Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07133/2015
HU/07154/2015
HU/07162/2015
HU/07178/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 29th September 2017	**On 23rd October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MOHAMMAD [A]
(2) TAMANNA [A]
[W H]
[W A]
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss Hafsah Masood (Counsel), Law Dale Solicitors
For the Respondent: Mr S Staunton (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Hanes, promulgated on 1st December 2016, following a hearing at Taylor House on 14th November 2016. In the determination, the judge dismissed the appeals of the Appellants, whereupon the Appellants subsequently

applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are a family of Bangladeshi nationals. The first Appellant, the husband and father respectively was born on [ ] July 1982. The second Appellant, the wife and mother respectively, was born on [ ] November 1981. The third Appellant, their son, was born on [ ] 2008. Finally, the fourth Appellant, their daughter, was born on [ ] 2012. The principal Appellant first entered the UK on 2nd May 2005, as a Tier 4 (General) Student, with the visa valid until 31st July 2006. There were various extensions of stay. This present appeal concerns a application for leave to remain on the basis of Article 8 private and family life rights and it was refused by the Secretary of State on 15th September 2015. This appeal is against that decision.

The Judge's Determination

3. The judge gave consideration to the fact that the adult Appellants were both 34 years of age at the date of the hearing and had lived in the UK for about eleven and a half years and nine and a half years respectively. Both parties had close family ties to Bangladesh. The judge did not find the Appellant credible on three particular issues. First, he did not accept that the principal Appellant was estranged from his parents on account of having married his wife against her will because otherwise the principal Appellant's father and uncle would not have funded his education to the UK, or invited his wife to live with them for two years whilst he was himself living in the UK. It was also not accepted by the Judge that the principal Appellant developed a relationship with his future wife travelling some three to four hours on a bus. Second, it was not accepted that the principal Appellant did not work in Bangladesh. Third, the judge did not accept that the principal Appellant did not have contact with his parents given that he was their only son or that his wife did not maintain contact with her close relatives or that either party was estranged from close family. Ample reasons for these findings were given (at paragraph 11).

4. It was, however, with respect to the two minor children that the determination was more nuanced. At the date of the application on 22nd June 2015, the third Appellant, the son, met the seven year requirement, but the fourth Appellant, the daughter, did not (see paragraph 13). The judge recognised that it was in the best interests of the children to live with their parents and be brought up by them (paragraph 14). He gives specific consideration in some depth to the individual circumstances of each child. With respect of the third Appellant, the judge observed how the fourth Appellant was two and a half years of age and was primarily focused on her parents and was at an adaptable age, such that her best interests were to remain with their parents should they return to Bangladesh (paragraph 17). With respect to the third Appellant, the son,

the judge observed that he would have to "give considerable weight to the fact that he would have spent seven years (or eight years as at the date of the hearing) continuously living in the UK", such that he was "well-settled in school, and had started to develop friendships", and that "English is his primary language" (paragraph 18). Nevertheless, given that it was proposed to remove the Appellants together to Bangladesh there would be no interference with their family life (paragraph 23).

5. The judge was not oblivious to the primary consideration that the best interests of the children are a primary consideration and that the third Appellant "is a qualifying child as defined in Section 117B as he has lived in the UK for a continuous period of seven years or more" (paragraph 24). Nevertheless when this was balanced against the "public interest" in immigration control, it was clear that the Appellants had no legitimate expectation that they would be allowed to remain and it would not be unreasonable to expect them to leave the UK in accordance with the requirements of Section 117B(6), particularly as "[WA] was born in the UK whilst her parents were overstayers.

6. The parties have all obtained treatment on the NHS whilst here unlawfully and the children have had the benefit of a British education to which they were not entitled" (paragraph 25). In these circumstances removal was not disproportionate in all the circumstances of the case.

7. The appeals were dismissed.

Grounds of Application

8. The grounds of application state that the judge failed to attach significant weight to the child's residence over seven years pursuant to the guidance given in **MA (Pakistan) [2016] EWCA Civ 705** and also failed to apply Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. Furthermore that the judge took into account irrelevant matters, such as the fact that the children were legally entitled to NHS treatment and an education during the currency of their time in the UK, even though the Appellants were in the UK unlawfully.

9. On 7th August 2017 permission to appeal was granted by the Upper Tribunal.

Submissions

10. At the hearing before me on 29th September 2017, the Appellant was represented by Miss Masood of Counsel and the Respondent was represented by Mr Staunton, a Senior Home Office Presenting Officer. Miss Masood relied upon her Grounds of Appeal, and her detailed, and well-compiled skeleton argument of five pages, together with appended legal authorities, which I was urged to take into account. In the submissions, she stated that the judge in the final paragraph of the determination had wrongly given weight to the following: "[WA] was born

whilst her parents were overstayers. The parties have all obtained treatment on the NHS whilst here unlawfully and the children had the benefit of the British education to which they were not entitled" (paragraph 25). The effect of this statement was that the children were here unlawfully and obtained benefits unlawfully. In **MA (Pakistan) [2016] 1 WLR 5098**, this approach was described as flawed by the Court of Appeal.

11. It followed from the judgment of the Supreme Court in **Zoumbas [2013] 1 WLR 3690** that children should not be blamed for matters for which they were not responsible. More fundamentally, she submitted that accessing NHS treatment *per se* whilst in the UK unlawfully cannot be a relevant factor to be weighed in the proportionality balancing exercise.

12. Second, the judge wrongly weighed the following in the balance: "... the public interest ensuring that the limited resources of the country (including itself and educational resources) are used to the best effect for the benefit of those for whom they are intended". Given that the third Appellant in this appeal was a child who had been in the UK for more than seven years, and was a "qualifying child", (see paragraph 24 of the determination), these were impermissible considerations, bearing in mind the purposes of Section 117B(6), in that the case law was clear that, where there was a qualifying child there had to be "strong reasons" with choosing leave (see **MA (Pakistan)**).

13. Finally, drawing from her skeleton argument, Miss Masood also submitted that there was in actual fact no evidence that, "the parties have all obtained treatment on the NHS whilst here unlawfully" (paragraph 25), given that the parties had been in the UK lawfully right up until 2010, during which time the first and second Appellants had both worked and paid tax; the first and third Appellants had had leave until 2010; and certain NHS services were free to everyone regardless of immigration status; and the evidence before the judge was that the Appellants paid for their medication (see the determination at paragraph 7).

14. For his part, Mr Staunton submitted that the determination was well-reasoned. He relied upon the Rule 24 response. He submitted that the essential question was one of the giving of weight to the range of facts before the judge. It was clear that the judge has earlier stated that, "when considering the best interests of [WH], I gave considerable weight to the fact that he would have spent seven years (or eight years as at the date of hearing) continuously living in the UK ..." (at paragraph 18). Moreover, the judge was not unmindful of the leading cases on the best interests of the child, citing **EA (Article 9 – best interests of child) Nigeria [2011] UKUT 00315** and of **Azimi-Moayed [2013] UKUT 00197**, to which the judge referred extensively (see paragraphs 14 to 15).

15. In reply, Miss Hafsah submitted that the fact that the judge had weighed in the balance other factors such as the children's access to NHS treatment

and to the educational facilities in the UK was a material error, especially given that one of the two children was by now a qualifying child and entitled to remain here, unless there were "strong reasons" to the contrary.

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. In what is otherwise a comprehensive and detailed determination, fully cognisant of the relevant law and the essential facts in the appeal before the judge, the reference to the Appellants having accessed NHS treatment "whilst here unlawfully and the children have had the benefit of a British education to which they were not entitled" (paragraph 25) is a material error. This is not least given that the judge in the same breath goes to say that, "the ability to speak English and be financially self-sufficient are neutral factors".

17. If that is the case, as it clearly is, the accessing of NHS treatment and of the British education system is also a neutral factor, especially given that the judge was considering the position of the third Appellant, who was a qualifying child, and had been in the UK for a continuous period of over seven years. It is clear that the balance of considerations shifted against the children on account of the manner in which these considerations were brought into play.

18. Second, and quite apart from this, it does not even appear to be clear on the facts determined by the judge, that the NHS treatment was accessed unlawfully by the Appellants. This is because the evidence before the judge was that, "the Appellant confirmed that his children attend a state school and that they use the services of the NHS but pay for their medication" (paragraph 7).

19. Of course, there may well be circumstances where accessing education and medical health facilities is a supremely relevant consideration weighing heavily on the public purse (see as an example **AE (Algeria) [2014] EWCA Civ 653**, but such a case has not been made out on the facts of the present appeal. Accordingly, the determination is infected with a material error of law.

Re-Making the Decision

20. I have re-made the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal only to the extent that under practice statement 7.2(a) the matter should be remitted back to another judge in the First-tier Tribunal for a proper balancing exercise to be carried out,

with the findings that the judge below made in respect of the adult parents (at paragraph 11) being preserved intact.

21. At the hearing before me, Miss Masood, while stating that she would rightly not wish to give evidence before the Tribunal, had expressed concern, on instructions from the principal Appellant sitting behind her, that the witness statement crafted by his solicitor at the hearing below, had not been read out to him prior to the hearing, and that he wished to add the matters set out at paragraph 11 of the determination of the judge below, reconsidered.

22. To the credit of Miss Masood, once the hearing was over, she returned back into the courtroom to inform the Tribunal that, having sought further clarification from the principal Appellant about the state of affairs, she was now given to understand that a copy of the witness statement by the principal Appellant's solicitor had been emailed over to him the night before. However, he had failed to give it his full and complete attention, so that when he turned up at court the following day, he proceeded simply to affirm it, without reading through it. Given that this was the case, the judge below cannot, I find, be criticised for making the findings that he did at paragraph 11, on the basis of a witness statement that the Appellant had confirmed the contents of, his having been sent such a statement the night before by his solicitors. The other matters, such as the accessing of medical treatment and educational facilities remained to be reconsidered again, on the basis of any fact or facts that are relevant to them, as well as the children's current condition and circumstances.

Notice of Decision

23. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal to be heard by a judge other than Judge Hanes at Taylor House.

24. An anonymity order is made.

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

Deputy Upper Tribunal Judge Juss 19th October 2017