IAC-HW-AM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/36847/2014
IA/36854/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 January 2016	**On 15 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD. NURUL HAQUE
MUNAYEM HAQUE
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr P Nath of the Specialist Appeals Team
For the Respondents: Ms A Radford of Counsel instructed by Waterstone Solicitors

DECISION AND REASONS

The Respondents

1. The Respondents are father born on 8 October 1952 and son born on 12 September 1994. The father is married to Rezia Akther born on 15 October 1959. They have two sons, the second named Respondent and

Murshed Haque born on 12 September 1996. They are all citizens of Bangladesh. The appeals of Rezia and Murshed have been found to be invalid because there is no relevant immigration decision against which there is any in-country right of appeal and the appeals were lodged while they were in the country.

2. On 9 February 2014 the father arrived with entry clearance as a visitor. Out of time on 24 October 2005 he applied for leave to remain outside the Immigration Rules which on 7 October 2009 the Appellant (the SSHD) refused. He did not appeal that decision and on 24 December 2013 he made a further application for leave to remain on the basis of his private and family life in the United Kingdom. His wife and two children made similar applications as his dependants. The second named Respondent at the date of the application was an adult and a separate decision was made because he could no longer be classed as a dependant.

3. It appears that on 4 September 2014 the SSHD refused each of the applications and considered that the wife and younger child did not have a right of in-country appeal but that the two named Respondents did have such a right.

4. On 18 September 2014 each of the four applicants lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). By decisions promulgated on 6 November 2014 Judge of the First-tier Tribunal North ruled that the appeals of the mother and younger child were not valid.

The Decisions under Appeal

5. By letters of 2 September 2014 addressed to the applicants' solicitors the SSHD gave reasons for the decision to refuse further leave. In the case of the elder child the SSHD noted his immigration history and that he had not been resident for any of the relevant minimum periods of time referred to in paragraph 276ADE(1) of the Immigration Rules and had not shown there were very significant obstacles to his re-integration into Bangladesh. Consequently, he did not meet the requirements of paragraph 276ADE(1)(vi). The SSHD noted the elder child had been in the United Kingdom since 2006 and that during much of that time he had in fact been a dependant of his father. The SSHD considered there were no circumstances justifying a separate consideration of the elder child's claim by way of reference to Article 8 of the European Convention outside the Immigration Rules and that he had since his leave to enter as a visitor expired on 2 May 2007, like his parents overstayed without leave.

6. The reasons letter addressed to the father also identified the mother and younger son as dependants. The father failed to meet the requirements relating to eligibility as a partner contained in Section E-LTRP of Appendix FM of the Immigration Rules because the mother was a Bangladeshi national who had had no valid leave to remain in the United Kingdom since expiry of her leave to enter as a visitor in 2006.

7. He also did not meet the requirements of Section E-LTRPT of Appendix FM for eligibility as a parent because he did not have sole responsibility for any child and although the younger son might live with him the household comprised both the father and mother and neither parent was British or settled in the United Kingdom.

8. The SSHD went on to consider Section EX.1 of Appendix FM and noted the father had no other family in the United Kingdom with whom he had established family life.

9. The father did not satisfy the minimum residence requirements of paragraph 276ADE(1) and could not succeed under paragraph 276ADE(1)(vi) because there were no obstacles to his return to Bangladesh with his family. The claim was also refused under paragraphs 276CE and 400 of the Immigration Rules.

10. The SSHD went on to consider the father's claim outside the Immigration Rules. It was noted that although the younger child had been living in the United Kingdom for seven years he could return to Bangladesh with both his parents and the father had three brothers in Bangladesh and had given no reason to think they would not be able to assist him and his family to re-integrate there.

11. Additionally, reference was made to the father's statement of 22 October 2005 signed after his visit visa had expired on 9 August 2004 stating:-

> "I became acquainted with someone who mentioned job opportunity in the UK. I have taken many different jobs from working in farms to shopkeeper, these help me to save the money I needed to get away and I was finally given the opportunity to escape from Bangladesh. Finally I arranged all the paperwork to face interview at the British High Commission, Dhaka as a visitor and I got the visit visa."

Further, the SSHD stated that in his application of 24 December 2013 the father had failed to mention the younger son. The SSHD referred to the circumstances in which the mother had obtained entry clearance stating at paragraph 48 of the reasons letter that she had:-

> "... claimed to need a visit visa to care for a relative who was pregnant. This originally was refused but was allowed on appeal. However evidence submitted when (she) applied for entry clearance including a non-settlement form ... signed 27 December 2005 ... clearly states your client's name and date of birth and states he is in Bangladesh. Further to this, in the interview conducted on 29 December 2005 with regard to questions 21 and 22: "(21) Where is your husband? At home; (22) Why is he not travelling? He's busy with his business". Evidence however shows your client was present in the UK."

12. The grounds of appeal are generic: see by way of illustration the manuscript insertion at paragraph 18. Many of the grounds read more like a skeleton argument or submissions than grounds of appeal.

First-tier Tribunal Proceedings

13. By a decision promulgated on 1 July 2015 Judge of the First-tier Tribunal M Symes allowed the appeals of the father and elder son on human rights grounds. At paragraph 41 the Judge found the father and mother had each "arrived in this country with a deliberate intention not to return to Pakistan". He referred to "very significant delays in progressing their cases notwithstanding documented efforts by the family and their representatives to pursue the matter: the (SSHD) has permitted the family life to flourish for some years". He noted the younger son had been in the United Kingdom throughout his teenage years and concluded that his removal would be unreasonable. At paragraph 59 he found:-

> "There is a relatively light burden on the family to demonstrate that their removal would interfere with their private life: given the marked difference between their circumstances in this country, where the sons are established in a progression from education leading to careers, I accept there is a significant interference."

The Judge then set out Section 117B of the 2002 Act and at paragraph 61 addressed s.117B(6) which provides that the public interest does not require a person's removal where he has a parental relationship with a child who has lived in the United Kingdom for a continuous period of seven years or more and it would be unreasonable to expect the child to leave.

14. The SSHD sought permission to appeal on the basis that the Judge had mis-directed himself in his consideration of the Respondents' claim. On 18 September 2015 Judge of the First-tier Tribunal J M Holmes granted the SSHD permission to appeal on the basis that it was arguable the decision contained an error of law because the Judge had assumed the mother or the younger son or both either had immigration status when they did not or that they would somehow and in some unspecified way acquire it. Further, it was arguable the Judge had failed properly to apply the principles set out in *EV (Philippines) v SSHD [2014] EWCA Civ.874* and had failed to follow the guidance on the treatment of the factors identified in Section 117B identified in *AN (s.117B) Malawi [2015] UKUT 260*.

The Upper Tribunal Hearing

15. The Respondents together with the mother and the younger son attended. There was an interpreter present for the father. Ms Radford confirmed the elder son had good English. I explained the purpose of and the procedure to be adopted at the hearing.

SSHD's submissions

16. Mr Nath referred to the submissions before the First-tier Tribunal that the father and mother had blatantly disregarded immigration control. Although the SSHD for the hearing had no evidence of the refusal decision in 2009, the parents had overstayed and "lied". They had obtained their sons' education at public expense and had no history of working or paying taxes. They were close knit with the local mosque community but there were no exceptional circumstances. Their sons were not a trump card and the family's presence had always been precarious. He also relied on the grounds of the application for permission to appeal. He made no further submissions on the first two grounds that the younger son had no valid appeal and therefore could not be a substantial or material reason for allowing the appeals of the father and the elder son.

17. The second ground challenged the Judge's conclusion that the public interest did not require the removal of the elder son.

18. The third ground complained of the Judge's treatment of any alleged delay. The Judge had erred in treating any alleged delay as a means of penalising the SSHD and he referred to paragraphs 27, 48 and 57 of the decision.

19. Fourth, the Judge had given inappropriate weight to the educational prospects of the younger son. The European Convention did not give a right to secondary education which in any event the younger son was close to or had completed. It had to be remembered that he was not a party to the appeal and the Judge had misdirected himself at paragraphs 51 following in respect of the jurisprudence in *EV (Philippines)*.

20. Finally, the SSHD considered the Respondents had no legitimate expectation that they would be permitted to remain in the United Kingdom and they would be able to re-establish their private and family life in Bangladesh. Ms Radford interjected to confirm that the Respondents were not pursuing the question whether they had any legitimate expectation of remaining in the United Kingdom.

Submissions for the Applicants

21. Ms Radford noted the father had made an application for further leave outside the Rules on 24 October 2005 some fourteen and a half months after his visa as a visitor had expired on 9 August 2004. He had originally come as a visitor to care for his mother and his application had been granted following an appeal.

22. She then referred to the correspondence and the Pre-Action Protocol letter of 12 March 2014 sent by the Respondents' solicitors. The SSHD had originally declined to issue a removal decision. Eventually the SSHD did issue removal directions for each of the applicants which were the decisions giving rise to the Respondents' present appeals.

23. She submitted that that when Judge North decided the appeals lodged in-country by the mother and younger son were not valid he was not aware they were linked to the Respondents' appeals.

24. The Judge had rightly taken into account at paragraph 38 of his decision the circumstances of the mother and younger son in the light of the learning in *Beoku-Betts v SSHD [2008] UKHL 39*. At paragraph 44 he had dismissed the claims by reference to paragraph 276ADE(1)(vi) [insurmountable obstacles on return]. At paragraph 45 of his decision he had commenced his consideration of the claims under Article 8 of the European Convention outside the Immigration Rules. At paragraph 48 he had addressed the issue of delay and the jurisprudence in *EB (Kosovo) v SSHD [2008] UKHL 41* and had quoted from paragraph 15 of the judgment. There had been a delay of some ten years which Ms Radford described as "outrageous". The Judge had taken this into account in assessing the situation of the younger son at paragraphs 49-54 of his decision.

25. In assessing the public interest, the Judge's consideration of the weight to be given to the public interest was not irrational. He had taken into account the immigration histories of the father and mother at paragraph 56 and his conclusions at paragraph 57 were not irrational. At paragraph 58 he had conducted a balancing exercising in respect of which nothing relevant had been omitted and nothing improper taken into account. There was nothing to support the submission that the SSHD had been penalised.

26. The Judge had allowed the appeal because the younger son in fact met the requirements of the Immigration Rules and his private life could not be pursued if he remained in the United Kingdom and the rest of the family had to leave. Consequently they should all stay. At no point had the Judge assumed the mother and younger son had or would have leave to remain. Indeed the Judge had not addressed the splitting of the family. He had referred only to the disruption which would be caused to the younger son's private and family life if he had to relocate to Bangladesh.

27. Ms Radford referred to the recent decision in *Treebhawon and others (s.117B(6)) [2015] UKUT 00674 (IAC)* and without citing any specific paragraphs submitted the public interest was in keeping the family of the applicants together as a unit. It was inconceivable an experienced Judge would not have kept in mind the public interest as identified by Article 8(2) of the European Convention or the duty to have regard to the welfare of children imposed by Section 55 of the borders, Citizenship and Immigration Act 2009.

28. The Judge's treatment of the factors identified in s.117B of the 2002 Act was in accordance with the guidance given in *Dube (ss.117A-117D) [2015] UKUT 00090 (IAC)*. The test set out in s.117B(6) was the same as the relevant test at paragraph 276ADE(1)(vi) in the case of a child. The decision should be upheld.

Further Submissions for the SSHD

29. Mr Nath submitted the Judge's treatment of the nature of the public interest at paragraph 61 of his determination was problematic. The decision as a whole was fragmented. The Judge's decision rested to a substantial extent on the fact that during the time the younger son had been in the United Kingdom some of which might be attributable to the alleged delay he had been educated and it would be difficult for him to re-integrate into life in Bangladesh. The fact was that the benefit of a British education would be an advantage to him on return. The Judge had failed expressly to consider whether the father and mother could return to Bangladesh. The decision contained errors of law and should be set aside.

30. Ms Radford added that the Judge had given no weight to the private lives of any of the family except the younger son.

Consideration

31. At paragraph 44 of the Judge's decision he dismissed the claim by way of reference to paragraph 276ADE(1)(vi). At paragraph 46 he considered the claim outside the Immigration Rules although there appears to be some confusion because the Judge referred at paragraph 46 again to paragraph 276ADE of the Immigration Rules. At paragraphs 51 and 52 the Judge cited *EV (Philippines)* and "the factors identified at paragraph 35 of *EV (Philippines)* to be taken into account in assessing the best interests of the child. However, the Judge omitted specifically to consider what the Court of Appeal said at paragraphs 36-38 of its judgment:-

> "36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.
>
> 37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.
>
> 38. The need to carry out this sort of assessment is considered in the judgment of the Upper Tribunal in *MK India (Best interests of the child)* [2011] UKUT 00475 (IAC):

> 23. *There is in our view a fourth point of principle that can be inferred from the Supreme Court's judgments in ZH (Tanzania). As the use by Baroness Hale and Lord Hope of the adjective "overall" makes clear, the consideration of the best interests of the child involves a weighing up of various factors. Although the conclusion of the best interests of the child consideration must of course provide a yes or no answer to the question, "Is it in the best interests of the child for the child and/or the parent(s) facing expulsion/deportation to remain in the United Kingdom?", the assessment cannot be reduced to that. Key features of the best interests of the child consideration and its overall balancing of factors, especially those which count for and against an expulsion decision, must be kept in mind when turning to the wider proportionality assessment of whether or not the factors relating to the importance of maintaining immigration control etc. cumulatively reinforce or outweigh the best interests of the child, depending on what they have been found to be.*
>
> *24. The need to keep in mind the "overall" factors making up the best interests of the child consideration must not be downplayed. Failure to do so may give rise to an error of law although, as AJ (India) makes clear, what matters is not so much the form of the inquiry but rather whether there has been substantive consideration of the best interests of the child. The consideration must always be fact-sensitive and depending on its workings-out will affect the Article 8(2) proportionality assessment in different ways. If, for example, all the factors weighed in the best interests of the child consideration point overwhelmingly in favour of the child and/or relevant parent(s) remaining in the UK, that is very likely to mean that only very strong countervailing factors can outweigh it. If, at the other extreme, all the factors of relevance to the best interests of the child consideration (save for the child's and/or parent(s) own claim that they want to remain) point overwhelmingly to the child's interests being best served by him returning with his parent(s) to his country of origin (or to one of his parents being expelled leaving him to remain living here), then very little by way of countervailing considerations to do with immigration control etc. may be necessary in order for the conclusion to be drawn that the decision appealed against was and is proportionate."*

32. Of particular note is that the Court of Appeal approved *MK* in which the Tribunal made it clear that in appropriate circumstances the assessment might be properly based on deciding whether the child's parent or parents can be returned and the interests of the child *then* taken into account and

due weight given to the child's interests in continuing to be part of the family unit.

33. The Judge did not have before him the appeal of the younger son. I accept his interests may well be a relevant factor in the light of *Beoku-Betts* but the Judge erred in his approach in his decision by first forming a view whether it was proportionate for the younger son to return with them *before* deciding whether it was appropriate for the father and the mother to return to Bangladesh without sufficiently explaining the approach he took in the light of what the Tribunal had said at paragraph 24 of *MK.* This is an error of law.

34. The younger son came to the United Kingdom on 18 November 2006: see page 243 of the Appellants' bundle filed on 21 May 2015. This was seven years before the date of the application leading to the decisions under appeal as correctly noted by the Judge at paragraph 33 of his decision and being the relevant period: see paragraph 8 of the decision in *Treebhawan* which was promulgated more than five months after the Judge's decision was promulgated.

35. At paragraph 61 of the Judge's decision he addressed s.117B(6) of the 2002 Act. He stated that:-

> "... in relation to the direct statement of the public interest at s.117B(6), which makes it perfectly clear that the public interest does not require the removal of a parent where they have a genuine and subsisting parental relationship with a qualifying child, as I accept that (the father) has with his son, given my findings above."

However, the Judge had already rejected the claim under paragraph 276ADE(1)(vi) [insurmountable obstacles] but failed to explain why having reached that conclusion, it would not be reasonable to expect the younger son despite being a qualifying child to leave the United Kingdom being a factor to be taken into account in s. 117B(6)(b). This is an error of law.

36. For these reasons, I conclude the decision of the First-tier Tribunal contains errors of law such that it should be set aside. Given that at any future hearing, the issue of the reasonableness will depend on the particular facts: see paragraphs 35-38 of *EV (Philippines)* I do not consider it appropriate to direct that any findings of fact be preserved.

37. Having regard to s.12(2)(B) Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2, the appeal is remitted to the First-tier Tribunal for hearing afresh.

Anonymity

38. There was no request for an anonymity direction and having considered the appeal and the issues raised, I find none is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained errors of law such that it should be set aside in its entirety. The appeal is remitted to the First-tier Tribunal for hearing afresh before any Judge other than Judge Symes.

Anonymity direction not made.

Signed/Official Crest Date 10. ii. 2016

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal