



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/03605/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
Heard on 9<sup>th</sup> of August 2018  
Prepared on 9<sup>th</sup> of August 2018

Decision & Reasons Promulgated  
On 22 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

RUHELA [B]  
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr M West, Counsel  
For the Respondent: Mr C Avery, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The Appellant is a citizen of Bangladesh born on 1<sup>st</sup> of January 1981. She appeals against a decision of Judge of the First-tier Tribunal Chowdhury sitting at Hatton Cross on 18<sup>th</sup> of April 2018 who dismissed the Appellant's appeal against a decision of the Respondent dated 2<sup>nd</sup> of March 2018. That decision was to refuse the

Appellant's claims for asylum and leave to remain, the latter being made on Article 8 grounds (right to respect for private and family life).

2. The Appellant left Bangladesh on 21<sup>st</sup> of October 2004 using a false passport supplied by an agent. She resided in the United Kingdom thereafter unlawfully. She made two unsuccessful human rights applications in 2011 and 2015 respectively. The latter gave rise to an appeal which was dismissed by the First-tier Tribunal on 29<sup>th</sup> of November 2016. Permission to appeal was also refused. The Appellant was not removed because she subsequently applied for asylum on 1<sup>st</sup> of September 2017 and it was the refusal of that application which gave rise to the present proceedings.

### **The Appellant's Case**

3. The Appellant's case in the First-tier was that she had travelled to the United Kingdom to avoid a forced marriage and because she feared persecution as a member of the Bangladesh National party. The Judge did not believe either claim finding the account given by the Appellant and her husband to be untruthful (see [73] of the determination).
4. The Appellant also argued that it would breach this country's obligations under Article 8 to remove her because she had established a private and family life in this country. She had lived in the United Kingdom for over 13 years and she and her husband, also a citizen of Bangladesh, had a child, M, who had been born in the United Kingdom on 4<sup>th</sup> of March 2011. By the date of the hearing before the Judge M had just turned 7 years old and was thus a qualifying child for the purposes of the Immigration Rules and the Nationality Immigration and Asylum Act 2002. She argued that it was not reasonable to expect M to leave the United Kingdom.
5. The Respondent's case was that it was reasonable to return the family as a whole to Bangladesh. M was aware of his Bengali culture as the family attended festivities and functions with other British Bengalis. In a decision dated 29<sup>th</sup> of November 2016, following the 2015 refusal, Judge of the First-tier Tribunal O'Brien had found that while M had established a modest degree of private life in the United Kingdom he was still at an age where his life predominantly revolved around his parents. M had no entitlement to be educated in the United Kingdom and he would be able to access education in Bangladesh. His best interests would be served by remaining with his parents wherever they went. There were no significant obstacles to the Appellant's integration in Bangladesh. She was born and raised in that country and she had spent the majority of her life there.

### **The Decision at First Instance**

6. In her determination the Judge set out paragraph 276 ADE of the Immigration Rules relied upon by the Appellant and from paragraph 78 onwards set out her decision under Article 8 and in particular her duty under section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") to safeguard the best interests of M. The

Judge also reminded herself in accordance with the Respondent's own policy guidance issued in November 2014 that strong reasons were required before a case involving a qualifying child could be refused. The guidance notes that over time children start put down roots and integrate into life in the United Kingdom to the extent that being required to leave the United Kingdom might become unreasonable. The longer the child has resided in the United Kingdom the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the United Kingdom.

7. The Judge further directed herself in accordance with the Court of Appeal decision in **MA Pakistan [2016] EWCA Civ 705** quoting the passage in which the Court noted that when carrying out the proportionality exercise significant weight must be given to the fact that a child has been here for 7 years. The best interests' consideration had to be tackled first by any factfinder as a discrete issue and a decision maker had to be properly informed of the position of a child affected by an immigration decision.
8. At [85] the Judge noted the evidence she had been provided with in relation to M's schooling that he was progressing well and was healthy. Given his age, however, the Judge found that M would be more focused on his parents rather than his peers and would be adaptable, citing the Upper Tribunal authority of **Azimi-Moayed [2013] UKUT 197**. Seven years from age 4 were likely to be more significant than the first seven years of life. Whilst it would be difficult for M to leave the United Kingdom it would not be unreasonable for him to leave with his parents. His best interests would be served by remaining with his parents wherever they went. Neither the Appellant nor M could meet the Immigration Rules.
9. The Judge then went on to consider the appeal outside the Rules directing herself on the contents of section 117B of the 2002 Act. The Appellant's private life was formed while she was here unlawfully, and M was a burden on the taxpayers as he was accessing public funds. These factors weighed against the Appellant in a consideration of her private life. The Respondent's decision was proportionate to the legitimate aim pursued. The Appellant had not provided evidence of her English language ability or of her financial means, see [94]. The appeal was dismissed.

### **The Onward Appeal**

10. The Appellant appealed against the First-tier decision arguing that the Judge had not explicitly considered or applied section 117B (6) of the 2002 Act (for which see paragraph 25 below). The Judge had found it was difficult for M to leave the United Kingdom and would involve hardship for him and thus appeared to treat the reasonableness test as imposing an extremely high threshold. The Judge had failed to consider the factors in the Court of Appeal decision of **EV Philippines [2014] 874**. The **Azimi-Moayed** test applied by the Judge was not determinative of reasonableness it was merely a guiding factor. Had the Judge addressed the issue of powerful reasons required to justify the removal of a qualifying child she would have found there were no such reasons.

11. The 2<sup>nd</sup> ground was that the Judge had failed to make any findings with reference to paragraph 276 ADE of the Rules. The Judge had not decided whether there would be very significant obstacles to the Appellant's integration into Bangladesh. Thirdly the grounds took issue with the Judge's credibility findings regarding the asylum claim. The inconsistencies between the Appellant's evidence and her husband's were not such as to make the claim unsustainable. It was unfair to take against the Appellant that she had not raised her membership of the BNP in her screening interview but only at question 136 of the substantive asylum interview.
12. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Buchanan on 29<sup>th</sup> of June 2018. In granting permission to appeal Judge Buchanan noted that Judge Choudhury had discussed the issue of whether it was reasonable for M to leave the United Kingdom from [78] of the determination onwards and her conclusion that it was reasonable to expect M to leave the United Kingdom was open to her on the evidence. There was no arguable error of law in that finding.
13. Judge Buchanan was concerned however as to the Judge's treatment of the Immigration Rules writing, at paragraph 4 of his decision: "In relation to the issue of private life and whether there would be very significant obstacles to integration, I note that the FTTJ mentions the issue in summarising the Respondent's decision at [22] of the [determination]. It is also noted that the [2016] determination rejected the suggestion that there were any significant obstacles as is mentioned at [38] of the [instant determination]. However, the only later mention of the Immigration Rules is at [87] where the FTTJ states "I do not find that the Appellant or her child meet the Immigration Rules". No further explanation is given. I am unclear about the scope of jurisdiction exercised in dismissing the appeal "under the Immigration Rules". For these reasons it is arguable by reference to the grounds of appeal that there may have been [a] material error of law in the decision. I grant permission to appeal. In doing so I do not restrict the grounds which may be advanced at appeal". There was no reply from the Respondent to the grant.

### **The Hearing Before Me**

14. In consequence of the grant of permission to appeal the matter came before me to determine in the first place whether there had been a material error of law in the determination such that it fell to be set aside and the appeal reheard. If there was not, then the decision of the First-tier would stand.
15. For the Appellant, counsel accepted that the Judge had set out in her determination a comprehensive description of the law in this area. To find that it was reasonable that a qualifying child should leave the United Kingdom there had to be powerful reasons but those could not be found in this determination. At the time of the previous determination in November 2016 M was not a qualifying child and the considerations

in relation to his best interests were therefore different to the present case. M was a qualifying child by the time of the hearing before Judge Choudhury.

16. **MT [UKUT] 2018 88** had given an example of factual circumstances which could amount to powerful reasons. In that case the Appellant had come on a visit visa and overstayed, had made an asylum claim which was disbelieved and had committed fraud. Nevertheless the appeal had been allowed. In the instant decision those powerful reasons were not present. **MA Pakistan** had said that the starting point was that leave should be granted unless powerful reasons to the contrary existed. The Judge had to set out what those powerful reasons were. The Judge had referred at [82] to the Respondent's policy. Counsel handed up an extract from the latest policy issued by the Respondent dated 22<sup>nd</sup> of February 2018 which set out relevant factors to consider as to whether it would be reasonable to expect a child to leave the United Kingdom. These were likely to include whether the child would be leaving with their parents, the extent of wider family ties in the United Kingdom and whether the child was likely to be able to reintegrate into life in another country. The Judge had not dealt with reintegration into Bangladesh. The Appellant had said she had no contact with her sister since the death of their mother. Whilst the parents might speak to M in Bengali M spoke back to them in English. M was described as a model pupil with exemplary behaviour. That had not been properly considered nor had the Judge taken into account all of the factors in **EV Philippines**. The case of **Devaseelan** relied upon by the Judge when in turn relying on the earlier decision in 2016 of Judge O'Brien was only a starting point.
17. The 2<sup>nd</sup> ground of appeal was the claimed failure of the Judge to deal with the Appellant's claim under paragraph 276 ADE of the Immigration Rules. It was not clear from the determination whether the Appellant satisfied the paragraph. It was incumbent on the Judge to make her own findings. There was no consideration of the very significant obstacles there would be for the Appellant upon return to Bangladesh. Paragraph 276 was an issue and had been referred to by the Respondent. Article 8 had to be considered both within and outside the Rules. Counsel acknowledged that the grant of permission to appeal had not dealt with the 3<sup>rd</sup> ground in relation to the Judge's credibility findings. Counsel's submission on this point was confined to saying that reliance was placed on what had been said in the grounds, see [11] above.
18. In reply the Presenting Officer argued that the Article 8 assessment had to be looked at in the context of the other findings made by the Judge including the lack of credibility in the asylum claim. The Judge had dealt with the best interests of the child under section 55 of the 2009 Act at [78]. The Appellant's asylum claim was fraudulent, she had lied about her involvement with the Bangladesh National party and the difficulties with her uncle. The determination had to be read as a whole.
19. The previous 2016 determination was not old at the time of the hearing before Judge Choudhury and Judge O'Brien had already canvassed many of the issues such as the best interests of M. M was now a little older but the factual situation had not changed

in any great detail. The Judge had agreed with the findings of the previous Judge. She had made clear that M's best interests were to remain with his parents wherever they went. These were perfectly sound findings and there was nothing in the evidence to disturb those findings. The finding of reasonableness in requiring M to go to Bangladesh was open to both Judges. There was no fundamental error in the determination. The case of MT required a balancing exercise to be carried out, but in that case the child had been in the United Kingdom for 10 years. Any difficulties which M might face upon return did not amount to much and the Appellant's argument in relation to paragraph 276 ADE did not take the case significantly further. If the Appellant failed outside the Rules (as the Judge found) she would have failed under the Rules in any event. The credibility assessment was perfectly sound.

20. In closing, counsel argued that it was not right to say that there had been no significant changes since the previous determination as M had now started at school. It was insufficient for Judge Choudhury to say that she agreed with the findings of Judge O'Brien. She had to make her own assessment. There were numerous considerations which had been disregarded. The issue of powerful reasons was not addressed by the Judge. Whilst it was correct that M had not been here for 10 years as in the case of MT, the Appellant in this case had not committed a criminal offence as was the case in MT. It was not sufficient to say that the Appellant would have failed under 276 ADE in any event, it was incumbent upon the Judge to give proper reasons if she came to that view. In any event whether 276 ADE was or was not satisfied would inform the proportionality exercise to be considered by the Judge. The Appellant had been here for almost 15 years (it was 13 years at the date of hearing before the First-tier).

### Findings

21. There were two bases on which the Appellant had put her appeal at first instance. The first was an asylum claim which the Judge found contained no merit whatsoever. She had found that the Appellant and her husband had given untruthful evidence in relation to that asylum claim. Although the grounds of appeal complained about the Judge's credibility findings that issue was not directly addressed in the grant of permission and the point was not advanced with any force before me. That must be right. The Judge's reasons for dismissing the asylum appeal were cogent. The Appellant's claim that she was subjected to pressure over a two-year period to marry an older man was rejected by the Judge at [72]. There were inconsistencies between the Appellant's evidence and that of her husband which undermined her evidence for example matters as basic as how many sisters the Appellant had.
22. The Appellant had initially told the Respondent she had no political involvement at a screening interview, and only at question 136 of her substantive asylum interview did she indicate that she was a significant member of the Bangladesh National Party. The lateness of this claim inevitably undermined its credibility. I agree with the submission made by the Respondent that one has to look at the credibility of the Appellant's claim that her rights and M's rights under Article 8 would be infringed

by the removal of the family to Bangladesh in the context of a failed asylum claim since the Appellant's claim in relation to her present and future circumstances is significantly undermined by the finding that she was not a witness of truth.

23. It is also clear from the determination that the principal focus of the Article 8 claim at the hearing was on the best interests of M. The Judge was aware that M was a qualifying child and had lived in United Kingdom for more than 7 years. The Judge's point was that when assessing the reasonableness of requiring M to leave the United Kingdom one had to bear in mind that M had spent the first 7 years of his life in the United Kingdom, but they were not necessarily the most significant years, it would rather be seven years from the age of 4. It is correct that that is guidance rather than a definitive determination of the case but it was open to the Judge to take that factor into account, giving it such weight as she saw fit, when deciding whether or not it was reasonable to expect M to leave the United Kingdom.
24. The Judge was aware that she had to tackle M's best interests first as a discrete issue before applying that assessment to the proportionality exercise. The Judge was also aware of the evidence given in relation to M's education and appreciated there would be difficulties and even some hardship in relocation, but she pointed out at [91] there was no evidence of matters beyond choice or inconvenience. The evidence submitted to her highlighted a bright, healthy 7-year-old boy who would be able to adapt to life in Bangladesh. M could speak some Bengali, see [51] of the determination. The Appellant and her husband spoke to M in Bengali but he replied in English. Given that evidence it was hardly surprising that the Judge would come to the view that M would be able to adapt to a country where Bengali was the principal language spoken. M's best interests would be served by remaining with his parents wherever they went.
25. Judge Buchanan in his grant of permission stated he was unclear about the scope of the jurisdiction exercised when dismissing the appeal under the Immigration Rules. I disagree that the determination is unclear either in relation to M or the Appellant. Dealing first with M, the eligibility requirements in section E-LTRPT of Appendix FM and section 117B (6) of the 2002 Act both set out the same test. In the case of the eligibility requirements the child should have lived in the United Kingdom continuously for at least 7 years and paragraph EX .1 should apply that is that it would not be reasonable to expect the child to leave the United Kingdom. Subparagraph (6) of section 117B provides that the public interest does not require a person's removal where that person has a genuine parental relationship with a qualifying child (as was the case here) but it would not be reasonable to expect the child to leave the United Kingdom.
26. The test being the same, the fact that the Judge dismissed the appeal because she found it was reasonable to expect M to go with his parents to Bangladesh for the cogent reasons she gave meant that the Judge was quite entitled to dismiss the appeal under both the Rules and outside the Rules. In the latter case under the existing Article 8

jurisprudence, which the Judge had correctly summarised but taking the section 117B factors into account as she was bound to do.

27. The argument that the Judge did not deal with paragraph 276 ADE in relation to the claim by M or the Appellant to a private life is something of a red herring. The test under sub-paragraph (iv) of 276ADE is that a minor applicant must have lived continuously in United Kingdom for at least 7 years and it would not be reasonable to expect the minor to leave the United Kingdom. In effect, the test of whether it is reasonable to expect M to leave the United Kingdom appears in three separate places, twice in the Rules and once in the statute, but is only ever one test.
28. After referring at [80] to: “the current position of the law in relation to children who have been in United Kingdom for 7 years and whether it would be unreasonable for them to leave” the Judge concluded at [86] that it was reasonable. Before reaching that conclusion, she set out the Respondent’s policy guidance and Court of Appeal authority. It was clear that the Judge was dealing with the relevant test since in whatever guise it appeared, EX 1, 276 ADE(1)(iv) or section 117B(6) the law was the same in each case. Was it or was it not reasonable to expect M to leave the United Kingdom? Since the Judge found that it was M could not succeed under sub paragraph (iv) of 276 ADE.
29. The Judge dealt comprehensively with that issue. Besides relying on the findings of Judge O’Brien which I have cited above at paragraph 5, the Judge made clear she was aware of the substantial evidence in relation to M. The Judge used the word “overwhelmingly” at [87] when determining that M’s best interests would be served by remaining with his parents wherever they went. The use of the word “overwhelmingly” indicates that the Judge was applying the correct test that there had to be powerful reasons why a qualifying child could reasonably be expected to leave the United Kingdom.
30. The Judge had evidently taken the Respondent’s guidance into account because she found that both M and his parents had cultural ties with an exposure to the cultural norms of Bangladesh. As the guidance puts it, a period of time spent living amongst a diaspora from in this case Bangladesh may give a child an awareness of the culture of that country. M could speak some Bengali and evidently could understand it when it was spoken to him. The Judge had found M to be adaptable and he would therefore be able to adapt to life in Bangladesh with the assistance of his parents. He was a citizen of Bangladesh and so able to enjoy the full rights of being a citizen. Both parents had family and social ties with Bangladesh.
31. In this respect the Judge’s credibility findings (that the Appellant’s evidence was unreliable) are relevant to an assessment of the Article 8 claim both within and outside the Rules. The Appellant and her husband had given contradictory evidence about how many relatives the Appellant had in Bangladesh. It is also significant to note the comment made by the Judge at [94] that the Appellant had provided no

evidence of her ability in the English language. This would suggest that M's knowledge of Bengali was likely to be more considerable than had been stated.

32. Whilst the Appellant had not committed any criminal offence, she had made a late claim for asylum which had no merit whatsoever and had never had any form of leave to live in this country. These were factors which could properly be taken into account by the Judge when assessing the reasonableness of expecting M to leave the United Kingdom, see MA Pakistan at paragraph 45. Wider public interest considerations should be taken into account in assessing reasonableness.
33. The Appellant's private life claim was that she came within paragraph 276 ADE (10 (vi)) because there would be very significant obstacles to her integration into Bangladesh. Those very significant obstacles were those she referred to in her asylum claim that the Judge comprehensively dismissed. That claim disappeared. The Judge pointed out that the Appellant had had no leave to be in the United Kingdom since her arrival. Pursuant to subsection (4) of section 117B little weight could be given to the Appellant's private life in the proportionality exercise.
34. It is difficult to see how the Appellant could bring herself within paragraph 276 ADE since she had not lived in United Kingdom for at least 20 years. There were no very significant obstacles to her integration back into Bangladesh. She still had family there as the Judge found, she had lived there most of her life and could speak the language as she herself accepted and her asylum claim had been comprehensively disbelieved. She had been in the United Kingdom for a period of time but had lived illegally. As she would be returned with her husband and child she would be able to pursue her private and family life elsewhere. She had made a number of applications which had failed the most recent one being the dismissal of her appeal in 2016. As was submitted to me that dismissal was still quite recent at the time that the Judge decided this case. It was reasonable therefore for the Judge to rely on Devaseelan when dismissing the Appellant's claim under the Immigration Rules.
35. Paragraph 276 ADE does not take this case significantly further for the Appellant. The Appellant's submissions otherwise are a no more than a disagreement with the result. She could not succeed under that paragraph and the objection raised in the grounds and in submissions to me is simply that the Judge did not finally "dot the i's and cross the t's" but it is clear from the general tenor of the determination and the authorities which the Judge cited that she was well aware of the reasonableness test and applied it. On the basis that the Judge was correct to find that it was reasonable to expect M to leave the United Kingdom, as Judge Buchanan had also agreed, and there were no significant obstacles to the Appellant's integration into Bangladesh it is difficult to see what was left of any argument under paragraph 276ADE. Certainly none was put to me.
36. Significant matters weighed against the Appellant in the assessment of her private life claim outside the Rules as the Judge pointed out at [94]. The Appellant could not succeed either in relation to a private life claim of her own or in relation to the best

interests of M and the reasonableness or otherwise of requiring him to leave the United Kingdom with the Appellant and her husband. The family would be removed as a whole and there would be no breach of this country’s obligations under Article 8 or of the Immigration Rules. The Judge’s conclusions were open to her on the evidence. I do not find that there was any material error of law in the determination of the First-tier Tribunal Judge and I dismiss the appeal.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant’s appeal

Appellant’s appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 13<sup>th</sup> of August 2018

.....  
Judge Woodcraft  
Deputy Upper Tribunal Judge

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

As I have dismissed the appeal there can be no fee award.

Signed this 13<sup>th</sup> of August 2018

.....  
Judge Woodcraft  
Deputy Upper Tribunal Judge

I approve the attached Decision and Reasons for promulgation

Name: Edward Woodcraft

Date: 9/8/18