Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21330/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 18 December 2015	**On 5 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

Rayhana Sharmin Khandoker
~~(ANONYMITY DIRECTION MADE)~~

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms R Akhter, Edward Alam & Associates
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of FTTJ Boyes, promulgated on 23 March 2015. While the original appellant is the respondent to this appeal, I refer to her as the appellant throughout and the Secretary of State as the respondent.

Background

2. The appellant originally entered the United Kingdom, dependent upon her student husband, on 30 March 2004. Her leave and that of her husband

was extended in the same capacity until 31 March 2009. On 30 October 2008, the appellant's husband unsuccessfully attempted to fraudulently gain leave to remain in the United Kingdom as a Tier 1 Post-study Worker, with the appellant as his dependant. The appellant's eldest child was born in the United Kingdom in 2006 and youngest in 2010. Her appeal rights were exhausted on 11 May 2010. Thereafter, the appellant made a number of applications for leave to remain in the United Kingdom on the basis of her family life with her husband and two children, the most recent of which was made on 16 April 2012 and which is the subject of this appeal.

3. That application was refused on 28 April 2014 because the respondent considered that the requirements of the Rules relating to partners, parents and EX.1 could not be met. In relation to paragraph 276ADE, the respondent accepted that only the eldest of the children had lived in the United Kingdom for 7 years, however it was not considered unreasonable for him to leave this country with his parents and sibling. It was not accepted that there were very significant obstacles to the integration of the respondent and her family in Bangladesh. Section 55 of the Borders, Citizenship and Immigration Act 2009 was considered. It was also considered there were no compassionate and compelling circumstances involved. Particular reference was made to an attempt by the appellant's husband to gain further leave to remain in the United Kingdom as a Tier 1 (Post-study work) migrant by deception, which was refused on 4 February 2009, on the basis that he submitted a false certificate from the Cambridge College of Learning.

The hearing before the FTTJ

4. The FTTJ heard evidence from the appellant as well as submissions from both representatives. The FTTJ allowed the appellant's appeal solely on the basis that the Secretary of State had failed to fully comply with her statutory duties under section 55 of the Borders, Citizenship and Immigration Act 2009 and therefore her decision was not in accordance with the law and remained outstanding pending its lawful consideration. The FTTJ made no fee award as the appeal was allowed on only a limited basis and the case of JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC) post-dated the Secretary of State's decision.

Error of law

5. The grounds of appeal argue that the FTTJ, who had a statutory duty to determine matters before her, erred in failing to do so. The FTTJ was bound by AJ (India) v SSHD [2011] EWCA Civ 1191, where it was "*held that a failure of the Secretary of State to consider a child did not lead to the decision being otherwise than in accordance with the law*."

6. FTTJ Garratt granted permission, finding that it was arguable that the FTTJ erred in referring the matter back rather than "*getting on the with the case*" in circumstances where it had been noted that the Secretary of

State had raised section 55 and dealt with it in the refusal letter.

Decision on error of law

7. Mr Bramble relied on the decision in MK (section 55 – Tribunal options) [2015] UKUT (IAC), which he submitted was the current position on remittals to the Secretary of State in relation to children. As this was the one issue involved in this appeal, he argued that the judge erred in finding that the Secretary of State's decision was not in accordance with the law. The Secretary of State's decision had fully considered the circumstances of the children and engaged with the requirements of section 55. Furthermore AJ (India) had not been taken into account. All the information was before the judge and he should have just got on with deciding the case.

8. Ms Akther stressed that there were options open to the FTTJ. She placed reliance on the decision in JO. With regard to AJ (India), she asked me to note that this case was not cited to the FTTJ and did not address the 7-year point. The FTTJ found that he did not have enough information to make a decision after hearing the evidence and the Secretary of State's reasons were lacking. In relation to [30] of the FTTJ's decision, where he said that *"there was no assessment of the …impact that removing them from the UK with their parents will have on them specifically…"* I enquired as to what evidence there was before either the Secretary of State or the FTTJ regarding the impact of the intended removal on the children, however other than a vague reference to school reports of the eldest child, Ms Akhter was unable to refer me to any specific document.

9. I found that the FTTJ had materially erred in allowing the appeal on the limited basis that he did. I therefore set aside his decision in its entirety for the following reasons.

10. I have considered the content of the Secretary of State's reasons for refusal letter of 28 April 2015. The children are considered throughout this 13-page decision. Their circumstances are considered in respect of paragraph 276ADE(iv) of the Rules; exceptional circumstances are considered; section 55 is set out and addressed in detail; with the issue of the best interests of each child being assessed separately and with particular mention made of the education and specific school of the eldest child of the family. The circumstances of the minor children were and indeed are, that they lived with their parents, socialised with the wider family and the eldest attended primary school. I find that this decision engaged with the requirements of section 55. There was no aspect of the children's circumstances, which went unaddressed in this decision. Indeed, Ms Akhter was unable to point me to any evidence pointing to the impact on the children of being removed, which was what the FTTJ indicated that he was concerned with.

11. The material before the FTTJ consisted of an appellant's bundle, which included a witness statement from the appellant dated 6 July 2014, financial information including that regarding the United Kingdom-owned properties of the appellant and her husband, letters from relatives and material from the school of the eldest child, in particular.

12. The FTTJ had all the information before him, the vast majority of which had already been considered by the Secretary of State, and could therefore have proceeded to decide the appeal. In this I reproduce [39](a) of MK;

> "Where either the FtT or the Upper Tribunal decides that there has been a breach by the Secretary of State of either of the duties imposed by section 55 of the 2009 Act, both Tribunals are empowered, in their final determination of the appeal, to assess the best interests of any affected child and determine the appeal accordingly. This exercise will be appropriate in cases where the evidence is sufficient to enable the Tribunal to conduct a properly informed assessment of the child's best interests."

13. Ms Akther invited me to proceed to remake the decision immediately. She advised me that the appellant did not require an interpreter, that she was the only witness and that she would be relying on the evidence, which was before the FTTJ. I therefore heard oral evidence from the appellant and submissions from each representative, which is set out in my typed notes and which I have taken into consideration along with all the other evidence before me, in reaching my decision.

14. At the end of the hearing I reserved my decision.

Remaking

15. To summarise the appellant's evidence, her relatives in the United Kingdom consisted of herself, her husband and their two children. In addition, her husband had siblings and aunts and uncles and their own families living in the United Kingdom. The eldest child was currently in year 5 of primary school. The appellant and her husband spoke "*Bangla*" at home but the children spoke English. When asked how her eldest child's Bangla was, the appellant replied, "*Their first language is English*." Her eldest child had been to Bangladesh when he was around 22 months for 4 or 5 weeks and the youngest had never been. The appellant stated that her eldest child would feel scared to return to Bangladesh because he had seen a television news report featuring a bomb blast in connection to the political situation there. She stated that the children could not adjust to life in Bangladesh because they spoke English and could not understand Bangla properly or read or write it. When asked whether her eldest child had any friends in the United Kingdom, the appellant referred to cousins and other relatives living nearby who they saw almost every weekend.

16. The appellant said that her parents and those of her husband currently reside in Bangladesh and her brother lived in Australia. The appellant lived with her parents before coming to the United Kingdom. She had not explored the possibility of sending the children to European or English-

speaking schools in Bangladesh. None of the school friends of the eldest child had written supporting letters. At the weekend, the eldest child spent time with his cousins and enjoyed family time. In terms of extra-curricular activity, the eldest child played netball once during the week but his week was busy as he attended a madrassa.

17. Mr Bramble's submissions relied mainly on the reasons for refusal letter referred to above.

18. Ms Akhter's submissions centred on the eldest child who is now aged 9. With reference to Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197, she argued that the private life of the eldest child was concentrated on his peers, that he spoke English and was doing well at school. In terms of that child's best interest, she argued that it was "better" for him to remain in the United Kingdom and not enough to say that he could readily adapt after living in the United Kingdom all his life. He was on the cusp of going to secondary school and was not familiar with Bangladesh. Very weighty reasons were required for separating a child from his community. Ms Akhter confirmed that the answer to this issue was the same whether I considered paragraph 276ADE(iv) of the Rules or section 117B(6) of the Nationality, Immigration & Asylum Act 2002 (as amended). Indeed, she stated that there was no point in considering the case outside the Rules regardless of my decision under the Rules. I was referred to a supporting letter from the appellant's MP, which referred to the family's contribution to the community. Ms Akther stressed that the appellant had been lawfully resident in the United Kingdom until 2010 and the fraudulent application carried out by the appellant's husband did not negate the best interest of the children. It was unreasonable to expect the eldest child to leave the United Kingdom.

19. Ms Akther did not seek to argue that the partner rules under Appendix FM were met or that there were very significant obstacles to the integration of the appellant or any other family member into Bangladesh. Nor did she make any freestanding submissions in relation to Article 8 ECHR.

20. The eldest child of the family, who was born in May 2006, has been residing in the United Kingdom, since birth, for more than 7 years. The sole issue before me is whether it is reasonable for that child to leave the United Kingdom, in terms of accompanying his parents and younger sibling to Bangladesh. Considering, the child's best interests firstly, I note that there is nothing out of the ordinary about his circumstances and I therefore find that his best interests are served by continuing to be cared for by his parents, along with his younger sibling, be that in Bangladesh or the United Kingdom.

21. I consider the eldest child to not yet fall into one of the categories identified in Azimi-Moayed, in that he has not lived in the United Kingdom for 7 years from the age of 4. Furthermore, there was no real evidence to show that he has developed a private life independent of his parents. His weekend activities are solely related to time with his family, including

seeing his cousins. He attends primary school, the madrassa and plays netball once a week. His school reports indicate that he is doing well. As the appellant stated, his first language is English; her answer implying that his second language is Bangla and that he understands this language to some extent. I accept that there could well be a time of adjustment while the eldest child gets to grips with his parents' language, particularly if they decide that he be educated in Bangla rather than English.

22. I consider that there is a realistic possibility of the eldest child receiving an education in English in Bangladesh owing to the fact that each of his parents purchased properties in the United Kingdom, which they could either let or sell to pay any school fees. While the eldest child has cousins and aunts and uncles in the United Kingdom, both sets of grandparents live in Bangladesh and could assist him in adjusting to life in that country. Considering the circumstances of the eldest child in the round, I find that it is not unreasonable to expect him to leave the United Kingdom for Bangladesh, along with the remainder of his immediate family.

23. I find that the Rules, in relation to the eldest child of the family, amount to a complete code and even if I were to proceed to consider his circumstances under paragraph 117B(6), my decision would be the same.

24. Ms Akther did not argue that I should consider the circumstances of the appellant, her husband and youngest child outside the Rules and I therefore end my consideration here.

25. I accordingly dismiss this appeal.

26. As I have dismissed the appeal, it follows that I make no fee award.

Conclusion

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision of the FTTJ.

I remake the decision by dismissing the appeal.

An anonymity direction was made by the FTTJ, however I could see no reason for continuing such a direction now.

Signed Date: 20 December 2015

Deputy Upper Tribunal Judge Kamara