Reliance in the grounds has been placed on the links to the UK but no evidence or even detail of the other relations and friends in the UK has been provided. No evidence as to what has happened to her family, friends or relations in Bangladesh has been provided.

48. The claimant has not discharged the burden of satisfying me that she has lost connection with life in Bangladesh.

49. The claimant does not meet the requirements of the Immigration Rules in respect of private and/or family life.

Article 8 outside the Immigration Rules

50. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) the Upper Tribunal set out the correct approach to appeals involving both Article 8 and the new Immigration Rules. The headnote reads as follows:

    "On the current state of the authorities:

    …

    (b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);

51. There is no 'exceptionality test' or 'threshold' test but there is a requirement to carry out a balancing exercise where an individual cannot meet the requirements of the Immigration Rules. The public interest will generally only be outweighed if an applicant can show that 'compelling circumstances' exist – see [40] to [42] of SS (Congo) [2015] EWCA Civ 387.

52. Mr Norton submitted that there are no compelling circumstances or factors that were not considered under the Rules. Mr Hassan submitted that separation of the children from their mother is a compelling circumstance.

53. In this case the Secretary of State did not consider the children when deciding if there were any circumstances that might warrant consideration of a grant of leave to remain outside of the Immigration Rules. For this reason to ensure fairness I have considered the Article 8 claim outside of the Immigration Rules.

54. The correct approach to determining a claim under Article 8 is that set out in R v SSHD ex parte Razgar [2004] UKHL 27. A Tribunal should consider 5 questions, namely:

    (i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

    (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

    (iii) If so, is such interference in accordance with the law?

(iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(v) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

55. In this case I do not consider it necessary to consider the first 4 questions posed as it is not disputed that there is family life and that a decision that would potentially result in a wife and mother being parted from her husband and children is an interference with family life, that the consequences in the circumstances of this case are of such gravity to engage Article 8, that the interference is in accordance with the law and is necessary. The core issue is whether the interference in the claimant's, her husband's and the children's Article 8 rights is proportionate to a legitimate aim.

56. In this case the Mr Norton submitted that the family can remain together. There is no requirement for the family to be separated. It is a matter of choice for them. It is not however a matter for them to be able to choose where they live together if they are unable to meet the requirements for leave to remain in the UK.

57. I am mandated by Parliament to give effect to section 117 of the 2002 Act. Section 117A is engaged because I am required to decide whether the impugned decision to refuse leave to remain would breach the right to respect for private and family life under Article 8 enjoyed by the claimant, her husband and their children.

58. Sufficient weight must be accorded to the public interest in the maintenance of effective immigration controls (s117B(1)). In this case the claimant does not meet the requirements for leave to remain in the UK. Further, sufficient weight must be accorded to the interests of the economic well-being of the United Kingdom, in that persons who seek to enter or remain in the United Kingdom must be financially independent (s117B(3)). The claimant was unable to meet the financial requirements of the Immigration Rules. Little weight is to be accorded to a private life formed when the person's Immigration status is precarious (s117B (5)). Very little detail of the private life of the claimant has been provided but in any event I would afford it very little weight in the balancing exercise.

59. Section 117B(6) is of a different nature and is directly relevant. The claimant is in a genuine and subsisting relationship with qualifying children. In Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC) the Upper Tribunal held, at paragraph 20 that :

'…

Within this discrete regime, the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none.'

60. In the headnote in that case the position was set out as

    (i) … In any case where the conditions enshrined in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the section 117B(6) public interest prevails over the public interests identified in section 117B (1)–(3).

61. In considering section 117B(6) therefore the only real question in this case is whether or not it would not be reasonable for M and MS to leave the UK. The test is essentially the same as in Paragraph Ex.1(a).

62. The Court of Appeal stated in VW (Uganda):

    "19. … While it is of course possible that the facts of any one case may disclose an insurmountable obstacle to removal, the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts…

    "24. EB (Kosovo) now confirms that the material question in gauging the proportionality of a removal or deportation which will or may break up a family unless the family itself decamps is not whether there is an insuperable obstacle to this happening but whether it is reasonable to expect the family to leave with the appellant…"

63. For the reasons I have already set out above I have found that it would be reasonable for M and MS to leave the UK even in the absence of any of the countervailing factors that I identified.

64. I identified a number of factors above in relation to the claimant, her husband, M and MS when considering private and family life under the Immigration Rules. They do not need to be repeated. Having weighed all the factors set out above the cumulative effect of the factors in favour of refusal of leave to remain, i.e. the precariousness of the claimant's and her husband's position with regard to leave to remain at the relevant time, the public interest in maintenance of effective immigration control and the public interest in ensuring that persons who seek to enter or remain in the United Kingdom are financially independent, outweigh the Article 8 interests of the children, the claimant and the claimant's husband. I find that the interference with their Article 8 rights is proportionate to the legitimate public end sought to be achieved namely, the aim of preserving the economic well-being of the country. The refusal to grant the claimant leave to remain in the UK is proportionate and therefore the appeal is allowed and the Secretary of State's decision stands.

65. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Decision

66. The decision to refuse the claimant leave to remain is a justified interference with the family's right to family and private life such interference being proportionate to the legitimate aim of preserving the economic well-being of the country. The appeal is allowed and the Secretary of State's decision stands.

Signed *P M Ramshaw* Date 26 December 2015

Deputy Upper Tribunal Judge Ramshaw