UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/3473
IA/34736/2014
IA/34737/2014

THE IMMIGRATION ACTS

Heard at: Field House
on 29 February 2016

Decision and Reasons Promulgated
on 15 April 2016

Before

Deputy Upper Tribunal Judge Mailer

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS MOMOTAJ SHEREN
MISS JANNATUL FERDOUS ALAM
MISS SUMAYIA ALAM
NO ANONYMITY DIRECTION MADE

Respondents

Representation

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondents: Mr A A Rahman, MQ Hassan Solicitors

DETERMINATION AND REASONS

1. I shall refer to the appellant as "the secretary of state" and to the respondents as "the claimants."

2. The claimants are nationals of Bangladesh and are a family unit. They are the mother and two children born on 1 January 1973, 31 January 1999 and 24 August 2000 respectively. I shall refer to Mrs Sheren as "the claimant."

3. The claimants appealed against the decisions of the respondent dated 19 August 2014 refusing their applications for leave to remain in the UK, and to issue removal directions.

4. In a decision promulgated on 13 April 2015, the First-tier Tribunal Judge allowed their appeals under the Immigration Rules.

5. The second and third claimants contended that they had resided in the UK for a continuous period of seven years and that it would not be reasonable to expect them to leave the UK. They claimed that they satisfied the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules.

6. The claimant contended under Appendix FM section EX.1 that she has a genuine and subsisting parental relationship with the children who have lived in the UK for seven years and it would not be reasonable to expect the children to leave the UK. It was also contended that they should succeed outside the rules under Article 8 of the Human Rights Convention [2].

7. The secretary of state was not represented at the hearing.

8. The evidence before the First-tier Judge was that before coming to the UK, the claimant and her daughters had lived for two years in Bangladesh. Prior to that they lived in Saudi Arabia and Abu Dhabi. The second claimant (Jannatul) had a problem with her speech before coming here. She had been enrolled in a school in Bangladesh. Her daughter, Sumayia, did not go to school in Bangladesh. She did not speak much. She is able to speak now. She and her daughters have been in the UK for seven years and eight months [5].

9. The family only visited Bangladesh once since coming to the UK, for a period of about 3-4 weeks. The claimant's father passed away during that visit. Her mother was still alive in Bangladesh but was "very old." The claimant confirmed that she still had three sisters in Bangladesh with whom she kept in contact by telephone [6].

10. When the claimant's husband left for Bangladesh in 2013, the claimants stayed in the UK. Since February 2013, her children have lived with the

claimant. She has been responsible for maintaining them financially. She used to work but has stopped working for one of the companies and only has one job. She looks after her children and provides their care here. [7]

11. The children do have contact with their father from time to time. He does not provide financial support for them as he has "very little income" [7].

12. The claimant confirmed that her husband was currently in Spain and has been there since December 2014. She said that her husband paid for their eldest daughter's education; the latter is currently at university. For the last two years her husband had not made any financial provision for the children.

13. The claimant took the decision to stay in the UK and allow her daughters to finish their education here when she saw the progress that they had made at school. On account of his work situation, her husband was required to leave for Bangladesh.

14. When her husband was in Bangladesh, she often needed an instant decision which her husband was not able to offer. She took all the decisions herself regarding what was good for the children [9].

15. The Judge heard evidence as to how Jannatul was doing at school. She was doing well and was going to sit her GCSE using British Sign Language and had a place at college. The claimant asserted that if her daughter had to go back to Bangladesh she would be admitted to a class 5 or 6 classes below her present grade. She would not be able to continue her studies. She would be cut off from the outside world. That would impact on her mental and physical welfare.

16. The claimant stated in evidence that Sumayia spoke very little when she was in Bangladesh. She was also in a support group in a school in the UK. She is required to use a head microphone and hearing aid. If she went back to Bangladesh, she would have difficulty in adjusting as she was used to the UK. Her studies have been in English. She would not be able to adjust to Bangladesh. It would be difficult for her as she will sit her GCSEs "next year". [12] She does not know Bengali and has never spoken it. If returned to Bangladesh, her children would not be able to access the supports for their deafness that they had in the UK and the facilities are not there.

17. Sumayia speaks a little bit of Bengali at home but cannot write it. Nor could Jannatul write any Bengali.

18. The Judge in his "Conclusions" had no hesitation in finding that the claimant was a credible witness. He found her evidence regarding the level of input her husband has in relation to decisions affecting the children to be credible.

19. He had regard to s.55 of the Borders, Citizenship and Immigration Act 2009 regarding the best interests of the child, which must be a primary consideration.

20. He considered the children's appeals first under the rules and considered the issue of the best interests of the child in assessing whether it is reasonable for them to return to Bangladesh.

21. He found that the decision of the respondent dated 19 August 2014 was flawed as it incorrectly stated that the second and third claimants did not live continuously in the UK for seven years [24].

22. The claimants have been in the UK lawfully throughout. They entered the UK in 2007 with entry clearance and their visas were extended with leave granted until 30 May 2014. They applied for further leave to remain on 29 May 2014 [25].

23. The Judge had regard to EV (Philippines) v SSHD [2014] EWCA Civ 874 at [35]. He also had regard to Azimi-Moayed regarding the best interests of the children [26-27].

24. He found that the claimant would be able to work in Bangladesh and be in a position to financially support and provide for the second and third claimants. There was no reason why she would be unable to return to Bangladesh to set up a home there and work to provide for them. There is also an extended family still living in Bangladesh.

25. The second and third claimants have been residing in the UK for a period in excess of seven years. They have been here during their formative years in their development from aged 8 in the case of the second claimant and aged 6 in the case of the third [29].

26. They have spent more than seven years in education here. The second claimant has a disability and is profoundly deaf. She accesses education

through the use of British Sign Language and has specialist educational support. She is able to lip read in English. She has reached an important stage in her education and will be taking her GCSEs this year [30].

27. He had regard at [30] to the COI report dated 30 December 2012. He found that the second claimant would have significant linguistic difficulty in adapting to life in Bangladesh, having regard to her disability. She would be unable to communicate effectively there. Here, her communication difficulties are supported and she can communicate with others around her more effectively. She has made friends here, particularly through school. If required to leave the UK this will have significant adverse effects on her ability to communicate with others and on her overall well being [30].

28. She has become distanced from Bangladesh and only visited the country once since residing here. That was for a short period. She cannot speak or read Bengali. It would be difficult for her to adapt to life in Bangladesh, which would have a detrimental effect on her education. [31]

29. Her best interests are that she should remain in the UK and be allowed to complete her education. It would be inappropriate to disrupt her education, given her disability and the absence of compelling reasons to the contrary.

30. Accordingly, the Judge found that it would not be reasonable to expect the second claimant to return to Bangladesh [33].

31. With regard to the third claimant, he noted that she also has a disability. She is not profoundly deaf but has bilateral moderate hearing impairment. She uses hearing aids and requires intervention from a specialist speech and language therapist and from a teacher of the deaf to develop her listening, learning and communication [34]. She is on the school special educational needs register.

32. Her disability is not so severe as that of the second claimant. The Judge found that her disability would also make it very difficult for her to adapt to life in Bangladesh. Her return would significantly set back the progress she has made in her education here [34].

33. He found that it would be in her best interests as well to remain in the UK and complete her education.

34. The Judge accordingly allowed the appeals of the second and third claimants under the Immigration Rules.

35. He then considered whether their mother can succeed under the Rules. It was contended that she met the requirements of the Rules for leave to remain as a parent under Appendix FM EX.1. He found that the children are not leading independent lives and are living in the UK and have lived here continuously for at least seven years. He found that the claimant had sole responsibility, having regard to the decision of the Court of Appeal in TD (Yemen) v SSHD [2006] UKAIT 0049 [38].

36. He had regard to the respondent's assertions that she did not have sole responsibility for the reasons set out at [39]. He found that her husband had returned to Bangladesh in February 2013. Nor is he referred to as being present at any meetings with medical professionals after 2012 [39].

37. He found that the claimant had sole responsibility for the second and third claimants. In particular, she makes any major decisions in their lives in relation to their education and which school they attend, and where they should live. Whilst their father had been involved in their upbringing when he was residing in the UK, the Judge found that since he returned to Bangladesh in February 2013 and then moved to Spain in December 2014, he has played very little part in their lives and has "in effect abdicated responsibility for them" [40].

38. Accordingly the claimant satisfied the requirements of EX.1. He stated at [41] "that for the reasons already given" it would not be reasonable to expect the second and third claimants to leave the UK. The claimant therefore satisfies the requirements under the Rules.

39. No human rights claim under Article 8 was considered. At the hearing, the Judge noted that Mr Rahman submitted at [2] that if the Judge was not satisfied that the claimants met the requirements under the rules, the appeals should be allowed under Article 8. It does not appear that the submission was made that their appeals should in any event be considered under the Human Rights Convention. There has been no cross appeal by the claimants on the basis that there has been an error of law given that the First-tier Judge failed to consider claims under Article 8.

40. On 27 July 2015, Upper Tribunal Judge Kekiç granted the secretary of state permission to appeal to the Upper Tribunal, and in particular in respect of the Judge's assessment of the best interests of the children and the

"flawed finding" relating to the duration of their residence. It was arguable that at the date of application they had not spent seven years in the UK. The Judge's findings regarding the mother's sole responsibility for her children were also "criticised" as the father has not abdicated responsibility for them and makes financial contributions.

41. Ms Isherwood at the outset referred to paragraph 276ADE(1) of the rules. This set out the requirements to be met for an application for leave to remain on the grounds of private life. It is a requirement that at the date of application, the claimant, inter alia, must be under the age of 18 and have lived continuously in the UK for at least seven years, and it would not be reasonable to expect the applicant to leave the UK. That also applies to section EX.1 (a)(i) (cc) if applicable.

42. The children's applications were refused under paragraph 276ADE as they had not lived in the UK continuously for at least seven years immediately preceding the date of application. The applications were all made on 29 May 2014 and they entered the UK on 19 July 2007, i.e. less than seven years earlier.

43. It is also a requirement under paragraph 276ADE(1)(ii) that the applicant has made a valid application for leave to remain on the grounds of private life in the UK.

44. On behalf of the claimants, Mr Rahman submitted that the issues are narrow but "technical". He relied on his Rule 24 response dated 24 November 2015, in which he contended at paragraphs 3 onwards, that it was open to the Judge to conclude that the claimants lived continuously in the UK for seven years prior to the application within the meaning of paragraph 276ADE(1).

45. Mr Rahman relied on paragraph 276AO of the Rules, which provided (as at the date of lodging their appeal) that for the purposes of paragraph 276ADE the requirement to make a valid application will not apply when the Article 8 claim is raised as part of an asylum claim; or where removal directions have been set pending an imminent removal; or in an appeal or in response to a one stop notice issued under s.120 of the 2002 Act. Such a notice was issued in respect of the claimants.

46. He submitted that where paragraph 276ADE is relied on during the course of an immigration appeal, it is the date of appeal hearing which is material as the requirement to make a valid application is waived. He referred to

paragraph 276ADE0 which provides that for the purposes of paragraph 276ADE(1) the requirements to make a valid application will not apply when the Article 8 claim is raised in an appeal. He submitted that the Article 8 claim was meant to include an Article 8 claim made under the rules.

47. He submitted at paragraph 11 of his "further submissions" that the application is a valid one if it complies with all the provisions of paragraph 34 of the Immigration Rules. He submitted at paragraph 12 of the submissions that the claimants made valid applications as they were considered.

48. Nor is the secretary of state's contention that paragraph 276ADE is to be judged strictly by reference to the actual date of application consistent with other statutory provisions, including s.120 and s.85(4) of the Nationality Asylum and Immigration Act 2002.

49. He submitted at paragraph 9 of the response that in this case the claimants had acquired seven years before consideration and decision of their applications. Accordingly the relevant date here should be the date when they acquired seven years' stay on 19 July 2014, (whilst the application was still pending) as the application is varied by change of circumstances and on a true interpretation of the matter that would be the date of application.

50. He relied for that submission on the decision in Qureshi (Tier 4 - Effect of Variation) App C Pakistan [2011] UKUT 00412 (IAC). He submitted that the same principle in Qureshi will apply and consequently the First-tier Judge made no error in allowing the appeal as the appellants had acquired seven years whilst the application was still pending. He contended that the application was "varied by change of circumstances". Even though Qureshi involved a points based application, "by analogy" the same principle applied in relation to paragraph 276ADE(1) of the rules.

51. He further submitted that the grounds raised no arguable error of law and that it would not be reasonable to expect the claimants to return to Bangladesh. The argument that the Judge did not conduct "a balanced judgment" on this issue was "very vague".

52. He submitted that if the requirement of a valid application has been dispensed with when human rights are raised in an appeal, or in response to a s.120 notice, a necessary consequence is that the reference to "prior to application" is not relevant. Hence the seven years shall be

decided by reference to the point when it was raised in appeal. In this case it was raised with the notice of appeal.

53. He also submitted at paragraph 22 of his further submissions that the seven year "fact" was not a new matter as it was already accrued when the application was pending and the secretary of state was duly put on notice.

54. Ms Isherwood on behalf of the secretary of state submitted that the decision in Qureshi had no bearing on the appeal. The letter dated 29 May 2014 at 'D' of the respondent's bundle constituted the application for limited leave to remain on the grounds of private life. However, it was noted there that the applicants' residence in the UK would be seven years on 19 July 2014, which was another six weeks. The application was accordingly made earlier as their leave would expire on 30 May 2014. That is why they had to make "this premature application" (page 2). This did not 'in any way constitute an application to vary'.

55. She referred to a further letter from the claimant's solicitors dated 11 August 2014 following a letter from the secretary of state requiring further documents. These are set out. There was a further explanation as to why Ms Mariam Allam is not applying for an extension.

56. Ms Isherwood repeated her contention that unlike the appellant in Qureshi, there has been no attempt to vary the application. The claimants were required to meet the relevant requirements at the date the application was made. The argument presented amounts to a submission that the secretary of state should have exercised discretion in the circumstances.

57. Ms Isherwood submitted that a valid application under the Rules with effect from 9 July 2012 means an application made in accordance with the requirements of Part 1 of the rules.

58. Part 1 contains general provisions. A34 provides that an application for leave to remain under the rules must be made, inter alia, by using the specified application form.. There has been no contention that the application was not valid.

59. She submitted that the Judge's findings that it would not be reasonable to expect the child claimants to return to Bangladesh was flawed. A balanced judgment of what could reasonably be expected of those involved in the appeal in the light of all the material facts was required.

60. She referred to the decision of the Upper Tribunal in Nasim and others (Article 8) Pakistan [2014] UKUT 25 which was promulgated on 17 January 2014. She submitted that there was a similar factual matrix. The Tribunal noted that the judgments of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72 served to re-focus attention on the nature and purpose of Article 8 of the Human Rights Convention, and in particular, to recognise that Article 8's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity.

61. In considering the appeals of Mr Mughal and his family, the Tribunal noted at [54] that he entered the UK in June 2011 as a student. Shortly after that he was joined by his wife and their three children, born on 2004, 2007 and 2008. A fourth child was born in the UK in 2011.

62. The appellant in that appeal sought to extend his leave to remain in the UK in order to gain work experience here. The First-tier Tribunal noted in the decision dated 13 November 2012 that there was no evidence to show that it would not be in the children's best interests to return to Pakistan. It was now a feature of the case for Mr Mughal and his family that the best interests of the two children at least lie in remaining in the UK on the basis that two of his children, the daughter born in January 2004 and the one born in December 2011 suffered from deafness [56].

63. The Tribunal was presented with documentary material relating to hospital visits made by these children in the UK in connection with their deafness as well as school reports relating to the school aged children. There were various letters from the NHS regarding the daughters. The Tribunal referred to various decisions regarding the "best interests" of children in the context of immigration such as Azimi-Moyaed and others (Decisions affecting children; onward appeals) [2013] UKUT 197 and Zoumbas v SSHD [2013] UKSC 74. The Tribunal noted at [65] that as concerns the two children who suffered from deafness, given the socio economic position of the family, there was no reason to assume that these children would not continue to receive the necessary medical attention for their deafness in Pakistan.

64. Their removal as a family would not constitute an interference with Mr Mughal's Article 8 rights or be disproportionate to the legitimate public end of the maintenance of a coherent and fair system of immigration control.

65. Ms Isherwood submitted that there has been no appropriate balancing exercise taken under s.55. The Judge found that the child claimants came to the UK when the elder child was 8 years old and the younger was 6. Both had lived in the UK for seven years and eight months. Although the claimants had been in the UK lawfully, they had not lived here for the required seven years as at the date of application.

66. She referred to the finding by the Judge that the claimant would be able to work in Bangladesh and to support and provide for the children. There is no reason why she would be unable to return to Bangladesh and set up a home there and provide for them. There was an extended family still living there [28].

67. Ms Isherwood submitted that although the Judge referred to paragraph 35 of EV (Philippines) and others, supra, no reasons were given as to why the circumstances were compelling. She also referred to the Upper Tribunal's decision in AM (S 117B) Malawi [2015] UKUT 0260 (IAC) at [13]. The mere presence of the children in the UK, and their academic success, was not a "trump card" which their parents could deploy to demand immigration status for the whole family; Butt v Norway App 47017/09 4 December 2012, and EV (Philippines) and others v Secretary of State for the Home Department [2014] EWCA Civ 874.

68. Ms Isherwood further submitted that the finding that the claimant had sole responsibility for her children was flawed. There was evidence that from time to time the children do have contact with their father [7]. He was currently in Spain and had been there since December 2014. He paid for their eldest daughter's education. She is at university. In her evidence, the claimant stated that as her husband was in Bangladesh she often needed an instant decision. Her husband was not able to offer such an instant decision. As a result she took such decisions herself [9]. However, at [10] the Judge noted that the claimant stated that she sometimes discussed things about the children with her husband. When she did talk to him about these things he would simply say in relation to any decision that "you talk to people and you take the decision." She would make any decision regarding medical intervention or advice from the school and make the decision. She submitted that it is apparent that the husband has not abdicated responsibility since he returned to Bangladesh in February 2013 and then moved to Spain in December 2014.

Assessment

69. It is accepted on behalf of the claimants that when the applications were submitted, the second and third claimants had not been in the UK for a period of seven years. However, it is contended that as at the date of the decision, they had been here for over seven years.

70. Mr Rahman relied on paragraph 276AO which provides that for the purpose of paragraph 276ADE(1) the requirement to make a valid application will not apply if the Article 8 claim is raised in certain relevant contexts, including where the claim is raised in an appeal or in response to a one stop notice issued under s.120 of the 2002 Act.

71. A valid application means an application made in accordance with the requirements of Part 1 of the Rules. As submitted by Mr Rahman at paragraph 11 of his Further Submissions date 11 January 2016, if the provisions of a valid application are not complied with, the application is invalid and it would not be considered - paragraph 34C(a). Mr Rahman accepted that the claimants made valid applications as they were considered.

72. Mr Rahman sought to rely on the decision in Qureshi (Tier 4 - Effect of Variation) App C Pakistan [2011] UKUT 00412 (IAC).

73. The Tribunal in Qureshi held at [38] that a Tier 4 (General) student application can be varied by virtue of the provisions of s.3C(5) of the Immigration Act 1971. There is no restriction in s.3C(5) on the number of occasions on which applications for variation of the original application can be made provided notice of variation is given prior to the respondent's decision as thereafter there would then be no application pending. As to the date the respondent is required to take into account for the purposes of determining the points to be awarded under Appendix C, where there has been a variation substituting a new college, it is the date of the most recent variation for the purposes of paragraph 1A(c).

74. The Tribunal considered the legal framework applicable in that case, namely, paragraph 245ZX(d) of the Rules. To achieve 10 points for maintenance, the applicant needed to meet certain of the requirements of Appendix C. There is reference to the requirement that the applicant must have the funds specified in the relevant part of Appendix C at the date of the application.

75. Section 3C of the Immigration Act 1971 provides for the continuation of leave pending a variation decision. Section 3C(2) provides that the leave

is extended by virtue of the section during any period when, inter alia, the application for variation is neither decided nor withdrawn.

76. In Qureshi, the appellant made an in time application for the purposes of further studies in the UK which she then subsequently sought to vary in anticipation of that course expiring or coming to an end on 21 January 2011.

77. When she made the application dated 12 August 2010 it was for an extension of leave to remain in order to study at a particular college. The Tribunal considered whether when she wrote to explain that she wished to vary the application for a degree course at Birmingham City University she was applying for a different purpose. The second issue was what the relevant date of application was for the purpose of Appendix C.

78. She gave notification of her changed plans on 15 December 2010 and again on 12 January 2011. The tribunal at [22] identified the issues to be: which of those dates is the relevant date? In the alternative, is it open to an applicant to vary an application more than once whilst it is pending before the respondent?

79. At [35] the Tribunal was satisfied that the endeavours by the appellant to vary her application were for the same purpose, which was for further leave to remain in the UK in order to pursue studies. The variation sought by her was not therefore one caught by the provisions in paragraph 34E of the rules, which dealt with variation of applications or claims for leave to remain.

80. The Tribunal concluded at [37] that in the case before them there is no indication that the Attributes needed to be in place at the time of application. Appendix A which was the relevant provision at the time of the decision simply required that an applicant applying for entry clearance or leave to remain as a Tier 1 (General) Migrant must score 75 points for attributes. There is no indication that the Attributes needed to be in place at the time of the application.

81. Appendix C however requires an applicant to show the specified funds at the *date of application*.

82. Mr Rahman submitted that "by analogy" the same principle in Qureshi should apply and consequently the First-tier Judge made no error in

allowing the appeal as the appellants had acquired seven years whilst the application was still pending.

83. The letter dated 29 May 2014 at D of the respondent's bundle constituted the application for limited leave to remain on the grounds of private life. Their leave however was to expire the following day, i.e., on 30 May 2014. That is why they had to make a premature application - (page 2).

84. It is accepted that a valid application was made. The secretary of state has never contended that the applications, or any of them, were invalid in any way. The fact that the applications were refused or were unsuccessful cannot be equated with the failure to make "valid applications."

85. Accordingly, there is nothing contained in Mr Rahman's contentions that would render inapplicable the mandatory requirement under the applicable Rule that the relevant seven years' residence must have been met as at the date of application. The claimants have frankly conceded that a premature application in this respect had to be made. If their applications had been delayed they would not have had lawful leave to remain with the consequence that, in the event of a negative outcome, they would have been denied a right of appeal.

86. I do not accept Mr Rahman contention that the approach adopted in Qureshi, supra, is 'by analogy applicable' in the claimants' case. There the Tribunal concluded that there was no indication that the relevant attributes under Appendix A needed to be in place at the time of the application. However, insofar as Appendix C was concerned, the relevant requirements had to be met at the time of application. That appendix thus required an applicant to show that the specified funds were available at the date of application. That was the time line which Sedley LJ had in mind in Pankina v SSHD [2010] EWCA Civ 719.

87. As already noted, one of the requirements to be met by an applicant for leave to remain on the grounds of private life under paragraph 276ADE(1)(iv) is that at the date of application the applicant must have lived continuously in the UK for at least seven years. Paragraph 276CE provides that limited leave to remain on the grounds of private life in the UK is to be refused if the secretary of state is not satisfied that the requirements in paragraph 276ADE(1) are met. It is thus a mandatory requirement affording no discretion. That also applied to the application under Appendix FM - EX.1.

88. I find that the First-tier Tribunal Judge made an error of law in finding at [24] that the decision by the secretary of state (that the second and third claimants have not lived continuously in the UK for seven years) was flawed.

89. Furthermore, I find that although referring to EV (Philippines), the Judge's findings that it would not be reasonable to expect the second and third claimants to return to Bangladesh were made without regard to the proper approach set out in that case.

90. Although the Judge referred to s.55 of the 2009 Act, the Court of Appeal in EV, at [37], referred to the balance "on the other side" which needs to be taken into account, including the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be a relevant factor, (the claimants have remained here lawfully).

91. Lord Justice Lewison stated at [55] that underlying statements of principle as disclosed by decisions such as ZH (Tanzania); EB (Kosovo) and Naidike v Attorney General of Trinidad and Tobago is the real world fact that the parent has no right to remain in the UK. So no counter-factual assumption is being made, and the interests of the other family members are to be considered in the light of the real world facts. This is not an approach which is confined to domestic law. One of the factors to be considered is the best interests and well being of the children, including the seriousness of the difficulties they would likely encounter in the country to which they are being removed.

92. Lewison L.J. stated that this too, takes as the starting point the real world fact that the applicant has no right to be in the host country. Regard was also had to the decision of the European Court of Human Rights in Rodrigues da Silva, Hoogkmeer v Netherlands [2007] 44 EHRR 34 where the Court stated that factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties and the contracting state, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control or considerations of public order weighing in favour of exclusion.

93. At [58] Lord Justice Lewison stated that if the other parent has the right to remain, that is the background against which the assessment is

conducted. The ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain in the country of origin?

94. At [60] he stated that although it is a question of fact for the Tribunal, he could not see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the rest of the world, so we cannot educate the world.

95. Although the First-tier Judge weighed the best interests of the children as a primary consideration, there is no indication that this was set against the economic well being of the country. In particular, there was no consideration of the costs to the public purse in providing the highly specialised education and treatment to these children. That was not something that the Judge considered. He simply stated at [34] that it would be inappropriate to disrupt her education in the absence of any compelling reasons to the contrary. There were no such compelling reasons which existed in this case.

96. In that respect, the Judge had concluded that the claimant would be able to work in Bangladesh and be in a position financially to support the children. She had been able to come here and obtain accommodation and provide for her family. There was no reason why she would be unable to return to Bangladesh and set up home there and work to provide for them. Nor was there any evidence that there would not be proper educational and other facilities available on their return to Bangladesh to meet the children's needs.

97. I also accept Ms Isherwood's contention that the evidence did not establish that the children's father has abdicated responsibility for the claimant children. Nor has he shown a lack of interest in his children with whom he has contact [7]. He pays for the education of the eldest child, which as noted by the secretary of state, is arguably inconsistent with the finding that he would abdicate responsibility. Further, it is not evident that he has refused to provide financial support for the claimants but simply that he has very little income.

98. Accordingly the finding that the father has "in effect abdicated responsibility for them" was not borne out. The finding therefore that the claimant has sole responsibility for the claimants was not justified by the evidence before the Judge.

99. I accordingly find that the decision of the First-tier Tribunal involved the making of errors of law. I accordingly set it aside and re-make it.

100. For the reasons already given, I find that the second and third claimants did not meet the requirements of paragraph 276ADE(1)(iv). I also find that the claimant has not satisfied the relevant requirements under Appendix FM.

101. As already noted, the Judge did not consider Article 8 of the Human Rights Convention having regard to the Mr Rahman's 'submission' at [20] that if the Judge were not satisfied that the claimants met the requirements under the rules, the appeals should be allowed under Article 8.

102. There has been no contention that the failure by the Judge in any event to consider Article 8 constituted an omission amounting to an arguable error of law. There has been no counter application for permission to appeal on that basis.

Notice of Decisions

The decision of the First-tier Tribunal involved the making of errors on a point of law and is accordingly set aside and remade.

Having remade the decision I substitute a decision for that of the First-tier Tribunal, dismissing the claimants' appeals.

No anonymity direction is made.

Signed Date 12 April 2016

Deputy Upper Tribunal Judge Mailer