



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

Appeal Number: HU/16795/2017  
HU/16797/2017  
HU/16800/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 January 2019**

**Decision & Reasons  
Promulgated  
On 12 February 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE APPEYARD**

**Between**

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

Appellant

**And**

**MR S U A  
(ANONYMITY DIRECTION MADE)**

First Respondent

**And**

**M M A S  
(ANONYMITY DIRECTION MADE)**

Second Respondent

**And**

**MRS M S M  
(ANONYMITY DIRECTION MADE)**

Third Respondent

**Representation:**

For the Appellant: Mr C. Howells, Home Office Presenting Officer.  
For the Respondent: Mr P. Richardson, Counsel.

**DECISION AND REASONS**

1. The Appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-Tier Tribunal with the Secretary of State referred to as “the Respondent” and Mr S U A, Master M A S and Mrs M S M as the “First, Second and Third Appellants” respectively.
2. The Appellants are citizens of Bangladesh who made an application for leave to remain. It was refused and they appealed and following a hearing, and in decision promulgated on 11 October 2018, Judge of the First-tier Tribunal Raymond allowed their appeals.
3. The Respondent sought permission to appeal. It was granted by Judge of the First-tier Tribunal E M Simpson in a decision dated 4 December 2018. Her reasons for so granting were: -

*“1. The respondent applied for permission to appeal in time, concerning the decision of First-tier Judge JG Raymond promulgated on 11/10/2018 (the Decision) allowing the appeals on human rights grounds, Art 8 of the ECHR.*

*2. The appellants, husband, wife and eldest minor son, all nationals of Bangladesh, had appealed against the respondent’s decision of 17/11/2017 refusing their 28/06/2017 human rights claims for leave to remain on the basis of their family & private life in the UK, their family life additionally comprising 2 younger children of the family born in the UK.*

*3. Permission to appeal is granted because:*

*(i) as asserted, there was arguable that on a material matter concerning the respondent’s refusal of the first appellant husband/father’s application inter alia under the suitability requirements in the Immigration Rules (the Rules), App FM para S-LTR.4.2. because when he submitted a TOEIC certificate from Educational Testing Service (ETS) in a previous application there had been concluded that the certificate had been fraudulently obtained by the use of a proxy test taker, that there appeared in the course of the judicial analysis both an inadequacy and inconsistency of reasoning underlying the finding that the respondent had failed to establish the appellant’s dishonesty and/or that the appellant had furnished a sufficiency of innocent explanation (70-78);*

*(ii) further when coming to addressing the minor son’s Art 8 appeal, that appellant having been accepted to have been in the UK 7 years, at the time of the family’s human rights applications, having entered on 08/05/2010, there appeared altogether,*

*contrary to the authorities, an arguably muddled unstructured analysis of his 5.55 best interests and para 276 ADE(1)(iv) of the Rules concerning that child, and arising from that child S.117B.(6) with reference to the appellant parents' appeals, disclosing arguable error in appearing inter alia to attribute primacy to best interests of the child, in failing to analyse in any real way the question whether it would not be reasonable to expect the eldest child to leave the UK, and further appearing overall to arguably fail to carry out in any real way the balance sheet structured approach of which the higher authorities have underlined is necessary.*

4. *Arguable material error(s) of law disclosed."*

4. Thus, the appeal came before me today.
5. Mr Howells relied upon the grounds seeking permission to appeal. He urged me to firstly accept that the Judge had failed to give adequate reasons for findings on a material matter. This relates to the allegation of deception by the Appellant in the obtaining of his TOEIC certificate by the use of a proxy test taker. He submitted that having accepted that the evidential burden fell upon the Appellant to offer an innocent explanation the Judge has failed to adequately address this issue where the Appellant has done no more than simply deny the allegation without the actual provision of the required "innocent explanation". Further in reaching the findings that he did the Judge relied upon the Appellant's English language ability and other English qualifications.
6. Further he submitted that the Judge has misdirected himself in law by treating the Appellants' child's "best interests" as a "trump card". In so doing the Judge has elevated the consideration of the child's "best interests" above that required, namely that of a primary consideration. There is no indication of the Judge carrying out a balancing exercise and the Judge has failed to consider Section 117B Nationality, Immigration and Asylum Act 2002 under public interest in removal in light of the precarious nature of the Appellants' status. It is not apparent that the Judge has considered the balance of the elements of Section 117B and the Judge has "used Article 8 as a general dispensing power". Any assessment of whether it is reasonable to remove a child must encompass all of the relevant public interest factors including those set out in sections 117B [1]-[5]. It is reasonable to remove a child if the actions of their parents are sufficiently damaging to the public interest.
7. Beyond that he submitted that the Judge had materially erred in failing to apply binding caselaw with particular reference to the Authorities of **EV (Philippines) & Others v SSHD [2014] EWCA Civ 874, Zoumbas v SSHD [2013] UKSC 74** and **E-A (Article 8 - best interests of child) Nigeria [2011] UKUT 00315 (IAC)**.
8. Mr Richardson submitted that the Judge had not materially erred as asserted. I find that to be the case.

- 9.** The Respondent's grounds amount to little more than a disagreement with findings and conclusions that were open to be made on the evidence and contained no material error of law.
- 10.** Contrary to the grounds the Judge has not simply relied on the Appellant's English language ability and other English qualifications. At paragraph 60 onward the Judge has set out with great care not only the relevant legal authorities but also the principles that are involved. The Judge has carried out an evaluative assessment before concluding that the Respondent had not established that the first Appellant was dishonest in the June 2012 test. The Judge has recognised (paragraph 61 of his decision) that the claimed dishonesty of the Appellant on the ETS test effectively reverses the burden of proof where deception is concerned. The Judge has explored the Appellant's plausible explanation and the inability of the Respondent to disprove it. In so doing the Judge has not materially erred as submitted by the Respondent.
- 11.** Likewise, in relation to his analysis of the best interests of the third Appellant, the child of the first and second Appellants, the Judge has applied relevant case law throughout. At no point, contrary to the grounds, has the Judge elevated the child's status to that of a "trump card". The third Appellant had been in the United Kingdom since three years of age. He was 11 at the time of the decision. The Judge concluded at paragraph 87 of his decision that the third Appellant had provided adequate evidence to conclude that he had provided a "credible basis for considering that he should be perceived as having the cultural profile of any British child his age". He recognised that irrespective of the precarious state of his parents' leave the best interests of the third Appellant were to remain in a regular relationship with them both. The Judge has looked at his position, accepting that it has changed over time, and acknowledging the need for a correspondingly wider focus examining that position in the wider world of which school would usually be an important part. The Judge has given significant weight to the period of time the third Appellant has been in the United Kingdom and concluded at paragraph 96 of his decision that there were no powerful reasons militating against the best interests of the child being to remain with all his family in the United Kingdom. The Judge has taken into account public interest factors throughout. He focused on the reasonableness of the third Appellant going to Bangladesh but it was open to him to conclude that as a child whose 7 years of life and more in the United Kingdom engaged paragraph 276ADE [1][iv] of the Immigration Rules and section 117B [6]. Considering both the Immigration Rules and the statutory provisions the Judge has taken into account the best interests of the third Appellant and the issue of reasonableness. Thereafter he has separately subsumed those considerations into his Article 8 analysis at paragraph 103 onward of the decision before allowing the appeal on human rights grounds.

**Notice of Decision**

The making of the decision did not involve the making of an error of law.

The appeal of the Respondent is dismissed and the decision of the First-tier Tribunal Judge is maintained.

**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 him or any member of their 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: 8 February 2019

Deputy Upper Tribunal Judge Appleyard