



IACTH-WYL-V2

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

Appeal Numbers: IA/01613/2015
IA/01618/2015
IA/01619/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 26 February 2016**

**Decision & Reasons Promulgated
On 24 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

**MRS JOMILA AKTHER
MR MOHAMMAD SAYEDUR RAHMAN
[T R]
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Mustafa of Kalam Solicitors

For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Bangladesh. Jomila Akther and Mohammad Sayedur Rahman are husband and wife born respectively on 15 April 1970 and 8 April 1973. [TR], their daughter was born [] 2010.

2. The appellants appealed against the respondent's decisions to remove them from the United Kingdom, dated 18 December 2014. The respondent's reasons for refusal are set out in a letter dated 16 December 2014.
3. Judge Sullivan (the judge) dismissed the appeals because she found that the appellants were not credible regarding events in Bangladesh, they could not satisfy the Immigration Rules and that the decision was proportionate in terms of Article 8, bearing in mind the public interest.
4. The grounds claim the judge materially erred in failing to have regard to the delay in the respondent's decision making and further, failed to apply or properly apply the guidance in **EB (Kosovo) [2008] UKHL 41**. In particular:
 - (a) Private life ties and expectations to remain here must have strengthened over time.
 - (b) The significant delay was such that it detracted from "*effective immigration control*" under Article 8(2).
 - (c) The judge failed to have regard to the fact that whilst the application was pending, "*..... the third child was born and is in fact at school at present*". I take it that is an error and refers to [TR]. The grounds claim that was a material development which the judge should have taken into account.
5. As regards [TR], there were issues which the judge should have considered and failed in that regard. In particular, with regard to Article 8 outside the Rules. See [29] **SS (Congo) [2015] EWCA Civ 387** and [35] of **EV (Philippines) [2014] EWCA Civ 874**.
6. Judge Hollingworth granted permission to appeal. He considered it was arguable that the judge erred both with regard to the failure to consider the delay and the application of Section 55 and the implications for [TR] on return.
7. There was no Rule 24 response.

Submissions on Error of Law

8. Mr Mustafa relied upon the grounds. The delay of four years eleven months was such that there was an expectation on the part of the appellants that they would not be removed. Further, the delay reduced the weight to be addressed to the public interest. There was a conflict between **EB (Kosovo)** and s.117B(4) which the judge had failed to resolve. My attention was drawn to the respondent's guidance "*Chapters 46 to 62: Detention and removals*". It was first published on 11 December 2013 and updated on 17 December 2015. In particular, chapter 53 which considers exceptional circumstances.

9. Mr Mustafa additionally relied upon **Forman (ss.117A-C considerations) [2015] UKUT 00412 (IAC)**. Mr Mustafa submitted that **Forman** was authority for the proposition that additional considerations can be taken into account. Delay should be weighed against s.117B(4).
10. Mr Whitwell submitted that the delay was irrelevant. As regards [TR], she could not satisfy the seven year period as of the date of the application under paragraph 276ADE. As regards Article 8, the assessment was as of the date of the hearing. There was no conflict between **EB (Kosovo)** and s.117B(4). See in that regard **AM (s.117B) Malawi [2015] UKUT 0260 (IAC)**.

Conclusion on Error of Law

11. No issue was taken regarding the judge's adverse credibility findings which stand.
12. There was no issue that the appellants were never able to satisfy the Rules. The first and second appellants came here as visitors. After exhausting appeal rights they absconded, subsequently lodging an application for leave to remain on human rights grounds, the subject of the appeals before the judge.
13. There was a delay on the part of the respondent in considering the application but the grounds fail to explain how it was in the appellants' particular circumstances that the respondent's guidance assisted them. See [19] below. The judge took account of the delay and the arguments put forward on the appellants' behalf including the birth of [TR] and her life here at [33] - [35] of the decision.
14. I find the delay was irrelevant. [TR] could not satisfy the Rules. There was no evidence before the judge nor any claim before me that the appellants had been disadvantaged by the delay in the respondent dealing with the application save for the claim before the judge that they could not obtain work permits and the submission made by Mr Mustafa to me that the delay gave rise to an expectation that they would not be removed; in my view, there was nothing to suggest such an expectation.
15. **Forman** was authority for the proposition that the list of considerations in s.117B is not exhaustive. I do not accept that there was any conflict between **EB** and s.117B(4).
16. The judge carried out a careful and comprehensive assessment of the appellants' circumstances. Whilst she did not refer to **AM** or **Forman** in terms, both were of significance in terms of the appellants' lack of status here and whether it was reasonable given the family circumstances to expect [TR] to return to Bangladesh with her parents. The judge took those circumstances into account at [74] - [76] of the decision. Other factors were that the family were not financially independent and the private life established here both with regard to the time subsequent to

absconding, before they made the application for leave and then the period of delay before the respondent dealt with the application, were built up at a time when the first and second appellants were here without leave. The judge took into account that [TR] had no responsibility for decisions taken for her by her parents.

17. Whilst the judge did not in terms refer to **EV (Philippines) [2014] EWCA Civ 874**, or to s.55, she made a careful analysis of all of the relevant issues and concluded that as the family would be returning with [TR], which was in her best interests, the respondent's decision was proportionate.
18. Arguably, in terms of **SS (Congo) [2015] EWCA Civ 387** the judge did not need to go outside the Immigration Rules in order to reach her decision, however, she gave the appellants the benefit of the doubt in that regard and having found that they failed to meet the requirements of the Rules and having considered the factors relevant under s.117B she went on to consider the "gap issues" outside the Rules identified in **Sunasee [2015] EWHC 1604 (Admin)**.
19. Whilst the judge did not say so, it was clear from what she had to say regarding the appellants' circumstances that she did not consider them to be exceptional in terms of the guidance, such that the delay needed to be factored into her decision. If she had considered the guidance then the fact that the appellants' had absconded would have been adversely significant.
20. I do accept that to the extent that the judge did not factor in the delay on the part of the respondent in terms of the respondent's guidance, the judge erred. Nevertheless, I do not accept that the error was material bearing in mind the other findings made by the judge in her decision and what I have said above in that regard.

Notice of Decision

The decision of the First-tier Tribunal establishes no material error of law and shall stand.

Signed

Date: 10 March 2016

Deputy Upper Tribunal Judge Peart