**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/10489/2015**

**THE IMMIGRATION ACTS**

**Heard at Field House** **Decision & Reason Promulgated**
**On: 22 November 2017** **On: 5 December 2017**

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR JUBER AHMED NAYEEM**

Respondent

**Representation:**

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Ms B Jones, Counsel instructed by Syed Shaheen solicitors

**Anonymity**
*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*
No anonymity order was made by the First-tier Tribunal. There is no good reason to make an anonymity direction in this case.

## DECISION AND REASONS

### Background

1. The Appellant in this appeal is the Secretary of State for the Home Department. For ease of reference though, I refer to the parties as they were before the First-tier Tribunal.

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2. The Appellant appeals against the Respondent's decision dated 28 October 2015 to refuse his application for leave to remain on family and private life grounds. His appeal was allowed by First-tier Tribunal Judge Feeney promulgated on 22 June 2017 ("the Decision").

3. The facts of the Appellant's case are as follows. He is a national of Bangladesh born on 22 July 1999. He was brought to the UK by his mother as a visitor in 2011. He claims that she then abandoned him here in the care of his uncles. The Respondent does not accept that the Appellant has lost contact with his mother or that she could not look after him if he were removed to Bangladesh. He is in any event now an adult (although he was still a child at the date of the appeal in the First-tier Tribunal).

4. The Judge found the evidence given by the Appellant's uncles to be unsatisfactory in large part. Nonetheless, she concluded that since the Appellant had arrived in the UK aged just eleven years and had built up a private life in the nearly six years that he had been here, his best interests favoured remaining in the UK. She concluded that the Respondent's decision to remove the Appellant was disproportionate.

5. The Respondent sought permission to appeal on a number of grounds. I will turn to the detail of those in the discussion below. Permission was granted by First-tier Tribunal Judge Ransley in the following terms, so far as follows (so far as relevant):-

> "…
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> 2. Ground (1) – the Judge found [at 45] that it is unlikely that the appellant was working in his uncle's restaurant as an employee on the basis that the appellant was attending school at the time. This finding is inconsistent with the Judge's having noted [at 31] that checks made by the Respondent with the local authority showed that the appellant was in fact working in the uncle's restaurant. It is also submitted that the Judge wrongly allowed the appellant's uncle to remain in the court room when the appellant gave evidence on this issue.
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> 3. Ground (2) – the Judge failed to give adequate reasons for finding that the appellant's mother who lives in Bangladesh would be unable to support and accommodate the appellant upon his return.
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> 4. Ground (3) – the Judge erred in his assessment of the considerations under section 117B of the 2002 Act: the Judge [at 66] wrongly balanced the appellant's ability to speak English [under s117B(2)] against his precarious immigration status [under s117B(5)], when the two factors are disjunctive.
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> 5. The Judge's decision has been shown to involve arguable errors of law that might have made a material difference to the outcome of the appeal. Permission is granted."

6. The appeal comes before me to determine whether there is a material error of law in the Decision and if so to either re-make the decision or remit to the First-tier Tribunal to do so.

**Discussion and conclusions**

7. The Respondent's grounds span ten paragraphs. I do not need to repeat them all because, as Ms Jones pointed out, some of them appear to recite the background facts or set out additional facts which do not appear to have been before the Judge and cannot be relevant to any error of law. Some recite the findings of the Judge without giving any indication of an error in those findings. Those paragraphs amount to a mere disagreement with the findings.

8. In light of the way in which Mr Wilding dealt with the grounds in his oral submissions, the salient paragraphs appear to be [6] and [10] of the grounds which read as follows:-

> "[6] The Judge having dismissed the appeal under the Rules [48] ventured into a proportionality assessment out with the Rules [49-52]. It is clear that the appellant is approaching adulthood. He has not been in the UK for seven years. He received education in UK at public expense, which was clearly engineered by the family as per judge's findings. His immigration status was clearly precarious. Furthermore he was working as per checks with the local authority when he had no permission to do so, irrespective of whether he was receiving appropriate or any remuneration for such work. Whether or not he was coerced into such work has not been explored (and could not reasonably be explored at the hearing as his uncles it appears were in the room when he gave evidence). He is clearly not financially independent.
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> …
>
> [10] Having concluded that the best interests of the appellant are to remain in the UK, assuming that his assessment was not flawed, the judge was obliged to factor this into the proportionality assessment taking into account s.117B factors inserted into the 2002 Act. The judge's consideration of this section with all due respect to him is perfunctory. At [66] the learned judge "balances" the appellant's precarious status with his ability to speak English. However these are separate, disjunctive factors to be considered and cannot be used to balance one another. Furthermore knowledge of English is at best a neutral factor. 117B(2) does not mean that knowledge of English Language should be treated a matter which can militate positively in the appellant's favour in the proportionality assessment. See *inter alia* Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803."

9. Mr Wilding's main submission based on the above was that the Judge's assessment is "two dimensional" and fails to factor into account properly or at all the public interest in permitting the Appellant to remain when his presence has been unlawful for most of his stay and particularly when he cannot meet the Immigration Rules in relation to his private and family life. Mr Wilding accepted however that the Judge was entitled to reach the view she did as to where the Appellant's best interests lay.

10. Ms Jones took me through the grounds in some detail. In light of my summary at [7] above, I do not need to repeat her submissions. She submitted that the Judge found the Appellant's best interests strongly favoured him remaining in the UK. As she pointed out, the case of <u>EV (Philippines) & others v Secretary of State for the Home Department</u> [2014] EWCA Civ 874, relied upon by the Respondent in her grounds does not militate against such a finding. That case permits consideration of how long a child has been in education in the UK and the stage reached. That is the approach taken by the Judge.

11. Ms Jones also pointed out that the Judge did not ignore factors adverse to the Appellant. Indeed, the Judge decided some issues against the Appellant and expressed herself dissatisfied with some of the evidence given for the Appellant, particularly that of his uncles. She found for example that the Appellant's family had contrived to bring him to the UK to have a better life ([42] of the Decision).

12. I turn then to the basis of the Decision. The Judge accepts that the Appellant has formed emotional ties with his uncle and family with whom he has lived (for the most part) since his arrival. She accepts that the Appellant has been in education in the UK even if he worked at his uncle's restaurant outside school hours. She notes the Appellant's evidence that he wishes to remain in the UK and finds that "[h]e has formed family and social ties here, as well as ties to the wider community which is evidenced through the many photographs I have seen. He has plans and aspirations for his future and these are firmly rooted to the United Kingdom."

13. The Judge accepts that the Appellant could not meet the Immigration Rules ([48] of the Decision). She correctly directs herself at [51] that she is required to consider whether removal would lead to unjustifiably harsh consequences for the Appellant such that it would be disproportionate. That is the exercise that she thereafter conducts from [52] onwards.

14. The starting point for the Judge's consideration is at [52] where she says this:-

> "...Although consideration is given to the length of time somebody has spent in the United Kingdom as a child, in this particular case I'm influenced by the stage at which Juber arrived in the United Kingdom. Juber was 11 years old and he has spent crucial years of his development in the United Kingdom. He has currently been here for in excess of six years and is approaching adulthood. The consequences of his removal to a country from which he has been absent for a consideration amount of time would result in unjustifiably harsh consequences for him. He would in effect abandon his education and the life he enjoys here. I consider that as a result of the circumstances a further consideration under article 8 is warranted."

15. As I have already noted, the Appellant was, at the date of the hearing and the Decision, just under eighteen years old and therefore his best interests had to be considered as he was still a child. That is a primary

consideration and the Judge deals with it as such. In so doing, she accepts that, based on her earlier finding about the relationship between the Appellant and his uncles, he enjoys both a private and family life in the UK.

16. Having reviewed the case law concerning best interests, the Judge proceeds to make findings about what those require. She there takes into account the unusual circumstances of this case in terms of the lack of relationship between the Appellant and his mother and his more developed relationship with his uncles. She also takes into account the Appellant's educational progress. She concludes that it would be in the Appellant's best interests to remain in the UK with his family here. As I have already noted, Mr Wilding accepted that this finding was open to the Judge on the evidence. That then is the cornerstone from which the Judge's consideration of Article 8 proceeds.

17. The Judge goes on at [61] to [63] of the Decision to set out the factors in favour of the Appellant as follows:-

> "[61]…I accept he has not been in the United Kingdom for 7 years but he has been here for over 6 years and I must look at the wider circumstances including his age on arrival. The fact that Juber has been here for several years and from such a crucial age is a weighty consideration in the balance of competing considerations. He has been fully integrated into British society. His personal identity has developed. He has formed friendships and social links. Juber has grown up in the United Kingdom. Whilst his primary focus in early years was upon his parents, given the length of time he has lived here, he has formed extensive ties with the wider community. I take into account the benefit of stability and continuity of Juber's social and educational provision. There was no evidence before me what educational provision might be made for Juber in Bangladesh and I accept that educational provision is available, however, I find the potential disruption of his studies at a time when he is about to complete his GCSE syllabus to be considerable and certainly not in his best interests. I find the upheaval would inevitably adversely affect his ability to settle into a new educational regime and adversely affect his ability to settle into a new educational regime and adversely affect his ability to learn. I find he is unlikely to be able to take up his education in Bangladesh where he left off in the United Kingdom.
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> [62] Juber might have initially come here on a visit visa with his parents. He was too young to understand and had no expectation of remaining, however, the passage of time and his integration into British Society has inevitably changed his circumstances and has given him certain expectations as to his future prospects for remaining in the United Kingdom. Although I do accept his uncles and mother bear responsibility for this.
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> [63] There is limited information as to how he would be expected to support himself in Bangladesh or whether he would have any home to return to at all. The evidence that his mother works as a domestic has been consistent and I am not satisfied that she would be able to accommodate Juber. Juber may make the best of a forced exit but I am

not satisfied taking into account **VW [2009] EWCA Civ 5** that it is reasonable to expect him to go."

18. The Judge then considers the other side of the equation namely the public interest. She properly directs herself at [64] to section 117 Nationality, Immigration and Asylum Act 2002. She correctly notes that the central focus of her assessment is the proportionality issue.

19. Her analysis of the public interest balance is then set out at [66] of the Decision onwards as follows:-

> "[66] I take into account the public policy reasons that attach to maintaining immigration control and in particular that the private life was acquired at a time when Juber's immigration was precarious, indeed he was an overstayer. I balance this against the fact that the appellant can speak English and has qualifications and prospects of employment (although I note these are neutral factors). I attach limited weight to the address given in the application form as Juber did not complete the form himself and in any event, I accept the explanation that he divides his time between the two addresses.
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> [67] I take into account my findings that Juber cannot satisfy the requirements of the Immigration Rules. I have taken into consideration, applying section 55 BCIA 2009, it would not be in Juber's best interests to return, even to live with his mother as a family unit, for the reasons given above. I weigh this, together with my earlier findings, against the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country.
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> [68] I take into account that I am entitled to factor into any assessment the impact removal has on those sharing a life with the appellant in terms of **Beoku-Betts v SSHD 2008] UKHL 39.** Juber's removal will no doubt have an impact on his uncles who have been responsible for his care.
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> [69] Looking at all the factors in the round I find that the respondent's decision is disproportionate. In reaching this decision I take into account my earlier findings. I take into account that the appellant's immigration status in the United Kingdom has always been precarious. However, I factor into that assessment that he is a minor and could not have simply taken himself back to Bangladesh. The appellant has enjoyed life in the United Kingdom as a child and now as he approaches adulthood he has made the United Kingdom his home such that is in his best interests to stay. I find this factor tips the balance in Juber's favour. As a consequence, I find that any interference would be disproportionate."

20. I accept that if the Judge balanced the Appellant's ability to speak English and maintain himself as positive factors against the other factors militating against the Appellant, she was wrong to do so. However, she expressly notes that these are neutral factors (and if she was making a finding that the Appellant is financially independent that is contrary to her earlier finding that he is not). However, reading that sentence in context, the Judge is there simply balancing the unlawfulness of the Appellant's stay against his integration and

educational success which were factors in his favour taken from the earlier passage.

21. Contrary to Mr Wilding's submissions, the Judge has expressly weighed in the equation that the Appellant is unable to meet the Rules. However, the Judge took into account (and was entitled to do so) her finding about where the Appellant's best interests lay. She accepted that there is a strong public interest in removing the Appellant. In her conclusion at [69] of the Decision, the Judge takes into account in short summary the factors for and against the Appellant and, balancing those, reaches the conclusion that the Appellant should not be removed.

22. On its facts, this is a finely balanced case and another Judge could undoubtedly have reached the opposite conclusion on the same findings and evidence. However, assessments of this nature are not an exact science. They inevitably involve a matter of personal assessment.

23. Provided the Judge took into account factors both for and against the Appellant and properly recognised her duty to take into account the strong public interest in removal, she cannot be said to have erred in her conclusion. For the reasons I have given, and based on an analysis of the salient passages in the Decision, I am satisfied that the Judge has properly conducted the balancing exercise. The Decision does not disclose any material error of law.

**DECISION**

**The First-tier Tribunal Decision did not involve the making of a material error on a point of law. I therefore uphold the First-tier Tribunal Decision of Judge Feeney promulgated on 22 June 2017.**

Signed Dated: 5 December 2017
Upper Tribunal Judge Smith