Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/14567/2017
HU/15931/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 April 2019	**On 10 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

MRS RAJIA BEGUM (FIRST APPELLANT)
MR FAHAD HUSSEN (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Z Hussain, Legal Representative
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision promulgated on 20 February 2019 I set aside the decision of the First-tier Tribunal and directed that the appeal would be reheard in the Upper Tribunal by me. A copy of my decision on error of law is attached as an appendix to this decision.

2. I was not asked and saw no reason to make an anonymity direction. The general rule is that hearings are held in public and judicial decisions are published (*A v BBC*

[2014] UKSC 25) and I saw no reason to depart from the general rule in this case.

3. The appellants in this appeal are a mother and son. They entered the UK together as visitors on 23 September 2003 and overstayed. An application for leave outside the rules was made in September 2012 and refused without a right of appeal in November 2013. On 9 December 2016 a human rights application was made on the basis of the interference with family life which would be occasioned by removing the appellants. The second appellant was a minor and had lived in the UK for more than seven years.

4. The respondent refused the application on 25 October 2017. The first appellant could not meet the requirements of paragraph EX.1(a) of Appendix FM of the Immigration Rules because it was reasonable to expect the second appellant to leave the UK and return to Bangladesh to live there with the first appellant. There were no very significant obstacles to the first appellant's reintegration in Bangladesh. The second appellant could not meet the requirements of the rules for minors and there were no exceptional circumstances to justify a grant of leave outside the rules.

5. Having heard oral evidence from the appellants and received a written statement from the first appellant's brother, Mr Miah, I make the following findings of fact to the balance of probabilities.

6. The chronology set out in paragraph 2 above is agreed. The appellants only held leave to enter the UK for a brief period of a few months before they overstayed. They have had no leave since 29 February 2004. They have now resided in the UK continuously for 15½ years. The second appellant was 3½ when he arrived in the UK and he is now 19.

7. The circumstances explaining how it came about that the appellants overstayed their visit visas are set out in the first appellant's witness statement. She says they were abandoned at her mother's house by her husband. He and his family members were threatening and warned her against contacting him. He has not been in contact with the appellants since then. If they had returned to Bangladesh they would have had nowhere to go and the first appellant felt afraid of her husband and in-laws. In short, she had never intended to remain in the UK but felt she had no other option. She was encouraged by her family in the UK to remain.

8. Ms Everett did not challenge this evidence. Her cross-examination was limited to asking whether the appellants were in contact with anyone in Bangladesh, which they both denied. There was a degree of evasiveness, particularly with regard to the second appellant's evidence. Asked whether his mother was in contact with anyone in Bangladesh, he answered cautiously, "not as far as I know". Having denied knowing anyone in Bangladesh, it emerged that his uncle, Mr Miah's, wife is in Bangladesh. However, this is not enough, in my judgment, to lead to an adverse inference being drawn about the core of the claim that the appellants were effectively forced to remain in the UK by the actions of the first appellant's husband in abandoning them here. I accept that most of the close family which the appellants

have are in the UK and that Mr Miah, who is a British citizen, is planning to bring his wife to the UK.

9. I accept the appellants have settled into life in the UK, where they have been supported by Mr Miah, with whom they reside. I accept the first appellant has, over time, lost her ties with Bangladesh. I accept the second appellant has no real ties with the country of his birth. He does not remember it. Whilst he lives in a Bangladeshi household, he says he cannot read of write Bengali. He is certainly integrated in the UK, having had his entire education here. He plans to go to university as soon as he can resolve his immigration status.

10. The first appellant is 56 years of age. In the last few weeks she has received a diagnosis of follicular lymphoma and is awaiting further investigation. She has an appointment at the haematological oncology department at Bart's hospital in June. According to the background evidence supplied by Mr Hussain, follicular lymphoma cannot be cured. However, it grows slowly and patients may not need treatment for many years. If treatment is needed, it usually works well. Patients are kept under surveillance so that treatment can start when they develop symptoms or the disease begins to change. I accept that receiving such a diagnosis will have been very frightening for the first appellant. Given it is too soon to know how her disease will develop, I proceed on the basis she will require monitoring for the foreseeable future.

11. Mr Hussain also provided a recent news article from a Bangladeshi newspaper which describes a grim situation for cancer sufferers there due to "overwhelming treatment costs, wrong diagnosis, faulty treatment plans and shortage of trained doctors and treatment facilities". I accept that obtaining the assistance she needs in Bangladesh would prove very problematic for the first appellant.

12. It is clear I can only allow the appeals if the decision is not in accordance with section 6 of the Human Rights Act, which in this case means the decision under appeal amounts to a disproportionate lack of respect for the enjoyment of family or private life. In all cases the ultimate question is whether there is interference with the enjoyment of article 8 rights which is disproportionate. The Secretary of State has set out his position as to where the public interest lies by publishing Immigration Rules and in most cases the ability to show that the rules are met would provide an answer to the proportionality question. The fact the rules are not met must be given considerable weight (*Hesham Ali v SSHD* [2016] UKSC 60).

13. Paragraph 276ADE(1) of the Immigration Rules, HC395, reads as follows:

> "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

14. When assessing the public interest, I am required to have regard to section 117B of the 2002 Act reads as follows:

"(1) The maintenance of effective immigration controls is in the public interest.

(2) 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 able to speak English, because persons who can speak English-

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) 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.

(4) Little weight should be given to-

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

…"

15. I accept there is family life as between the first and second appellants. There is no bright line when a child reaches majority at which point family life ends. It depends on the facts. The second appellant remains living at home with his mother and her

extended family. He is an only-child and he has had no contact at all with his father for many years. The bond between mother and son would be very strong under such circumstances.

16. I bear in mind the case of *AA v United Kingdom (Application No.8000/08)*, a decision of the European Court of Human Rights, where it was said at paragraph 49 that:

> "An examination of the court's case law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having 'family life'."

17. There would no be no real interference with family life if the appellants were to be removed together. However, I accept the second appellant's evidence that he would not leave the UK. Moreover, he is very unlikely to be required to leave given he could no, on a fresh application, show that he meets the requirements of paragraph 276ADE(1)(v) of the rules. Suitability has not been put in issue by the respondent and there is no reason to suggest it would be.

18. I must consider each appellant individually but also bear in mind they form a family unit. It is helpful in this case to start by considering the second appellant. I have explained in my decision on error of law that he cannot meet the rules for the purposes of this appeal because of the requirement in paragraph 276ADE(1) to fulfil the conditions described at the date of application. At the date of application the second appellant was not yet 18.

19. It has been clear since the Supreme Court decision in *Patel and others v SSHD* [2013] UKSC 72 that there is no formalised 'near-miss' principle, although all the facts have to be taken onto account and considered in context. I have focused on the position of the second appellant outside the rules. Removing him would certainly represent a significant interference with his enjoyment of the private life he will have established in the UK over the years. The decisive issue is the proportionality of removal. In *R (on the application of Agyarko) v SSHD* [2017] UKSC 11, the Supreme Court explained that the ultimate question in article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying a proportionality test.

20. As said, in assessing the public interest, I am bound to have regard to the factors listed in section 117B. Looking at the factors in a structured way, I note the following. There is, in general terms, great public interest in ensuring immigration controls are maintained by removing overstayers. The appellant speaks English but that is only a neutral factor. He is financially independent (see *Rhuppiah v SSHD* [2018] UKSC 58) but this is also only a neutral factor. Whilst the decision to overstay was made by his mother, little weight can be given to his private life, according to the statute, because nearly all his time in the UK has been unlawful.

21. The conundrum posed by this case is therefore to determine the proportionality of the decision, which would entail uprooting the appellant after so many years, balancing the "little weight" which can be given to his private life with the fact the

respondent's own policy would be to grant leave to the appellant if he made a fresh application. Mr Hussain's submission was that the public interest in removing the appellant is reduced to zero in these circumstances. On the other hand, the interests of immigration control demand that applicants go through the correct procedure of making a paid application. It has long been recognised that article 8 should not be used simply to circumvent inconvenient requirements of the rules.

22. There may be a loose analogy to be drawn with the circumstances in which it is argued a partner, who cannot show the rules have been met, should apply for entry clearance once in a position to do so. However, there must be a "sensible reason" to expect them to do so, which there may not be if it is clear the rules will be met. I ask myself whether there is a sensible reason to expect the appellant to make a further application now that he can show that he meets the requirements of the rules.

23. On the respondent's side, it may be argued there is always strong public interest in correct applications being made, with the appropriate fee being paid, so that applicants are not permitted to "short-cut" the process. I give those matters considerable weight.

24. However, in my judgment, this is one of the few cases in which sufficiently compelling reasons have been shown to justify a finding that the decision is disproportionate. That is because the private life which the appellant has been permitted to establish in the UK, spanning most of his life, is of a particularly valuable kind. The appellant has spent all his formative years here and has completed all his education here. He has lost all of his ties with Bangladesh and he has become entirely integrated in the UK. This state of affairs is recognised as outweighing the public interest by paragraph 276ADE(1)(v) of the rules. Notwithstanding the requirement to apply section 117B(iv), I find that these matters render the decision disproportionate.

25. The second appellant's appeal is allowed on human rights grounds.

26. I now return to consider the position of the first appellant. Unlike Judge Jones, I do so on the basis that the second appellant would not accompany her and she would be returning alone. To do so would rupture, not only the private life she has established in the UK, but also her family life with the second appellant. Given the background of their being abandoned in the UK and her having brought him up as a single parent, this family life is of a particularly valuable kind.

27. Starting with the rules and the requirements of paragraph 276ADE(1)(vi), I remind myself that the meaning of similar provisions in relation to deportation appeals found in section 117C(4) of the 2002 Act and paragraph 339A of the rules was considered in *SSHD v AK (Sierra Leone)* [2016] EWCA Civ 813. Sales LJ said at paragraph 14 as follows:

> "In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job

> or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

In *Treebhawon and Others (NIAA 2002 Part 5A – compelling circumstances test)* [2017] UKUT 00013 (IAC), McCloskey J, in re-making the decision, said the "very significant obstacles" test was clearly an elevated threshold.

28. I note the appellant was 41 when she entered the UK so she clearly spent the majority of her life in Bangladesh. She speaks Bengali (Sylheti). She is Muslim. She cannot seriously contend that she would not be able to reintegrate in the sense of understanding how life in Bangladesh works. Her experience of 41 years living in that country would mean she could quickly assimilate and become an insider again, despite her lengthy absence. I do not see any reason why the support she receives financially in the UK could not continue if she went back, although she claims that to pay for her upkeep, including accommodation and medical expenses, would be too much for Mr Miah, who currently lets her stay in his house. The rule is not met.

29. However, I do nevertheless consider that removing her would amount to a disproportionate breach of family and private life outside the rules. My reasons are as follows.

30. I start by noting that the first appellant is financially independent but it must be weighed against her that she does not speak English. Her private life has been established through overstaying and, whilst I accept the circumstances which brought this about were matters largely beyond her control, she bears more responsibility for this than the second appellant. There is considerable public interest in removing overstayers to give members of the public confidence that the law is properly applied. Significant weight must be given to these matters.

31. However, as mentioned, I consider that separating mother and son would amount to a rupture of valuable family life ties which occasional visits and telephone or skype contact would not be an adequate substitute for. There is an unusual degree of mutual dependence between the appellants because of their history.

32. I accept the first appellant has no home to return to in Bangladesh and no family members she could turn to for accommodation. She would be forced to find her own accommodation. Mr Hussain submitted an article from another Bangladeshi news platform describing the difficulties faced by unmarried females in securing accommodation. Parts of the article are obscured but I accept the thrust of it is that women are defined by their marital status in Bangladesh and prevailing attitudes are

suspicious towards women who choose to live independently.

33. Mr Hussain also provided me with a copy of the respondent's CPIN Bangladesh: Women fearing gender based violence, version 2.0, January 2018, which also reports on the restrictions on the participation of women in the workplace and social stigma against single women. Living without male support is "almost impossible". Realistically, the first appellant would face almost insuperable difficulties in trying to live independently as a lone female. She might conceivably find extremely low -paid employment in the garment industry but her age and marital status would place huge obstacles in her path. Her outlook would be very bleak indeed.

34. There is also the matter of her diagnosis. This is not a health case in the sense that it is argued that removing her would lead to a deterioration in her health so as to breach her human rights. However, it is a significant factor in the proportionality balancing exercise. She is more likely than not going to require medical intervention beyond simple monitoring in the foreseeable future. As seen, this will be very difficult to access. Even the monitoring she requires is likely to be difficult and extremely costly to obtain. It would be a further obstacle in her path in terms of living independently.

35. The compassionate circumstances in this case mount up. The first appellant is not a young woman, she was abandoned by her husband, she would be separated from her only child, she would not have the support of close family members in Bangladesh and would have to fend for herself with whatever support Mr Miah can provide, she would face stigma and discrimination as a single woman without male support, and, she has been diagnosed with cancer, albeit this does not appear to be life-threatening at present, for which she would struggle to obtain treatment when the time comes.

36. For all these reasons, I regard the decision to remove the first appellant alone to amount to a disproportionate breach of article 8. The public interest in removal is outweighed by the matters put forward on behalf of the first appellant notwithstanding her inability to show she meets the requirements of the rules.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The following decision is substituted:

The appeals are allowed on human rights grounds (article 8).

Signed Date 5 April 2019

Deputy Upper Tribunal Judge Froom

Fee Award Note: this is **not** part of the decision.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. However, I have decided not to make any fee award in view of the fact the appeals were allowed largely because of a change of circumstances since the decision, namely the length of the second appellant's residence.

I make no fee award.

Signed Date 5 April 2019

Deputy Upper Tribunal Judge Froom

APPENDIX: DECISION ON ERROR OF LAW

DECISION AND REASONS ON ERROR OF LAW

1. *The appellants in this appeal are a mother and son. They entered the UK together as visitors on 23 September 2003 and overstayed. An application for leave outside the rules was made in September 2012 and refused without a right of appeal in November 2013. On 9 December 2016 a human rights application was made on the basis of the interference with family life which would be occasioned by removing the appellants. The second appellant was a minor and had lived in the UK for more than seven years.*

2. *The respondent refused the application on 25 October 2017. The first appellant could not meet the requirements of paragraph EX.1(a) of Appendix FM of the Immigration Rules because it was reasonable to expect the second appellant to leave the UK and return to Bangladesh to live there with the first appellant. There were no very significant obstacles to the first appellant's reintegration in Bangladesh. The second appellant could not meet the requirements of the rules and there were no exceptional circumstances to justify a grant of leave outside the rules.*

3. *The appeal was heard on 4 June 2018 at Hatton Cross by Judge of the First-tier Tribunal Geraint Jones QC. The first appellant argued that her appeal should be allowed under paragraph 276ADE(1) of the Immigration Rules. The judge accepted she may find some significant obstacles to reintegration in Bangladesh but not of such severity that they could probably be characterised as very significant obstacles. He found that the reality of the appeals was that the first appellant simply wished to continue residing in the UK because she has many family members here but the rule does not provide applicants with a choice of country of residence and it is not there to reward those who have flouted the law. The judge went on to find that there were no exceptional or compelling circumstances to warrant allowing the appeal on article 8 grounds outside the rules.*

4. *It was pointed out to the judge at the hearing that, since the date of decision, the second appellant could now meet the requirements of paragraph 276ADE(1)(v), having passed his eighteenth birthday and having spent more than half his life in the UK. However, the judge declined to take this into account, reasoning that his consideration was whether the appeal fell to be allowed against the decision which rested on paragraph 276ADE(1)(iv). With respect to that rule, he found it was not unreasonable to expect him to leave the UK.*

5. *The grounds submitted to the First-tier Tribunal for permission to appeal were considered by the Judge of the First-tier Tribunal to consist largely of an attempt to reargue the appeal. However, the renewed grounds to the Upper Tribunal found favour. It was arguable that Judge Jones failed to give consideration to the weight to be attached, in assessing the proportionality of removing the first appellant, to the ability of the second appellant to meet the requirements of paragraph 276ADE(1)(v) by the time of the hearing. Arguably therefore the judge had failed to have regard to all relevant matters.*

6. *The respondent has not filed a rule 24 response.*

7. Mr Hussein, who represented the appellant before Judge Jones, and Mr Kotas explained that they had had some discussions about the case. Mr Kotas considered he was in difficulties because it appeared that the presenting officer at Hatton Cross had conceded that the second appellant would now meet the requirements of paragraph 276ADE(1)(v) and therefore the judge should have taken this into account when making his proportionality assessment. On that basis, the appeal was allowed by consent and the decision of Judge Jones set aside. I would add only the following.

8. The judge was plainly right that the second appellant did not meet the requirements of paragraph 276ADE(1)(v) such that his appeal could be allowed on the basis that the rules were met, albeit on human rights grounds. As he pointed out in his decision, the provisions of the rule must be shown to be met as at the date of application and at that time the second appellant was only 16.

9. However, that was not the end of the matter. When assessing the proportionality of the decision outside the rules, it was incumbent on the judge to take into account when weighing the public interest in removal the fact that the second appellant could now satisfy the substance of the rule. It was an error therefore to proceed to consider the impact on the first appellant of removal on the assumption that the second appellant would accompany her to Bangladesh.

10. The decision shall be re-made by the Upper Tribunal. It is reserved to me. The parties may file up to date evidence.

Notice of Decision

The appeal is allowed. The decision of the First-tier Tribunal contains a material error of law and is set aside. The appeal will be re-made in the Upper Tribunal.