



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/15549/2015  
IA/11969/2015  
IA/11733/2015  
IA/11734/2015  
IA/11735/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre  
On 9<sup>th</sup> May 2017

Decision & Reasons Promulgated  
On 23<sup>rd</sup> May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR ANIRBAN SARKER  
(2) MRS JULITA ADONIS SARKER  
(3) [P S]  
(4) [F S]  
(5) [F A S]  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Abdullah Khurram (Solicitor)  
For the Respondent: Mr David Mills (Senior HOPO)

## **DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Boylan-Kemp, promulgated on 22<sup>nd</sup> August 2016, following a hearing at Birmingham Sheldon Court on 1<sup>st</sup> August 2016. In the determination, the judge allowed the appeal, on human rights grounds, of the Appellants, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellants**

2. The Appellants comprise a family, of two parents and their three children. The first Appellant, the father, was born on 8<sup>th</sup> May 1977 and is a Bangladeshi national. The second Appellant, the wife, together with the third, fourth and fifth Appellants, the children, are all nationals of the Philippines. Their dates of birth are 16<sup>th</sup> June 1974, [ ] 2003, [ ] 2006, and [ ] 2013.

### **The Appellants' Claim**

3. The Appellants' claim is that the first Appellant, who the principal Appellant, upon whom the others are dependent, entered the UK on a student visa on 8<sup>th</sup> February 2005 with valid leave to remain until 31<sup>st</sup> March 2006, following which there were various extensions of his stay in this country. On 13<sup>th</sup> January 2015, he applied for indefinite leave to remain on the basis of ten years' lawful continuous residence in the UK. This application was refused on 1<sup>st</sup> April 2015. The second Appellant, his wife, entered the UK on 25<sup>th</sup> March 2008, on a work permit valid from 25<sup>th</sup> February 2008 until 20<sup>th</sup> April 2009. Her first two children were born in the Philippines, but the youngest has been born in the UK. They appeal the Respondent's refusal decision dated 1<sup>st</sup> April 2015 to the effect that the first Appellant has not had ten years' continuous lawful residence in the country, because his valid leave expired on 31<sup>st</sup> July 2007, and he did not submit a fresh application for leave to remain until 4<sup>th</sup> September 2007. This meant that he overstayed for a period exceeding 28 days during those dates. The Respondent decided that the Appellants did not satisfy the requirements of Appendix FM or paragraph 276ADE(1). The first Appellant and his dependent wife was neither a British citizen, nor settled in the UK, and nor had they been granted refugee status in this country. They did not satisfy the long residency requirements under paragraph 276ADE(1)(iii) to (v) as the first Appellant was aged over 25 years old and had not lived in the UK for twenty years. The Appellants also did not satisfy paragraph 276ADE(1)(vi).

### **The Judge's Findings**

4. The judge heard evidence that the first Appellant had completed his MSc in International Business from Birmingham City University, and he had obtained

employment in May 2007 with a company. The evidence was given before the Tribunal that the Appellant was not technically responsible for the delay in submitting his relevant visa application, as responsibility for this had been placed upon his employers, as they were his work Sponsor, but unfortunately they were a few days late in making the application.

5. The judge went on to say that he recognised that besides this one incident the Appellant has had a “faultless immigration record”, and this issue occurred due to the delay caused by his employers, who were acting as his Sponsor, not due to the direct actions of the Appellant himself (paragraph 13).

6. Second, the judge went on to record that,

“There is also a wealth of evidence in the Appellants’ bundle about the children’s lives, as well as statements from the two eldest children explaining how settled they are in the UK in respect of their schooling and social life” (paragraph 19).

7. Third, the judge observed that her English was the children’s first language now, and applying Section 55 of the BCIA 2009, the judge held that, what I find that it would not be reasonable for the third or fourth Appellant to leave the UK as they have both established lives here in the UK by moving either to Bangladesh or the Philippines” and added that this would be “to a level that I find cannot be justified” (paragraph 20).

8. Finally, the judge had regard to Section 117B(6) of the 2002 Act. He concluded that, bearing all these factors in mind, that

“It will be unreasonable to require the parents of other sibling of the third and fourth Appellants to leave the UK as to do so would result in an unjustifiable division of the family. Therefore, I find that the Appellants’ right in this respect outweighs the public interest in effective immigration control ...” (paragraph 21).

### **Grounds of Application**

9. The grounds of application state that the judge erred in law in failing to consider the public interest factors in determining the reasonableness of requiring the minor children to leave the United Kingdom.

10. On 23<sup>rd</sup> November 2016, permission to appeal was granted by the Tribunal. On 13<sup>th</sup> January 2017, a Rule 24 response was entered by the Appellants’ solicitors.

### **Submissions**

11. At the hearing before me on 9<sup>th</sup> May 2017, Mr Mills, appearing on behalf of the Respondent Secretary of State, accepted that the period of overstaying here was

relatively short (see paragraphs 13 to 14). There was also here a non-custodial driving offence committed by the first Appellant. The judge also wrongly concluded that the elder two children could come under paragraph 276ADE and Appendix FM, because they had not been in the UK quite seven years, but just over six years. Whereas none of this may be material to the eventual decision, the judge misconstrued the application of Section 117B(vi), in determining whether it will be reasonable for the children to leave the UK, because the judge focused only on the “best interests” of the children, and not on the period of unlawful stay in this country. These matters were important because the Appellants could not meet the Immigration Rules (see paragraph 20). They were also important because contrary to the position previously, the judgment in Treebhoven now makes clear, that all aspects of Section 117B need to be looked at together and that they are not independent of Section 117B(vi). Therefore, the fact that the principal Appellant was only earning £18,000, and not even £18,600, was a factor that ought to have militated against their being allowed to remain in this country. All in all, therefore, the judge had erred in law.

12. For his part, Mr Khurram, relied upon the Rule 24 response dated 13<sup>th</sup> January 2017. He submitted that if Mr Mills on behalf of the Respondent Secretary of State, had accepted that the decision with respect to paragraph 276ADE was not material, to the overall outcome of the appeal, then the only issue that remains is Section 117B(vi). However, the judge addressed all the relevant issues at paragraph 21, at paragraph 20, at paragraph 10, and at paragraph 19, where in the latter case, it is expressly stated that, apart from the short overstaying by the Appellants, for which they were not responsible themselves, “the Appellant has had a faultless immigration record” (see paragraph 13).
13. There was no reply by Mr Mills.

### **No Error of Law**

14. I am satisfied that the making of the decision by the judge, did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision. My reasons are as follows.
15. First, the principal basis of the challenges that the judge overly concentrated on the “best interests” of the children, and neglected the public interest in immigration control. This is not so. The judge did give the public interest in immigration control proper consideration. Not only is there an express reference to this in the concluding paragraph (at paragraph 21), but the judge is clear (at paragraph 31) that, “the Appellant has had a faultless immigration record” and that this “occurred due to the delay caused by his employers who are acting as his Sponsor and not due to the direct actions of the Appellant” (paragraph 13). Second, the judge gave express recognition to the fact that, “the Respondent ... granted him a period of limited leave to remain for 24 months” (see paragraph 8). Third, in looking at the position of the children, the judge had regard to the fact that, “there is a wealth of evidence in the

Appellant's bundle about the children's lives, as well as statements from the two eldest children explaining how settled they are in the UK" (paragraph 19). Fourth, one aspect of this evidence is that, "regarding their family life in the UK and the fact that their children are settled into English culture having spent most of their formative lives here" (paragraph 11). Finally, it was in the context of the aforesaid, that the judge eventually concluded that, "therefore, I find that the Appellants' rights in this respect outweigh the public interest in effective immigration control" (paragraph 21). These conclusions were not perverse. They were entirely open to the judge on the evidence that he heard.

### **Notice of Decision**

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

22<sup>nd</sup> May 2017