



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

Appeal Number: IA/26987/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18 October 2017**

**Decision & Reasons Promulgated  
On 02 November 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HANBURY**

**Between**

**MR MD KABIR MIAH  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Seelhoff, a solicitor

For the Respondent: Ms N Willocks-Briscoe, a Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant is a Bangladeshi national born on 30 November 1987.
2. The appellant appeals against the decision of the First-tier Tribunal (FtT) which dismissed his appeal against the respondent's decision to refuse his

human rights claim. The grounds on which the appellant attacked the decision of the FtT, promulgated on 19 January 2017 by Judge of First-tier Tribunal Kimmell (the Immigration Judge), were found to be arguable by First-tier Tribunal Judge Brunnen (Judge Brunnen). On 18 August 2017 Judge Brunnen pointed out that the appellant appeared to have a genuine and subsisting relationship with a qualifying child, who was born on 3 November 2015. The appellant having applied on 13 February 2015 for further leave to remain on the basis of his marriage to Mrs Rubala Begum, a British national, then sought settlement in the UK under Appendix FM.

3. The respondent refused the application for leave to remain on human rights grounds on 22 July 2015.
4. In his decision, the Immigration Judge considered that the appellant had not established on the facts his entitlement to rely on Article 8 of the European Convention on Human Rights (ECHR). The appellant claimed that his son, who was born in the UK on 3 November 2015, had become integrated into British society and could not be expected to remove to Bangladesh particularly given that his mother was a British national. The appellant claims to have developed a family and private life with Ms Begum and his son and that Section 117B (6) of the Borders, Citizenship and Immigration Act 2002 applied so that the public interest did not require his removal.
5. The appellant was given permission to appeal by Judge Brunnen who considered it to be arguable as it was not conducive to the public good or justified to remove the appellant from the UK given that he had a “qualifying child” and that it appeared arguable that it would not be reasonable to expect that child to leave the UK. Accordingly, he gave permission to appeal on those grounds.

### **The Hearing**

6. At the hearing I heard submissions by both representatives. Mr Seelhoff began by explaining that his client was a Tier 4 Migrant whose leave had been curtailed. He indicated that the Immigration Judge had found that the appellant had used deception to obtain a certificate (a level 5 diploma). Accordingly, the Immigration Judge concluded that the appellant did not meet the suitability requirements having obtained his certificate by fraudulent means as the respondent had alleged. This conclusion came about following a review of the evidence, including the evidence of fraud placed before the FtT. The appellant could not meet the requirements of Appendix FM and therefore did not qualify for leave to remain in the UK under the Immigration Rules.
7. Mr Seelhoff submitted that the appellant’s child, who remained nameless throughout the proceedings, could not reasonably be expected to leave the UK. I was referred to paragraphs 43–47 of the decision where the Immigration Judge points out that although it was claimed that the

appellant had “fully integrated” into the culture here. It was noted that although it had been asserted that both the appellant and his UK wife were in fact of Bangladeshi origin, that assertion had not been supported by any evidence. It was submitted that in fact the sponsor had been born in the UK, although both she and the appellant had come from the Bangladeshi community. Having identified Section 117B(6) of the 2002 Act as the crucial provision, the Immigration Judge did not go on and address the requirement for renewal of leave to remain inside or outside the Immigration Rules. Nor had the Immigration Judge addressed the whole public interest. I was also referred to the respondent’s policy document “Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b - “Family Life (as a Partner or Parent) and Private Life: 10-year Routes”. According to that document it would usually be appropriate to grant leave to a parent or primary carer to enable them to remain in the UK with their child provided there is satisfactory evidence of a genuine and subsisting parental relationship. It may be appropriate to refuse to grant leave where the conduct of one parent or primary carer gives rise to considerations of such weight as to justify separation, if the child is otherwise to stay with another parent or alternative primary carer in the UK or in the EU. Those circumstances could cover, amongst others, criminality falling below the threshold set by paragraph 398 of the Immigration Rules or “a very poor immigration history, such as where a person has repeatedly and deliberately breached the Immigration Rules”.

8. Mr Seelhoff submitted that the respondent had not followed her own policy and the reasoning was incorrect. Although there were some aspects of a poor immigration history the judge’s findings did not support the view that it was such as to outweigh other considerations and justify the conclusion that the Immigration Judge reached.
9. Mr Seelhoff then took me to the “suitability provisions” and accepted that the respondent would have been entitled to refuse leave to remain in the UK inside or outside the Immigration Rules. At the time of the refusal (22 July 2015) the suitability criteria are contained within Appendix FM S-LTR 1.1-3.1. Items listed there include conduct, character and associations or other reasons which make it undesirable for the appellant to remain in the UK.
10. At this point in the submissions I was referred to the case of **SF [2017] UKUT 00120 (IAC)**. In that case, which would have been published after the decision here, Judge Ockelton, a vice president, indicated the importance of taking into account guidance issued by the respondent. Having regard to the guidance in that case, it was not reasonable to expect the youngest child to leave the UK. It was pointed out that in this case the appellant would not be able to return to the UK as he had offended the suitability requirements and would be prohibited from doing so. It would therefore not be correct to analyse the case in terms of the appellant returning from abroad (i.e. Bangladesh), making a fresh application and then returning to the UK.

11. Finally, I was referred to ground 5 wherein it is stated that the Immigration Judge had erred in not considering the fact that the appellant's spouse had been born in the UK, although she was of Bangladeshi origin. Wherever her cultural roots lay, the appellant's wife had not been to Bangladesh since she was aged two or three and, it was submitted, in support of ground 5, that her status had been "devalued".
12. I then heard submissions from Ms Willocks-Briscoe. She submitted that the judge had rightly concluded that the requirements of Section 117B(6) were not met in that the public interest did require the appellant's removal, even though it may affect his genuine and subsisting relationship with a qualifying child. This was for the reasons given at paragraph 47 et seq. in the decision. The Immigration Judge pointed out in those paragraphs that the appellant had developed a family life "exclusively" while he had been present in the UK unlawfully. In the Immigration Judge's view, it was reasonable for the appellant and his child to return to Bangladesh and make an application to join his wife (Mrs Begum) and child. The Immigration Judge found that it was reasonable to expect the appellant to do that. It was highly desirable that the appellant should return to Bangladesh to make his application and demonstrate that he is capable of satisfying the Immigration Rules.
13. Mrs Willocks-Briscoe did not accept that the appellant's child (Esshaq) was being held responsible for the behaviour of his father. Esshaq was barely 1 year old and would be likely to remain with his mother in the UK if the father returned to Bangladesh. Mrs Begum had support from other family members and it would not be unreasonable for the appellant to go back to Bangladesh. The appellant had unilaterally decided to settle in the UK and in the course of doing so had acted dishonestly in respect of his ETS test. He had, essentially, obtained leave by deception and it was in the public interest to require him to return to Bangladesh, a country of which he was a national and in which his parents lived. They would, presumably, be able to accommodate him. There was no serious detriment to the appellant's wife and family who, as I have stated, were supportive. Insofar as the decision required the appellant to leave the UK, it was not disproportionate to do so. The judge made no anonymity direction. Ms Willocks-Briscoe explained that the guidance of the Immigration Directorate (at page 49 and the bullets referred to there) did not prohibit the removal of the appellant in the circumstances. In any event, the guidance referred to in the appellant's submissions merely contained examples of circumstances in which it might be appropriate to refuse to grant leave and are not intended to envisage every circumstance. In particular, the guidance does not state that in other cases an application for further leave to remain would succeed. In this case, the exercise of deception was of great importance and 10.2.3 of the Guidance supported the refusal of leave to remain in this case.

14. I was referred to paragraph 2 of the Immigration Judge's decision, where he sets out the background, including the fact that the appellant had to be served with forms IS151A and IS151A, Part 2. An attempt to challenge these notices by way of judicial review, had been unsuccessful. The appellant's subsequent curtailment of leave followed from the use of deception leading to cancellation of the test results. Plainly, the appellant did not meet the suitability criteria that he would have to meet in order to be allowed to remain in the UK. The appellant had remained in the UK with full knowledge of his precarious status. There was not just one incident but the appellant had taken a series of actions which resulted in his leave being cancelled. Having considered all factors, it was submitted that notwithstanding Section 117B, the question was whether the appellant should be allowed to stay in the UK. His overall level of behaviour was such that he ought to be barred under FM-SE or Appendix FM. Otherwise, he did not fall within the suitability criteria.
15. Ms Willocks-Briscoe submitted that the failure to meet the requirements of the Rules, including the suitability requirements, impacted on the Article 8 assessment. The requirements of Section 117B (6) did not "get you home" automatically. The Immigration Judge had explained this. At this point Ms Willocks-Briscoe referred me to the bundle of authorities that she had, helpfully, produced for the hearing. She took me first of all to the case of **AM** which she had tabulated as section C of her bundle of authorities. That case was a decision of the Court of Appeal. She particularly took me to paragraph 19 which states that:
- "The considerations in Section 117B (6) ought to have been treated as just one relevant factor when considering whether an interference with Article 8 was justified. Properly construed, it did not take priority over the public interest considerations ..."
16. I was also referred to the case of **Rajendran [2016] UKUT 00138 (IAC)**. According to that case, it was pointed out that it may be an error of law for a court or tribunal to disregard the relevant public interest criteria. There, at paragraph 30, the court commented on the first instance judge's alleged failure to take into account the family life of the appellant's daughter and son-in-law and grandson in the UK. The court failed to see that this was the case. A conclusion that the appellant enjoyed family life in the UK and the fact that the judge was clearly impressed with the level of care the appellant received and the closeness of her ties to her younger daughter and family. However, the court went on to point out the decision of the House of Lords **Beoku-Betts [2008] U K H L 39** did not provide support for the proposition that a visitor, who had only been in the UK for a short period and had no expectation of being able to succeed under the Immigration Rules for dependents, would be allowed to remain permanently. The appellant in the **Rajendran** case fell within that category of person. No application had been made under the "carer" provisions of the Rules, probably because she failed to meet the requirements. Therefore, the case was not comparable to the case of

**Beoku-Betts.** The appellant was, effectively, in the UK unlawfully, Ms Willocks-Briscoe submitted.

17. Next I was referred to the case of **Chikwamba** in which the court made it clear that the success of an application involving a child was not to be assumed. I was also referred to the case of **Chen** at tab E in the authorities bundle. In that case the Upper Tribunal pointed out that Appendix FM did not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country and rejoin his family in the UK. There may be cases where there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance appeared necessary, it may be disproportionate. In all cases it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with the protected human rights. It will not be enough to rely solely upon case law, including **Chikwamba [2008] UKHL 40**.
18. It was submitted by reference to these cases that it was incumbent upon an appellant to place evidence before the court or tribunal of the impact of removal on the child. No evidence of additional factors had been placed before the FtT in this case. The suitability provisions may have to be treated differently in leave to remain as opposed to entry clearance cases.
19. Mr Seelhoff responded to say there was no proper opportunity to present evidence. The suitability provisions should be decided in his client's favour. It was unreasonable to expect a young child to return with his parents to Bangladesh. The decision was disproportionate. All factors should have been taken into account.
20. In the dialogue which followed it was pointed out that the appeal had been dismissed under the Immigration Act 2014 and the child had not even been born at the time of the original immigration decision. The sole basis on which an appeal could therefore be advanced would be on human rights grounds. Both parties agreed that it was appropriate for me to remake the decision in the event that I found a material error of law.
21. At the end of the hearing I reserved my decision as to whether or not there was a material error of law in this case.

## **Discussion**

22. As Ms Willocks-Briscoe reminded me, the appeal was solely on human rights grounds, following the implementation of the Immigration Act 2014. Sections 117A-D of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) set out the public interest criteria to be applied to the determination of human rights claims. Section 117B (6) is but one provision and, as the Court of Appeal said in **AM [2017] E WCA Civ 180**,

the consideration of whether the interference with Article 8 rights is justified in a context to which Section 117B (6) applies, i.e. where there is the potential for a qualifying child to be required to be removed from the UK, it is but one factor to take into account. Properly considered, the rights of the child did not take priority over other public interest or public considerations. The importance and weight to be attached to those considerations is not to be underestimated.

23. Given the finding that the appellant had a genuine and subsisting relationship with a qualifying child and that the child could not live in a country, which the Immigration Judge described as a “third world country”, how could the public interest justify the appellant’s removal?
24. It was suggested before me that, having recognised the fact that it was not reasonable to expect the child to live in Bangladesh in paragraph 47 of the decision, it could not be reasonable for him to go on and find the appellant could be removed there. It was submitted that in the light of the appellant’s immigration history he would not be granted entry clearance to return to the UK.
25. Having carefully read the decision, I find that the Immigration Judge did not misapply Section 117B (6) of the 2002 Act to the facts as he found them to be. He had regard to the suitability requirements noting that they included cases where it was “not conducive to the public good” for the applicant to be allowed to remain by virtue of his character and associations. Whilst it was conceded before me that one instance of deception was not enough, I find that the appellant has a poor immigration history, using deception and remaining in the UK for a long period of time without any right to be here and utilising the system to attempt to challenge enforcement procedures that were employed against him. As Ms Willock S-Briscoe submitted, this was not a case of an isolated incident of deception.
26. The Immigration Judge firmly rejected the appellant’s account on credibility grounds and there has been no successful application for permission to appeal that part of the decision.
27. Mrs Begum apparently only met the appellant in late 2014, when the appellant’s removal must have been imminent. Although the appellant and his wife formed a family life together, it has been of short duration and the appellant’s private life beyond that of his own family seems to have been limited. The appellant’s child, who is still only 2 years of age, although of British nationality, it is not yet at school.
28. The Immigration Judge correctly considered Article 8 outside the Immigration Rules, having first decided that those Rules were inapplicable to the facts of this case. He nevertheless considered the rules provided the framework in which Article 8 had to be considered. The appellant had

a poor immigration history and the question is: whether it was right for his child potentially to suffer as a consequence?

29. The child's mother is likely to remain in the UK, although her Bangladeshi background would enable her to undertake regular visits to that country. Alternatively, she may decide to return there with the appellant and reform the family unit. There is no convincing evidence of any deleterious impact on the appellant, the appellant's wife or their child by virtue of the removal of the appellant to Bangladesh, the country where the appellant has spent the bulk of his adult life. There are compelling and convincing public interest considerations for the respondent to take the view that the appellant must be removed from the UK even if this results in the family being split up.

### **Conclusion**

30. In the circumstances, the Immigration Judge was entitled to conclude that the removal of the appellant was proportionate to the end of effective immigration control and that conclusion took full account of the rights of the appellant's child as well as other family members.

### **Notice of Decision**

The appeal on human rights grounds is dismissed.

The FTT made no anonymity direction and no fee award. There is no appeal against that decision.

Signed W.E.Hanbury

Date 1 November 2017

Deputy Upper Tribunal Judge Hanbury

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

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 1 November 2017



Deputy Upper Tribunal Judge Hanbury