Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07822/2016
HU/07826/2016
HU/07828/2016
HU/07831/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 November 2018	**On 27 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SHAHIN [A] (FIRST APPELLANT)
RUMANA [B] (SECOND APPELLANT)
[S A] (THIRD APPELLANT)
[Z A] (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Spurling, Counsel instructed by Hunter Stone Law
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are nationals of Bangladesh and a family. Their appeals came before the Upper Tribunal for an error of law hearing on 11 July 2018 and in a decision and reasons promulgated on 21 August 2018, I found material errors of law in the decision of the First-tier Tribunal and adjourned the appeal for a resumed hearing before the Upper Tribunal with directions to be listed for submissions only in respect of the proportionality of removal. A copy of that decision is appended.

2. At the resumed hearing the Appellants were represented by Mr Spurling of Counsel, who sought to rely on a skeleton argument dated 28 November 2018. He also sought to rely on some additional brief documents as to the condition of the third Appellant, S. Ms Pal had no objection to submission of that evidence.

3. I heard submissions from Ms Pal, who stated she wished to rely on the refusal dated 2 March 2016 in particular at [43] onwards. She submitted that the factors in favour of removing the Appellants from the UK were considered by the First-tier Tribunal Judge and the factors on the Respondent's side as set out in the Appellants' skeleton argument are what the Respondent sought to rely on today. In particular, the first two Appellants could seek employment in Bangladesh, the children had been exposed to the language and culture, their mother tongue is Bengali or Sylheti, they are young, still at primary school and not at a critical stage of their education and the family will continue to receive support from the Appellants' extended family. Lastly there was provision for the education of autistic children in Bangladesh. Ms Pal submitted that the Appellants were not currently financially independent. The first Appellant sought leave to remain in the UK when his leave as a student expired in 2012, referring to [97] of the decision of the First-tier Tribunal.

4. She submitted the judge had considered whether the third Appellant S would be able to return to Bangladesh with his parents and would be able to settle, given he had been born in the UK. She appreciated that S had been in the UK for more than seven years thus the issue is whether it would be reasonable for the family unit to return to Bangladesh. Ms Pal submitted that it would be reasonable for the reasons outlined earlier. On the findings of the judge, the third Appellant would be able to access some form of education: see [107] and would have access to the culture and language of the country. She submitted that the conduct of the parents in seeking to remain unlawfully in the UK for a considerable period of time is a relevant factor in the proportionality exercise and it is expected that parents who have no leave to remain would leave the UK and children would follow with them unless it was not reasonable to expect them to leave. She submitted the decision to remove would not be disproportionate.

5. In his submissions, Mr Spurling sought to rely on his skeleton argument and the factors set out therein as to the balancing exercise when considering the proportionality of removal. He drew my attention to the witness statement of the second Appellant at [46], [49], [51] and [53] which addresses the impact on their daughter Z due to the discrimination they have experienced because of their son's

autism. This discrimination has been by Bangladeshi people who lack understanding as to the condition and that there is evidence in Bangladesh of the abandonment of autistic children. He submitted that, whilst he was not suggesting that connections could not be formed, it was relevant to consider the ease with which they could be formed and that Z's position was compromised by the fact that she had an autistic brother and there would be social discrimination particularly in Bangladesh given that the family have already experienced it in the UK.

6. Mr Spurling took issue with some of the points raised on behalf of the Respondent, in particular, he submitted that the third Appellant is not conversant in Bengali and this is clear from the report from Hatton School at subparagraphs (5) and (6). In relation to the second Appellant's overstay, this was due to the fact that after she gave birth to the third Appellant, she had difficulties with him as a baby and this is why she overstayed. He submitted it was necessary to look at the family members as a whole and that the second Appellant had had leave until 2012, her reasons for overstaying were more nuanced.

7. In relation to the third Appellant, S, Mr Spurling submitted that he has formed social connections outside the family with his teachers and he referred to page 3 of the main bundle which provides that the Appellant has made good relationships with all the adults in his class: see pages 16 to 17 of the letter dated February 2017. Thus he has developed a private life with people outside his immediate family. Mr Spurling also sought to rely on a letter from Beverley Power at pages 134 to 136, who found that S would have delayed development absent access to PECS and other forms of support and that he has made excellent progress. Mr Spurling submitted it would be harder for S as somebody suffering from autism to change because people in S's position are less adaptable.

8. He submitted that the seven year starting point for whether or not it was reasonable for Z to leave the UK should apply no less than it would to any other child. Mr Spurling submitted that the children's mother tongue is English. He submitted that S is always at a crucial stage in his education, albeit his sister is not, and the ultimate question was whether it was reasonable for the third Appellant to return and to then go on to consider the conduct of the parents. Mr Spurling also sought to rely on the decision of the Upper Tribunal in *MT and ET* (child's best interests; *ex tempore* pilot) Nigeria [2018] UKUT 00088 (IAC)

9. Mr Spurling submitted that it was clearly in the third Appellant's best interests to remain and also those of his younger sister. Whilst the Appellant's father's immigration history was poor it was not so poor as to make it reasonable for the Appellant and his family to leave the UK and that in light of the test at Section 117B(6) of the NIAA 2002 it was unreasonable for both children to have to leave the UK.

Findings and reasons

10. I allowed the appeal and announced my decision at the hearing. I now give my reasons.

11. The First tier Tribunal Judge made the following preserved findings of fact:

(i) the third Appellant has severe Autistic Spectrum disorder and multiple special needs requiring educational and health resources support [87];

(ii) his needs are catered for in the best possible manner [87];

(iii) removing the third Appellant would significantly disrupt the current care package [88];

(iv) the provision of care in Bangladesh for children like the third Appellant is considerably less advanced than it is in the UK [88];

(v) if the third Appellant is returned to Bangladesh he will receive considerably reduced care, both medically and educationally, than he receives in the UK [88];

(vi) the third Appellant and his wider family may be subjected to a higher level of social discrimination than would be the case in the UK [89];

(vii) it was in the third Appellant's best interests to remain in the UK with his parents [110];

(viii) the Appellant may receive assistance from the first Appellant's parents [90] including financial assistance [93] and could get some assistance from his sister [91] and there may also be some support from the second Appellant's family [92];

(ix) the first two Appellants are relatively young and healthy and as well placed as any other relatively young parents to get work in Bangladesh [94];

(x) the first Appellant has remained unlawfully since October 2003 and the second Appellant's leave expired in 2012 and there has been a deliberate and persistent refusal to comply with the UK's immigration laws: [97];

(xi) there are no very significant obstacles to integration in Bangladesh: [98];

(xii) the fourth Appellant's best interests are to return with her family; [110] and

(xiii) the Appellants' stay has at all times been precarious: [111].

12. Since the decision and reasons of the First tier Tribunal Judge was promulgated on 9 August 2018, the third Appellant became a qualifying child on 31 May 2018. The effect of this is that the proportionality of removal of the family must take place following consideration of section 117B(6) of the NIAA 2002; the associated Home Office guidance and the jurisprudence in respect of the reasonableness of expecting a qualifying child to leave the UK.

13. The current Home Office guidance in relation to "*Family Migration: 10 year route*," which was updated on 22 February 2018 and provides *inter alia* as follows:

> *"The requirement that a non-British citizen child has lived in the UK for a continuous period of at least seven years immediately preceding the date of application, recognises that over time children start to put down roots and to integrate into life in the UK, to the extent that it may be unreasonable to require the child to leave the UK. Significant weight must be given to such a period of continuous residence. The longer the child has resided in the UK, and the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more.*
>
> *Such strong reasons may arise where, for example, the child will be returning with the family unit to the family's country of nationality, and the parents have deliberately sought to circumvent immigration control or abuse the immigration process. For example, by entering or remaining in the UK illegally or by using deception in an application for leave to remain or remain. The consideration of the child's best interests must not be affected by the conduct or immigration history of the parents or primary carer, but these will be relevant to the assessment of the public interest, including in maintaining effective immigration control; whether this outweighs the child's best interests; and whether, in the round, it is reasonable to expect the child to leave the UK.…*
>
> *In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the child who has been resident here for seven years or more could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has been or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules."*

14. In *MA (Pakistan)* [2016] EWCA Civ 705, Lord Justice Elias held as follows at [46]:

> "*Applying the reasonableness test*
>
> *46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a*

policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment."

And at [49}:

"…the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."

15. In *MT & ET* (child's best interests; *ex tempore* pilot) Nigeria [2018] UKUT 00088 (IAC) the Upper Tribunal held *inter alia* as follows:

"32. This is why both the age of the child and the amount of time spent by the child in the United Kingdom will be relevant in determining, for the purposes of section 55/Article 8, where the best interests of the child lie.

33. On the present state of the law, as set out in MA, we need to look for "powerful reasons" why a child who has been in the United Kingdom for over ten years should be removed, notwithstanding that her best interests lie in remaining.

34. In the present case, there are no such powerful reasons. Of course, the public interest lies in removing a person, such as MT, who has abused the immigration laws of the United Kingdom. Although Mr Deller did not seek to rely on it, we take account of the fact that, as recorded in Judge Baird's decision, MT had, at some stage, received a community order for using a false document to obtain employment. But, given the strength of ET's case, MT's conduct in our view comes nowhere close to requiring the respondent to succeed and Mr Deller did not strongly urge us to so find. Mr Nicholson submitted that, even on the findings of Judge Martin, MT was what might be described as a somewhat run of the mill immigration offender who came to the United Kingdom on a visit visa, overstayed, made a claim for asylum that was found to be false and who has pursued various legal means of remaining in the United Kingdom. None of this is to be taken in any way as excusing or downplaying MT's unlawful behaviour. The point is that her immigration history is not so bad as to constitute the kind of "powerful" reason that would render reasonable the removal of ET to Nigeria.

16. In light of the fact that the First tier Tribunal Judge found that it would be in the best interests of the third Appellant to remain in the UK, due to his particular circumstances and given that he is now a qualifying child, I find that on the basis of the preserved findings of fact and the additional submissions, that it would not be

reasonable to expect the third Appellant to leave the UK and thus, in accordance with the statutory provisions set out at section 117B(6)(b) of the NIAA 2002 that the public interest does not require his removal.

17. Having considered the relevant jurisprudence and the Home Office guidance, set out at [13] above, I find on the particular facts of the case that there are no powerful reasons to refuse leave, even if as a consequence of that the third Appellant's family are entitled to remain with him. Whilst the third Appellant's parents are overstayers, the second Appellant entered the United Kingdom lawfully and has leave to remain when the third Appellant was born and until October 2012. I do not find that as such this can be characterised as a "*very poor immigration history*" in the absence of any criminality or deception.

Decision

18. The appeals of all four Appellant are allowed on human rights grounds [Article 8].

Signed *Rebecca Chapman* Date 13 December 2018

Deputy Upper Tribunal Judge Chapman

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07822/2016
HU/07826/2016
HU/07828/2016
HU/07831/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 July 2018

Decision & Reasons Promulgated

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SHAHIN [A]
RUMANA [B]
[S A]
[Z A]
(ANONYMITY DIRECTION NOT MADE)

Appellants

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jafferiji, Counsel instructed by Hunter Stone Law
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are nationals of Bangladesh and a family. The first Appellant was born on 1.3.72; his wife was born on 18.9.85 and the two children were born on

31.5.11 and 30.10.13 respectively. The first Appellant claimed to have arrived in the United Kingdom in March 1998. He made an asylum claim which was rejected and his appeal against that decision was upheld thus he became appeal rights exhausted on 6 October 2003. His wife arrived in the United Kingdom with entry clearance as a student after July 2010 and gave birth to the third Appellant on 31 May 2011. An application for leave to remain was rejected on 1 March 2012. The fourth Appellant was born on 30 October 2013 following which the family were supported from 26 February 2015 by Tower Hamlets local authority. Further submissions were made and refused on 12 March 2015; 24 November 2015 and on 22 February 2016, which focused on the third Appellant's diagnosis of autism and developmental difficulties.

2. On 2 March 2016, the Respondent refused the representations in support of an application for leave to remain. The Appellants appealed against this decision and their appeal came before First tier Tribunal Judge Mayall for hearing on 15 May 2017. In a decision and reasons promulgated on 9 August 2017, he dismissed the appeals.

3. Permission to appeal was sought, in time, on the basis that the First tier Tribunal Judge erred:

   (i) having found at [110] that it would be in the best interests of the third Appellant to remain in the United Kingdom, failed to engage appropriately with the public interest without giving adequate reasons or gave mistaken reasons;

   (ii) erred in finding that the family would remain dependent on public funds because if granted leave to remain one of the adults would work;

   (iii) erred in concluding that the financial support the family receive under section 17 of the Children Act amounted to public funds;

   (iv) erred in placing weight on the parents' poor immigration history, given the best interests of the children.

4. Permission to appeal was granted by Upper Tribunal Judge Coker on the basis that it is arguable that the First tier Tribunal Judge concluded that the answer to the question of the best interests of the child not being an "emphatic yes" or an "overwhelming decision" erred in his assessment of the proportionality of the decision, despite having set out the nature of the test to be applied and despite having accepted the evidence in connection with the oldest child.

Hearing

5. At the hearing before me, Mr Jafferiji drew my attention to [17]-[20] of the decision and reasons and the evidence of Beverley Power. The Judge records the evidence about delayed development of the third Appellant if returned to Bangladesh; the fact it is unlikely he could get appropriate therapy; that it would take him a long time to adapt to new surroundings. At [21] and [22] the Judge sets out the medical evidence from Dr Gadong, paediatrician.

6. Mr Jafferji submitted that there had been a failure by the First tier Tribunal Judge to take account of material considerations in respect of the financial evidence and the evidence. Having accepted that evidence, his finding on best interests is incomplete: see [110] where he found "*it is not, however, an overwhelming decision.*" He is making an assessment as to where the best interests of the child lies, however he failed to go on to say why despite this it was proportionate for him and the family to leave, which is inconsistent with his accepting of the evidence. In particular, at [89] the Judge accepted that the third Appellant and possibly the wider family may be subjected to a higher level of social discrimination than in the UK. Mr Jafferiji submitted that these factors do not seem to form part of the balancing exercise at [110]. Also no reasons were provided to support the finding at [110] that Zahra's best interests would be best served by returning to Bangladesh with her parents and he needed to engage with the impact on Zahra.

7. Mr Jafferiji acknowledged that there was no evidence of section 17 support by the local authority but equally there was no evidence that the family are in receipt of public funds.

8. In his submissions, Mr Duffy argued that it makes no difference whether the funds come from the tax payer via local authority or State funds and what the Judge is essentially saying at [96] is that the family are costing the taxpayer money, whatever the source. It may not be the case that section 17 support falls within public funds but it can be taken into account. Education and health care are being supplied to [S]. They are a Bangladeshi family but none are British and are supported because of children. Their leave has always been precarious and in the case of one parent unlawful and they had children during this period. Mr Duffy reminded me that the children are not qualifying children within the meaning of section 117(B)(6) of the NIAA 2002.

9. In reply, Mr Jafferji submitted that, in relation to public funds, he recognized the Judge was applying section 117B(6) and it is not what the man on the Clapham omnibus says but what the law says. However, he submitted that the source of funds is important as the council does not support every child who is here but the third Appellant falls within the category of support because of his special needs and there is a difference between this and other support. It is an error for the Judge to place on the scales public funds - not as defined by the Rules – and is inconsistent with section 55 duty. The Immigration Rules define public funds at paragraph 6 and this does not include section 17 support. In terms of future reliance on public funds the Judge addressed this at [95] however this was primarily in relation to Bangladesh. He submitted that the children will go into full time education and the parents will not have to give up a career for good.

10. Mr Jafferji sought to rely on the decision of the former President of the Upper Tribunal in Kaur [2017] UKUT 14 (IAC) at the 4th headnote which makes clear that every balancing exercise must contain adequate reasoning. He submitted that the

Judge has not placed on the scales the factors he should have placed at [110]. Mr Jafferji further submitted that the Judge had also failed to consider the future impact on the children as per the section 55 duty. There is no consideration of how the third Appellant's best interests would be promoted in the UK. The Judge further failed to consider the length of time the first Appellant has stayed in the UK, albeit as an overstayer but he does hold against the family the adverse immigration history.

11. I gave Mr Jafferji 7 days to provide evidence of section 17 support. However, at the time of writing no further evidence had been received on the file or by email.

Findings

12. I find material errors of law in the decision of First tier Tribunal Judge Mayall, in his assessment of the proportionality of removal of the Appellants in the following respects:

12.1. the relevant test pursuant to section 117B(3) of the NIAA 2002 is:

> "*It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –*
>
> *(a) are not a burden on taxpayers, and*
>
> *(b) are better able to integrate into society."*

Thus the test is financial independence, rather than receipt of public funds and I accept Mr Duffy's submission in this respect as the Appellants are not financially independent. However, whilst no evidence of the local authority support pursuant to section 17 of the Children Act 1989 provided to the Appellants has been received by the Upper Tribunal, in the refusal decision of 2 March 2016 reference is made at [6] to the family receiving support from the local authority from 26 February 2015. This was also the evidence of the first Appellant before the First tier Tribunal. I thus accept that the family are in receipt of section 17 support and I find that this does not fall within the definition of public funds set out at paragraph 6 of the Immigration Rules. It follows, given that section 17 support is only provided where there is no other source of financial support, that the Appellants would be ineligible for income support or housing benefit and the First tier Tribunal Judge erred in fact at [96] in finding that they were in receipt of these benefits, as is asserted at [3] of the grounds of appeal. I have concluded that this is a material error because it was one of the key reasons put forward by the Judge at [112] for concluding that it would be proportionate for the family to return to Bangladesh and it is not possible to know whether, absent his factual misapprehension as to the source of funds, this would have made a material difference to his overall decision.

12.2. I further find that, in light of the fact that, at [106] and [110], the Judge made clear findings that it would be in the best interests of the third Appellant to remain in the United Kingdom with his parents, more was required by way of reasoning to

substantiate his finding that it would be proportionate for the Appellants to leave the United Kingdom. In addition to the reliance on public funds, addressed at 12.1. above, the only other reason provided was the immigration status of the parents. In this respect, the former President of the Upper Tribunal addressed this issue in some detail in Kaur [2017] UKUT 14 (IAC) at [13]-[19] where he held at [31]:

> *"The significance in the present context of Part 5A of the 2002 Act and section 117B (6) in particular is that Parliament, in enacting the new regime, focused special attention on children and, in doing so, had the opportunity to make explicit provision for the weight to be attached to the parental immigration misconduct issue embedded in the seventh of the principles compromising the Zoumbas code: it did not do so.*

And at [33]:

> "*In a welcome contribution, the Lord Chief Justice, echoing the jurisprudence of this Tribunal, emphasises the importance of making clear findings on material issues of fact. The next requirement on Judges is to "set out in clear and succinct terms their reasoning", with particular reference to [37] – [38], [46] and [50] of the judgment of Lord Reed. Lord Thomas then advocates the adoption of the "balance sheet" approach. This is a self-evidently important stage in the judicial decision making. It involves the identification of the material facts and factors belonging to the two basic sides of the equation."*

In conclusion, however, McCloskey J held at [40]:

> "*40. My third observation is that an outcome for a family which has a prejudicial impact upon a child member is not incompatible with the seventh principle of the Zoumbas code. Where, in any given case, the evaluation of parental immigration misconduct in the balancing exercise contributes to a conclusion which will involve the entire family unit departing the United Kingdom, this does not (per Elias LJ) "amount to" blaming the children. Critically – absent some other vitiating factor – the assessment of the best interests of the children, always most aptly carried out at the beginning of the overall exercise, will be unassailable in law provided that the factor of parental misconduct has not intruded at that stage."*

12.3. In light of the judgment in *Kaur* I have concluded that the Judge did not materially err in law in his approach to best interests and parental misconduct. However, as stated at 12.2. above, there is an absence of reasoning and a "balance sheet" approach in that material factors such as the ability of the adult Appellants to work; the reasons for the overstay; the ability to speak English; the ages of the children, their length of residence, whether they are receiving education; to what extent they are distanced from the country of return; the renewability of their connection with it; the extent of linguistic, medical or other difficulties in adapting to life there, were neither considered nor factored into the proportionality assessment.

Decision

13. I find material errors of law in the decision of the First tier Tribunal Judge. I adjourn the appeal for a resumed hearing before the Upper Tribunal.

DIRECTIONS

1. The appeal is to be listed for submissions only in respect of the proportionality of removal, with a time estimate of 1 hour. No interpreter will be booked unless specifically requested.

2. The findings of fact by the First tier Tribunal Judge which were unchallenged shall stand. This does not include [96] or [112] which were successfully challenged.

3. If the parties wish to submit any further evidence this should be submitted in accordance with the provisions of rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman 17 August 2018