Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/32938/2014**

IA/32945/2014

IA/32949/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 August 2015	**On 14 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

FARHAMA SULTANA
MD MAHMUDUL HOQUE MIAH
MANEEAH HOQUE MIAH
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr D Coleman of Counsel instructed by Shamaz & Partners, solicitors For the Respondent: Mr T Wilding of the Specialist Appeals Team

DECISION AND REASONS

The Appellants

1. The Appellants are wife, born 1 September 1976 and husband, born 3 January 1974 and their daughter born in 2006. The adult Appellants have

another child born at the end of 2014. All family members are citizens of Bangladesh. Both children were born in the United Kingdom.

2. On 10 September 2006 the wife arrived with leave to enter as a student which leave was extended on a number of occasions, expiring on 31 May 2014. On 16 December 2006 her husband arrived with leave as her dependant. His leave has been extended in line with hers. Their eldest child was granted leave as a dependant of the wife expiring also on 31 May 2014.

3. In time, on 18 May 2014 the three Appellants applied through their solicitors for leave to remain on the basis of their private and family life in the United Kingdom. There is no evidence that a subsequent application has been made in respect of the younger child.

The Respondent's Decision

4. On 31 July 2014 the Respondent refused the applications. He considered the wife's application under paragraph 246ADE of the Immigration Rules and Appendix FM. She noted that paragraph EX.1. of Appendix FM was not applicable because the relevant criteria were not met. Her application was refused insofar as it related to her private life under paragraph 276ADE(1) of the Immigration Rules because the wife did not meet the length of residence requirements. Further, the Respondent considered there was no evidence to show the wife with her husband and family could not re-integrate into life in Bangladesh and it was not the case the family had no ties to Bangladesh. So they did not meet the requirements of paragraph 276ADE(1)(vi).

5. The Respondent went on to consider whether the wife's claim merited consideration by way of reference to Article 8 of the European Convention outside the Immigration Rules. She referred to her duty in respect of the Appellants' children imposed by Section 55 of the Borders, Citizenship and Immigration Act 2009 and noted the eldest child aged 7 had been born and lived in the United Kingdom since birth.

6. She referred to the functioning education system in Bangladesh and asserted there was no evidence the eldest child would not be maintained or be safe in Bangladesh. The disruption to the wife's private and family life was proportionate to the legitimate aim of maintaining immigration control and removal of the Appellants as a family unit would not place the Respondent in breach of her duties under Section 55 of the 2009 Act.

7. Similar considerations were made and similar conclusions reached in respect of the husband. The Respondent then went on to consider the eldest child and for similar reasons concluded that she and the child could return with the parents to Bangladesh. Additionally, the Respondent made directions for removal of the Appellants to Bangladesh by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

8. On 18 August 2014 the Appellants lodged notices of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the

2002 Act). The grounds assert that para EX.1. of Appendix FM was applicable because their eldest child had spent at least seven years in the United Kingdom. The Respondent had failed adequately to consider paragraph 276ADE(1)(iv) in relation to their eldest child and to take into account relevant factors in her assessment of her duties under Section 55 of the 2009 Act. The best interests of the Appellants' child required that she remain in the United Kingdom and removal with the parents would breach their rights to respect for their private and family life protected by Article 8 of European Convention.

The First-tier Tribunal's Decision

9. By a decision promulgated on 1 May 2015 Judge of the First-tier Tribunal K W Brown dismissed each of the appeals under both the Immigration Rules and on human rights grounds. A concession was made at the hearing that the Appellants could not meet the eligibility requirements of the Immigration Rules.

10. The wife and the husband gave oral testimony. The Judge made certain adverse findings against each of them.

11. Each of the Appellants sought permission to appeal on grounds that the Judge had erred in law in his consideration of the best interests of the child Appellant and the public interest factor referred to in Sections 117A–117D of the 2002 Act.

12. The Judge had further erred in law by narrowing the consideration of the child's best interests to a finding that the child would return with the parents as a family unit. The Judge had failed to give adequate and sufficient consideration to the circumstances outlined in the documentary evidence about the mental health of the paternal grandmother and the drug addiction of the paternal uncle. Additionally reference was made to "the current and ongoing social and political instability in Bangladesh" but without any detail.

13. The grounds also referred to the fact that the child had lived in the United Kingdom since birth and the quality of schooling in the United Kingdom. The Judge had not taken into account the different standards of education in the United Kingdom and Bangladesh. The grounds assert that any adverse findings against the child's parents should not be held to the child's detriment and challenged the Judge's treatment of the factors referred to in Sections 117A–117B of the 2002 Act.

14. On 23 June 2015 Judge of the First-tier Tribunal Landes granted permission to appeal because it was arguable the Judge had erred in his assessment of the child's best interests and had not made any findings in relation to the grandmother and uncle. It was further arguable he had erred in disregarding certain of the factors referred to in Section 117B, and in particular Section 117B(vi) that in the case of a person not liable to deportation, the public interest does not require the person's removal where a person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United

Kingdom. The Judge had erred because earlier in his decision he had already concluded in effect at para.44 that it was reasonable to expect the child to leave the United Kingdom. It was only subsequently in his decision that he had gone on to consider Section 117B of the 2002 Act.

The Upper Tribunal Hearing

Submissions for the Appellants

15. Mr Coleman submitted that the cumulative effect of the various aspects of the Judge's determination under challenge and to which he was to refer was such as to amount to a material error of law.

16. At para.44 the Judge had concluded there was no reason why the child Appellant would not thrive in Bangladesh. He submitted there was in fact a wealth of evidence that the child would not thrive for the reasons identified in the statements made by the wife and husband. On return to Bangladesh the husband would have no employment or other work. He had no assets in Bangladesh and no accommodation. He and his family were well integrated into life in the United Kingdom and the child had made considerable academic success. There would be considerable detriment to the child, if removed.

17. The Judge had also failed to take into account the findings in *Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)* that:

> It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

These aspects were in favour of the child and the Judge had failed to consider them although he had noted that at the time of the hearing the child was 8 years of age.

18. At para.45 of his decision the Judge had not dealt with the factors referred to in Sections 117B(2) and (3) of the 2002 Act identifying the desirability that individuals speak English and be financially independent because persons who meet these criteria are less of or not a burden on tax payers and are best able to integrate into society. These were elements in favour of the Appellants. I noted the Judge had considered aspects of these matters at paras.17, 19, 21 and 35 of his decision.

19. Mr Coleman turned to the adverse findings against the husband and noted the Judge's comments at para.37 amounted to a very serious conclusion but nevertheless it should have had no impact on his treatment of the child Appellant's appeal in relation to Section 55 of the 2009 Act and para 276ADE(1)(iv) of the Immigration Rules.

20. It was evident from the opening words of para.38 of the Judge's decision that in focussing his treatment of the human rights claim outside the Immigration Rules that he had in mind his earlier adverse findings against the husband and this had infected his treatment of the Article 8 claim.

21. Additionally, the Judge had not referred to the situation of the child Appellant's grandmother and uncle when dealing with his consideration of the Respondent's duties under Section 55 of the 2009 Act and had not referred to para 276ADE(1)(iv) of the Immigration Rules. In the key para.44, the Judge had focused on removal of the Appellants as a family unit but had not taken into account the surrounding circumstances of the wife and husband and in particular their child.

22. Mr Coleman referred at length to the determination in *JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC)*. The Judge's treatment of the child Appellant's claim had not been in accordance with the specific duty imposed by Section 55(3) of the 2009 Act or the over-arching duty to have regard to the need to safeguard and promote the welfare of any children involved in or affected by the relevant matrix: see *JO and Others* para.12. He then turned to paras.8-10 of *JO and Others*. The Judge had not made a careful examination of all the circumstances of the child Appellant or considered the various factors identified in *Zoumbas v SSHD [2013] UKSC* 74. The failure specifically to address the circumstances of the child's grandmother and uncle was evidence that the Judge did not have a clear idea of what would be the child's circumstances on removal to Bangladesh. This issue was before the Judge. It had been referred to in the statements of the wife and husband and the husband's brother.

23. Mr Coleman further invited me to accept that the circumstances of the child Appellant were the same as those of one of the Appellants identified at page 18 of *JO and Others* because the child Appellant was entitled to succeed under para.246ADE(1)(iv) and the Judge had not sufficiently considered whether it would not be reasonable to expect the child to leave the United Kingdom.

Submissions for the Respondent

24. Mr Wilding opened by noting that the grounds for permission to appeal did not assert any error of law dependent upon the Judge's pre-consideration or lack of consideration of paragraph 276ADE(1) of the Immigration Rules. I noted the concession which had been made at the hearing on behalf of the Appellants recorded at page 3 of the Judge's decision.

25. He then turned to the Judge's treatment of Section 55 of the 2009 Act. The key paragraph in the decision was para.44. The Judge had made no

reference to his earlier adverse findings about the wife and husband. He had been careful to limit his consideration to the interests of the children and other relevant elements. He had to consider these in the context of his adverse findings, in particular on the husband's credibility about whom at para.36 of his decision he had noted a lack of candour about the available accommodation in Bangladesh.

26. The Respondent's notes of the hearing indicated that no submissions had been made against taking as a starting point that it was in the best interests of children to be with both their parents referred to in *Azimi-Moayed and Others.* There were no reasons to the contrary and that fact limited the relevance of the other aspects of *Azimi-Moayed and Others* referred to in para.44 of the decision.

27. Mr Wilding referred to the Judge's treatment of Sections 117B(2) and (3) of the 2002 Act and cited the decision in *AM (s.117B) Malawi [2015] UKUT 0260 (IAC)*. The Upper Tribunal had noted that the factors of facility in English and financial independence referred in Sections 117B(2) and 117(3) of the 2002 Act are matters which are important because they reinforce the statement in Section 117B(1) that the maintenance of effective immigration controls is in the public interest. At para.18 the Upper Tribunal had noted that an applicant "could obtain no positive right to a grant of leave to remain from either s.117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources".

28. The Judge had made findings of fact and a proper assessment that the Appellants could return as a family unit to Bangladesh. He had at para.36 of his decision rejected the account of the family accommodation available in Bangladesh. The Appellants had made no material challenge to the facts as found by the Judge and the grounds for appeal amounted to a haphazard complaint which was no more than a disagreement with the Judge.

29. The Appellants' leave throughout had been"precarious". The wife's leave was as a student with her husband and child as dependants so that little weight should be given to any private life established in the United Kingdom as provided in Section 117B(5) which principle had been fore-shadowed by para.5 of the extract from *Azimi-Moayed and Others* set out at para.44 of the Judge's decision. At paras.43-46 the Judge had made an adequate assessment of the proportionality of the decision which involved a consideration of the duties imposed by Section 55 of the 2009 Act and importantly other matters. If the adverse credibility findings are accepted then the submissions for the Appellants based on *JO and Others* were not relevant because the Appellants would be removed as a family unit. The decision should be upheld.

Response for the Appellants

30. Mr Coleman replied that any credibility findings at paras.35 and 36 of the Judge's decision were not made with reference to the issue of the child

Appellant's grandmother and uncle and that evidence was integral to the assessment of the best interests of the child and the assessment of the proportionality of the Respondent's decision to remove.

31. The Appellants had never been a burden on the public purse and consequently were to be considered as financially independent, a factor which the Judge had been obliged to take into account.

32. The concession made for the Appellants in relation to para.276ADE(1) of the Immigration Rules had been limited to eligibility. The consideration of the duties under Section 55 of the 2009 Act should have been inextricably linked to a consideration whether the Appellants met the requirements of para.276ADE(1)(iv). And indeed the scope of the concession was evidently limited in view of the fact that the Respondent had made submissions in relation to Appendix FM as recorded by the Judge at para.27 of his decision. His assessment of the eligibility of each of the Appellants in relation to Appendix FM was deficient, comprising a single sentence, being para.34 of the decision. The Judge although properly informed, particularly about the child Appellant's grandmother and uncle, had not conducted a careful examination of all the relevant information and factors in assessing the child's interests and consequently had not conducted a scrupulous analysis of the situation as outlined at para.11 of *JO and Others*. The decision should be set aside.

33. Both parties confirmed that in the event that I found a material error of law they were not in a position to proceed to a re-hearing and the parties would require time to prepare.

Findings and Consideration

34. At paras.11 and 24 the Judge noted the child Appellant's grandmother was said to have suffered from paranoid schizophrenia and diabetes and was a victim of domestic violence perpetrated by the child Appellant's uncle who was a drug addict and resistant to assistance (para.25) but when he came to consider the reasons for dismissing the appeals he failed to make any reference to these matters. Notwithstanding it is evident from paras.29 and 32 of the decision that the Judge had in mind that on return the Appellants would go to the family home occupied, at least in part, by the grandmother and the uncle. There was no consideration whether the Appellants could without undue hardship relocate elsewhere in Bangladesh, notwithstanding the Judge's finding at para.44 that both wife and husband had been educated to a relatively high level in Bangladesh.

35. If the Appellants were to return to the family home then the circumstances of the grandmother and uncle would be crucial to any assessment under Section 55 of the 2009 Act which in turn would go to the assessment of the proportionality of the decision under Article 8 of the European Convention: see *Zoumbas*. At para.46 the Judge failed to conduct an adequate balancing exercise, including giving sufficient reasons for his conclusion. In line with the learning in *Azimi-Moayed and Others* that the starting point is that it is in the best interests of children to be with both their parents unless there

are reasons to the contrary, the Appellants had given reasons to the contrary as mentioned by Mr Coleman but the Judge did not address them in sufficient detail.

36. The Judge had noted that the Appellants were financially dependent on the husband's brother. There was no finding as to the facility in English of the wife and husband. The Judge dealt with the issue of facility in English of the child Appellant at para.44. In assessing the financial independence or otherwise of the wife and the husband, it would be necessary to take into account comments at para.18 of *AM (s.117B) Malawi* promulgated a few days before the Judge heard this appeal. Para.18 states:-

> The mere fact that the evidence in a particular case establishes fluency or financial independence to some degree, does not prevent the Respondent from relying upon these matters as public interest factors weighing against the claimant. The Respondent would only be prevented from doing so if a claimant could demonstrate fluency, or financial independence, to the level of the requirements set out in the Immigration Rules. ....

37. Subsequent to the hearing in the First-tier Tribunal, the Upper Tribunal has promulgated the determination in *Bossade (ss. 117A-D - inter-relationship with Rules) [2015] UKUT 00415 (IAC)* which although subsequent to the hearing in the First-tier Tribunal explains what is and has been the jurisprudence in respect of the relationship between the Immigration Rules and Sections 117A-117D of the 2002 Act.

38. For the reasons already given, I find the decision of the First-tier Tribunal contains material errors of law such that it cannot stand. However, there is no reason why the findings of fact in paras.35 and 36 of the decision should not stand with the proviso that the findings in para.36 stand limited to the lay-out of the family accommodation in Bangladesh and its impact on the husband's credibility as a witness. Save as aforesaid the appeal will need to be heard afresh in its entirety.

39. The decision has been set aside. Section 12(2) of the Tribunals, Courts and Enforcement Act 2007 allows for the case to be remitted to the First-tier Tribunal with directions or for the Upper Tribunal to re-make it. Having regard to Practice Statement 7.2(b) and the nature and extent of the fact finding required, I conclude the decision should be remitted to the First-tier Tribunal to decide afresh.

40. I noted that no submissions for the Appellants had been made to the Judge in relation to any consideration of the Section 55 of the 2009 Act duties. Further there was no reference to para.276ADE(1)(iv) of the Immigration Rules, only to para. EX.1. of Appendix FM. If in the light of this decision the Appellant may wish to consider withdrawing the concession but if so, adequate written notice must be given to the Respondent.

Anonymity

41. There had been no request for an anonymity direction before the First-tier Tribunal and no request for anonymity was made to the Upper Tribunal. Having considered the appeal I find that anonymity is not necessary.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained errors of law such that it should be set aside in part and to that extent the appeal of each of the Appellants is allowed.

Anonymity order not made.

Signed/Official Crest Date 11. viii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal