



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

Appeal Numbers: HU/00489/2016  
HU/00503/2016  
HU/00492/2016  
HU/00499/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 6<sup>th</sup> March 2018**

**Decision & Reasons  
Promulgated  
On 12<sup>th</sup> April 2018**

**Before**

**UPPER TRIBUNAL JUDGE MARTIN**

**Between**

**CHHANDA [M] (FIRST APPELLANT)  
BINDA [S] (SECOND APPELLANT)  
[B C S] (THIRD APPELLANT)  
[B K S] (FOURTH APPELLANT)  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: Mr M Murphy (instructed by J Stifford Law Solicitors)  
For the Respondent: Mr L Tarlow (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. This appeal relates to a family of four, parents and their two children, all of whom are of Bangladeshi nationality. The third Appellant, the father, first entered the UK as a student in October 2004. He was subsequently joined

by his wife as his dependent. Further leave was granted thereafter until 31<sup>st</sup> March 2009, also as a student and his dependant. The couple then they had two children born in the UK, the first on [ ] 2007 and the second on [ ] 2009.

2. The father made a further application for a Tier 1 (Post-Study Work) visa in 2009 which was refused and their appeal against that refusal was dismissed. As a result they became appeal rights exhausted in May 2010.
3. The couple then sought leave to remain, outside the Immigration Rules, which was refused without a right of appeal. They then made a subsequent application in 2014 on the basis of their family and private life. That was also refused with no right of appeal but reconsidered and the decision maintained.
4. The application under appeal was made in August 2015, also on the basis of their private and family life. That was refused on 15<sup>th</sup> December 2015 and that is the decision against which the appeal was heard in Hatton Cross on 20<sup>th</sup> June 2017 by Judge Walker.
5. The Judge heard oral evidence and in a Decision and Reasons promulgated shortly thereafter dismissed the appeals. He heard evidence only from the Third Appellant, the father. He set out the law in relation to paragraph 276ADE and in relation to EX.1. of Appendix FM. Appendix FM EX.1. refers to a person having a genuine and subsisting parental relationship with a child who is a British citizen or who has lived continuously in the UK for at least seven years preceding the date of application and it would not be reasonable to expect the child to leave the UK. There is a similar provision contained in paragraph 276ADE.
6. The appeal rested largely on the situation with regard to the children. There is reference to the wife not giving evidence. The Judge found that the children's first language was Bengali, English being their second language, albeit they are taught in school in English. The Judge found there would be no significant obstacles to the Appellants' integration into Bangladesh where they have extended family members as well as the wife having family in India. He did not find it credible that the family would not assist them and he did not find it credible that the children would have any difficulties.
7. Permission to appeal to the Upper Tribunal was sought and granted by a Judge of the First-tier Tribunal in January of this year on the basis that it was arguable that the Judge had not properly assessed the best interests of the children separately from their parents as required. On the basis of what the Judge has said in the Decision and Reasons, which is very short in terms of its findings, that ground is plainly made out. There is no separate consideration of where the best interests of the children lie, save obviously for them living with their parents.

8. I have no hesitation in finding that the Judge made a material error of law in his treatment of the children in this appeal and setting the decision aside. Mr Tarlow for the Secretary of State, to his credit, did not strenuously argue to the contrary.
9. It was also agreed by the representatives before me that I could proceed to remake the decision. There was no interpreter for the Appellants, but that said, there was no necessity to hear oral evidence.
10. The Appellants have sought to put into evidence today, and Mr Tarlow has accepted that it does not present him with any difficulty, some further evidence, namely statements by the Third Appellant and his wife and a certificate of registration in relation to the eldest child who is now a British citizen.
11. The existence of children in Article 8 cases has been said not to represent a trump card and there is a line of case law saying exactly that. However, there is also a line of case law starting with Lady Hale's judgment in ZH (Tanzania) [2011] UKSC 4 indicating that the best interests of children are a primary consideration, are not, as they are in the Family Court, a paramount consideration. However, they nevertheless have to be attached due weight and whilst their interests can be outweighed by other matters, those matters have to be carefully considered.
12. More recently the case of MA (Pakistan) [2016] EWCA Civ 705 which was a judgment of Lord Justice Elias, looked at the question of considering the best interests of children and the weight to be attached, particularly to children who have been in the United Kingdom for more than seven years. He was looking at the matter in relation to the provisions of Section 117 of the Immigration and Asylum Act 2002 and in particular Section 117B(6). Suffice it to say that the provisions in s.117B(6) replicate those contained in paragraph 276ADE and Ex.1. of Appendix FM. All the provisions provide that when considering removal of a child who has been in the UK for seven years, consideration has to be given to whether it is reasonable for that child to leave. MA followed the rationale of an earlier case, MM (Uganda) [2016] EWCA Civ 450 which had looked at deportation appeals. MA established that, when considering reasonableness that involved an assessment of proportionality taking into account all matters, including the conduct of the adults concerned.
13. In this case, other than the fact that the parents have not had leave since 2010, not for the want of trying, there is no criminal element in this case and there are now two children who have been in the UK, one for nearly eleven years, and one for seven years. Lord Justice Elias at paragraph 49 of MA said:-

"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”.

He says that in relation to a child who has been here seven years. In this case there is one, not only who has been here seven years, but another who has been here more than ten years, and indeed is now a British citizen.

14. In relation to whether it is reasonable to expect a British citizen to leave the United Kingdom I refer to the recently published Home Office guidance in relation to “Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes”. On page 76 of that guidance it says:-

“Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1.(a) is likely to apply”.

It goes on to say that there are circumstances in which it may be appropriate to refuse to grant leave to parents of such a child where there are public interest considerations of such weight as to justify their removal, and that clearly was referring to the previous guidance which talked about criminality. There are no such circumstances in this case. The British child therefore cannot be expected to leave the UK. In relation to the other child who is not British there are no powerful reasons outweighing the best interest of that child which are clearly to remain in the UK where she has lived her entire life. It is not reasonable to expect either child in this case to leave the UK.

15. In this case the entire family are Appellants. The children clearly cannot remain on their own and therefore the Secretary of State’s own guidance, taken with the case law dictates that these appeals should be allowed. On that basis the appeal to the Upper Tribunal is allowed and the appeal itself is allowed on Article 8 grounds.
16. No anonymity direction is made.

Signed

Date 6<sup>th</sup> April 2018

Upper Tribunal Judge Martin

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

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable.

Signed

Date 6<sup>th</sup> April 2018

Upper Tribunal Judge Martin