



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

Appeal Numbers: IA153162015
IA153232015
IA153252015

THE IMMIGRATION ACTS

Heard at Field House

On 18th May 2017

**Decision &
Promulgated
On 23rd May 2017**

Reasons

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ANJANA SHAH

MR SAMIR SHAH

[S S]

(ANONYMITY DIRECTIONS NOT MADE)

Respondents

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer

For the Respondent: Mr A Malik of Counsel

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals against the decision of First-tier Tribunal Judge Meah promulgated on 1 October 2016,

in which the appeals against her decision to refuse Mrs Shah and her dependants leave to remain on the basis of private and family life dated 1 April 2015 were allowed under the Immigration Rules and on human rights grounds (Article 8). For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mrs Shah and her dependents as the Appellants and the Secretary of State for the Home Department as the Respondent.

2. The Appellants are nationals of Bangladesh, born on 10 February 1979, 11 April 1971 and [] 2003 respectively. Anjana Shah, the main Appellant, is the wife of Samir Shah and the mother of [SS]. The main Appellant was granted entry clearance to the United Kingdom as a Tier 4 General Student and entered the United Kingdom on 13 September 2009, with leave to remain valid to 31 October 2011. Further leave to remain on the same basis was granted to 8 March 2016, although this was subsequently curtailed to end on 16 February 2015. The other Appellants were dependent on her and were granted leave to remain as dependents for the same periods. On 13 February 2015, the Appellants made an application for leave to remain on the basis of private and family life in the United Kingdom.
3. The Respondent refused the applications on 1 April 2015 on the basis that none of the Appellants could meet the requirements of the Immigration Rules set out in Appendix FM and paragraph 276ADE. Specifically, neither adult was a British Citizen, present and settled in the United Kingdom, nor here with refugee leave or humanitarian protection such that the partner route was not available to either of them. Neither of the adult Appellants were entitled to leave to remain under the parent route because neither had sole responsibility for the third Appellant. Similarly, the third Appellant could not satisfy the requirements for a grant of leave to remain under the child route because of the refusal of leave to remain to his parents.
4. In relation to private life, the adult Appellants were not considered to face any very significant obstacles to their reintegration to Bangladesh, because they had spent the majority of their lives there, were familiar with the culture and spoke the language. In relation to the third Appellant, the requirements of paragraph 276ADE were not met as he had not lived in the United Kingdom continuously for at least seven years and in any event it would not be unreasonable to expect him to return to his country of origin with his parents.
5. The Respondent considered whether there were any exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules and in doing so took into account her duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to consider the best interests of the third Appellant as a child. It was considered that the family would return to Bangladesh together and the third Appellant would be able to continue his education there and that he

remained familiar with the culture. There was nothing to suggest that the adults would be unable to maintain and provide for their son on return.

6. Judge Meah allowed the appeals in a decision promulgated on 1 October 2016. In respect of the third Appellant, it was found that he satisfied the requirements set out in paragraph 276ADE(1)(iv) of the Immigration Rules as he had, at the date of the hearing, been continuously resident in the United Kingdom for seven years and it would be unreasonable to expect him to leave and return to Bangladesh. This is because there was no evidence that he could speak the Bengali language such that he would struggle on return at a Bengali speaking school; he was well settled in the United Kingdom having spent a critical part of his youth growing up here and was progressing well in his education.
7. Against that backdrop, that the third Appellant would be granted leave to remain and if his parents were not, the family would be split, which would be contrary to the best interests of the child, Judge Meah went on to consider the remainder of the appeals under Article 8 of the European Convention on Human Rights. With reference to section 117B of the Nationality, Immigration and Act 2002 (the “2002 Act”), he found that the public interest in removal was diminished in line with subsections (2), (3) and (6) as the Appellants have always remained in the United Kingdom lawfully (albeit with precarious status as a student and dependents), they have always supported themselves from their own funds and they all speak very good English. In these circumstances the appeals were allowed under Article 8 on the basis that it would be a disproportionate interference of the adult Appellants’ right to respect for private and family life in the United Kingdom to be removed.

The appeal

8. The respondent appeals on four grounds as follows:
 - (i) that the First-Tier Tribunal materially adding law in finding that the third Appellant satisfy the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules because the relevant date to be a qualifying child is expressly the date of application and not the date of hearing contrary to paragraph 8 of the decision;
 - (ii) that as the third Appellant could not meet the requirements of the Immigration Rules for the reasons in ground one, the First-Tier Tribunal was required to consider whether there were any compelling circumstances to warrant consideration of Article 8 outside of the Immigration Rules, but failed to do so;
 - (iii) that the First-tier Tribunal failed to properly consider whether it be reasonable to expect the third Appellant to leave the United Kingdom with his parents in accordance with section 117B(6) of the 2002 Act and failed to attach significant weight to the fact that all of the

Appellant's immigration status' were precarious as required by subsection (5) of the same;

(iv) that the First-tier Tribunal materially erred in law in allowing the appeals of the adult Appellants on a freestanding basis given the flawed findings in respect of paragraph 276ADE.

9. Permission to appeal was granted by Upper Tribunal Judge Pitt on all grounds on 5 April 2017.
10. At the hearing, the Home Office Presenting Officer relied on all of the written grounds of appeal and submitted that the third Appellant's appeal under the Immigration Rules must fail because he had not, at the date of application, been continuously resident in the United Kingdom for seven years as expressly required by paragraph 276ADE(1). The First-tier Tribunal erred in law in considering the circumstances at the date of hearing and that error, erroneously allowing one appeal under the Immigration Rules, went on to infect the remainder of the decision to allow the adult Appellants' appeals on Article 8 grounds.
11. It was further submitted that the First-tier Tribunal failed to give any consideration as to whether there were compelling factors to consider Article 8 outside of the Immigration Rules, did not make a full assessment of all of the circumstances of the family who would be returning to Bangladesh together, nor of the precariousness of the Appellants' leave in the United Kingdom for the purposes of the wider assessment required under section 117B of the 2002 Act. Further, the First-tier Tribunal's focus throughout the determination was on the third Appellant's education, but in accordance with **AM (S117B) Malawi [2015] UKUT 260 (IAC)**, that was not a trump card. It was however accepted that there was no appeal against the best interests assessment for the third Appellant, only as to the First-tier Tribunal's assessment on the reasonableness of his return to Bangladesh.
12. In response, Counsel for the Appellant submitted that there was no material error of law in the decision. Although it was accepted that it was an error of law to allow the third Appellant's appeal under paragraph 276ADE(1)(iv) of the Immigration Rules because at the date of application he had not been continuously resident in the United Kingdom for seven years, it was submitted that it was not material because section 117B(6) of the 2002 Act required the same assessment of whether it was reasonable to require a child to leave the United Kingdom if they had been resident here continuously for seven years at the date of hearing. There was no material difference to the third Appellant in terms of a resulting grant of leave to remain in the United Kingdom between his appeal being allowed under the Immigration Rules or on human rights grounds.
13. Further, there was no error in the assessment of the best interests of the third Appellant. Although there was no express reference in the decision to compelling circumstances, it is clear that this would be satisfied if the

family were to be split because one was successful in his appeal and the adults were not.

Findings and reasons

14. The starting point in this appeal are the requirements of paragraph 276ADE(1) of the Immigration Rules, which so far as is relevant, provide as follows:

“the requirements to be met by an applicant to leave to remain on the grounds of private life in the UK that at the date of application, the applicant;

(i) ...

(ii) ...

(iii) ...

(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; ...”

15. As was accepted by Counsel for the Appellant at the hearing, it was an error of law to consider the third Appellant’s length of residence in the United Kingdom at the date of hearing for the purposes of paragraph 276ADE(iv) of the Immigration Rules and to allow his appeal on that basis. It is expressly specified in the rules that the relevant date for these purposes is the date of application for calculating length of residence. At the date of the application for leave to remain on 13 February 2015, the third Appellant had resided in the United Kingdom for less than five years and therefore could not satisfy the requirements of the Immigration Rules for a grant of leave to remain on the basis of private life and his appeal could not lawfully be allowed for that reason.
16. I find it is a material error of law to allow an appeal under the Immigration Rules when an Appellant has not satisfied the requirements of the Immigration Rules, even if the appeal may otherwise be allowed on human rights grounds for the same reason and/or following the same assessment (which I deal with further below) because there are different consequences for an individual as to the type of leave they may be granted as a result and the route for any future applications. I allow the appeal on the first ground. For these reasons, this part of the First-tier Tribunal’s decision must be set aside and remade so as to dismiss all of the appeals under the Immigration Rules. That also means that the third Appellant’s appeal on human rights grounds remains outstanding.
17. As to the second ground of appeal, although the First-tier Tribunal did not expressly set out any compelling circumstances or reasons as to why it went on to consider the appeal outside of the Immigration Rules, I do not consider the omission to amounts to a material error of law. In a case where at the date of hearing, there was a child who had been lawfully resident in the United Kingdom for over seven years and there was a finding that it would be in his best interests to remain in the United

Kingdom, it was clearly evident that this was the case where consideration of Article 8 outside of the Immigration Rules was required.

18. I consider the third and fourth grounds of appeal together which both relate to whether the First-tier Tribunal materially erred in law in allowing the adult appeals under Article 8, with reference to the factors set out in section 117B(6) of the 2002 Act.

19. The First-tier Tribunal concluded, by reference to the factors in section 117B of the 2002 Act, that the Appellants all spoke English, have supported themselves in the United Kingdom without recourse to public funds and that the third Appellant's return to Bangladesh would be unreasonable, such that the public interest in removal was therefore diminished and it would constitute a disproportionate interference with their right to respect for private and family life under Article 8 of the European Convention on Human Rights. There was no specific or express assessment of reasonableness for the purposes of section 117B(6) of the 2002 Act, which states as follows:

“(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 relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.”

20. It is the Respondent's case that this requires a wider assessment than that in paragraph 276ADE(1)(iv) as to the reasonableness of expecting a child to leave the United Kingdom, involving wider public interest factors and the situation of the adults and in this case that the leave to remain had been precarious. Conversely, it is the Appellant's case that there is no material error of law given that the assessment of reasonableness is materially the same in both paragraph 276ADE(1)(iv) of the Immigration Rules and section 117B(6) of the 2002 Act.

21. There is considerable support for the Appellants' submission from Lord Justice Elias in **MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705** who made the following preliminary observations about paragraph 276ADE(1)(iv) of the Immigration Rules and section 117B(6) in paragraph 13:

“... First, they are similarly framed: both require seven years' residence and in both the critical question is whether it is unreasonable for the child to be expected to leave the UK. Second, the concept of seven years' residence may not be calculated in precisely the same way in the two provisions. Rule 276ADE(1) states in terms of the period must be assessed as at the date of application. However, the Secretary of State conceded that as a result of section 85(4) of the 2002 Act, the relevant date for the purpose of section 117B is the later date when the court is making a determination. We have acted on the assumption that this is

correct. Third, only the child can apply under rule 276ADE(1)(iv), whereas section 117B is concerned with article 8 applications under which both the child and the parents can apply. Fourth, rule 276ADE is concerned with applications made on the basis of private life, whereas claims article 8 may rely on both private and family life. Fifth, it is in my judgement a legitimate assumption that the question whether it is reasonable to expect the child to leave should be approached in the same way in each context, and no party has sought contend otherwise.”

22. Lord Justice Elias went on in **MA (Pakistan)** to hold that the concept of reasonableness required regard to be had to the conduct of the applicant and any other matters relevant to the public interest, but that where the seven year rule is satisfied, it is a factor of some weighing in favour of leave to remain to be granted. This in turn relied on the reasoning in **MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450**) and was consistent with the analysis of the unduly harsh assessment in section 117C(5) of the 2002 Act. This strongly supports the need for a consistent approach across the provisions and the only remaining issue is then whether the First-tier Tribunal had in the present case lawfully undertaken the assessment of reasonableness either pursuant to section 117B(6) of the 2002 Act or under paragraph 276ADE(1)(iv) of the Immigration Rules.
23. In the present case, Judge Meah found that it was not in the third Appellant’s best interests to return to Bangladesh and that it was not reasonable to expect the third Appellant to live there. It does not automatically follow that leave must be granted whenever the child’s best interests are in favour of remaining – the bests interests assessment does not automatically resolve the reasonableness question (see paragraph 47 of **MA (Pakistan)**). However, in paragraphs 24 to 27 and 38 to 39, Judge Meah noted that there must usually be very strong reasons for a child to be expected to return to their country of origin if they have achieved seven years’ residence in the UK (as reiterated in **MA (Pakistan)**) and found that there were none in this case. This was because the Appellants have all resided lawfully in the United Kingdom since their arrival (albeit that their leave to remain was precarious as it was for a temporary purpose) and have no adverse immigration history; they have supported themselves from their own funds and they speak English well.
24. I find that in substance, there is no material error of law in the First-tier Tribunal allowing the appeals of the adult Appellants under Article 8 of the European Convention on Human Rights (with reference to section 117B(6) of the 2002 Act) for the reasons given by Judge Meah following an assessment of the reasonableness of expecting the third Appellant to leave the United Kingdom (albeit the assessment took place primarily in the context of paragraph 276ADE(1)(iv)). That assessment took into account and gave appropriate weight to all relevant factors, including the best interests of the child, the length of his residence, the lack of any adverse immigration history, language and self-sufficiency of the

Appellants. In these circumstances, there were no powerful reasons or significant factors which outweighed the significant weight to be attached to the third Appellant's long residence.

25. For the same substantive reasons, I would allow the third Appellant's appeal on human rights grounds under Article 8 of the European Convention on Human Rights. It would be a disproportionate interference with his right to respect for family and private life for him to be removed from the United Kingdom where it is not in his best interests to do so, it is unreasonable to do so and where his parents' appeals have been allowed precisely on that basis.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law only in allowing the third Appellant's appeal under the Immigration Rules. As such it is necessary to set aside that part of the decision and to re-make the decision as follows.

The Appellants' appeals are dismissed under the Immigration Rules.

The Appellants' appeals are allowed on human rights grounds.

No anonymity directions are made.

Signed
2017



Date

19th May

Upper Tribunal Judge Jackson