



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

Appeal Numbers: IA/23116/2015
IA/23124/2015
IA/23125/2015

THE IMMIGRATION ACTS

**Heard at Royal Courts of Justice
On 3 May 2017**

**Decision & Reasons
Promulgated
On 13 June 2017**

Before

THE HONOURABLE MR JUSTICE COLLINS

Between

**[M S] (FIRST APPELLANT)
[S S] (SECOND APPELLANT)
[M N] (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Karim of Counsel, instructed by Liberty Legal Solicitors

For the Respondent: Mr P Duffy, a Senior Home Office Presenting Officer of the Specialist Appeals Team

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Judge Gillespie given on 28 June 2016 whereby he refused the appeals of the father, his wife and

one of their two children. The child in question is the important focus of the issues which were raised and it is equally important to bear in mind that he was a separate appellant and was not there purely as the dependant of his father.

2. The appellants are nationals of Bangladesh. The third appellant was born on [] 2006 and that is important for the purposes of the issues that were raised in this appeal. The first appellant entered the United Kingdom in May 2007, having entry clearance as a student which was valid until the end of June 2011. The other two appellants entered the United Kingdom as his dependants on 28 August 2008. His leave was extended from time to time, he having made application properly within time and the final leave granted would have expired on 28 February 2015. He made an application within time and it is that application, or rather its refusal, which has been the subject of these appeals.
3. The father was apparently a practising lawyer in Bangladesh and he came here to obtain an LLB. The third appellant was thus nearly 2 years old when he arrived with his mother in this country. The case put by the appellants was that he was discovered to have been profoundly deaf and his deafness had not been appreciated until he came to this country. There was an issue raised by the Secretary of State before the First-tier Tribunal that the father had decided to come here in order in part to obtain treatment for his son but that the First-tier Judge was not prepared to accept. He was treated in 2009 at Great Ormond Street Hospital and received a cochlear implant and he is still under care in the sense that his development of his hearing and the effect of the implants is considered on an ongoing basis. Nonetheless, he is still suffering from the effects of his hearing loss and he has special needs at the school which he attends. Indeed, the school has special equipment in place and this enables him with the appropriate support and therapy to advance in his learning but he does have severe language and speech difficulties and he needs what is described as communication software in order to be able to join in properly with his education and he needs what is said to be a high level of support and one-to-one therapy. So it is not a question that he is simply deaf or hard of hearing because there are needs for special treatment in order that he is able to pursue his education and obviously to have a proper life in the future.
4. The evidence produced before the judge was that the facilities in Bangladesh and the continuation of his therapy are extremely limited, and of course there would be a serious lapse in the support that he is obtaining, and further there was concern that children with disabilities who are stigmatised by society in Bangladesh and the third appellant would be excluded from mainstream education. The First-tier Judge dealt with that, having referred to the evidence in paragraph 24 of his decision where he said this:

“He said that the third appellant would be seriously disadvantaged. Reports pertaining to the child show that he enjoys in the United Kingdom most advantageous conditions for learning in rooms and with equipment devised to facilitate as far as possible communication with teachers and also maintenance of his cochlear implants. They show that he benefits from his circumstances and his ability to communicate both initiating speech and using an electronic tablet is improving. There is evidence of the sort of facility available in Bangladesh. It is true that the facilities are by no means favourably comparable with those which the appellant enjoys in the United Kingdom. There would appear to be very limited access to tuition in Bengali sign language and to other support for therapy. There can be little doubt the third appellant will lose the substantial benefit which he enjoys in the United Kingdom. The question remains whether his best interests would be so materially adversely affected by removal such that his removal would be unreasonable”.

5. The important further consideration in relation to the third appellant is that by the time of the hearing before the First-tier Judge he had been resident here for over seven years and that is of fundamental importance because of the provisions of Section 117B and D of the Nationality, Immigration and Asylum Act 2002. Section 117B deals with public interest considerations applicable to Article 8 and 117B(6) provides:

“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. That leads to consideration of the recent decision of the Court of Appeal in **MA (Pakistan) and Others v the Upper Tribunal**. It is now reported in the Immigration and Nationality Reports, but the neutral citation number is **[2016] EWCA Civ 705**. That was a case or a number of cases brought together where there was an issue in relation to deportation of parents and the effect on the child. The misdeeds of a parent which were material in the **MA** cases are not of course material here because there is no suggestion of any such question but what the court decided in paragraph 49 was as follows:

“Although this was not in fact a seven year case, on the wider construction of Section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best

interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary”.

7. With respect to the First-tier Judge he has got, in paragraph 24 which I have cited, the matter the wrong way round. The starting point where a child has been here for seven years, is that there should be leave to remain which will mean leave for the parents to remain in the vast majority of cases. I say the vast majority because one can imagine a case where the child is under 18, but very nearly 18 and it is possible in such a case it would not be necessary for the parent to be allowed to remain with the child but that of course is not a situation which applies at all in circumstances of this case. The child is I imagine due to start secondary education fairly soon. It seems to me in those circumstances that it is quite impossible having regard to the evidence of the way in which he has to be dealt with at school that he would be other than seriously disadvantaged were he to have to go back to Bangladesh.
8. The point that is often relied on and appears to underlie the decision reached was that provided a family can be returned together then it must be not unreasonable to expect the child to go as well. But this is a disabled child and a child who clearly has required the aids that he receives in teaching in order to be able to be educated properly. It is not appropriate to believe that he would receive such care if it were not necessary for the purposes of furthering his education and thus enabling him to live a sensible, proper life. The relevance of the Bengali point is that the evidence is of course clear; at school he learns English, he grows up learning English and the facilities that are provided for him are to enable him to learn English and the fact, if it be a fact, that his parents may speak Bengali at home and he may be able to understand some Bengali is really not the point.
9. The First-tier Judge was concerned that there had been use of public funds in paragraph 27 in which he decided that albeit there would be much reduced professional support and therapy in Bangladesh, he would enjoy the support of the parents and their wider extended family which has not put the matter I deal with in the proper way for the reasons I have already given. He concludes his reasons in that paragraph by saying it comes at a cost to public funds in this country and that is a factor that he has taken into account, and it is within Section 117B a matter that is referred to in 117B(3) where it is said:

“It is the public interest, in particular in the interests of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom are financially independent because such persons –

- (a) are not a burden on taxpayers, and

(b) are better able to integrate into society”.

10. The point that is being made is that public funds are dealt with in guidance from the Secretary of State and of course are a factor that are referred to specifically in the Immigration Rules and the guidance indicates that school and medical treatment are not to be regarded as public funds for the purpose of the Rules. It seems to me in those circumstances that it was wrong for the First-tier Judge to give any weight to that factor in all the circumstances. I appreciate that there are certain instances in which that can be appropriate but where one is dealing with a child who has been here for seven years since Section 117B(6) indicates that the public interest does not require a removal in such a case, then what is set out in sub-Section (3) which refers to the interests of the economic wellbeing of the United Kingdom is a matter that is to be regarded in the context of what was in the public interest cannot apply here.
11. It is also to be noted that the First-tier Judge approached the matter on the basis of focusing on the father as the appellant and treating the child’s appeal really as a Section 55 approach. Whether that will have made any significant difference I am not sure, but unfortunately he did make the serious error in that he said that lesser weight was to be accorded to private and to family life; that is simply wrong because Section 117B(4) and (5) provide:

“(4) Little weight should be given to –

(a) a private life, or

(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.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious”.

Thus private life can properly be given less weight but not the family life and of course family life here was an issue. Nevertheless, again that is to be considered in the light of the main point which I have referred to, namely the fact that the child has been here for seven years, has the disabilities in question and I have no doubt whatever that if one adopts the approach the Court of Appeal said is the correct approach, the starting point being that leave should be granted unless there are quite apart from there being no powerful reasons to the contrary, there are powerful reasons why leave should be granted in the light of the disability of the third appellant.

12. In those circumstances it seems to me that this appeal must be allowed and there is no need for me to remit. I am satisfied that I can re-make the

decision and allow the appeals of all three appellants. It is not for me in terms to indicate the nature of the leave that should be granted. I only draw attention to the fact that father has now been in this country for over ten years and has, I understand, made an application based on his ten year residence for indefinite leave to remain. In the light of that, and in the light of the need for the third appellant to be here at least until he reaches the age of 18 while he still remains a minor and is certainly undergoing treatment, it seems that it will be difficult to justify anything other than permanent leave to remain but it is, as I say, I think not for me to direct that that should be the case and I only indicate that it would be in my judgment difficult, if not impossible for the Secretary of State to justify anything else.

No anonymity direction is made.



Signed

Date: 7 June 2017

Mr Justice Collins

TO THE RESPONDENT
FEE AWARD

I was not asked to make a fee award.



Signed

Date: 7 June 2017

Mr Justice Collins