



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

Appeal Numbers: HU/15570/2017  
HU/15574/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 11 July 2019**

**Decision & Reasons  
Promulgated  
On 30 July 2019**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**MISS M B (FIRST APPELLANT)  
MASTER A U (SECOND APPELLANT)  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

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

Respondent

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure  
(Upper Tribunal) Rules 2008**

**Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.**

**Representation:**

For the Appellants: Mr T Shah of Taj Solicitors

For the Respondent: Mr A Melvin, Home Office Presenting Officer

## **DECISION AND REASONS**

1. These are the approved record of the decision and written reasons which were given ex tempore at the end of the hearing on 11 July 2019.
2. This is an appeal by the appellants against the decision of First-tier Tribunal Judge J L Bristow (the FtT) promulgated on 25 March 2019, (the 'Decision') by which he dismissed their appeal against the respondent's refusal of their human rights claims. The respondent's decision in turn refused the appellants' application for leave to remain, based on a claim under article 8 of the European Convention on Human Rights ('ECHR')
3. In essence, the appellants' claim as minors, aged 16 and 14, who entered the United Kingdom ('UK') on 25 June 2014, on limited visas involved the following issues: whether the appellant's mother had genuinely abandoned them into the care of their aunt and uncle in the UK; and whether the aunt and uncle were no longer in contact with the appellants' mother, nor was the mother in contact with the appellants.
4. The FtT recorded the agreed issues in dispute at paragraphs [11] to [13] of the Decision limiting it to those central issues. It is worth briefly reciting what facts were agreed between the parties before the FtT. The agreed facts and issues were:-
  - (a) the appellants are both nationals of Bangladesh;
  - (b) the immigration histories are set out in the refusal letters;
  - (c) the appellants entered the UK on 25 June 2014;
  - (d) the first appellant was 12 years of age when she entered the UK;
  - (e) the second appellant was 9 years of age when he entered the UK;
  - (f) the appellants have lived continuously in the UK for four years and eight months;
  - (g) the appellants' father died on 18 June 2015;
  - (h) the appellants cannot succeed under Appendix FM to the Immigration Rules;
  - (i) the appellants cannot succeed under paragraph 276ADE of the Immigration Rules;
  - (j) the appellants' appeal is based on article 8 outside the Rules;
  - (k) if the FtT were to find it proved that the appellants' mother had abandoned them and that she has not been in contact with their aunt or them since she did so then the appellants would have an 'overwhelming' or 'exceptional' claim outside the Rules and the FtT would allow the appeal; and
  - (l) if the FtT were not to find it proved that the appellants' mother had abandoned them and that she had been in contact with the aunt and them, then the appellants would not have the overwhelming or

exceptional claim outside the Rules and the FtT would dismiss the appeal.

5. Paragraph [13] of the Decision records the sole remaining issue in dispute, namely whether the appellants' mother had abandoned them and had not contact with their aunt or them since she did so.

### **The FtT's Decision**

6. The FtT made a detailed analysis of the evidence running from paragraphs [16] to [23] of the Decision, together with a proportionality assessment from paragraphs [24] to [39], including a balance sheet assessment on proportionality. The FtT was not impressed by various aspects of the evidence, finding that the appellants' mother was in fact in contact with both the aunt and the appellants and that their claimed desertion had been fabricated and that the Family Court's award of a special guardianship to the aunt had been based on an account fabricated by the appellants' family.
7. Having considered the evidence as a whole, the FtT carried out a proportionality exercise, referring itself to the well-known authorities of **Hesham Ali v SSHD [2016] UKSC 60** and **R (Razgar) v SSHD [2004] HL 27** as well as section 117B of the Nationality, Immigration and Asylum Act 2002 and concluded that on balance, refusal was both proportionate and that it was in the best interests of the appellants to be reunited with their mother in Bangladesh.

### **The Grounds of Appeal and Grant of Permission**

8. The appellants' grounds of appeal are essentially that unsuccessful attempts had been made to trace the appellants' mother and too much weight had been placed by the FtT on the lack of credibility of the appellants' aunt leading to an incorrect evaluation of the appellants' best interests. The FtT had also applied too high a test in considering the proportionality of the refusal on 'exceptionality' grounds when the appellants were minors; and the FtT had failed to consider the impact of the appellants' removal on their aunt and uncle.
9. First-tier Tribunal Judge Simpson granted permission on 3 June 2019. She regarded it as arguable that the FtT had placed insufficient weight on the special guardianship order and the social worker's report, together with the critical stage at which the children were in their education. The grant of permission was not limited in its scope.
10. In the hearing before me the appellants' representative accepted that the conclusions around the aunt fabricating the account of estrangement were well-reasoned and there was no challenge to that finding of fabrication. Nevertheless, it remained in the best interests of the appellants that they stay with their aunt and uncle in the UK. There was no evidence that the appellants' mother was able and willing to receive them in Bangladesh.

The aunt to her credit had taken them to social services when they had been left in her charge in the UK and there had been a detailed assessment and involvement resulting in special guardianship. I should consider the analogous principles of **KO (Nigeria) and Others v SSHD [2018] UKSC 53** and consideration of the reasonableness of their return needed to be done without considering the blameworthy conduct of any of their adult carers or mother. Indeed, the FtT itself reminded itself that the children had not been to blame.

11. I should also consider that the appellants were now in full-time education at a crucial stage of their studies and the well-known authority of **EV Philippines & Others v SSHD [2014] EWCA Civ 874** had given guidelines as to reasonableness of their return. The assessment conducted by social services as well as correspondence to which I was referred at page [90] of the appellants' bundle provided a detailed and professional assessment. These assessments had been given no weight when in fact they should have been given some weight by the FtT and that was an error. It was also suggested that whilst the aunt's involvement in fabricating the account of estrangement was not challenged, nevertheless there was no indication that social services had been able to trace the appellants' mother.
12. In response Mr Melvin relied on the Rule 24 response which I do not recite in detail but in essence the gist of which was that the FtT had considered carefully the evidence including that of the social worker, the Family Court documents and education documents and had given lengthy and considered conclusions for the finding that it remained in the appellants' best interests, and indeed it was proportionate that their application for leave to remain be refused. They were non-qualifying and so whilst there had been a delay so that they had been in the UK now for four years, nevertheless the Decision had been adequately reasoned and the grounds disclosed no error of law. The FtT had been entitled to conclude that the children could reasonably be expected to return to Bangladesh with their mother.
13. In terms of the law I considered section 117B of the 2002 Act which I do not recite in detail as well as the authorities to which I have already been referred. I also consider the authority of **KO**, although not strictly binding because the appellants are not qualifying children.

### **Decision on the Error of Law**

14. I conclude that there are no errors of law in the Decision. My reasons for this conclusion are as follows.
15. As already noted, the FtT had narrowed down the agreed issues substantially so that the central issue in this case was the question of the fabrication of estrangement between the appellants; their aunt; and their mother. Whilst Judge Simpson had given permission on the basis of an arguable error of law of insufficient weight on the special guardianship

order and the social worker's report, it is noteworthy that in the Decision not only did the FtT consider and refer themselves to the case law at paragraphs [26] to [33], including a balance sheet approach endorsed by **Hesham Ali** at paragraph [32], but indeed carried out that balance sheet approach at paragraphs [36] to [39].

16. It has been suggested in the grounds that the FtT erred in failing to consider the appellants' best interests as minors separate from any blameworthy conduct of either their aunt or their mother. However, that is not an error into which on any view the FtT fell. Indeed, at paragraph [36] the FtT records:-

"I make it clear here that I do not consider that the behaviour of [the aunt] or the Appellants' mother adds any weight to the public interest. The Appellants are not to blame for that behaviour. For the avoidance of doubt, I do also not consider that the behaviour of [the aunt] or the Appellants' mother subtracts any weight from the Appellants' Article 8 claims either."

17. The FtT then continued by noting the critical period in which they were in their education at paragraph [37]. Indeed the FtT noted that it would be in their best interests that their education, their present living arrangements and their relationship with their aunt and uncle is not disrupted at this stage. In what I regard is a careful analysis the FtT nevertheless considered at paragraph [38] that their longer relationship was with their mother, and whilst the present immigration situation of the appellants was disrupting this feature of their best interests, it had not been easy to decide which disruption should take precedence, but ultimately the FtT decided that the factor which should take precedence was that they should live with their mother as their surviving parent. In doing so the FtT considered the special guardianship order.
18. I accept the submission that the FtT had plainly considered carefully the social services as well as correspondence at page [90] of the appellants' bundle, referred to at paragraph [20] of the Decision, as well as attempts to trace the appellants' mother. Indeed, at paragraph [21] the writer of the report and the local authority have been dependent on the account of information provided to them by the appellant's aunt to provide an opinion on the location of the appellants' mother and to facilitate searches for her. In essence, the difficulties that the local authorities will have had in tracing the appellants' mother must have been caused substantially because of the aunt's reluctance in disclosing that she was in fact in contact with the mother. It follows that she is likely to know perfectly well where the mother is and to be in a position to make appropriate arrangements in assisting social services with the reception of the appellant's children. This was not an error that the FtT fell into in when considering the article 8 assessment.

### **Notice of Decision**

19. In conclusion, there are no errors of law in the Decision. The FtT was entitled to reach the conclusions he did, following a careful proportionality assessment on the evidence before him. The appeals fails and dismissed and the Decision is upheld.

Signed

**J Keith**

Upper Tribunal Judge Keith

Date

26 July 2019

**TO THE RESPONDENT**  
**FEE AWARD**

The appeal is dismissed and therefore there can be no fee award.

Signed

Date

26 July 2019

**J Keith**

Upper Tribunal Judge Keith