



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

Appeal Number: HU/ 06002/2020

**THE IMMIGRATION ACTS**

**Heard at Manchester Civil Justice Centre**

**Decision & Reasons  
Promulgated**

**On 25 January 2022**

**On 8 February 2022**

**Before**

**UPPER TRIBUNAL JUDGE LANE  
DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

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

Appellant

**and**

**SHAHINA YASMIN  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr Williams, Senior Home Office Presenting Officer

For the Respondent: Ms Simak, instructed by Legit Solicitors

**DECISION AND REASONS**

1. We shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born on 5 April 1994 and is a female citizen of Bangladesh. By a decision dated 29 September 2020, the Secretary of State refused the appellant's application for leave to remain on the basis of her family and private life. She appealed against that decision to the First-tier Tribunal which, in decision promulgated on 8 June 2021, allowed

the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The appellant resides in the United Kingdom with her two children (now aged 3 years and 18 months respectively) having entered in 2017 as the Tier 4 dependant partner of her husband, Mohammad Abul Hussain. Her leave was valid for the period 17 January 2017 – 7 December 2017. We understand that Mr Hussain made an application for leave to remain outside the Rules in 2017 (on which the appellant was a dependant) which was refused without a right of appeal.
3. There are two grounds of appeal. First, the respondent asserts that the judge erred in law by having treated the presence of the children in the United Kingdom as a determinative factor notwithstanding that they are not Qualifying Children under section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended). Secondly, the respondent argues that the judge's application of the 'public interest considerations applicable in all cases' set out in section 117B was inadequate and in parts incorrect thereby vitiating his proportionality assessment of the appeal on human rights grounds.
4. Ms Simak appeared for the appellant as she had before the First-tier Tribunal. She submitted that the Secretary of State's challenge to the First-tier Tribunal's decision was no more than a disagreement with the findings of the judge. We told the representatives that we intended to reserve our decision on error of law. Ms Simak told us that, in the event that the decision of the First-tier Tribunal is set aside, her client would be content for the Upper Tribunal to remake the decision on the existing evidence and without the need for a resumed hearing.
5. In our opinion, the First-tier Tribunal did err in law such that its decision falls to be set aside. We agree with the respondent that, despite having reminded himself that the best interests of the children was not a 'trump' card in the appeal [63], that is exactly how he then proceeded to treat their best interests in determining the appeal. At [69], after dismissing as irrelevant factors such as the weather in Bangladesh and the 'merits of the educational system', he wrote that:

The deciding factor, to my mind, is the presence of two children. The need to consider their best interests is what tips the balance ... were there no children involved, I would not have found in the appellant's favour.

The Secretary of State's grounds of appeal cite *EV (Philippines) and others* [2014] EWCA Civ 874:

58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is

conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

In our view, the judge fell into error because he failed to ask himself that 'ultimate question.' Neither the appellant nor her husband have any right to remain in the United Kingdom. The appellant appears to have been without valid leave from August 2018 when her husband's application (in which she had been a dependant) had been refused without a right of appeal. The children were born in the United Kingdom but have no right to remain nor have they acquired the status of Qualifying Children. They have not lived in Bangladesh but that country is their country of nationality and that of both parents. There was no evidence before the First-tier Tribunal that the children had, at such a young age, formed any meaningful ties within United Kingdom society. Even if they have formed ties (which the judge, for reasons which are unclear, seemed to find at [65]), we consider that their youth is such that integration with their parents into Bangladeshi society would be achieved relatively easily. We have to say, given the circumstances of this family, that, had the judge posed the 'ultimate question', he could only have reached one answer; the best interests of these young children will be served by the children 'following the parent[s] with no right to remain to the country of origin.' It is important to bear in mind that this is an appeal on Article 8 ECHR grounds and that the core of family life of the parents and children would be preserved by the family returning as a unit. The judge recognised [62] that the children live within a 'close-knit family' in the United Kingdom but that the weakening of those ties by a return to Bangladesh would not amount to disproportionate interference such as to engage Article 8 ECHR. That part of the assessment was correct, in our opinion.

6. There is merit also in the second ground of appeal. The judge has not adequately addressed the section 117 factors which apply in all Article 8 ECHR cases and which include an ability to speak English and financial independence. He has, correctly in our view, not accepted the submission that Mr Hussain (who initiated his own human rights claim immediately before the First-tier Tribunal hearing) is unlikely to return with the family to Bangladesh although, for reasons which are unclear, the judge did give weight to the fact that the appellant would return 'with two young children in tow' [66]; those children will be 'in tow' if the appellant remains in the United Kingdom. At [47], the judge found that the immigration status of the appellant has been precarious, but only 'in part' despite the fact that neither she and her husband have never enjoyed settled status and have had either no leave to remain or time-limited leave by reason of Mr Hussain's student visa. Overall, the proportionality assessment is unfocussed and the weight attaching to factors for and against the appellant have not been clearly stated before ultimately (and wrongly) being 'trumped' by the judge's view of the children's best interests.
7. In the light of what we have said, we set aside the decision of the First-tier Tribunal. We refer to Ms Simak's comments about the remaking of the decision (see [4] above). On the basis of the evidence before us, we find

that the appeal against the decision of the Secretary of State should be dismissed. As the First-tier Tribunal found, there is little evidence that the appellant has integrated in society here beyond her immediate family, that she speaks English or that she is financially independent. As at the date of today's hearing, Mr Hussain has no right to remain in the United Kingdom and we find that he and the appellant will return to Bangladesh with both children. The appellant would not, therefore, return as a lone female. Finally, we repeat that, on the particular facts in this appeal, our assessment of the best interests of the two children begins and ends with our finding that those interests will be met by the children travelling to live in Bangladesh with their parents.

### **Notice of Decision**

The decision of the First-tier Tribunal is set aside.\_We have remade the decision. The appellant's appeal against the decision of the Secretary of State dated 20 September 2020 is dismissed.

Signed

Date 25 January 2022

Upper Tribunal Judge Lane