



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

Appeal Number: HU/17092/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
Oral determination  
hearing  
On 2 November 2018**

**given following**

**Decision &  
Promulgated  
On 8 January 2019**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE CRAIG**

**Between**

**MR JAKARIAH ULLAH  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr A W Khan, Legal Representative (non-practising  
Barrister) of Fountain Solicitors

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant in this case is a national of Bangladesh who arrived in this country in 2004 when he was 12 years old. He arrived with his mother and his two sisters. One of his sisters was about six years older than him, and his younger sister was then 5. It is said that his mother had been in an abusive relationship with her husband and they are now divorced.

Although there is not very much evidence in support of this claim, it does not appear to be disputed by the respondent.

2. Although the appellant together with his sisters and mother had some limited leave to remain that very soon expired and none of them left. They have accordingly been in this country without leave from about May 2009. The older sister (of whom this Tribunal was unaware until the hearing today) apparently was married in 2014 and has subsequently had a child. As her husband is a British citizen, so is her child and although the Tribunal was not given any details, it appears that she now has leave to remain in this country. She lives with her husband and child close to the appellant, about a 30 minute bus journey away.
3. In or about 2016 the appellant's mother applied for leave to remain as did the appellant and his younger sister. The appellant by this time was about 19 and his sister was about 14. None of them met the eligibility requirements set out within the Rules and their applications were refused. The respondent considered that the family could all return as a unit to Bangladesh; although the appellant's sister had been living in the UK for at least seven years prior to the date of the application, the respondent considered it was reasonable for her to return to Bangladesh along with her mother and brother having regard to her obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009, pursuant to which she is required to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, which in subsequent jurisprudence it is established requires her to have regard to the best interests of such children as a primary (but not paramount) consideration.
4. The appellant together with his mother and younger sister all appealed against this decision and their appeal was heard before First-tier Tribunal Judge Hawden-Beal at Birmingham on 26 September 2017 but in a decision and reasons promulgated on 4 October 2017 the judge while allowing the appeals of the mother and daughter dismissed the appeal of this appellant. So far as the daughter was concerned she was then 14 years old and in the middle of her education at school; having regard to the facts that first she had been here over seven years and secondly her schooling was at a particularly important stage, the judge considered it would not be proportionate for her to return. Because she could not return the judge went on to find that by reason of what is set out at Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (inserted by Section 19 of the Immigration Act 2014) the public interest did not require the removal of the mother either. That is because the mother had a subsisting parental relationship with a qualifying child and (the judge had found) it would not be reasonable to expect that child, that is the appellant's younger sister, to leave the United Kingdom.
5. Although the case had been argued before Judge Hawden-Beal on the basis that either all three should stay or all three should be removed, the judge having found that but for the daughter's position at school all the family could return, considered that because this appellant was 21 years

old and would be able, in her words, to “find his own way in the country of his birth” (this is at paragraph 44 of her decision) he could reasonably be expected to return to Bangladesh and that for that reason “the decision is both justified and proportionate”.

6. The appellant has appealed against this decision, leave having been granted by First-tier Tribunal Judge Pullig on 28 March 2018. When granting permission to appeal, Judge Pullig, giving his reasons, stated as follows:

“I find that there is no finding as to whether or not the appellant, being dependent on his mother, has family life with her or, for that matter his sister, taking the family unit as a whole. There was no Article 8 *Razgar* approach or proper proportionality balancing exercise”.

7. The appeal then came before me on 27 July 2018 when I found that Judge Hawden-Beal’s decision had contained a material error of law, such that the decision had to be re-made and I gave directions that the appeal would be re-listed in the Upper Tribunal before me when the Upper Tribunal would re-make the decision. Much of what I said in that decision is of necessity repeated in this decision.
8. As I stated in my earlier decision, and repeat here, the error which I consider Judge Hawden-Beal made in her decision was that she did not consider the position of this appellant through the prism of her having found that both his mother and sister should remain. Although the judge did consider the *Razgar* questions in the context of all the evidence jointly, she does not appear to have asked herself the same questions with regard to this appellant on the basis that he would be the only person returning. In my judgement it was incumbent on her to do so.
9. When giving my reasons for finding an error of law, I stated that it was not realistically arguable that there would be insurmountable (that is very significant) obstacles to this appellant returning to Bangladesh on his own. Although he had not been there for nine years (now ten years), he is a fit and healthy young man and I considered then, and I have no reason to alter this aspect of my decision, that he would be able to make a life for himself there, albeit possibly not the sort of life that he might enjoy in this country. However, that still left the question to be considered as to whether or not in the particular circumstances of this case there are sufficiently compelling reasons why exceptionally this appellant should be granted leave to remain under Article 8 outside the Rules. I considered that a further decision would have to be made following consideration of up-to-date evidence and in particular first as to whether or not on usual *Kugathas* principles there were in this case more than the usual emotional ties to be expected between an adult and his parents (in this case his mother and/or his younger sister) such as to engage the operation of Article 8, and secondly whether if this was the case it might nonetheless still be proportionate to return him to Bangladesh. It was for this reason that a further hearing was necessary in which I anticipated hearing further evidence. I considered that the issues remaining were sufficiently narrow

that the appropriate course would be to retain this appeal in the Upper Tribunal where I would be able to re-make the decision myself in light of such further evidence and submissions as were brought before me.

10. Accordingly, I adjourned the hearing part-heard for a further hearing before myself and directed that the appellant should serve up-to-date evidence as to the circumstances of his family, to enable the Tribunal to consider primarily first whether there is still existing family life between the appellant and his mother and sister such as to engage the operation of Article 8, and secondly whether if this was the case, and given that the appellant's mother and sister would remain in the UK, it would be proportionate to remove the appellant. The appellant in particular was to supply up-to-date witness statements from himself, his mother and, if so advised, his 15 year old sister, which witness statements should be capable of standing as evidence-in-chief. This evidence was in fact lodged with the Tribunal and served on the respondent within the time set out within my directions and the witness statements did in the event stand as evidence-in-chief.

### **The Hearing**

11. The appellant was represented at the hearing by Mr Khan, who although listed as he now has to be as a legal representative, is in fact a retired barrister who has considerable advocacy experience. I am extremely grateful to him for the exceptionally lucid way in which he argued the case on behalf of the appellant. I am also extremely grateful to Mr Bramble who represented the respondent at the hearing before me today for the very fair manner in which he argued the respondent's case which was both thorough but also concise. He asked all the appropriate questions in cross-examination and made the submissions which were properly open to the respondent on what I have found to be a very finely balanced case in an extremely fair and persuasive manner.
12. At the hearing I heard evidence first from the appellant and then from his mother and sister. An interpreter was present to assist both the appellant and his mother. I asked the appellant to give his evidence so far as he was able in English and rely on the interpreter only to the extent that this was necessary. Unfortunately, for reasons which will be apparent, this was necessary to a fairly large extent. So far as his understanding of English is concerned (which I mention because one of the matters to which the Tribunal must have regard pursuant to Section 117B of the Nationality, Immigration and Asylum Act 2002 is whether or not an appellant is able to speak English), I found that the appellant's knowledge and understanding of English was less than I would expect from somebody who has been in this country for ten years from the age of 11/12 but I nonetheless do consider that it is of a sufficient level that he would be able to get by. Certainly, having regard to the standard of English which is regarded as sufficient to enable an applicant to pass an English language test which is usually seen as the appropriate yardstick, I consider that his level of English would be sufficient certainly to pass such a test, although it is not

of a standard that one would expect from a fluent English speaker. It is the case, however, and it is common ground, that the appellant does speak fluent Bengali, which of course is consistent with the previous finding that he would be able easily to integrate into Bangladesh were he to be returned there.

13. So far as the appellant's mother is concerned, it was quite clear that she spoke very little English indeed. Even when I asked the most basic questions in English she needed the assistance of the interpreter to understand that question and her evidence was given entirely in Bengali with the assistance of the interpreter.
14. So far as the appellant's young sister is concerned, she is now 15 and has been attending school since her arrival in this country some ten years or so ago. She is taking her GCSEs next June (she told the Tribunal in about eight subjects) and English is her first language. The interpreter was not required for her evidence.
15. All the witnesses affirmed that what was contained within their witness statements were true and they were all cross-examined. I also heard submissions on behalf of both parties, which, as I have already indicated, were of a very high standard and have greatly assisted me in reaching my decision. It is not necessary for the purposes of this decision to set out the evidence or the submissions in full. They are recorded in my Record of Proceedings verbatim, as far as I was able, and so I shall refer below only to such parts of the evidence and submissions as are necessary. I have, however, had regard to everything which was said to me, either by the parties' representatives or by the witnesses, as well as to all the documents contained within the file, before reaching my decision.

### **The Evidence**

16. Essentially the appellant's case is that he has a family life with his mother and sister in this country as well as a private life here such as to engage Article 8, and that his removal would interfere with those rights. It is his case that the ties between himself and his mother and sister go beyond the normal emotional ties to be expected between an adult child and his mother and/or sibling as predicated in *Kugathas*, such that his article 8 family life rights are engaged. It is his case further that when one applies the *Razgar* fifth test to the facts in this case it would not be proportionate to remove him from this country because although it is not disputed that there is a public interest in so doing, this is not on all the facts of the case sufficient to justify the interference with his Article 8 rights.
17. Mr Bramble reminded the Tribunal that it has first to consider whether or not as a matter of fact the appellant's ties with his mother and sister do go beyond the normal emotional ties to be expected between an adult child and his parent and/or sibling. In this case the appellant and his family say that his mother is not well, suffering mental problems of depression as well as being asthmatic, and that he does some of the cooking and

cleaning within the house, that he has a particularly close relationship with his younger sister, effectively being the father figure (certainly the only male) in the household and also that he has a particularly close bond with his younger sister.

18. In the witness statements that were provided the appellant's case is effectively put on the basis that the appellant's mother speaks Bengali but very little English, his younger sister speaks English but very little Bengali, but the appellant alone amongst the three is the only one who speaks both fluent English and Bengali. On this version of the family dynamic, the appellant is accordingly pivotal within this family because he is the one who can interpret between the mother and the daughter.
19. So far as the mother is concerned, it was clear from the evidence which was given that she speaks Bengali and no English. So far as the daughter is concerned, she clearly speaks very good English, but it was not possible for this Tribunal to assess fully the extent of her Bengali. In evidence she said that she could speak to her mother in broken Bengali, and this must be so. She was 5 when she left Bangladesh and obviously at that time was speaking Bengali, and as she has not been able to speak to her mother in any other language since, the inference that I have to draw is that her knowledge of Bengali is sufficient at least to enable her to communicate and continue to communicate with her mother. So far as the appellant's knowledge of English is concerned, I have already remarked on this, and it is clear that English remains very much his second language.
20. So far as the witnesses themselves were concerned, I take account of the fact that the appellant himself must have been extremely nervous when giving his evidence and that accordingly this in itself would have made it difficult perhaps for him to put his case as well as he might have liked. However, there is nothing in the evidence to suggest that he has any significant private life in this country beyond the life which he has with his family. He told the Tribunal that whenever his mother is unable to, he will do the cooking in the house and he will also do the cleaning. He regrettably seems to have fallen through a gap in the provision of services in this country because although he was on the waiting list for a school for two or three years it appears that he had very little formal education in an English school. Such education as he did have was in his words in either an Arab or Arabic school which might account for why the standard of his English is less than would be normal for a person of his age who had been in this country for so long.
21. So far as the evidence of the appellant's mother is concerned, I found her a very unimpressive witness. It was not clear to me that she was always attempting to give an answer to the questions she was asked. Although she claimed that her health was so poor that she could not get by without the assistance of her son, I have noted that the evidence does not include any significant medical evidence as to the state of her health. Also, I have to consider her evidence against the background which is that she is somebody who came to this country some ten years or so ago and

remained without any leave at all at a time when she had absolutely no right to remain here. There is no reason for me to doubt that the decision of Judge Hawden-Beal, which is that but for the position of her daughter she would have had no claim to be allowed to remain, was correct. To the extent that she has been granted leave to remain this is entirely because of the position of her daughter and not because of any intrinsic merit in her own case.

22. The evidence which I did find impressive was that given by the appellant's younger sister. It is right that she is at a particularly important time in her schooling, and I accept from her evidence in particular that her relationship with her brother is an extremely close one. She told the Tribunal, and I accept, that although most of what she knows about the behaviour of her father to her mother is what she has been told by her mother and her brother, nonetheless she has on occasion had flashbacks in which she remembers arguments between them, and I accept that she does rely on her brother as an important male adult who is able to provide support to her which she does not get from a father within her own household. Certainly, I am entirely satisfied despite my misgivings with regard to some of the evidence which was given that the relationship between this particular appellant and his mother and sister goes beyond what might be said to be the normal emotional ties to be expected between an adult child and his mother and/or sibling. This is a very close-knit family unit of now three people (together with the older sister who they still regularly see) and if that relationship were to be interfered with it would be very difficult to maintain through Skype or Facebook or any other of the ways in which attempts are usually made to maintain such relationships. To his credit Mr Bramble did not suggest that if there was a family relationship this could realistically be maintained through the use of modern technology which argument is sometimes relied on in cases of this kind.
23. However, Mr Bramble then submitted that even and to the extent that there was a family relationship between the appellant and his mother and sister, it would still be proportionate for him to return to Bangladesh. With regard to Section 117B, it is of course in the public interest to maintain effective immigration control and it is against that public interest that the consequences of an interference in the family life has to be judged. Although normally little weight can be given to a private life which is formed when the presence of an applicant in this country is unlawful and/or precarious, very fairly Mr Bramble accepted that that provision cannot be relied on to the same extent in the case of a person whose presence, albeit unlawful, is when he or she is a minor, because to that extent the sins of a parent cannot be visited on the child. However, he did rely, in my judgement legitimately, on the fact that the appellant appears to have developed only a very limited, if any, private life in this country beyond the family life which he enjoys with his mother and younger sister, and no doubt his older sister and her family as well. It is also right to say that he does have an aunt and cousins in this country.

24. There is no doubt in my judgement that were it not for the family life which this appellant has in this country, in particular with his sister, his appeal would be bound to fail. None of the provisions set out within paragraph 276ADE(1)(iii) to (vi) are satisfied; as I have also already indicated above, there would be no real obstacle to his reintegrating into life in Bangladesh were he to be returned there. The real issue that has to be considered in this case, however, is whether or not the decision to remove this appellant is proportionate having regard in particular to the position of his younger sister in light of long established jurisprudence as set out from *Beoku-Betts* onwards to the effect that the Tribunal must have regard also to the interests of the other family members which will be affected by removal.
25. This appellant is 21 years old and his evidence is that having regard to the culture in which he was brought up the normal expectation is that he would remain in the same home as his mother even after he got married because it would be more likely than not that if he got married he would bring his wife to live within that home. That may or may not be the case and certainly in the fullness of time one would expect his sister to move out and as the family get older the family ties between them will or might become no more than the normal emotional ties to be expected between adult siblings with each other and with their parents. However, at the moment there is a very strong family life and this Tribunal must consider what it regards as the likely consequences if those ties are now broken.
26. I do, as I have already indicated, find this a finely balanced case, but having heard the evidence in particular of the appellant's younger sister, I consider that the effect on her would be profound. She does not at the moment have any other male person to look up to and to guide her, and I note in this regard what was said by Judge Hawden-Beal in her decision when considering whether or not it was reasonable for all the appellants to return. She said as follows:
- “25. The question of whether it is reasonable for the third appellant [that is the appellant's younger sister], aged 14 years old to go back to Bangladesh is the crux of this appeal. If I find that it is reasonable for her to go back, none of the appellants could meet Appendix FM and they cannot meet the requirements of paragraph 276ADE(1)(iv). The first appellant cannot succeed under Section 117B(6) if it is reasonable for the third appellant to go back and if the third appellant goes back to Bangladesh with the first appellant as being in her best interests, following the principle in *PD [2016] UKUT 108*, the second appellant [that is this appellant] then will return which will then mean that the first appellant [his mother] will have the male support she needs and there will be no very significant obstacles to her integration under paragraph 276ADE(1)(vi). Conversely, if it is unreasonable for the third appellant [the younger sister] to go back to Bangladesh, then effectively the whole family will stay here as per *PD*”.
27. It is not clear whether or not this is what the judge had in mind herself or whether this was the basis upon which the case was put before her on



behalf of the respondent, but in either event, it appears either to have been argued on behalf of the respondent or to be accepted by the judge at that stage in her decision, that this appellant was providing male support which was needed by the mother at that stage. Although as I have indicated I am less clear with regard to the support needed by the appellant's mother, partly because of a lack of medical evidence and secondly because of the unsatisfactory nature of her evidence, it is nonetheless clear to me that at the moment his younger sister is benefiting greatly from the support which he has given to her and not to put too fine a point on it, she would be absolutely devastated were she now to have to continue her life in this country without it. Also, when considering proportionality holistically overall, and notwithstanding my finding that the appellant himself could form a life in Bangladesh without his other close family, I do understand the cost to him in personal terms were he now obliged to do so. Moreover, even leaving these personal considerations out of account I am still able to make my decision by having regard to the effect which I consider that his removal would have on his younger sister.

28. In my judgement the effect upon the appellant's younger sister would be sufficiently detrimental, at a time when it is important that she is able to concentrate on getting the best results in her exams as she can (she told me, and I believe, that her ambition is to be a doctor) as to make the appellant's removal disproportionate for Article 8 purposes. There is a very great public interest in maintaining effective immigration control but there are exceptionally some cases where the countervailing factors are so compelling that an exception has to be made. These cases will be very rare, and will not occur very often, but having considered all the evidence in this case I am satisfied that this is one of those rare cases where despite there being a public interest in removing this appellant, the reasons why he should not be removed are sufficiently compelling as to on balance outweigh that public interest.
29. It follows that, having given very careful consideration and extremely anxious scrutiny to this decision, this appeal must be allowed and I will so order.

### **Notice of Decision**

**I set aside the decision of Judge Hawden-Beal as containing a material error of law and substitute the following decision:**

**This appellant's appeal is allowed, on human rights grounds, Article 8.**

No anonymity direction is made.

Signed:

A handwritten signature in black ink on a light blue background. The signature reads "Ken Craig" in a cursive, slightly slanted script. The "K" is large and the "C" in "Craig" is prominent.

Upper Tribunal Judge Craig  
November 2018

Date: 17