



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

Appeal Numbers: HU/15456/2017
HU/15449/2017
HU/15445/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 8 May 2019**

**Decision & Reasons Promulgated
On 05 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**FARHANA [L] (FIRST APPELLANT)
[PI H] (SECOND APPELLANT)
[PA H] (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr Avery, Home Office Presenting Officer

For the Respondents: Ms Bustani, Paul John & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were referred to in the First-tier Tribunal.
2. The first appellant is a citizen of Bangladesh born on 7 April 1980. In 2005 she met and married Mr [H] ("the sponsor") in Bangladesh.

3. The sponsor is a British citizen by descent who was working and living in Bangladesh at the time he met the first appellant.
4. The second appellant, who was born on 14 June 2011, and the third appellant, who was born on 14 September 2006, are the children of the first appellant and the sponsor. They were both born in, and are citizens of, Bangladesh.
5. In June 2016 the sponsor returned to the UK and the appellants entered the UK as visitors. Following expiry of their leave the appellants applied to remain in the UK on the basis that their removal would breach Article 8 ECHR. The respondent rejected the application on the basis that the requirements of the Immigration Rules were not satisfied and there were not exceptional circumstances to justify allowing the appeal outside of the Immigration Rules.
6. The appellants appealed and their appeal was heard by Judge of the First-tier Tribunal Lawrence at Hatton Cross. In a decision promulgated on 4 March 2019 the judge allowed the appeal. The Secretary of State is now appealing against that decision.
7. The decision of the First-tier Tribunal focused primarily on the third appellant. The judge found that even though the third appellant had only been in the UK for two and a half years her removal (with her mother and sibling) would represent a disproportionate interference with her right to a family and private life in the UK because:
 - (a) she is settled in the UK educational system and is well-integrated into it (paragraph 13);
 - (b) her focus is on her studies and the relationships she has formed with her class mates, not merely her parents and siblings (paragraph 16);
 - (c) every time the subject of relocating to Bangladesh is brought up she weeps uncontrollably and she is mature enough to be aware of the relationships she will lose if returned to Bangladesh (paragraph 17);
 - (d) she is sufficiently old and mature enough to express her opinion about wishing to remain in the UK (paragraph 18);
 - (e) the appellant's father is a British citizen and his "birth right, as a British citizen" would be affected by the decision to refuse the third appellant leave as he would return with her to Bangladesh (paragraph 20(v)); and
 - (f) had the third appellant's father been born in the UK she would automatically be a British citizen and this is a quirk not addressed in the Immigration Rules (paragraph 10).
8. The grounds of appeal submit that the judge erred by failing to follow Sections 117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") which mandates that only little weight should be attached to the third appellant's private life in the UK. The grounds also

submit that there was no basis to attach significant weight to the appellant's private life in the UK when she had only been in the country for 33 months and in education for two years. In addition, the grounds submit that the judge erred by treating as relevant to the proportionality assessment under article 8 ECHR that if the second and third appellants had been born in the UK they would be British citizens.

9. Before me, Mr Avery submitted that the judge failed to engage with the fact that the 2002 Act required him to give little weight to the third appellant's private life. He also argued that is irrelevant that the second and third appellants might have been British if the law in respect of nationality was different.
10. Ms Bustani argued that the judge was correct to focus on the best interests of the third appellant. She submitted that although the judge referred to case law relating to children who have been in the UK for seven or more years, he kept in mind that the third appellant had been in the UK for a substantially shorter period of time. She maintained that the judge identified a range of factors which cumulatively entitled him to reach the conclusion that removal would be disproportionate. These factors include that the third appellant's father is a British citizen, that she would have been British had she been born in the UK, that she wept uncontrollably when told she may have to go to Bangladesh and she has been an excellent student in the UK who is very well integrated.
11. The decision contains several material errors of law and therefore cannot stand.
12. The first error of law is that the judge failed to adequately explain why weight has been attached to his finding that if the second and third appellants had been born in the UK they would have been British citizens. The appeal must be decided based on the facts as they are and the undisputed fact is that the second and third appellants were not born in UK. What might have been, if the circumstances were different, is immaterial.
13. Secondly, the judge has failed to adequately explain why substantial weight has been attached to the wish of the third appellant to remain in the UK. In immigration appeals it is invariably the case that appellants desire to remain in or gain entry to the UK – that, after all, is why they are appealing. There is no explanation in the decision why in this case that desire has been elevated to a significant factor in the article 8 assessment.
14. Thirdly, the judge has failed to adequately explain why he has attached significant weight to the third appellant's private life in the UK when she had only been living in the UK for two and a half years and, if removed, would be leaving with her family to a country in which she has spent most of her life. No health problems or special needs were identified and it appears from the findings of fact that the third appellant is a healthy and


well adjusted child who has done well integrating into the UK during the short time she has been in the country. There is no consideration in the decision of why the third appellant would not be able to integrate in Bangladesh, as she has done in the UK.

15. Fourthly, the judge has failed to consider the appeal through the prism of the Immigration Rules as there is no assessment of the obstacles (if any) the family would face returning to Bangladesh.
16. Both Mr Avery and Ms Bustani submitted that in the event I were to find an error of law the appeal should be remitted to the First-tier Tribunal. I agree. The remaking of the decision will require the facts to be considered afresh and in these circumstances the First-tier Tribunal would be a more appropriate forum. The appeal will therefore be remitted to the First-tier Tribunal.

Notice of Decision

17. The decision of the First-tier Tribunal contains a material error of law and is set aside. The appeal is remitted to the First-tier Tribunal to be heard before a judge other than Judge of the First-tier Tribunal Lawrence.
18. No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 3 June 2019