

3. I reserved my reasons, which I now give.
4. The respondent (Mr Khan) appealed to the First-tier Tribunal against the refusal of his human rights claim that was made on 28 August 2015. Because by that time s.15 of the Immigration Act 2014 had come into force, the respondent could only appeal against that decision on the ground of appeal provided in s.84(2) of the Nationality Act 2002, which specified that the decision was unlawful under s.6 of the Human Rights Act 1998. Thus, Judge Pooler was charged to determine whether the SSHD's decision of 28 August 2015 violated his right to private and family life as protected by article 8 ECHR. Because both parties accept that Judge Pooler did not carry out this function, which is evident from his decision and reasons statement of 21 July 2016, I must find that Judge Pooler erred in law by not completing the appeal process.
5. It fell to me to decide whether I could remake the decision or whether the appeal needed to be remitted to the First-tier Tribunal for a fresh hearing. After hearing submissions and after discussing the situation, I decided I should remake the decision myself.
6. It is evident from paragraphs 49 of the reasons for refusal letter of 28 August 2015 that the SSHD conceded that the respondent has genuine and subsisting relationships with his wife and their daughter in the UK, both of whom are British citizens. It is also conceded that it would be unreasonable to expect either of them to leave the UK to continue family life with the respondent in Bangladesh.
7. The SSHD thereafter tries to justify removal of the respondent either on his own and thereby splitting the family group or to expect the respondent's wife and daughter to join him in Bangladesh even though that is deemed unreasonable. Regarding the latter point, I add that although the SSHD couches that option in terms of a choice the respondent's wife would have to make, the mere fact that the immigration decision forces such a challenging choice interferes with the existing family life rights of those affected. Presenting a couple with a choice does not, of itself, absolve the UK of its duty to respect family life.
8. I find the SSHD's reasoning to be wholly defective. Because it is accepted the respondent has genuine and subsisting relationships, to justify splitting the family group, the SSHD would have to establish some significant factor in the public interest. Similarly, to expect the respondent's wife and daughter to give up their lives in the UK, would require proof that there is some significant countervailing factor in the public interest. The factors relied upon by the SSHD to justify interfering with the family life that exists is that the respondent previously used deception to remain in the UK lawfully and that he has previously overstayed.
9. When I consider the public interest under s.117B of the 2002 Act, I acknowledge that expulsion of the respondent is justified because he has failed to respect legitimate immigration control by using deception and by overstaying. These are strong factors that would undermine his case to remain except for the fact he has a genuine and subsisting parental

relationship with a qualifying child. That is a strong factor in the respondent's favour.

10. Of itself, the fact the respondent benefits from s.117B(6) is not enough (see R (MA (Pakistan) & Ors) v SSHD [2016] EWCA Civ 705, [2017] Imm AR 53). But in this case, there are other factual matters that mean the balance between his right to respect for his family life and the public interest falls in his favour. The other factors relate to the fact the respondent did not employ deception in relation to securing leave to remain based on his relationships. The deception was employed to secure leave to remain as a student some years ago. That distance is a significant feature that weakens the SSHD's position because to rely on what the respondent did in very different circumstances is not proportionate.
11. In addition, as Ms Aboni acknowledged, the policy of the SSHD, where British citizen children would be affected by the outcome, has not been properly applied in this case. It would be contrary to that policy for the SSHD to expect - directly or indirectly - a British citizen child to leave the UK. The SSHD would have to demonstrate good reasons to separate a child from the care of both parents because such care, where available as here, is in the child's best interests. The failure to consider and apply the policy undermines the justification given in the reasons for refusal letter.
12. Ultimately, it is evident that the disruption that would result from the family group being separated is unjustified in all the circumstances. For this reason, I remake the decision and allow the original appeal.

Decision

The decision and reasons statement of FtT Judge Pooler contains an error on a point of law.

I set his decision aside.

I remake the decision and allow the appeal of Mr Khan against the refusal of his human rights claim dated 28 August 2015.

Signed

Date 12 June 2017

Judge McCarthy
Deputy Judge of the Upper Tribunal