



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

Appeal Number: HU/12871/2016

**THE IMMIGRATION ACTS**

**Heard at Cardiff Civil Justice Centre**

**Decision & Reasons**

**On 10<sup>th</sup> September 2018**

**Promulgated**

**On 26<sup>th</sup> September 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

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

Appellant

**and**

**SS**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr C Howells, Senior Home Office Presenting Officer

For the Respondent: Mr N Gobir of Counsel, instructed by Syed Shaheen Solicitors

**DECISION AND REASONS**

**Introduction and Background**

1. The Secretary of State appeals against a decision of Judge Powell (the judge) of the First-tier Tribunal (the FtT) promulgated on 21<sup>st</sup> September 2017.
2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to her as the Claimant.

3. The Claimant is a national of Bangladesh born 6<sup>th</sup> January 2009. She is now 9 years of age.
4. The Claimant was born in the UK. Her father arrived in the UK in March 2007. His asylum claim was refused on 18<sup>th</sup> April 2007. The Claimant's mother arrived in the UK in November 2007. The Claimant has a sister born in the UK in July 2014. None of the family have any leave to remain in this country.
5. The Claimant's father applied for leave to remain on 17<sup>th</sup> November 2010. The application was refused but apparently is still being reconsidered by the Secretary of State.
6. An application for leave to remain was made on behalf of the Claimant and refused on 6<sup>th</sup> May 2016. An appeal was lodged and heard by the FtT on 7<sup>th</sup> September 2017.
7. The judge heard evidence from the Claimant's father and noted that the Claimant relied upon paragraph 276ADE(1)(iv) of the Immigration Rules. The Claimant therefore had to prove that at the date of application she was under 18 years of age and had lived continuously in the UK for at least seven years, and it would not be reasonable to expect her to leave the UK. It is perhaps no coincidence that this application was made on 11<sup>th</sup> February 2016, approximately one month after the Claimant had accrued seven years' continuous residence.
8. The judge found that at the date of the FtT hearing, the Claimant had been living in the UK for eight years and eight months having been born in this country. She had never visited Bangladesh. The judge found that it would not be reasonable to expect her to leave the UK and therefore she satisfied paragraph 276ADE(1)(iv).
9. The judge went on to consider Article 8 outside the Immigration Rules with reference to section 117B of the Nationality, Immigration and Asylum Act 2002. The judge found the Secretary of State's decision to be disproportionate, and therefore the appeal was allowed with reference to Article 8 of the 1950 European Convention on Human Rights.
10. The Secretary of State applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had failed to apply binding case law such as EV (Philippines) [2014] EWCA Civ 874, and Zoumbas [2013] UKSC 74. It was submitted that the judge had failed to give any good reason why he had not applied the principles in those cases.
11. It was also contended that the judge had made a material misdirection of law in allowing the Appellant's appeal on Article 8 outside the Rules. The judge had failed to give adequate weight to the public interest. It was submitted that the judge had only considered those factors which weigh in favour of the Appellant and ignored his duty to consider the very weighty factors pointing in the opposite direction, including the public purse and

the public interest in maintaining a firm and coherent system of immigration control.

12. It was submitted that the judge had erred in making speculative findings when considering reasonability. It was contended that the Claimant's family have family members in Bangladesh who could assist if they return, and there was no reason that would prevent the Claimant's parents from finding employment in Bangladesh.
13. Permission to appeal was granted by Judge E B Grant of the FtT and I set out below, in part, the grant of permission;

"Having read the decision carefully it can be seen the judge has set out the factors he had to consider in the balancing exercise at paragraph 40 in virtually all of the factors set out therein factors in favour of the Appellant. Very little weight is given to the public interest in removal and higher court authorities have not been taken into account and applied. The Record of Proceedings shows that the Respondent's representative drew the attention of the judge to case law including EV (Philippines) yet this is not been taken into account. The skeleton argument of the Appellant's representative referred to relevant case law which has arguably not been taken into account by the judge."

14. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT decision contained a material error of law such that it should be set aside.

### **The Oral Submissions**

15. Mr Howells relied upon the grounds contained within the application for permission to appeal. He submitted that paragraphs 60-61 of EV (Philippines) are particularly relevant in which it was found that the desirability of being educated at public expense in the UK does not outweigh the benefit to the children of remaining with their parents, and just as the UK cannot provide medical treatment for the world, the UK cannot educate the world. Mr Howells submitted that when considering the length of residence, it was accepted that seven years from age four is more significant than the first seven years of life.
16. Mr Howells submitted that the judge erred in law when considering Article 8 outside the Rules by failing to give adequate weight to the public interest and failing to properly consider section 117B of the 2002 Act.
17. On behalf of the Claimant Mr Gobir relied upon his skeleton argument. In brief summary it was submitted that the judge had taken into account the relevant case law, had conducted a comprehensive balancing exercise and taken all relevant matters into account. Mr Gobir pointed out that the Secretary of State had been reconsidering the application for leave to remain made by the Claimant's father, since at least 2012 and had still not reached a decision.

18. At the conclusion of oral submissions I observed that neither representative had made any reference to MA (Pakistan) [2016] EWCA Civ 705 which I thought may be relevant in considering the question of reasonableness, in relation to a child with in excess of seven years' continuous residence. I asked the representatives whether they wished to make any submissions on this case, and they did not.

### **My Conclusions and Reasons**

19. The reason that I have made an anonymity order in this case is because of the age of the Claimant.
20. I do not accept that the judge has materially erred in law. In my view it is not the case that the judge has failed to consider authorities from the Court of Appeal and the Supreme Court. By way of example the judge at paragraph 16 makes specific reference to ZH (Tanzania) [2011] UKSC 4, and EV (Philippines) reminding himself that the welfare of a child must not trump all other considerations.
21. The case that is omitted from consideration is MA (Pakistan) which does not assist the Secretary of State's case.
22. I do not accept the contention in paragraph 2 of the grounds that the judge appears to have only considered factors weighing in favour of the Claimant, a point that seems to have been accepted by the judge granting permission.
23. In my view a careful reading of the decision indicates that not to be the case. The judge at paragraphs 11 and 29 expresses the view that the decision before him "was finely balanced". At paragraph 39 the judge correctly highlights that the key issue in the appeal is whether it would be reasonable for the Claimant to go to Bangladesh, and specifically makes the point that when considering whether it would be reasonable, the judge must take into account the wider public interest in the operation of immigration control. The judge also correctly makes the point that the child's welfare is a primary but not a paramount consideration.
24. The judge considers at paragraph 40 whether it would be reasonable to expect the Claimant to relocate to Bangladesh. It is this paragraph that the Secretary of State contends is weighted heavily in favour of the Claimant. I do not agree. The judge divides the paragraph into subparagraphs a-x. I will now refer to factors taken into account by the judge, which in my view are not favourable to the Claimant and her family. At g the judge finds that the Claimant has been exposed to Bengali culture, and at h finds that she probably understands Bengali far more than her father states in evidence. Bengali is the language used at home.
25. At i the judge finds that the Claimant is likely to be developing a degree of bi-lingualism and is likely to be able to communicate in Bengali.

26. At j the judge finds that if removed to Bangladesh the Claimant would go with her parents and sister as a family unit and family life would be preserved and could continue in Bangladesh as well as it can in the UK.
27. At k the judge finds that while the values, cultural norms and opportunities in Bangladesh are different to those in the UK, they do not pose a real risk of harm to the Claimant in the medium or long-term. Any short-term distress by changing her home should be capable of being mitigated by her parents.
28. At n the judge finds that there is a public interest in the maintenance of effective immigration control. At o the judge finds the UK does not have to accept the choices made by the Claimant's parents in relation to her upbringing or in the choices they have made to try and settle in the UK.
29. At p the judge finds that while the Claimant cannot be held responsible for her parents' faults, their lack of immigration status and their decision to remain in the UK without leave, is relevant to the question of what is reasonable. At v the judge rejects the Claimant's father's continuing assertion that he and his family have a well-founded fear of persecution in Bangladesh. At w the judge finds that even if the Appellant's parents have cynically manipulated the immigration system by founding a family here and avoiding the immigration authorities until the Appellant has reached the age of seven years, the Claimant cannot be punished for their fault by taking a harsher line with her than might be taken in respect of a similar child with parents less culpable.
30. At x the judge gives less weight to the private life formed by the Claimant because her immigration status was precarious while she formed it.
31. In my view the judge carried out an appropriate balancing exercise. What he did not do was take into account the guidance given in MA (Pakistan). For example at paragraph 49 of that decision it is stated;

“However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons, first, because of its relevance to determining the nature and strength of the child's best interests, and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.”
32. The Claimant had in excess of seven years' residence and therefore the approach to be followed by the judge should have been, according to MA (Pakistan), that leave should be granted unless there are powerful reasons to the contrary.
33. The judge has considered the immigration history of the parents. They have remained in the UK without leave. The judge did not have the benefit of the decision in MT and ET (Nigeria) [2018] UKUT 00088 (IAC) which was decided after the FtT decision. At paragraph 34 of that decision the President of the Upper Tribunal considered the immigration history of

a parent who had abused the immigration laws of the UK. The parent in that case had received a community order for using a false document to obtain employment, had come to the UK on a visit visa, overstayed, made a claim for asylum that was found to be false, and thereafter pursued various legal means of remaining in the UK. While this behaviour was not to be excused or downplayed, it was found on the facts of that case, that the immigration history was not so bad as to constitute the kind of “powerful” reason that would render reasonable removal of a child with in excess of seven years’ residence from the UK.

34. The judge did not err in considering Article 8 outside the Immigration Rules. The judge has considered section 117B and the public interest. The judge has considered the parents’ immigration history and the public interest in immigration control. The judge did not err in law in finding that it would not be reasonable to expect a child with eight years and eight months’ residence in the UK, who has been born in the UK and never visited Bangladesh, to have to leave the UK. That was a finding open to the judge on the evidence. The grounds submitted by the Secretary of State display a strong disagreement with the conclusion reached by the judge but do not disclose a material error of law.

### **Notice of Decision**

The decision of the FtT does not disclose a material error of law. The decision is not set aside. I dismiss the appeal of the Secretary of State.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 11<sup>th</sup> September 2018

Deputy Upper Tribunal Judge M A Hall

### **TO THE RESPONDENT FEE AWARD**

Because the decision of the FtT stands so does the decision not to make a fee award.

Signed

Date 11<sup>th</sup> September 2018

Deputy Upper Tribunal Judge M A Hall