



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

Appeal Numbers: IA/50677/2014  
IA/50680/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 June 2016**

**Decision & Reasons  
Promulgated  
On 22 July 2016**

**Before**

**Mr H J E LATTER  
(DEPUTY UPPER TRIBUNAL JUDGE)**

**Between**

**MSJAC  
MSYAC  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Muquit, Counsel, instructed by Taj Solicitors  
For the Respondent: Mr C Avery, Home Office Presenting Officer

**DECISION AND REASONS**

*An order has been made under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead to the appellants being identified.*

1. This is an appeal by the appellants against a decision of the First-tier Tribunal (Judge James) who dismissed their appeals against the respondent's decisions made on 27 November 2014 refusing them further leave to remain in the UK.

### Background

2. The appellants are citizens of Bangladesh born on [ ] 1999 and [ ] 2002 respectively. They entered the UK on 1 December 2013 with their father as family visitors, following a successful appeal against the refusal of entry clearance. The original intention was that their mother would travel with them but she was unable to do so due to ill health. It is the appellants' case that their mother died of a heart attack on 29 December 2013. Their father returned to Bangladesh leaving the appellants in the care of their uncle with whom they were staying, saying that he would return to collect them (para 4 of the uncle's witness statement dated 10 March 2015). However, he did not do so. He married on 14 February 2014 and then lost contact with his family. The appellants have three sisters but they told their uncle that they had broken all ties with their father after his remarriage and that they would not be able to look after their brothers as they were housewives, each living with her husband and extended family.
3. The appellants have continued to live with their uncle and his family in this country. In his evidence before the First-tier Tribunal their uncle said that the appellants lived with him with the approval of the local social services. It also appears from his witness statement that they are attending a local high school having secured places with the help of social services.
4. The respondent's reasons for refusing leave to remain are set out in the decision letters of 27 November 2014. She did not accept that the appellants could bring themselves within the provisions of para 276ADE of the Rules or that there were exceptional circumstances justifying the grant of leave under Article 8 outside the Rules.

### The Hearing before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal it was conceded that the appeal was solely on the basis of Article 8. It was not being pursued on the basis of the appellants' educational needs as they would be able to return to the same schools previously attended in Bangladesh. The judge heard oral evidence from the appellants' uncle and his son. It was argued on behalf of the respondent that their evidence was not true and that everything had been planned to enable the appellants to come to the UK for their education without going through the proper process of applying for the appropriate entry clearance. In relation to the s.55 duty, it was argued that if the account given was not truthful, it was clear that the best interests of the appellants was for them to return to their father.

6. On the appellants' behalf it was submitted that the key issue was whether the narrative given was credible. In short, it was argued that the witnesses had given an honest account of what they knew and had it been their intention to fabricate a story, the narrative would have been much more detailed.
7. The judge set out his findings and conclusions at [29] - [38]. He set out the basic facts, noting from the appeal in relation to the visit applications that the appellants' father was well set up as a local businessman with two businesses, one a car business in a village outside Sylhet and the other a vegetable business in Sylhet. The businesses were currently under the control of a cousin of the appellants. The family owned two residential properties and there was no evidence that either had been sold. A maid or similar home help was used in the home at Sylhet and there was evidence that she remained there after the death of the appellant's mother, possibly without being paid [31]. The judge said that he was asked to accept that the appellants had been abandoned in the UK and that they would have no means of support in Bangladesh. He did not accept that contention, finding that it was clear that the appellant's father was a well established businessman who was well respected and well connected in his community, these facts having been part of the reasons for allowing his appeal against the refusal of a visit visa. The judge found it improbable that he would abandon all these connections and, more importantly, his sources of income and means of supporting a new wife.
8. The judge said that if the appellant's father was no longer running the businesses, one of two circumstances arose: either their father was in receipt of the profits for the business and was therefore in contact with the cousin for that purpose, or he had no contact or interest in the profits which would, accordingly, be available to the appellants on return to Bangladesh. He was more inclined to the view that the father would be receiving the profits of the businesses and as a result would be traceable in Bangladesh. He was further satisfied that the cousin who was running the businesses would be able to provide support for the appellants. [32]
9. The judge noted the suggestion that the appellants' father and his new wife had travelled to India but there was no evidence to suggest that they intended to remain there [33]. He accepted that culturally the appellants might not be able to live with any of their sisters but they would still be able to provide support short of providing accommodation but, in any event, it would appear that residences were available to them [34]. The judge then commented as follows:

“35. I accept that the new wife may not wish to have responsibility for the appellants. It is not the role or function of the respondent to undertake responsibility for children who are no longer wanted by their parent or step-parent if that parent or step-parent is available to take that responsibility.”

10. It was common ground that the appellants did not meet the requirements of the Rules. When considering the position outside the Rules, the judge said that he rejected the assertion that the appellants had no means of support in Bangladesh and said that it was likely that their father would be traceable. In relation to s.55 he noted the decision in Zoumbas v Secretary of State [2013] UKSC 74 and the principles laid down by that decision and in particular that children should not be blamed for matters for which they are not responsible but he did not consider that returning to the appellants to Bangladesh would have that effect. In conclusion, he was not satisfied that there were exceptional circumstances to justify the consideration of a grant of leave outside of the Rules, commenting at [37] that

“... It may be that the appellants’ father now finds himself in circumstances where he would like to divest himself of responsibility for his sons but I believe the circumstances in Bangladesh are such that he can be found and his responsibility towards his sons can be re-established or continued”.

Accordingly, the appeal was dismissed.

#### The Grounds and Submissions

11. The grounds argue, in summary, that the judge’s finding that the children had not been abandoned was irrational, there had been no proper consideration of s.55, it was irrational to find that they should be removed from their present stable family, there had been no evaluation of the nature and quality of their current family life, there was a failure to consider the provisions of s.117A-D of the Nationality, Immigration and Asylum Act 2002 as amended and finally, that there were compelling reasons justifying a full consideration of Article 8 outside the Rules.
12. In the respondent's Rule 24 response, it is submitted that the judge’s findings were open to him. It had been conceded that if the appellants returned to Bangladesh, they would return to their previous school. Further, it was clear from the decision that the judge did not accept the evidence concerning the appellants’ father and they would therefore be returning to him. The judge had been entitled to find that, having entered the UK as visitors in December 2013, that they would have the appropriate support on return to Bangladesh.
13. Mr Muquit adopted his grounds. He submitted that the judge had failed to take into account the provisions of s.117B of the 2002 Act. This was not a case of the judge rejecting the appellants’ account. He had accepted that the appellants' mother had died, that their father had remarried and that he and his new wife did not now wish to undertake responsibility for the appellants. The judge had found at [32] that the appellants had been abandoned in the UK and would have no means of support in Bangladesh but his reasons all related to the appellants' means of support and not to their father’s intentions. The question of the best interests of the children could not be disposed of simply by saying that it was not the respondent's

function to undertake responsibility for children no longer wanted by their parent or step-parent [35]. He submitted that the judge had not made adequate findings of fact nor had he properly explored the issues relating to proportionality. There had been no adequate findings in respect of family life nor had the approach to Article 8 as set out in Razgar [2004] UKHL been followed.

14. Mr Avery accepted that the judge could perhaps have set matters out more clearly but it was his submission that the judge had not accepted the primary contention made by the appellants that they had been abandoned in the UK. Some of the judge's comments may have been speculative when he said that the new wife may not wish to take responsibility for the appellants or that their father might like to divest himself of responsibility for his sons. However, in the light of the finding that the children had not been abandoned by their father, it followed, particularly taking into account the evidence submitted in support of the visit appeal about his circumstances and financial resources, enjoying a comfortable life style in Bangladesh, that the reality of the position was that the appellants would be able to return to their family in Bangladesh.

#### Assessment of the Issues

15. I must consider is whether the First-tier Tribunal erred in law such that the decision should be set aside. There was a clear dispute between the parties about the circumstances in which the appellants came to remain in the UK after their father returned to Bangladesh. The respondent submitted that this was all planned so that the appellants could complete their education in the UK without the necessity of complying with the Rules and obtaining entry clearance, whereas it was argued on behalf of the appellants that after a tragic turn of events, the death of their mother, their father returned to Bangladesh, remarried and abandoned his previous family.
16. The judge said at [32] that he was asked to accept that the appellants had been abandoned in the UK and that they would have no means of support in Bangladesh. He said he did not accept that contention but it is clear that the rest of [32] deals with the second limb, whether the appellants would have no means of support in Bangladesh. The judge was more inclined to the view the view that the appellants' father was receiving the profits of the businesses and would be traceable in Bangladesh and further that he was satisfied that the cousin who was running the business would be able to provide support for the appellants.
17. However, it is unclear whether and to what extent the judge accepted that the appellants' father had abandoned his responsibilities as a parent. The judge said he did not accept that contention in [32] but in [33] he notes the suggestion that the appellants' father and his new wife had travelled to India but said that there was no evidence to suggest that they intended to remain there. He later commented that the father's new wife might not

wish to have responsibility for the appellants [35] and it might be that the appellants' father found himself in circumstances where he would like to divest himself of responsibility for his sons [38]. As Mr Avery submitted, these comments, at least on their face, appear to be matters of speculation and do not indicate findings of fact on a balance of probabilities. Further, in [38] the judge said that he believed the circumstances in Bangladesh were such that the appellants' father could be found and his responsibility towards his sons could be re-established or continued. This appears to follow up the judge's comment in [35] that it was not the role or function of the respondent to undertake responsibility for children who are no longer wanted by their parent or step-parent if available to take that responsibility.

18. However, that leaves open the issue, if in fact the position is that their father has at the present time abandoned his responsibilities, of what family support is available on return until their father resumes his responsibilities. It is not the function as such of the respondent to undertake responsibility for children no longer wanted by their parent or step-parent but that does not discharge the respondent from the duty of considering the best interests of the children when making a decision on an application for leave to remain. The judge referred to the seven principles set out in Zoumbas but these principles must be considered in the light of the facts relating to each individual child.
19. I am satisfied that there was no adequate consideration of the best interests of the children in the respondent's decision letters, although it is entirely clear how much information was before the respondent, or that the issue has been adequately addressed in the decision of the First-tier Tribunal in the light of the lack of clarity of what facts are accepted in accordance with the appropriate standard of proof. In Zoumbas, the Supreme Court made it clear that the best interests of a child could be outweighed by the cumulative effect of other considerations but, nonetheless, their best interests have to be assessed in the light of clear findings about their actual circumstances, which in the present case includes as a factor of considerable importance the reception or family support arrangements available on return.
20. The respondent not only refused to vary their leave to enter or remain but also made a decision to remove. In these circumstances the judge should have given specific consideration to the provisions of s.117A-D of the 2002 Act. Finally, I am not satisfied that the judge's findings of fact were sufficiently clear to explain how he came to the view that there were no exceptional circumstances or perhaps more accurately, compelling reasons, justifying a consideration of Article 8 outside the Rules.
21. For these reasons, I am satisfied that the judge erred in law such that the decision should be set aside. In the light of the lack of clarity of the judge's findings of primary fact, I am satisfied that this is a case which should be reheard afresh by the First-tier Tribunal.

Decision

22. The First-tier Tribunal erred in law such that the decision should be set aside. It is remitted to the First-tier Tribunal for a full rehearing.
23. In the light of the ages of the appellants and issues raised in this appeal, I am satisfied that this is a proper case for an order to be made under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and I make an order prohibiting the disclosure or publication of any matter likely to lead to the appellants being identified.

Signed H J E Latter

Date: 19 July 2016

Deputy Upper Tribunal Judge Latter