Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: **HU/17417/2016**
HU/17431/2016
HU/18827/2016
HU/18828/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 1 November 2018	**On: 28 November 2018**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

M H
N A
N H
L H
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellant: Mr J Gajjar of Counsel
For the respondent: Mr T Lindsay, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Bangladesh and are a family. They appealed to the First-tier Tribunal against the decision of the respondent dated 30 June 2016 to refuse to grant them leave to remain in the United Kingdom under paragraph 276ADE and Article 8 of the European Convention on Human Rights. First Tier Tribunal Judge Wyman dismissed the appellants' appeal in a decision dated 10 January 2018.

2. Permission to appeal was granted by Deputy Upper Tribunal Judge Norton Taylor on 1 January 2018 stating that it is arguable that the first appellant's immigration history was not adequately addressed. Furthermore, the Judge's Reasonable assessment under section 117B (6) of the 2002 Act is flawed. The Judge appears to have confused the consideration of paragraph 276 ADE (1) (iv) with that of section 11B (6). In this case the relevant child was not qualified as at the date of the human rights claim but had been in the United Kingdom for 8 ½ years as at the date of hearing. Further whilst the Judge states that "significant weight" had been attributed to the residence factor of the child, it was stated that the relevant residence was a matter only of "some weight". Finally, it is difficult to discern whether the Judge posed and then answered the core questions relating to the existence of "powerful reasons" which might have outweighed the significant factor of the 8 ½ years of residence.

First-tier Tribunal's findings

3. The Judge made the following findings in his decision which in summary are the following.

   I. The facts of the case are not in dispute. All the appellants are Bangladesh nationals. The first appellant came to the United Kingdom as a student in 2007. He was joined by his wife in 2008. He was subsequently granted further leave to remain until 2015, although this leave was curtailed until 2014. All three children were born in the United Kingdom. Only the eldest child, Iqra has had any leave to remain as she was granted leave in line with her parents. The younger two children have never been granted any leave to remain.

   II. It is accepted that the first appellant has a genuine and subsisting relationship with his wife as they married in 2007 and have been now married for approximately 10 years. They have three children of the marriage. However, the family would be returned together, as a family unit to Bangladesh, where the family are all nationals. The parents spent all their formative years in Bangladesh and had spent the majority of their lives in that country. The parents have their parents/ parent and siblings in Bangladesh. They have no family in this country.

III. The first appellant is a qualified lawyer from Bangladesh. Since he has come to the United Kingdom he has successfully qualified as a solicitor and is fluent in English. He explained that he wished to qualify as a barrister but has failed to do so. He also claims that he cannot return to Bangladesh and work without having a barrister's qualification. In his view, the general public in Bangladesh know the term advocate and barrister but do not know the term solicitor. The first appellant has provided no evidence of this whatsoever. Nor has he explained why he could not work for either a firm of solicitors or barristers in Bangladesh. It is also unclear why he did not qualify as a barrister given that he had leave to remain as a student for seven years. Instead he chose to qualify as a solicitor and only then did he seek to qualify as a barrister. If qualifying as a barrister was so important to him, it is surprisingly that he did not make every effort to qualify as a barrister prior to becoming a solicitor.

IV. The first appellant has not explained why there would be very significant obstacles for him to return to Bangladesh with his family. He has a large family in Bangladesh both on his side and on his wife's side. His wife studied as a lawyer in Bangladesh before coming to the United Kingdom, so she may have legal connections in Bangladesh of her own. Therefore, the parents do not the requirements of paragraph 276 ADE (vi) of the immigration rules.

V. The Judge then went on to consider the position of the three children. In respect of the eldest child, she was eight years old at the date of hearing. She was granted leave to remain for the past five years of her life until August 2014. The two youngest children have never had any period of leave. So far as the parents do not have any leave, the children cannot qualify for leave under the immigration rules.

VI. In respect of the eldest child, she meets paragraph 276 ADE (iv) as although she is under the age of 18, she has lived continuously in the United Kingdom for at least seven years. The question is whether it would be reasonable to expect her to leave the United Kingdom. Section 55 states that the best interests of the children are a primary concern in decision making. It was noted in ***Azami Moyed*** that seven years from the age of 4 is likely to be more important to the child then the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable. The eldest child has lived in the United Kingdom for more than seven years, but not for seven years from the age of 4. The other two children have not lived in the United Kingdom for seven years. The child has been in the United Kingdom for seven years, this is a factor of "some weight" which is not seen as an "automatic win".

VII. The first appellant's immigration status has always been precarious. As of 2014, the first appellant has had no leave and therefore has not been working. He has therefore been a burden of the state. Furthermore, his wife and children have used the services of the NHS, when they did not have leave, at a considerable cost to the public. The appellant said that they are integrated into the United Kingdom the letter from her friends provided and the second appellant confirmed that their friends are Bangladesh.

VIII. This is a case with the children will be returning with their parents country where both parents are very familiar with the Bengali way of life, culture and language and have lived in Bangladesh longer than they have in the United Kingdom. In contrast, the family have extensively used the NHS.

IX. The first appellant came to the United Kingdom as a student and his intention was that he would return to Bangladesh and his explanation that he will not be able to work in Bangladesh is not accepted.

X. It is acknowledged that the eldest child has lived in the United Kingdom for seven years, "I have given this matter significant weight in the proportionality exercise". "I do not find that this is a compelling reason to allow the children or their parents to remain in the United Kingdom". If the eldest child is 11 years old and lived here for seven years from the age of four, this would have been a more cogent reason. She would have at 11 starting secondary school. Therefore, the application to remain under the immigration rules is dismissed for the eldest child.

XI. In respect of Article 8, there are no exceptional circumstances in this case and they cannot succeed under article 8 when they cannot meet the requirements of the immigration rules.

XII. The Judge dismissed the appellants appeal under the Immigration Rules and under Article 8.

Grounds of appeal

4. As at the date of the first appellant's entry into the United Kingdom on 18 January 2015, he had valid leave to remain in the United Kingdom. Before the expiry of his last period of leave, it was curtailed on 14 November 2014. The first appellant submitted an application for further leave to remain on 17 January 2015 and included an application for a fee exemption made in accordance with the respondent's policy. On 17 April 2015 the respondent wrote to the appellant asking for further evidence in connection with the application for a waiver of the fee. The respondent replied stating that the fees

will not be waived and that his application therefore is not valid for non-payment of fees. The first appellant made a further application for fees to be waived which was also refused and his application it was considered invalid. On 10 December 2015, the first appellant and his family member submitted a further application for leave to remain on the basis of their private life and again made an application for a waiver of the application fees. This application was again rejected by the respondent on 10 December 2015. The first appellant submitted a pre-action protocol letter to the respondent for judicial review and the respondent accepted to waive the fees.

5. On 30 June 2016 the respondent issued a substantive decision refusing the appellants applications. Is important to note that whilst this appeal was pending, the first appellant acquired a period of 10 years of continuous residence in the United Kingdom.

6. It is therefore argued that the first appellant was entitled to indefinite leave to remain on the grounds of having established 10 years lawful residence in the United Kingdom because at all times he had 3C leave. All his applications for fee waiver should have considered as valid.

7. In the alternative and if the first appellant did not have continuous 3C leave, the Judge materially erred by failing to factor this apparent injustice in the assessment of the Article 8 rights of the first appellant and his family. The Judge misconceived the appellant's immigration history and considered the first appellant's overstay with undue harshness by not affording the due weight to the first appellant's compliance with the immigration rules for the majority of his stay in the United Kingdom.

8. The Judge failed to assess the appellant's and, in particular the eldest child having resided in the United Kingdom for the entire 8½ years of her life. The Judge had a duty to assess her best interests within the decision of the Upper Tribunal in **Kaur (children's best interests/public interest interface) [2017] UKUT 00014 (IAC)** it was stated that every case of this kind, the proportionality balancing exercise, the scales are evenly balanced that the best interests of an affected child feature in the balancing exercise**.** It is incumbent upon the court or Tribunal concerned to make an assessment of those interests.

9. The next ground was that is that the Judge dealt very briefly with article 8 outside the immigration rules concluding that the lack of exceptional circumstances dictated that the appeal should fail. The failure to properly assess Article 8 of the rules is a clear error of law.

10. The Judge's proportionality assessment of the eldest child who has resided in the United Kingdom for more than seven years was inconsistent with the decision in **MA Pakistan [2016] EWCA Civ 705** which stated that the child who has had seven years residence must be given significant weight. Furthermore, parental immigration conduct should not be a reason not to grant leave as the child's best interests should be assessed in isolation of their conduct.

11. The Judge also dead not identify the powerful reasons for why the eldest child should leave the country. The first appellant and his family other than receiving medical treatment have not been a burden on the taxpayer.

The hearing

12. I heard submissions from both parties at the hearing which I have considered. The appellant's counsel said that the Judge has made a wrong finding of fact that the first appellant was unlawfully in the United Kingdom. The first appellant had valid leave to remain as a student. He made several applications fee waiver which was not granted by the respondent until he wrote a pre-action protocol respondent who then finally agreed to waive the fees. The Judge also failed to make findings as to the best interests of the children in respect of s55. The Judge confused 276 ADE with 117B (6). There was nothing in the decision as to what the powerful reasons for the eldest child were to require her to leave the United Kingdom.

13. Miss Lindsey on behalf of the respondent stated that the appellant's leave was curtailed in 2014 after which he had no further leave to remain. The first appellant accepted in the skeleton argument that lawful residence was interrupted. There has been no challenge to the decisions of the respondent to refuse fee waiver. The Judge made a proper assessment under the immigration rules and Article 8. The Judge took into account the public interest when he stated that the appellant has used the NHS to which they were not entitled. The Judge considered that child private life is more relevant from the age of 4 to 11. The Judge gave a substantial degree of weight to the child's residence.

Decision on error of law

14. In considering this appeal I have taken into account the case of **R (Iran) v SSHD [2005] EWCA Civ 982**, where Brooke LJ summarised at [9] the errors on points of law that will most frequently be encountered in practice:

> "9. …
>
> (i) making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");

(ii) failing to give reasons or any adequate reasons for findings on material matters;

(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;

(iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;

(vii) making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

15. The First-tier Tribunal Judge in a careful decision considered all the evidence in the appeal and found that the appellants could return to Bangladesh and continue their private and family life in that country, as a family unit. What is the best of interests of a qualifying child has to be determined taking into account all the likely circumstances of the qualifying child if returned as a family unit to Bangladesh. The Judge hard to take into account all the factors relevant to the appellant's qualifying child's well-being if returned to Bangladesh.

16. The grounds of appeal essentially state that the Judge did not consider the best interests of the eldest qualifying child who has been in this country for over seven years because at the date of the hearing, she was eight years old. The two other children were under the age of seven and therefore not qualified children. Therefore, the case for the appellants claim for leave to remain rested on the best interests of the 8½ year-old child.

17. It was asserted that the Judge made a mistake of fact when he stated that the first appellant has been in this country unlawfully. The facts are that the first appellant's student leave was curtailed the 2014 and it was also accepted in the skeleton argument that his continued leave was interrupted. The first appellant made many applications for fee waiver which were refused by the respondent. The Judge in the decision sets out the first appellant's immigration history and there is no material error in this regard because he considered the best interests of the qualifying child independently to the First appellant's immigration history.

18. It is also clear from the case of **MA Pakistan [2016] EWCA Civ 705**, that the fact that there is a qualified child is a relevant consideration and one that might be said to point to it being in the child interest to remain in the United Kingdom, but it is equally clear that the assessment of reasonableness must take account of the conduct of the claimant and his wife. To make an adequate legally and factually finding, a proper assessment of the best interests of the child must be based on a careful consideration of the likely circumstances of the children, if returned as a unit to Bangladesh. Therefore, the Judge was entitled to take into account all the circumstances of this family and there was no material error because the qualifying child's best interests were carefully considered over and above all else.

19. The ultimate question in this appeal was whether it would be unreasonable for the family to leave the United Kingdom as a family unit taking into account the best interests of the qualifying child. The Judge also considered whether there were any insurmountable obstacles to the family relocating to Bangladesh.

20. To that end the Judge considered the fate of the qualified child if she were to be returned to Bangladesh with her parents and siblings. In order to answer that question, the Judge considered the earning capacity of her parents because this would inform the Judge of the qualifying child's well-being on her return to Bangladesh. The Judge that regard took into account that both parents are lawyers and the first appellant is a qualified solicitor in this country. The Judge was entitled to reject the evidence of the first appellant that as a solicitor he would not be able to find work in Bangladesh because the legal fraternity do not understand the concept of solicitors in Bangladesh. The Judge found that there was no evidence of this whatsoever and found that the appellant's parents would be able to find work and look after their children in Bangladesh.

21. The children's best interests are served with being provided with all the requirements for their growth, security, education and to be able to reach their full potential. There was no evidence before the Judge that the qualified child would not be able to achieve this in Bangladesh with their parents being qualified lawyers. The Judge found that these objectives can be accomplished because their parents are professional lawyers who will be able to earn and provide for their children.

22. The Judge further considered that forced the parents of the qualified child have family in Bangladesh and against that he considered that they have no family in the United Kingdom. The Judge considered that qualifying child had been brought up in the Bangladesh community in the United Kingdom and would be able to adjust especially given that her parents are qualified professionals. There was no perversity in this reasoning of the Judge.

23. The Judge did consider that the appellants have been a burden on the public purse because they received free treatment on the NHS. I do not accept that this was taken against the qualifying child or her best interests. The decision would inevitably have been the same on the facts of this appeal. I say this because it was not material to the issue that the First-tier Tribunal Judge had to decide. The issue for decision was whether requiring the appellant and his family's return to Bangladesh would be in breach of the immigration rules or Article 8 of the European Convention on Human Rights.

24. The First-tier Tribunal was entitled to find that all the first appellant and his family can return to Bangladesh and continue their family and private life in that country of which they are citizens.

25. It was alleged that the Judge confused the test in section 276 ADE and 117B. The test both under 276 ADE of the immigration rules and 117B are the same and the same enquiries have to be made. This is whether it would be reasonable for the child to return to the country of their nationality with their parents taking into account all her circumstances. By virtue of section 117D a "qualifying child" means a person who is under the age of 18 and who— (a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more. If a child is a qualifying child for the purposes of section 117B of the 2002 Act as amended, the issue will generally be whether it is not reasonable for that child to return.

26. Although **R (on the application of Osanwemwenze) v SSHD 2014 EWHC 1563** was not specifically concerned with section 117B it has some relevance in terms of the reasonableness of a child leaving the UK. In this case, the claimant's 14-year-old stepson from Nigeria had been in the United Kingdom for more than 7 years and had leave to remain in his own right. It was held that this was an important but not an overriding consideration and it was reasonable to expect the claimant's family including the stepson to relocate to Nigeria. The parents had experienced life there into adulthood and would be able to provide for the children and help them to reintegrate.

27. In **AM (S 117B) Malawi [2015] UKUT 260 (IAC)** the Tribunal held that when the question posed by s117B(6) is the same question posed in relation to children by paragraph 276ADE(1)(iv), it must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin; **EV (Philippines).** It is not however a question that needs to be posed and answered in relation to each child more than once.

28. In **R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705** it was held that when considering whether it was reasonable to remove a child from the UK under rule 276ADE(1)(iv) of the Immigration Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002, a court or tribunal should not simply focus on the child but should have regard to the wider public interest considerations, including the conduct and immigration history of the parents. It was also confirmed however that if section 117B(6) applies then "there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal." It was additionally held, however, that the fact that a child had been in the UK for seven years should be given significant weight in the proportionality exercise because of its relevant to determining the nature and strength of the child's best interests and as it established as a starting point that leave should be granted unless there were powerful reasons to the contrary. The Court of Session has approved and followed the approach taken in **MA (Pakistan)** in the case of **SA, SI, SI and TA v SSHD [2017] CSOH 117.**

29. In the recent case of **MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088** it was held that a very young child, who had not started school or who has only recently done so, will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part. On the particular facts of a child who had been in the UK for ten years from the age of 4, that her mother had abused the immigration laws by overstaying on a visit visa and then making a false asylum claim and at some stage using a false document to obtain employment was not such a bad immigration history as to constitute the kind of "powerful" reason that would render the child's removal to Nigeria reasonable.

30. The Judge took into account all the factors including the fact that the child's life from the ages of 4 to 11 are more significant than the first four years of her life. The qualifying child being at the age of eight, is not at a pivotal stage of her education and can adapt to life and the education system in Bangladesh. The Judge referred to the case of **Azmi Moyed and others [2013] UKUT** it was stated that the children's connections the United Kingdom become more important from ages of 4 to 11. The qualifying child was eight years old and therefore her ties to this country were still tenuous. There is no material error of law in the Judge's findings on the evidence.

31. The First-tier Tribunal Judge understood the evidence and found that the best interests of the qualifying child must inform his decision. There is no perversity in the findings made that the appellant and his family can return to Bangladesh and they can integrate into the culture and lifestyle of Bangladesh.

32. Having considered the decision of the First-tier Tribunal Judge, in the round, I am of the view that the First-tier Tribunal Judge did not fall into material error both in fact or in law. The appellants appeal is no more than a quarrel with the First-tier Tribunal Judge's findings which he was entitled to make on the evidence. I find that the differently constituted Tribunal would not come to a different decision on the facts of this case.

33. The upshot is that the decision of the First-tier Tribunal is not affected by a material error and I find that the First-tier Tribunal did conduct a proper assessment of all the appellants' and the qualifying child's rights pursuant to the Immigration Rules and Article 8. I uphold the decision dismissing the appellant's appeal.

Conclusions

34. I therefore find that the appellants appeals must fail pursuant to the Immigration Rules and Article 8 of the European Convention on Human Rights.

DECISION

The appellants appeals are dismissed

I make anonymity orders
The appeal has been dismissed and there can be no fee order

Signed by

A Deputy Judge of the Upper Tribunal
Mrs S Chana Dated 21st day of November 2018