Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **HU/05945/2017**

THE IMMIGRATION ACTS

Heard At Field House	Decision and Reasons Promulgated
On 02.10.2018	On 09.10.2018

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Emad [A]
(anonymity direction not made)

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Patricia Glass* (counsel instructed by M-R)
For the respondent: Ms A Fijiwala

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Meryll Dean), sitting at Taylor House on 11 April, to allow an article 8 appeal by a citizen of Bangladesh, born 1987. The appellant arrived in 2010 on a student visa, valid till 2012, when it was renewed till 2015. However on 24 July 2014 his leave was 'curtailed', as he had used a proxy to take his English-language test when renewing it. The judge found this allegation proved, and there has been no appeal against that finding.

2. At the same time as the appellant's leave was curtailed, he was served with removal directions, which he challenged on judicial review; but on 21 August 2014 he withdrew that application, on which fresh removal directions were served. On 16 December he married [HB], a British citizen and, as his cousin, also of Bangladeshi origin. A second application for

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

judicial review was refused permission on 13 April 2015, and finally on 29 April he made a private and family life application.

3. On 13 January 2017 the Home Office eventually refused that application, both on suitability grounds (the proxy fraud), and on the basis that there were no 'insurmountable obstacles' to him and his wife continuing their family life in Bangladesh, or 'very significant obstacles' to his integrating there himself. Nor were the facts relied on considered to amount to exceptional circumstances justifying the grant of leave under article 8. That decision could not of course take account of the birth of the appellant and his wife's daughter on 2 November 2017.

4. The judge considered the proportionality of the decision under appeal at paragraphs 21 – 25. At paragraph 20 she had referred to s. 117B of the Nationality, Immigration and Asylum Act 2002, but she made her decision on proportionality without explicitly considering any of the relevant sub-sections. The judge did refer to the provisions of (2) (the appellant's English-language skills) and (3) (his ability to be financially independent); but she did not take account of *Rhuppiah* [2016] EWCA Civ 803, which makes it clear that satisfying these requirements can be no more than a neutral factor in the balancing exercise.

5. The relevant provisions of s. 117B in this case (apart from the general statement of the public interest in effective immigration control at (1)) are these:

> (4) Little weight should be given to—
> (a) ....
> (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.)
> ...
> (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.

6. There is no dispute that the appellant's wife is a qualifying partner, and their daughter is a qualifying child, as both are British citizens; or that he has a 'genuine and subsisting parental relationship' with his daughter. Nor could there be any dispute that the appellant had formed a marital relationship with his wife (though no doubt they knew each other as cousins) at a time when he was here unlawfully, which he had been, as both of them must have known, ever since his leave was curtailed and he was given removal directions on 24 August 2017. Even their unrecognized religious ceremony of marriage took place only in October 2014.

7. What the judge said about the appellant's marriage was this (see her paragraph 21):

> Although he was married at a time when he was awaiting the outcome of permission to bring a JR, I find that this does not detract from the considerable weight to be given to the Appellant's family life because it is clear from his

> immigration history that he has not just sat back and waited for matters to take their course, but has actively engaged in seeking legal outcomes to regularise his status … The passage of years was not the fault of the Appellant and during that time he met and married his wife.

8. The real position was this: the appellant had, as the judge accepted, brought about the curtailment of his leave in 2014 by his proxy fraud in 2012. He had not responded to the removal directions which came with it by applying to regularize his position, which he did not do till he made his private and family life application on 29 April 2015, only after he had withdrawn one application for judicial review, and had permission for another refused.

9. There may have been some culpable delay by the Home Office in considering the private and family life application when they got it; but the time till then was spent by the appellant in trying to resist his removal, without having done anything to regularize his situation. It follows that little weight was to be given to the appellant's relationship with his wife, and the judge would not have been justified in allowing the appeal on the basis of her findings on the point covered by s. 117B (4).

10. There was of course also the appellant's daughter, and s. 117B (6), to be considered. What the judge said on this subject was at 24:

> I accept that the Appellant did not meet the suitability requirement and as a result a question mark remains. Nevertheless, this has to be seen in the context of the best interests of his daughter, which … I find are clearly in this country. I find that the strength of the family life which has been created while the Appellant awaited the resolution of legal proceedings has to be given considerable weight. When taken in the round I find it would be unreasonable to tear the Appellant's wife away from her country of citizenship, her family and employment, while at the same time taking the child away from her country of citizenship and the opportunities that this will afford her as she grows up.

11. On the effect of s. 117B (6), Ms Fijiwala referred to *MA (Pakistan) & others* [2016] EWCA Civ 705. Clearly the daughter's best interests had to be a primary consideration, and here (see paragraph 53 of the judgment, citing *EV (Philippines) & others* [2014] EWCA Civ 874) "the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent".

12. As to whether it would be reasonable to expect the appellant's daughter to leave this country, the position is different. At paragraph 45 of *MA*, the Court of Appeal, with some reservations followed the approach taken to s. 117C (5) in *MM (Uganda) & another* [2016] EWCA Civ 450, in holding that wider public interest considerations must be taken into account when applying the reasonableness criterion in s. 117B (6).

13. While Ms Glass pointed to the judge's noting the appellant's failure to meet the suitability requirement, it cannot have been justifiable to describe it as doing no more than raise a question-mark. This was a serious point against him, and against the public interest in not only enforcing immigration control, but in deterring fraud used to get round it.

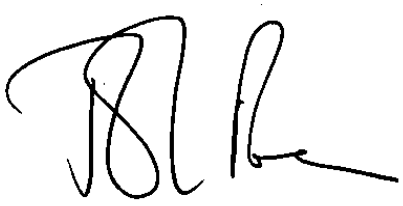
The mistake involved in the judge's reference to the appellant "awaiting the result of legal proceedings" has already been pointed out at **8 – 9**.

14. On the last sentence of the judge's 24, while she says she has considered the position 'in the round', there were two important things of which she did not take account. First, the appellant's wife was from Bangladesh herself, and did not come to this country till, at 19, she was already grown up; next, their daughter was less than six months old at the date of the hearing, and, British citizen or not, might reasonably be thought best off staying with her parents, wherever they went.

15. The judge was of course right in saying that the reasonableness question had to be considered in the round; but she did not do so, for the reasons I have given. That will have to be done properly, and the full consideration of the facts involved can best take place at a fresh hearing in the First-tier Tribunal. The judge's finding of proxy fraud has not been challenged, and will stand. The only fresh factor referred to by Ms Glass is one of which she accepted I could take no account in my error of law decision; but, depending on timing, it may become relevant on the fresh hearing, which should take place as soon as possible, to avoid any difficulties the appellant's wife might have in attending. This is the birth of another child, expected on 25 March 2019, according to a copy of an antenatal booking summary produced.

Home Office appeal allowed: first-tier decision set aside, apart from suitability finding

Fresh hearing in First-tier Tribunal at Taylor House, not before Judge Dean



(a judge of the Upper Tribunal)

Dated 03 October 2018