Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16048/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 July 2018	**On 10 September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR MASHHUD AHMED MASUD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Shah, Taj Solicitors
For the Respondent: Mr T Lindsay

DECISION AND REASONS

1. The Appellant, a national of Bangladesh, date of birth 26 December 1979, appealed against the Respondent's decision, of 14 June 2016, to refuse his application of 17 March 2016 for leave to remain largely based on human rights grounds.

2. After the date of the Respondent's decision the matter moved on, to a degree, for the appeal came to be heard in November 2017. The decision of First-tier Tribunal Judge Swaniker (the Judge), dated 18 January 2018, dismissed the Appellant's appeal on immigration and Article 8, ECHR grounds.

3. Permission to appeal that decision was given by First-tier Tribunal Judge Shimmin on 16 May 2018. The grant is not overly helpful as to what the Judge thought the errors might have been but having heard the arguments it has largely resolved itself to the simple issue of whether or not, in the light of the findings the Judge had made the decision to dismiss the appeal on Article 8, ECHR grounds was sustainable. There was no real challenge to the Judge's conclusions in relation to the Immigration Rules and no fundamental challenge to the Judge's consideration of Article 8, ECHR outside of the Rules.

4. The Judge approached this matter with some structure and in particular looked at the claimed relationship as of now between the Appellant, his two stepchildren and his young baby son aged 6 months. The Judge concluded for sustainable reasons that the children's best interests lay in remaining in the United Kingdom bearing in mind the two elder children who were 8 and 9, had been in the UK since birth and were the children of the Sponsor wife born of a previous marriage by her. Nevertheless the Judge accepted that the Appellant had established over the time a genuine and subsisting relationship with those two children as indeed he was doing presumably with his baby son.

5. The Judge went on having found the best interests to directly conclude with reference to **MA** (Pakistan) [2016] EWCA 705 but without reference to **AM** (Pakistan) [2017] EWCA 648 that it was not reasonable for the children to leave the United Kingdom.

6. The Judge then concluded by reference to the proportionality exercise that the Respondent's decision in the light of the Appellant's immigration history and other matters led to the conclusion that the Appellant had remained in the UK for the

purposes of economic betterment and determinedly, flagrantly disregarded Immigration Laws and Rules in the UK. Thus it was not disproportionate for him to go back to Bangladesh and make an application to return.

7. Given the identified approach in **MA** (Pakistan) and **AM** (Pakistan) it is clear by reference to such a case as **EV** (Philippines) [2014] EWCA Civ 874 that the immigration history of the parents or their conduct is material to the assessment of the reasonableness of the children being required to leave the UK. As is clear from **MA** (Pakistan) there is published guidance from the Secretary of State as to her stance in relation to the consequences of decisions which would separate British national children or persons from a foreign national who was being required to leave the UK.

8. It seemed to me that that guidance identified as confirmed in **MT and ET** [2018] UKUT 88 that there need to be powerful reasons to remove someone where the position is they are not being deported or they are not being subject to some sort of administrative removal and where their overstaying or immigration history is not of a significant level in terms of issues such as actual or potential harm to the public. This is not to say that the guidance necessarily means that people with poor immigration histories can expect to remain, but rather it is a factor in considering reasonableness.

9. In this case the Judge clearly took those matters and the conduct of the Sponsor wife and the Appellant into account in assessing the final stage of the proportionality exercise which, in the light of **MA** (Pakistan), may be, even if the consequence is the same the wrong approach. It is one thing to reach that conclusion but as **MA** identified if it is not reasonable for the children to leave, then that is the end of the proportionality exercise because it cannot be in the public interest, as identified by Parliament in Section 117B(6), for someone to have to remove if it would interfere in the parental relationship of a qualifying child it would confound the idea of maintaining a genuine and subsisting relationship when it is not reasonable for the child to leave.

10. It therefore seemed to me that in relation to the two stepchildren the Judge has not done the exercise in the intended form contemplated in **MA** (Pakistan) and to that extent there was plainly an error of law.

11. Nevertheless the question remains whether or not given the findings and the consideration of the issues the Judge did reach on the conduct of the Appellant in the overall decision on proportionality under Article 8, ECHR, the decision would really be any different if it was otherwise properly considered by the intended route that **MA** (Pakistan) identifies.

12. It is with some diffidence that it seems to me, without substituting my view of the matter, that the issue of reasonableness of requiring a qualifying child to leave and its impact on the life of the qualifying child in terms of separation from the father are two issues. One of which is directly dealt with by Section 117B(6) and the other necessarily becomes engaged with the Article 8 proportionality exercise, particularly in terms of the separation of the parents from the children with whom there is a subsisting relationship, which is not of course a provision contained within Section 117B.

13. Therefore I am not sure that any other Tribunal seized of the same facts would necessarily reach the same conclusion as the Judge did. I do not wish to hold out any hope that at the end of the day when this matter is looked at again there will be a different decision. It did seem to me it necessarily followed there will be, but in the circumstances I conclude that the error of law the Judge made was of sufficient materiality that I cannot say with sufficient certainty the likelihood is the decision would have been the same come what may.

NOTICE OF DECISION

14. For that reason I therefore find the Original Tribunal's decision cannot stand.

Signed Date 20 August 2018

Deputy Upper Tribunal Judge Davey

P.S. I have since approving this decision I have received a request from Kalam Solicitors for consent to withdraw the appeal on the basis that leave to remain was granted. I agree but for the avoidance of doubt the basis for my decision stands.

Signed DUTJ Davey date 6 September 2018