



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/04231/2018**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 17 September 2018**

**Decision Promulgated  
On 20<sup>th</sup> September 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**M A H  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Symes (counsel) instructed by Londonium solicitors

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

**DECISION AND REASONS**

1. To preserve the anonymity order deemed necessary by the First-tier Tribunal, I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Thomas promulgated on 26 June 2018, which dismissed the Appellant's appeal on all grounds.

## Background

3. The Appellant was born on 3 January 1977 and is a national of Bangladesh. On 14 March 2018 the Secretary of State refused the Appellant's protection claim.

## The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Thomas ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 27 July 2018 Judge Haria gave permission to appeal stating

2. The grounds assert that the judge erred in:

- (a) A failure to take account of relevant country and medical evidence, and
- (b) in considering it acceptable for the appellant to suppress his political opinion, and
- (c) In failing to make a finding about how the appellant was able to leave the country whilst charges against him were outstanding,
- (d) The assessment of best interests of a qualifying child, the daughter (...) and failing to give the fact that she had been in the UK for seven years significant weight and failing to identify "powerful reasons" as to why leave should not be granted.

3. It is arguable that the Judge may have erred in the assessment of the best interest of the qualifying child. Accordingly, I find that there is an arguable error of law.

4. All grounds may be argued.

## The Hearing

5. (a) For the appellant Mr Symes moved the grounds of appeal. He told me that the first three grounds of appeal relate to the appellant's asylum appeal. The fourth ground of appeal relates to article 8 ECHR. Miss Willocks-Briscoe immediately volunteered that the respondent no longer resists the fourth ground of appeal.

(b) Mr Symes told me that the Judge failed to take account of relevant country guidance and medical evidence, and made findings of fact based on speculation only. He took me to the appellant's witness statement which, at paragraph 35, rehearses the contents of the medical document produced by the appellant. He told me that the Judge does not refer to the medical documents and take no account of the evidence of the injuries that the appellant says he sustained in an assault.

(c) Mr Symes took me to background materials and then referred me to [28] of the decision where, he told me, the Judge has misinterpreted background materials. The Judge makes a finding that politically motivated assaults happen in Bangladesh. Mr Symes told me that the Judge's findings at [28] do not reflect the respondent's own country policy and information note January 2018, which says that corruption is endemic, that state institutions are highly politicised, and whilst the authorities have the ability to provide effective protection, they may not have the willingness to provide the protection to somebody from the political opposition.

(d) Mr Symes took me to [30] of the decision. There the Judge refers to the documentary evidence which includes letters from politicians in Bangladesh. He told me that the Judge's decision not to place any weight on those documents is not safe.

(e) Mr Symes then took me to [32] of the decision and told me that the Judge's conclusion in the penultimate sentence (that internal relocation is a viable alternative) is unsafe because the conclusion proceeds on the assumption that the appellant will conceal his political affiliation.

(f) Mr Symes then turned his attention to [12] and [26] of the decision. At [12] he said the Judge's findings are incomplete and lack clarity. He said that [26] appears to be either a suggestion that the appellant's account lacks credibility or a suggestion that any charges the appellant faces are false or do not exist.

(g) Mr Symes told me that the Judge has disregarded material evidence and given unsafe reasons for discounting documentary evidence. He told me that those are material errors of law and the decision should be set aside. He told me that a renewed hearing the First-tier Tribunal is necessary.

6.(a) Ms Willocks-Briscoe told me that the decision on the asylum claim does not contain errors of law. She took me to [6] of the decision where the Judge sets out the background, and then to [28] of the decision where (she said) the Judge made clear findings about the appellant claimed fear. She told me that the background materials have been properly considered by the Judge against the circumstances of the appellant's case on the facts as the Judge found them to be.

(b) Ms Willocks-Briscoe told me that the Judge made clear findings which were well within the range of findings and conclusions open to the Judge. She told me that the Judge's findings in relation to internal relocation are made on the basis that the appellant does not have the political profile he claims. She told me that the Judge carefully considers each strand of evidence and reached evidence-based findings of fact. She urged me to dismiss the appeal relation to the asylum claim.

(c) Ms Willocks- Briscoe told me that the Judges article 8 assessment and treatment of the best interests of the appellant oldest child is flawed by material error of law. She referred me to MT & ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88(IAC) and to the respondent's own policy position and asked me to substitute my own decision on article 8 ECHR grounds if I dismiss the appeal against the Judge's decision in the asylum appeal.

### Analysis

7. The first ground of appeal argues that the Judge failed to take account of the medical evidence, dealt inadequately with the documentary evidence, and dealt only superficially with the background materials.

8. The Judge summarises the appellant's position between [5] and [11] of the decision. At [10] and [11] the Judge clearly sets out the documentary evidence relied on by the appellant.

9. The Judge's findings start at [23] of the decision. Between [25] and [32] the Judge makes evidence-based findings of fact. The Judge gives adequate reasons for the facts as he finds them to be. At [30] the Judge takes account of the documentary evidence and takes guidance from Tanveer Ahmed [2002] UKAIT 00439 before finding that he cannot rely on the documentary evidence.

10. [25] to [32] of the decision makes it clear that the Judge considers all of the evidence in the round. The Judge reaches conclusions that the appellant does not like, but the conclusions he reaches are well within the range of reasonable conclusions available to the Judge.

11. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the Judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

12. It was noted in MD (Turkey) v SSHD [2017] EWCA Civ 1958 that adequacy meant no more nor less than that. It was not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons, is in part, to enable the losing party to know why she has lost and it is also to enable an appellate court or tribunal to see what the reasons for the decision are so that they can be examined in case there has been an error of approach.

13. A fair reading of the decision demonstrates that the Judge took account of each strand of evidence. The Judge considered the background materials as part of an holistic assessment of all of the evidence. There is nothing wrong with the Judge's fact-finding exercise. In reality the appellant's appeal (brought against the asylum, Humanitarian Protection and article 2 & 3 grounds of appeal) amounts to little more than a disagreement with the way the Judge has applied the facts as he found them to be. The appellant might not like the conclusion that the Judge arrived at, but that conclusion is the result of the correctly applied legal equation. The correct test in law has been applied. The decision on the asylum, Humanitarian Protection and article 2 & 3 appeals does not contain a material error of law.

14. It is now a matter of agreement that there is a material error of law in relation to article 8 ECHR grounds of appeal. The appellant's wife and two children are dependent upon the appellant's claim. Every member of this family is a Bangladeshi national. The appellant's oldest daughter is a qualifying child.

15. The Judge deals with the best interests of the children and the question of whether it is reasonable for the appellant oldest child to leave the UK between [33]

and [35]. The Judge's article 8 assessment at [34] is flawed. The Judge focuses on the qualifying child's ability to remain with her family and return to Bangladesh. The Judge does not consider the guidance given in MT & ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88(IAC), nor does the Judge consider the respondent's own IDIs. Nowhere in the decision does the Judge find that there are powerful reasons to remove a qualifying child.

16. The decision on article 8 ECHR grounds contains a material error of law. I set it aside. I am asked to substitute my own decision.

### The Facts

17. The appellant entered the UK in January 2011 as a student. His leave to remain was curtailed in January 2015. In April 2015 he made an application for leave to remain on ECHR grounds, that application was refused. The appellant claimed asylum on 12 September 2016. His claim for asylum was refused by the respondent on 14 March 2018.

18. The appellant's wife and two children are dependent on the appellant's claim. The appellant's youngest child was born in the UK in April 2015. The appellant's oldest child was born in Bangladesh in 2006 and came to the UK on January 2011. She is a qualifying child in terms of section 117B of the 2002 Act.

19. The appellant's oldest daughter is immersed in the English education system. She has just finished primary school, where she distinguished herself. She is an intelligent hard-working schoolgirl, who has just started secondary school. Her principal language is English.

20. The appellant lives with his wife and two daughters. He has a genuine and subsisting relationship with a qualifying child.

### Article 8 ECHR

21. Section 117B of the 2002 Act tells me that immigration control is in the public interest. Family life within the meaning of article 8 is established for the appellant. The respondent's decision is an interference with that family life. The burden therefore shifts to the respondent to show that the interference was justified. The respondent relies solely on the public interest in effective immigration control.

22. The appellant's oldest daughter is a qualifying child. S.117B(6) of the 2002 Act, says

(6) 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.

23. The focus in this case is on sub-section (6) of Section 117B. Section 117B(6) is in two parts which are conjunctive. Section 117B(6)(a) weighs in favour of the

appellant because he has a genuine and subsisting paternal relationship with qualifying children. It is Section 117B(6)(b) which is determinative of this case.

24. By virtue of section 117D a “qualifying child” means a person who is under the age of 18 and who— (a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more. If a child is a qualifying child for the purposes of section 117B of the 2002 Act as amended, the issue is whether it is not reasonable for that child to return.

25. I remind myself of Section 55 of the Borders, Citizenship and Immigration Act 2009. In ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 Lady Hale said that “*Although nationality is not a “trump card” it is of particular importance in assessing the best interests of any child*”.

26. In R(on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held that in light of the jurisprudence of the Supreme Court, courts and tribunals were not mandated to approach the proportionality exercise where the best interests of the child were in issue in any particular order such that it was an error of law for them to fail to do so. Although it would usually be sensible to start with the child’s best interests, ultimately it did not matter how the balancing exercise was conducted provided that the child’s best interests were treated as a primary consideration (paras 49, 53–57 and 72). In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) in which it was held that the best interests assessment should normally be carried out at the beginning of the balancing exercise.

27. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the “little weight” provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; “little weight” involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

28. The guidance given by the respondent in the IDIs on Family Migration (February 2018) is that the questions a decision maker should pose are:

- (i) is there a genuine and subsisting parental relationship?
- (ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?
- (iii) will the consequence of the refusal of the application be that the child is required to leave the UK?
- (iv) would it be reasonable to expect the child to leave the UK. In many cases where one parent has a right to remain in the UK, the child would not leave?

29. The respondent’s guidance suggests that the test is whether the child would be likely to leave rather than actually be required to leave. The Home Office now say in those circumstances EX.1 (a) and s.117B(6) would not apply but the impact on the child of the appellant’s departure from the UK should be considered taking into account the best interests of the child as a primary consideration and if refusal would lead to unjustifiably harsh consequences, then leave can be granted on the basis of exceptional circumstances.

30. It does not follow that section 117B(6) should be interpreted in the same way as the SSHD interprets his immigration rules. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held (see [19]) that when applying section 117B(6) only three questions needed to be asked as long as the applicant was not liable to deportation, and those questions are

- (i) is there a genuine and subsisting parental relationship?
- (ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?
- (iv) would it be reasonable to expect the child to leave the UK?

31. Caselaw tells me that it is in a child's best interests to live in a family with both of their parents. It cannot be reasonable to cause a school age child distress. It cannot be reasonable to separate a child from one of its parents. On the facts as I find them to be, family life exists. The respondent's decision is an interference with that family life. The burden therefore shifts to the respondent to show that the interference was justified. The respondent relies solely on the public interest in effective immigration control.

32. The respondent's own IDIs say that it is not reasonable for a qualifying child to leave the UK. There is no evidence of strong or powerful reasons to remove the appellant's oldest daughter. On the facts as I find them to be s.117B(6) weighs in the appellant's favour.

33. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was confirmed that if section 117B(6) applies then "*there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal.*"

34. Because section 117B(6) of the 2002 Act weighs in the appellant's favour, I find that the public interest does not justify removal. That finding leads me to the conclusion that the respondent's decision is a disproportionate interference with the right to respect for article 8 family life.

35. The guidance in MT & ET and in R(on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705, tells me that there must be a powerful reason why a qualifying child should be removed.

36. In the case of MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 it was held that a very young child, who had not started school or who has only recently done so, will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part. On the particular facts of a child who had been in the

UK for ten years from the age of 4, that her mother had abused the immigration laws by overstaying on a visit visa and then making a false asylum claim and at some stage using a false document to obtain employment was not such a bad immigration history as to constitute the kind of “powerful” reason that would render the child’s removal to Nigeria reasonable.

37. The circumstances of the appellants oldest child are almost on all fours with the circumstances of the child appellant in MT & ET. Relying on R(on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705, there must be a powerful reason why a qualifying child should be removed. There is a dearth of evidence of such a powerful reason which could outweigh the length of residence.

38. As there are no powerful reasons to remove the appellant’s oldest daughter, it cannot be reasonable for her (a qualifying child at the date of application) to leave the UK, so that in the article 8 proportionality assessment the appellant benefits from s.117B(6) of the 2002 Act.

Decision

39. The decision of the First-tier Tribunal promulgated on 26 June 2018 does not contain errors of law in the relation to the Asylum, Humanitarian Protection and article 2 & 3 Grounds of appeal. Insofar as this appeal relates to those parts of the Judge’s decision the appeal is dismissed.

40. The decision on the article 8 ECHR grounds of appeal of the First-tier Tribunal promulgated on 26 June 2018 contains a material error of law and is set aside.

41. I substitute my own decision

42. The appeal is refused on asylum, humanitarian protection and article 2 and 3 ECHR grounds of appeal.

43. The appeal is allowed on article 8 ECHR grounds.

Signed  
Deputy Upper Tribunal Judge Doyle

Date 20 September 2018

A handwritten signature in grey ink, appearing to read "Paul Doyle", is written in a cursive style.