



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

Appeal Number: IA/49570/2013
IA/49576/2013
IA/49581/2013
IA/49586/2013

THE IMMIGRATION ACTS

Heard at North Shields

On 13 May 2014

**Determination
Promulgated**

On 3 July 2014

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR H M A H

1st Appellant

MRS S A

2nd Appellant

MISS A H

3rd Appellant

MASTER A H

4th Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S M Marfat, Newcastle Legal Centre

For the Respondent: Mrs H Rackstraw, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) Judge of the First-tier Tribunal Cope dismissed these appeals against refusals to vary leave on the grounds of private and family life. The

Appellants are a family of four and are all nationals of Bangladesh. The first and second Appellants are married to each other and the third and fourth Appellants are their children, born in Bangladesh in August 2001 and December 2004.

Decision of the First-tier Tribunal

- 2) The Judge of the First-tier Tribunal records that the first Appellant came to the UK as a student in July 2005 and the rest of the family joined him as his dependants in March 2007. They were granted leave for successive periods until this was curtailed with effect from 29 December 2012. This was shortly after the family applied for leave to remain on family and private life grounds.
- 3) The judge found that the Appellants would not succeed under Appendix FM or paragraph 276ADE of the Immigration Rules. The judge went on to consider the appeal under Article 8, having regard to the best interests of the children. The judge noted that it was the intention of the Respondent to remove all four Appellants together as a family unit. They had no other relatives in the UK and there would therefore be no breach of family life arising from the refusal decisions. This point was conceded by the Appellants' representative at the hearing.
- 4) The judge was satisfied that the Appellants had established private life in the UK. So far as the children were concerned, the judge accepted that it was possible that they might receive a better standard of education in the UK than in Bangladesh. The judge also accepted that their first language, in which they were most fluent, was likely to be English, although the judge did not accept that they had no understanding of Bengali. The judge referred to evidence of "English medium schools" in Bangladesh which followed a British-style curriculum. The judge further noted that both the first and second Appellants were educated to first-degree level in Bangladesh, where the second Appellant also completed a Masters degree. The first Appellant undertook a Masters degree programme in the UK and was awarded an LLM. This indicated a considerable degree of ability and fluency in English which, judging from the timings of his studies, he must have acquired in Bangladesh.
- 5) The judge did not hear evidence from the children but took into account that they had expressed a wish to stay in the UK. The parents gave evidence about the good progress the children were making at school and within the community in the UK. The judge found that given the ages of the children they would be able to adapt to life in Bangladesh. It was not infrequent for children to change schools, either within this country or by going abroad. The judge recognised that a period of seven years was an appropriate period for considering that a child had developed strong private life ties to the UK but, as pointed out by Blake J in *Azimi-Moayed [2013] UKUT 00197*, the seven year period might have greater relevance and effect from the age of about four onwards rather than from birth.

- 6) Furthermore, the seven year period could be outweighed by compelling reasons to the contrary. The seven year period was not a rigid rule but was to be considered in context and the circumstances of each case. This was recognised in the Immigration Rules in paragraph 276ADE and in paragraph EX.1 of Appendix FM, where the seven year period was qualified by the need to show that it would not be reasonable to expect the child to leave the UK. The judge found himself unable to accept assertions, for example, in the first Appellant's supplementary statement, to the effect that because the children were aged 12 and 9 they were at a very sensitive stage of their education and the disruption to their schooling would be devastating for them if they were required to return to Bangladesh. The judge had earlier observed, at paragraph 31 of the determination, that the area of Newcastle in which the Appellants were living "...has a relatively large Bengali speaking population with a Bangladeshi cultural background."
- 7) The judge observed, at paragraph 84 of the determination, that the children would be returning to Bangladesh with their parents and would be returning to their cultural routes and background in the country of their birth.
- 8) The judge further observed that the first and second Appellants still have relatives in Bangladesh. The evidence of the first Appellant was that although his parents have died he has brothers and sisters there. The second Appellant has a father and step-mother there. The judge said it could not be assumed without evidence to that effect that the first and second Appellants would not be able to obtain work in Bangladesh. The first Appellant acknowledged in his evidence that when he came to this country he envisaged returning to Bangladesh after his studies were completed. The judge considered that the family should remain together. He was not satisfied that the children would not get an equivalent level of schooling in Bangladesh. While the state-funded education system in Bangladesh might have problems there was a functioning private education system. Although there were factors indicating that the third and fourth Appellants, in particular, should not be required to leave the UK, overall these were outweighed by other factors. The private life established by the Appellants in the UK was not such as to make it disproportionate for them to be required to go to Bangladesh. The view of the Respondent was that there was a public interest in the enforcement of an effective and efficient immigration control and in maintaining public confidence in such system. The judge accepted that this should be given very considerable weight. The periods of private life enjoyed by the Appellants in the UK were not long enough to require the protection of Article 8 for the first and second Appellants. There was little evidence, apart from that relating to the education of the third and fourth Appellants, to illustrate what the Appellants' private life and community ties actually were. The Appellants did not qualify to remain under the Immigration Rules.

Application for permission to appeal

- 9) It was contended in the application for permission to appeal that the judge was wrong at paragraph 31 to rely on his own knowledge to the effect that the area where the Appellants were living has a relatively large Bengali speaking community. This undermined the impartial role of the judge and it was wrong of the judge to apply his own knowledge in support of the Respondent and against the Appellants.
- 10) It was further submitted that at the time of the hearing before the First-tier Tribunal the two children had been living in the UK for only two weeks short of seven years. This was relevant to Paragraph 276ADE(iv). This provision benefits a child under the age of 18 who has lived continuously in the UK for at least seven years where it would not be reasonable to expect the child to leave the UK. The Judge of the First-tier Tribunal should have considered the implication of this and exercised discretion in favour of the Appellants. The presence of the Appellants in the UK would not be a threat to the economic well-being of the UK as the whole family had been in the UK for at least seven years and had never relied on public funds in anyway.
- 11) It was further submitted that the judge had not properly considered the best interests of the children. The judge seemed to have accepted that the best interests of the children would be to remain in the UK but still decided the appeal against the Appellants, which was contradictory. In terms of *Azimi-Moayed* the third Appellant had come to the UK when he was five years of age and there would be a strong impact upon him if he had to leave the UK and continue his studies in Bangladesh. It was further submitted there was a presumption in law that after seven years residence it would not be reasonable to expect a child to leave the UK.
- 12) Permission was granted on the basis that there was an arguable error of law for the judge to have used his own knowledge of the Appellants' home area in Newcastle and of the local culture and language spoken there.

Submissions

- 13) At the hearing before me Mr Marfat pointed out that it was accepted by the Respondent that private life was established. The Judge did not have proper regard to the best interests of the children, including their well-being and upbringing. By now the children had been living in the UK for seven years. The judge did not properly consider how this would affect the situation if they returned to Bangladesh. The youngest child had never been to school in Bangladesh and he did not know the alphabet in Bengali. The children did not know the culture in Bangladesh and they did not know their relatives there. The education system in Bangladesh was different and was based on children memorising at their desks, not on exploring and learning how to do things. There was further documentary evidence to be considered on English-speaking schools in

Bangladesh. There was a question as to whether the Appellants would have sufficient resources to enable the children to attend an English-speaking school. English was now the children's first language.

- 14) Mr Marfat referred to the use of the judge's personal knowledge in favour of the Respondent, as he expressed it. Mr Marfat did not, however state that the judge's description of the area where the Appellants lived was wrong. He submitted instead that this was an area where there was a mixed community of not only people of Bangladeshi origin but also people of Pakistani origin, as well as Bulgarians and Romanians. The children were at school from 9-3 and then they were at home rather than out in the community. The parents of the children had encouraged them to use English as their first language so that they would do well in their education. It would take a long time to adapt to the Bengali language. The grammar was complicated and it would be difficult for the children to carry on their education. The third Appellant was at the stage of selecting subjects for GCSEs.
- 15) I asked Mr Marfat if he had any submissions to make in terms of the decision of the Supreme Court in *Zoumbas* [2013] UKSC 74 but he declined to do it. He relied instead on *Azimi-Moayed*._
- 16) For the Respondent Mrs Rackstraw relied on a rule 24 notice dated 3 April 2014. This stated that although the judge may have erred in referring to his own local knowledge this was not shown to have been factually incorrect so as to constitute a material error of law. The judge should as a matter of procedural fairness have indicated that he had such knowledge and given both parties to the appeal the option to address him on this point but in not doing so there was still no material error of law.
- 17) The rule 24 notice further stated that the judge was right to conclude that the Appellants did not meet the terms of Paragraph 276ADE and, even if the children had seven years' residence, this was not determinative. The relevant consideration was whether on the basis of this length of residency it would be reasonable to expect the children to leave the UK. The judge had clearly concluded that it was reasonable and in the best interest for the children to return to Bangladesh with their parents.
- 18) In her oral submission Mrs Rackstraw submitted that in some circumstances a judge should not refer to their own knowledge. Here the local knowledge was shared with the Appellants and their representative. The judge was stating a fact and this was not a piece of obscure knowledge which would have had to be put to the parties.
- 19) Mrs Rackstraw submitted that the first Appellant had come to the UK as a student and the second Appellant as his dependant. They had no expectation of automatic settlement. It was clear the family wanted to remain because they perceived the education system as being better.

The judge had written a very careful determination in which he considered all the aspects of the case.

- 20) In response Mr Marfat submitted that the Appellants had not applied for settlement but for further leave to remain, where they would still be under certain restrictions. The important issue was the welfare of the children. The Judge of the First-tier Tribunal had accepted the family had private life in the UK but had not given proper consideration to the impact on the children of returning to Bangladesh and did not consider what would befall them if they were not in the environment in which they had lived for the last seven years. Failure to consider these matters was an error of law. There had been a lack of regard for the welfare of the children. If an error of law was found then there should be a further oral hearing unless the appeal could be re-made in favour of the Appellants without such a hearing.
- 21) At the conclusion of the hearing I reserved my decision on the question of whether there was an error of law in the decision of the Judge of the First-tier Tribunal in consequence of which it should be set aside and re-made.

Discussion

- 22) The principal issue on which permission to appeal was granted was the reference by the judge to his own knowledge of the area where the Appellants live in Newcastle. This appears at paragraph 31 of the determination, where the judge is making his findings, rather than later in the determination, where he gives his reasons. The judge made his observation in relation to a claim by the first and second Appellants in a statement dated 17 December 2012 that the children spoke only English and that their education had been only in an English language medium. In cross-examination the first Appellant conceded that the third Appellant had spoken Bengali as his main language in Bangladesh. The first Appellant had said further in his oral evidence that he and the second Appellant would use a mixture of English and Bengali when talking between themselves. This issue was raised in the context of whether the children could speak Bengali and if so to what extent. It was not disputed that English was the children's first language. As well as observing that the Appellants lived in an area with a relatively large Bengali-speaking population, the judge further observed that the second Appellant was noted within the South Asian community in the West End of Newcastle, according to the evidence, for her henna work and as a threading beautician. This suggested to the judge that at least part of the social and cultural life of the family was likely to be based in the Bengali or wider South Asian community in Newcastle.
- 23) The judge's observation about the area in which the family lived was made in the context of the evidence as to the children's understanding of the Bengali language and, to a lesser extent, their knowledge and understanding of the culture of Bangladesh. The conclusion of the judge,

expressed at paragraph 69, was that while English was the children's first language he did not accept that they had no understanding of Bengali. This was a finding the judge was entitled to make on the evidence. The judge further stated, at paragraph 81, that he would not seek to disregard any difficulties that would arise to the children from adapting "to a different cultural, social, religious and (largely) language, environment and society" but that children were frequently expected to undergo such changes and had a considerable degree of adaptability – the more so where they would be accompanied by both of their parents and returning to the country of the parents' background and where their wider family lived. Again these were findings that the judge was entitled to make.

- 24) The core of the objection by the Appellants to the judge's use of his own knowledge of the area where they lived was the idea that he was favouring the Respondent and not acting impartially. As pointed out by Mrs Rackstraw, it was not contended that the judge was fundamentally incorrect in his observation, although Mr Marfat sought to qualify it by stating that people from other ethnic or national minorities lived in the area also.
- 25) If this was a matter which the judge felt he ought to raise, it would have been better if he had raised it at the hearing and allowed the parties to comment upon it. I do not consider, however, in the context in which the judge made this observation that its effect was so prejudicial or unfair towards the Appellant as to amount to an error of law. This was in effect a passing observation which was fully in accordance with the evidence that emerged at the hearing about the Appellants' links to the Bengali or South Asian community in Newcastle and the extent to which the Bengali language was used in the family home. In its context the judge's observation had no significant effect on the outcome of the appeal. This is shown by part of the judge's reasoning, at paragraphs 81 and 82 of the determination, which was that even if the children could not speak Bengali and even if they were returning to a very different cultural environment in Bangladesh, they were at an age where they could be expected to adapt and, furthermore, they would have the advantage of accompanying their parents who were familiar with the language and culture. These are reasons which support the judge's decision in relation to proportionality and which the judge was entitled to take into account.
- 26) Indeed, it is clear from the judge's reasoning that the best interests of the children played a major part in the assessment of proportionality under Article 8. It was submitted in the application for permission to appeal that, having found that the best interests of the children were to remain in the UK, the judge reached a contrary conclusion in dismissing the appeals. This is not, however, the tenor of the judge's reasoning. The judge stated at paragraph 101 of the determination that it was in the best interests of the children to remain with their parents, even if that meant they had to leave the UK. The judge recognised in the balancing

exercise that advantages would be enjoyed by the children were they to remain in the UK but did not consider the loss of these benefits outweighed the public interest.

- 27) The question arose as to whether the children would be able to carry on their education in English language schools in Bangladesh. The judge rightly noted at paragraph 72 that it had not been explained why such schools would not be available to the children so that they could continue their education in a broadly similar way. I understood Mr Marfat to indicate at the hearing before me that there would be a question of whether the parents had sufficient resources to finance English language education in Bangladesh but this was not an issue before the Judge of the First-tier Tribunal. Mr Marfat also sought to submit additional evidence on problems, including the use of corporal punishment, at an English language school in Bangladesh.
- 28) Although Mrs Rackstraw pointed out that no decision had been made to admit additional evidence, I would regard this evidence as of very little potential significance to the outcome of the appeal. In any education system it is possible to highlight specific problems, particularly in an individual school, but these do not necessarily characterise either the system as a whole or even particular parts of the system.
- 29) A more significant issue from the Appellants' point of view was the submission made by Mr Marfat that at the date of the hearing before the First-tier Tribunal the children were only two weeks short of seven years' residence in the UK. There are, however, two observations that I make in response to this. The first is to accept the submission made by Mrs Rackstraw to the effect that the completion of seven years' residence by a child under 18 does not raise any presumption under paragraph 276ADE to the effect that it would not be reasonable to expect the child to leave the UK. The effect of seven years' residence is no more than to raise the further issue of whether it would not be reasonable to expect the child to leave the UK. This is a separate question which, where it arises, requires full and proper consideration. Indeed, in the case of two parents and two children all leaving together at around the time the children have completed seven years residence in the UK it may be quite difficult to show that it would not be reasonable to expect the children to leave the UK.
- 30) Secondly, the essential point so far as the question of whether the judge made an error of law is that at the date of the hearing the children had not completed seven years continuous residence in the UK. Although they were only short of this period by two weeks, there is, as was pointed out in the decision of the Supreme Court in *Patel* [2013] UKSC 72, no principle of a "near-miss" in relation to the application of Article 8. The approach the judge took was the proper one, which was to consider the best interests of the children as part of the private life established by the

family in the UK and weigh that against the public interest. The judge did not err by failing to apply the seven year test in Paragraph 276ADE.

- 31) Although given the opportunity to do so, Mr Marfat did not address me on the decision of the Supreme Court in *Zoumbas*. I mention this case because of certain similarities between its facts and circumstances and those of the present appeals. The case involved two parents and three children. The father had entered the UK illegally, unlike the father in the present appeals. The children were not British citizens. Before the Supreme Court it was argued that the Secretary of State had failed to have regard to the best interests of the children as a primary consideration; that the findings made by the Secretary of State in relation to the best interests of the children were irrational, in particular in assuming that the parents would be removed; and thirdly, that the Secretary of State was wrong to conclude that further representations did not have a realistic prospect of success before an immigration judge. (This latter ground is of no relevance to the present appeals.) The Supreme Court accepted that it would be possible to conclude, other things being equal, that it would be in the children's best interests to stay in the UK. The court rejected the criticism of the making of decision as to the best interests of the children on the assumption that the parents would be removed. It was legitimate for the decision-maker to ask first whether it would be proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance.
- 32) This approach is in essence the approach taken by the Judge of the First-tier Tribunal in these appeals. It was found that it would not be disproportionate for the parents to be removed and, even taking into account the advantages the children might retain by remaining in the UK, the balance of proportionality was not altered by removal of the family unit as a whole. The best interests of the children were a primary consideration but not a paramount one.
- 33) I have considered the arguments raised by the Appellants in seeking to identify an error of law in the Determination by the Judge of the First-tier Tribunal. For the reasons I have given I do not consider that any error of law has been identified such as would lead to the decision being set aside. Any criticism that might be made of the judge relates to matters which did not have any significant effect on the judge's reasoning or on the outcome of the appeals.

Conclusions

- 34) The making of the decision of the First-tier Tribunal did not involve the making of an error on the point of law.
- 35) I do not set aside the decision.

Anonymity

- 36) I continue the order for anonymity made by the Judge of the First-tier Tribunal. The judge made a direction to this effect to protect the identity of the children and I will maintain this in force (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed

Date

Judge of the Upper Tribunal