



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/26625/2015**

Appeal Numbers:

IA/26631/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 21 December 2017**

**Decision & Reasons
Promulgated
On 03 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**(1) MRS SALMA RAHMAN
(2) MASTER TT
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Ashraf, Legal Representative, JKR Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, who do not have extant leave to enter or remain, appeal from the decision of the First-tier Tribunal (Judge O'Garro sitting at Hatton Cross on 22 November 2016) dismissing their appeals against the decision of the Secretary of State to refuse to grant them leave to remain on human rights grounds either under the Rules or outside the Rules. The first appellant is the mother of the second appellant, who was born in the UK on 10 October 2007. TT's father was originally a party to the appeals,

but before his appeal was heard, he voluntarily returned to Bangladesh, and so his appeal was treated as abandoned.

The Reasons for the Grant of Permission to Appeal

2. On 20 October 2017, First-tier Tribunal Judge Alis granted the appellants permission to appeal for the following reasons:

The grounds of appeal argue that the Judge erred (a) by failing to have regard to **MA (Pakistan) [2016] EWCA Civ 705**; (b) failed to identify the best interests of the child. The grounds as drafted are arguable. The Judge did not consider the guidance in **MA (Pakistan)** and there is no specific assessment of the child's best interests before the reasonable assessment is undertaken.

Relevant Background

3. The appellants are citizens of Bangladesh. The first appellant, Mrs Rahman, was born on 3 May 1984. At all material times she was married to TT's father, Mr Mahmud, who had been born in Bangladesh on 29 November 1971.
4. Mr Mahmud arrived in the UK as a student on 6 August 2005. On 23 May 2006 Mrs Rahman joined him in the UK in the capacity of a Student Dependant. Following TT's birth in the UK on 10 October 2007, he was given limited leave to remain as a dependant of his father. On 30 August 2011 Mr Mahmud's application for further leave to remain as a student was refused, with a right of appeal, and the appellants were refused in line with Mr Mahmud.
5. Mr Mahmud lodged an appeal, which was allowed on human rights grounds by the First-tier Tribunal on 13 January 2012. The outcome was that his application for further leave to remain as a student was re-considered on 30 April 2012, and Mr Mahmud was granted limited leave to remain until 29 September 2012 to complete his current course of studies. His dependants were granted leave in line with him.
6. On 29 September 2012, Mr Mahmud applied for leave to remain as a Tier 1 (Entrepreneur) with the appellants as his dependants. The application was refused on 9 September 2013, and the Secretary of State made concomitant decisions to remove Mr Mahmud and his dependants under section 47 of the 2006 Act. Mr Mahmud appealed against the refusal decision, and his appeal was dismissed by the First-tier Tribunal on 23 May 2014. Permission to appeal was refused both by the First-tier Tribunal and by the Upper Tribunal, and by mid-August 2014 Mr Mahmud's appeal rights had been exhausted.
7. Following further applications by Mr Mahmud and the appellants being rejected, and following threatened proceedings for judicial review, the respondent agreed to reconsider the position of TT, who had now accrued seven years' residence in the UK, and hence to reconsider the position of the family unit as a whole. In a letter dated 9 July 2015, the respondent gave her reasons for refusing the human rights claims of each member of

the family.

8. With regard to Mr Mahmud, he did not meet the suitability requirements of Appendix FM or Rule 276ADE, as he had used deception in his application of 29 September 2012. During an administrative review process, ETS had confirmed that his test scores for tests taken on 16 May 2012 had been obtained through deception. There was an anomaly in his speaking test indicating the presence of a proxy test-taker.
9. On the issue of whether there were significant obstacles to the family reintegrating into life in Bangladesh, it was evident from Mr Mahmud's passport, and also from Mrs Rahman's passport, that they had both visited Bangladesh on several occasions since being present in the UK. It was also noted that in the appeal determination dated 21 May 2014, the Judge had found that all Mr Mahmud's family members were residing in Bangladesh. He and Mrs Rahman had had no valid leave in the UK since 29 September 2012, and his appeal rights had become exhausted on 11 August 2014. Since that time, they had remained in the UK without permission. The Judge in the appeal determination of 21 May 2014 found that it was quite clear that the parents were aware that their leave in the UK was only temporary. The fact that they had a child did not give them any extra rights in the UK. They had no legitimate expectation that they would be granted further leave to remain in the UK.
10. Although their son was aged over seven, he was still a child who had not yet entered his teenage years, which were particularly formative. It was not true that their son had no ties to Bangladesh. His parents were both Bangladeshi, and through his daily interaction and cohabitation with them, he would have been exposed to aspects of Bangladeshi culture through the parents' shared heritage. It was also noted that the child had visited Bangladesh since his birth, and so it could not be argued that he had never been there.

The Hearing Before, and the Decision of, the First-tier Tribunal

11. At the hearing before Judge O'Garro, both parties were legally represented. The Judge received oral evidence from the appellant, who produced documentary evidence to show that Mr Mahmud had divorced her in Bangladesh. She adopted as her evidence in chief her witness statement signed by her on 30 October 2016, the principal thrust of which was that TT's health and welfare would be imperilled if she was required to return to Bangladesh with him as a single mother. She had no house in Bangladesh. There was no one in that country to provide them with financial support. There was no one to provide financial support for medical treatment for TT if he became sick and ill, or to provide financial support for his educational expenses:

In the absence of food, shelter, medication and education, it would not be reasonable for my child to return to Bangladesh with me.

12. In her subsequent decision, the Judge found at paragraph [27] that at the

age of nine TT was still young enough to adjust to life in Bangladesh, to adapt to the education system there and learn his culture. He had not yet reached secondary level education "*which may have made a difference in my consideration*". She found that there would be little language problems for him, because she was not persuaded that he did not speak Bengali at home with his mother.

13. At paragraphs [28] and [29], the Judge addressed the mother's claim that she would have no support in Bangladesh, and her claimed fear of her former husband (who she said had been violent towards her in the past). She had provided documentary evidence that her former husband had divorced her. She said that he had since re-married. If that was the case, then he would have no interest in pursuing her to cause her any harm, as he was happily married. Further, if she seriously feared threats of harm from her former husband, the authorities in Bangladesh could offer her protection. To her knowledge, Bangladesh had an effective legal system.
14. At paragraph [30], she rejected the mother's claim that she would have no family support from her parents and siblings in Bangladesh. The Judge continued in paragraph [31]:

The appellants have no right to be in the United Kingdom and I have been provided with no evidence why they cannot return to Bangladesh. The first appellant is young and fit, and I have been provided with no evidence why she should not be able to find employment and adjust to life in Bangladesh with [TT]. She has managed to remain in the United Kingdom and been resourceful in getting support from charitable organisations and from the friends she made in the community. I see no reason why she cannot use these same resourceful skills in adjusting to life in Bangladesh.

15. The Judge concluded, in paragraph [32], that it was reasonable for the child to leave the UK with his parent, which meant that the first appellant could not meet the requirements of Appendix FM via the parent route. By the same token, the child could not meet the requirements of Rule 276ADE(1)(iv).
16. At paragraph [34], the Judge pronounced herself satisfied that the first appellant could not meet the requirements of Rule 276ADE as she had provided no credible evidence that there were very significant obstacles to her reintegration into life in Bangladesh.

The Hearing in the Upper Tribunal

17. At the hearing before me to determine whether an error of law was made out, Mr Ashraf developed the case advanced in the grounds of appeal to the Upper Tribunal. He also sought to rely on the fact that TT had now accrued over ten years' residence in the UK (as of 10 October 2017) and had now applied to register as a British citizen pursuant to section 1(4) of the British Nationality Act 1984.
18. He submitted that the reasoning of the Judge was flawed, as she failed to identify any powerful reason as to why TT should not remain in the UK.

The Judge's finding that TT was still young and able to adjust to life in Bangladesh was speculative. She did not advance any explanation as to how she had reached such a conclusion. The same applied to the Judge's finding that the child would be able to adapt to the education system in Bangladesh. He received no financial support from his father, and his mother had confirmed that she would not be able to afford to educate him privately in Bangladesh. The potential difficulty with a free Government school was that, although English was a compulsory subject, lessons were taught in the Bengali medium. Even if he had some knowledge of spoken Bengali, he had no knowledge of reading and writing Bengali as he had not been required to learn the same. This would certainly drag him into unwanted and serious hardship.

19. Mr Avery adopted the Rule 24 response settled by a colleague, opposing the appeal. He submitted that the Judge had correctly directed himself on the law by reference to **Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)** and **EV (Philippines) [2014] EWCA Civ 874**. Her correct starting point had been that the length of the child's residence was a significant factor as to where his best interests lay.

Discussion

20. There are aspects of the error of law challenge advanced by Mr Ashraf in his skeleton argument which are no more than an expression of disagreement with findings of primary fact which were reasonably open to the Judge, in circumstances where she did not find various aspects of the mother's evidence to be credible. The live issue is whether the Judge materially erred in law in her assessment of the related questions of where TT's best interests lay and whether it was reasonable to expect him to leave the country.
21. Ground 1 is that the Judge erred in law in the failure to take into account the guidance provided in the case of **MA (Pakistan) [2016] EWCA Civ 705**.
22. In that case Elias LJ said at paragraph [45]:

In my judgment, the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the 'unduly harsh' concept under Section 117C(5), so should it when considering the question of reasonableness under Section 117B(6). ... The critical point is that Section 117C(5) is in substance a free-standing provision in the same way as Section 117B(6), and even so the court in **MM (Uganda)** held that wider public interest considerations must be taken into account when applying the 'unduly harsh' criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in Section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of Section 117B(6) is that where the seven year Rule is

satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.

23. At paragraph [46] Elias LJ said that the published Home Office Policy guidance merely confirmed what is implicit in adopting a policy [the seven year rule] of this nature:

After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will to be remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

24. At paragraph [48] Elias LJ cited with approval the explanation given by Clarke LJ in **EV (Phillipines)** at [34]-[37] as to how the Tribunal should apply the proportionality test where wider public interest considerations are in play, in circumstances where the best interests of the child dictate that he should remain with his parents. At [36] Clarke LJ said that if it is overwhelmingly in the child's best interests to remain, 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. Clarke LJ continued in [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.

25. The appellants were represented before the First-tier Tribunal by Mr Khan of Lincoln Chambers Solicitors. He did not rely on either **MA (Pakistan)** or upon the IDIs of August 2015, which provide that, where the seven years' residence requirement is satisfied, there need to be strong reasons for refusing leave.
26. I accept that this is not determinative of the question whether the Judge nonetheless erred in law in not referring to the guidance of **MA (Pakistan)** of her own motion. However, I am not persuaded that express reference to **MA (Pakistan)** was essential.
27. At paragraph [24], the Judge correctly identified the over-arching question which she had to decide, which is whether it was reasonable for the child to be removed with his mother to Bangladesh. At the beginning of paragraph [25], she reminded herself that the child was now aged nine years old. She said that in considering whether it was reasonable to expect him to leave the UK with his parent, she was reminding herself of the

guidance given in **Azimi-Moayed**. The Judge went on to set out this guidance, which includes the following at sub-paragraph (iii):

Lengthy residence in a country other than the state of origin can lead to the development of social, cultural and educational ties which it would be inappropriate to disrupt, *in the absence of compelling reason to the contrary.*" [my emphasis].

28. The significance of the italicised words is that the Upper Tribunal in **Azimi-Moayed** made essentially the same point as was made later in **MA (Pakistan)** with regard to the significance of a child having accrued seven years' residence. There is no material difference between saying that there has to be a "*compelling reason to the contrary*" to justify disruption of social, cultural and educational ties acquired after seven years of residence in the host country, and the requirement in the IDIs, which Elias LJ endorsed, that there should be "*strong reasons*" for refusing leave to remain to a child who meets the seven years' residence requirement.
29. Moreover, the Judge went on, in paragraph [26], to cite the same passages from the judgment of Clarke LJ in **EV (Philippines)** at paragraphs [34]-[37], which Elias LJ cited with approval in **MA (Pakistan)**.
30. For the above reasons, Ground 1 is not made out. The Judge has in substance followed the guidance given in **MA (Pakistan)**.
31. The thrust of Grounds 2-5 is that the Judge adopted a flawed methodology in answering the question whether it was reasonable to expect the child to leave the UK, and that she failed to consider the child's best interests first in isolation from other factors, such as his and his mother's lack of status.
32. Viewed in isolation, the best interest consideration in paragraphs [27] to [31] presents as unbalanced, as the Judge's main focus is on the prospects for the child on return to Bangladesh. However, it is clear from what the Judge has said earlier that she takes it as read that the child's length of residence in the UK is a significant factor militating in favour of him remaining in the host country in accordance with the third principle of **Azimi-Moayed**. In paragraphs [27] to [31] the Judge is rightly addressing "*the principal important controversial issues*" relating to the child's best interests raised by his mother in her witness statement, all of which relate to his prospects in Bangladesh, and none of which relate to his life in the UK.
33. I accept that there is one flaw in the assessment, which is the declaration - at the beginning of paragraph [31] - that the appellants have no right to be in the United Kingdom. This is not a finding which belongs in the assessment of the child's best interests. It belongs to a discussion of wider proportionality considerations, after the Judge has decided whether it is in the child's best interests to remain or to leave; and, if to remain, whether it is overwhelmingly in the child's best interest that he should remain or whether it is only on balance, with some factors pointing the other way.

34. However, I do not consider that the Judge's error is material. It was open to the Judge to attach considerable weight to the fact that TT had not yet reached the stage of embarking upon his secondary education. The fifth principle in **Azimi-Moayed** is that "*seven years from age four is likely to be more significant to a child than the first seven years of life*". In light of this weighty consideration and the Judge's sustainable findings of fact on the prospects for the child and his mother in Bangladesh, it was clearly not overwhelmingly in the child's best interests that he should remain in the UK, such that the need to maintain immigration control might well not tip the balance.
35. In conclusion, I consider that the Judge has given adequate and sustainable reasons for finding that it was reasonable for TT to leave the UK.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands.

These appeals to the Upper Tribunal are dismissed.

Anonymity

The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellants require anonymity for these proceedings in the Upper Tribunal.

Signed

Date 27 December 2017

Judge Monson

Deputy Upper Tribunal Judge

