Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/23397/2015
IA/23398/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 September 2017	**On 28 September 2017**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

SALMA [B]
[M P]
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms T Kabir, Thamina Solicitors
For the Respondent: Mr S Kotas, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission against the decision of the First-tier Tribunal dismissing their appeals against the respondent's decision on 10 June 2015 to refuse them leave to remain in the United Kingdom on family and private life grounds.

Background

2. There is very little dispute about the core facts in this appeal appellants are a mother and daughter, both citizens of Bangladesh. They came to the United Kingdom in 2007 as dependants of the principal appellant's husband, who was studying here (the second appellant was only 1 year old then). They last had leave to remain in 2009. In 2012, the principal appellant and her husband had another daughter: by that time, he was no longer studying, but was working without leave in an Indian restaurant.

3. The marriage ran into difficulty in 2012 after the birth of the younger child. The principal appellant says her husband had an affair. He left his wife and two daughters, disconnecting his mobile telephone and ceasing all contact. The principal appellant says she does not know where he is now. There are no divorce papers in the bundle, but the principal appellant's evidence is that the separation is permanent.

4. Before leaving, the husband asked a close family friend, Mr Uddin, to look after his wife and daughters 'as if they were his own'. Mr Uddin found them a cheap room (the principal appellant says it is rent-free, but he says he paid a little for it) and the principal appellant has worked as a maid for a woman who also lives in that building. Mr Uddin says that he has assisted the family with small sums of money.

5. His support for the family included providing a letter to accompany the second appellant's appeal, urging that she be allowed to remain and pursue her education in the United Kingdom. Mr Uddin's letter makes no mention of any intention to stop supporting these appellants in the near future, or at all. Mr Uddin gave his email address and mobile telephone number, but he did not attend the First-tier Tribunal hearing. It is the principal appellant's evidence that he stopped supporting the family soon after the appeal was issued, and cut off contact with her.

6. At the date of hearing, the two girls were respectively 10 and 4 years old. Despite a statement to the contrary in her witness statement, the principal appellant accepted at the hearing that both girls speak English and Bengali. As well as the assistance received from Mr Uddin, the family are integrated into the Bangladeshi community here and receive financial and emotional support from them, and from family friends. The principal appellant says that she has sold her gold jewellery since her husband left, for a total of about £1000. There are no letters from community leaders or friends in the United Kingdom, apart from Mr Uddin.

7. The principal appellant's evidence is that neither of her daughters can read and write Bengali yet. Of course, the 4-year-old would not be learning to read or write in English or Bengali before beginning school, which she had not done at the date of hearing. The second appellant produced letters from her primary school, confirming

that she has done well and that her primary education is complete. There were no letters or other evidence that she had been allocated a secondary school place.

8. The principal appellant married an educated man. Her own level of education and social background is unclear. She still has her parents, a brother and a sister in Bangladesh. Her siblings are married, with families of their own: her sister's husband works in the Middle East and her sister is a housewife. The principal appellant's evidence was that her brother in Bangladesh worked doing clerical work in a small company. The principal appellant considered that she would be unable to be supported by them or to earn her living in Bangladesh. She did not want to return alone to Bangladesh. There are no letters of support or witness evidence from the appellant's parents or siblings.

9. The core of the principal appellant's case is that her daughters would be educationally disadvantaged as she would not be able to send them to an English language 'medium school' in Bangladesh on her return. The appellant said that such a school would be beyond her financial means, because she did not have sufficient qualifications to obtain a decent job in Bangladesh to pay for schooling, accommodation and so forth.

> "As the quality of education in Bangladesh is significantly different to the UK which my daughters are more used to ... I would obviously want my daughters to carry on with their education however for this to happen bearing in mind their lack of Bengali language this will be difficult. I submit that it will be unfair and unreasonable to expect my children to delay or even stop their education as a result of not being able to pay for English school tuition fees in Bangladesh."

10. The appellant contends that she will be destitute on return to Bangladesh. The bundle contains a number of documents about employment difficulties in Bangladesh, to which the Judge was not directed in submissions at the hearing, as Ms Kabir accepted.

First-tier Tribunal decision

11. The First-tier Tribunal Judge dismissed the appeals of both the principal and second appellants. He found as a fact, based on the principal appellant's evidence, that after the claimed breakdown of the principal appellant's marriage, these appellants and the younger daughter lived in the United Kingdom with the financial and emotional support of the Bangladeshi community. The Judge did not find the principal appellant to be a reliable witness: she had told lies about her children's linguistic ability, and he considered that she was prepared to fabricate elements of her account in order to remain in the United Kingdom.

12. The First-tier Tribunal Judge accepted that the principal appellant's circumstances engaged paragraph EX.1 of the Rules, but was not satisfied that it was unreasonable to expect the second appellant and her younger sister to return to Bangladesh, of which they were citizens, with the principal appellant, their mother. The second appellant had spent about 6 years in primary education and was not yet at secondary

school. The Judge took account of the immersion of this family in the Bengali community in the United Kingdom, and of the stage reached in the second appellant's schooling. He considered that she was young enough and flexible enough to adapt to life in Bangladesh on return. The Judge also considered paragraph 276ADE(1)(iv) and the private life of the second appellant.

13. The First-tier Tribunal Judge considered the principal appellant's evidence to be 'highly dubious' and vague. He considered that she really wished to remain in the United Kingdom as an economic migrant. He had regard to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended), accepting that the second appellant was a qualifying child under section 117D, but considered that, again, it was reasonable to expect the second appellant to return to Bangladesh with her mother. The younger child is not yet a qualifying child.

14. The Judge gave separate consideration to the children's section 55 best interests. He directed himself not to consider the principal appellant's mendacity about the children's linguistic ability as a negative credibility factor in the second appellant's appeal. The Judge did not place weight on the overstaying by the family when considering the second appellant's appeal, although he did have regard to that factor in relation to the principal appellant. The Tribunal's assessment of the second appellant's best interests, and those of her younger sister, is at [18]-[20]. The Judge was not satisfied that any educational disadvantages which the second appellant and her younger sister might experience on return were such as to outweigh the United Kingdom's right to control immigration.

15. The First-tier Tribunal Judge considered that it was in the children's best interests to remain with their mother, but that it would not be against those best interests for them to grow up in Bangladesh, the country of their nationality, with their mother. Both children were young enough to adapt to speaking Bengali and attending school in Bangladesh. There was no independent evidence about whether they could read or write Bengali at present, or whether they would have any particular difficulty in learning to do so, nor any evidence whatsoever as to what Bengali-language education in Bangladesh comprises.

16. The Judge also considered Article 8 ECHR outside the Rules but found nothing to satisfy him that leave to remain should be granted.

Grounds of appeal

17. The appellants appealed to the Upper Tribunal. The grounds of appeal are somewhat diffuse. The appellants argue that the principal appellant falls within the parent route under Appendix FM, as the parent of a child under 18 who has lived continuously in the United Kingdom for at least 7 years before the application was made. She is a single parent who has sole responsibility for the second appellant and her younger sister. The appellants argue that paragraph EX.1 of the Rules has not been properly applied and that the Judge failed to decide whether it was reasonable to expect the appellants to leave the United Kingdom.

18. The grounds of appeal argue that the second appellant has not previously been educated in Bangladesh and that she lacks appropriate understanding of Bengali. The appellants rely on the judgment of Lord Justice Clarke in *EV (Philippines)* at [34]-[37] and contend that the factors identified (age, length of residence, stage of education and linguistic difficulties) point to the second appellant being permitted to remain in the United Kingdom. They argue that section 117B(6) of the 2002 Act supports this analysis and that removal of the second appellant would be incompatible with paragraph 276ADE (iv) and Appendix FM of the Rules.

19. The appellants rely also on *EA* (Article 8 -best interests of child) [2011] UKUT 315 (IAC), but that decision predates the bringing of Article 8 ECHR into the Rules and later, by statute, into part VA of the Nationality, Immigration and Asylum Act 2002 (as amended).

20. The appellants further contend that it was not open to the First-tier Tribunal to discount the principal appellant's assertion that she would not be able financially to support her children in Bangladesh, or at least, not to the extent that she is supported here. The principal appellant's estranged husband does not support his family and she feels let down by him, after he has made promises to her in the past. Given the cumulative impact of the adverse effects of removing these appellants to Bangladesh, and their 'prospected ominous way of life' there, the appellants argue that their removal is disproportionate.

Permission to appeal

21. Both the First-tier Tribunal and the Upper Tribunal refused permission to appeal. On 18 May 2017, by way of a *Cart* judicial review, Mr Justice Mostyn granted permission to appeal on the following basis:

> "… I am satisfied that it is arguable that the Upper Tribunal has fallen into serious error by accepting the decision of the First-tier Tribunal. I believe that valid criticisms can be made of the first instance decision. It is strongly arguable that mere lip-service has been paid to the best interests of the children. I note that the best interests of the younger child, now aged nearly 5, are barely considered; that child is virtually entirely ignored in the First-tier Tribunal decision. By repeatedly referring, somewhat disparagingly, to the mother's reliance on this factor as an attempted 'trump card', it could be said that the significance of the children's best interests being a primary consideration has been subconsciously downgraded by the First-tier Tribunal Judge from its proper status. It seems indisputable that to return these children to what is in effect a completely foreign country for them would be directly contrary to their best interests, yet this has arguably not been properly weighed when determining that it would not be unreasonable to send them there. …"

22. On 7 June 2017, Master Gidden formally quashed the Upper Tribunal's refusal of permission to appeal. On 18 July 2017, Vice-President Ockelton granted permission to appeal, based on the decision of the High Court, reminding the parties that the Upper Tribunal's task is that set out in section 12 of the Tribunals, Courts and Enforcement Act 2007, that is to say, to decide first whether the decision in question

involved the making of an error on a point of law, and if so, whether the decision of the First-tier Tribunal should be set aside, and if set aside, to remit or remake the decision. No limitation on arguing any of the grounds of appeal was set.

Rule 24 Reply

23. The respondent on 2 August 2017 filed a Rule 24 Reply, stating that she had not received the grounds of appeal with the notice of decision and was therefore 'unable to agree that there is an error in law which renders the determination unsustainable'.

24. That is the basis on which this appeal came before the Upper Tribunal for hearing.

Error of law hearing

25. I heard oral submissions from Ms Kabir for the appellants. Much of what she submitted was in the grounds of appeal and has already been summarised. In addition, Ms Kabir relied on the newspaper reports in the bundle which indicated that a garment worker in Bangladesh earns about £25 a month and that child poverty is a problem in Bangladesh. The 'medium schools' which taught in English rather than Bengali were very expensive. Ms Kabir agreed that she had not drawn the decision of the First-tier Tribunal Judge to those press reports. Absent any reliance thereon, it is not an error of law for the First-tier Tribunal Judge not to deal in detail with destitution in the decision.

26. Ms Kabir argued that the First-tier Tribunal Judge had not identified the children's best interests and it had not been open to him to take into account 'deliberate overstaying' by the principal appellant, or whether she had delayed her application so that the second appellant would be a qualifying child, having been in the United Kingdom for 7 years. Ms Kabir accepted that the key points in the appellants' appeals (abandonment by her husband and Mr Uddin, the children's linguistic ability and the lack of family support in Bangladesh) all turned on the principal appellant's evidence alone, which had been found to be unreliable. Ms Kabir argued that the First-tier Tribunal Judge had erred in fact and law in his negative credibility assessment and that these elements of the evidence should have been accepted.

27. For the respondent, Mr Kotas noted that the Judge had referred to the children's best interests in the judgment and argued that he had reached a proper and sustainable decision thereon. He relied on paragraphs [18] and [20] in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74. While an English education was no doubt desirable, it was not a right for appellants in these circumstances and was outweighed by the United Kingdom's right to control immigration. The principal appellant had not explained her current circumstances transparently, either in the United Kingdom where she lived rent-free and worked as a maid, or in Bangladesh, where she still had family members. The grounds of appeal were essentially a disagreement with the outcome of the appeal and the appeals should be dismissed.

Discussion

28. It is in the best interests of these children to be with their mother, particularly if, as she states, she is their only parent. It is also clearly of benefit to them to be educated, like their father before them, in the United Kingdom education system and in English. However, in circumstances where their parent has been living in the United Kingdom without leave since 2009 and they are poorly integrated into the wider community, relying on family friends and the Bangladeshi community for accommodation, money and emotional support, the Judge was entitled to consider that reliable evidence of the circumstances to which they would return in Bangladesh was required if the appellants were to show that they could not reasonably be expected to return there.

29. It is not disputed that the paragraph 276ADE is met and that paragraph EX.1 applies to this appeal. Paragraph EX.1 of the Rules provides as follows:

> "EX.1. This paragraph applies if
>
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-…(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
>
> (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or ..."

30. The second appellant is a qualifying child under paragraph EX.1(a)(i)(cc) but the appellants must show that, taking into account the second appellant's best interests as a primary consideration, it would not be reasonable to expect her to leave the United Kingdom. The second appellant's younger sister is not yet a qualifying child, so that EX.1 does not apply to her, though her best interests must be taken into account pursuant to section 55.

31. The appellants relied on the decision of the Court of Appeal in *MA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 705 at [88] and [116] in the judgment of Mr Justice Elias, giving the judgment of the Court. Giving the judgment of the Court in *MA (Pakistan),* Lord Justice Elias was guided by the opinion of Lord Hodge JSC, giving the judgment of the Supreme Court in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, at sub-paragraph 10(7), that a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent. At [88] in *MA (Pakistan),* Elias LJ said this:

> "88. The second ground was this: having established that it would be in the children's best interest to stay in the UK, the judge's findings are entirely contrary to the guidance in the Supreme Court case of *Zoumbas* at para.10.7 that a "child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."... For reasons I have explained above (paras. 41 – 42) the conduct of the parent is relevant to their own situation which bears upon the wider public interest and does not amount to blaming the children even if they may be prejudiced as a result."

32. The First-tier Tribunal Judge followed that approach. He did take into account the unreliability of the principal appellant's evidence and her overstaying, in relation to her, but expressly directed himself not to do so when considering the situation of the second appellant and her sister. The best interests of the second appellant were considered carefully, given the very limited evidence about her educational opportunities here and in Bangladesh. In particular, I observe that there was no country evidence before the Tribunal about the cost of 'medium school' English education, nor any evidence about the education system in Bangladesh, except that of the principal appellant. Nor was there any evidence from the principal appellant's family members in Bangladesh (both parents, and a brother and sister, both of whom are married), as to their ability or willingness to support the appellants financially or emotionally on return to Bangladesh. The principal appellant's assertion that they would not support her carries little weight, given the low credibility of her evidence overall. The Judge assessed carefully all of the limited evidence of best interests which was produced, and gave proper, intelligible and adequate reasons for concluding that it was reasonable to expect the second appellant and her younger sister to accompany their mother to Bangladesh.

33. I am guided by the decision of the Court of Appeal in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874 at [58]-[60]:

> "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. …If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin? …
>
> 60. … In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

34. That is precisely the position in relation to this appellant and her children. The second appellant and her sister are not British citizens and neither of their parents is a British citizen or settled here. The second appellant has had no leave to remain since 2009, when she would have been 3 years old, and her younger sister has never had leave to remain. That is not their fault and the Judge properly gave no weight to it in considering the second appellant's appeal. However, this family would be removed together to Bangladesh, where they have family and could access community support there.

35. The second appellant and her younger sister speak Bengali and have lived in, and been supported by, the Bangladeshi community in the United Kingdom. The younger child having not begun primary school at the date of hearing, and only just

started now, the question of reading and writing either Bengali or English does not arise. There is no evidence to suggest that the second appellant has learning difficulties such that she would be unable to adjust on return to Bangladesh, including learning to read and write Bengali in due course. The judge was entitled on that basis to consider that any educational difficulties were not such as to outweigh the United Kingdom's right to control immigration particularly in relation to the mother and her extensive overstaying.

36. As regards the assertion by the principal appellant that she will be destitute on return to Bangladesh, I have regard to the complete absence of any evidence from her relatives in Bangladesh or any evidence save hers of her circumstances, educational level and social background. I do not consider that the First-tier Tribunal erred, either in fact or in law, in discounting the principal appellant's assertion that she would be so destitute on her return to Bangladesh that she would be unable to feed or educate her daughters.

37. For all of those reasons and despite the concerns justly expressed by Mr Justice Mostyn when granting permission on a *Cart* judicial review in this appeal. The appeal fails and I dismiss it.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I do not set aside the decision.

Signed: *Judith A J C Gleeson* Date: 28 September 2017
Upper Tribunal Judge Gleeson