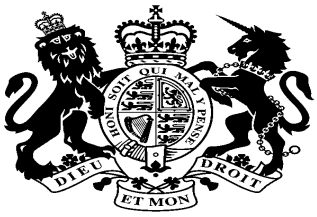

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11353/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 20 March 2019	**On 29th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

[A A]
~~**(ANONYMITY ORDER NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Mustakim (Strand Chambers)
For the Respondent: Mr S Whitwell (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of [AA], a citizen of Bangladesh born 4 January 1986, against the decision of the First-tier Tribunal of 27 October 2018, dismissing his appeal, itself brought against the refusal of his asylum and human rights claims of 13 September 2018.

2. The immigration history supplied by the Respondent is that the Appellant arrived in the UK on 10 February 2011, with student leave until June 2012. An application for

further leave was refused due to no fee being received, and a further application was received in August 2012 but refused. He came to the attention of the authorities as an overstayer in September 2016, that application being refused and certified as clearly unfounded. He claimed asylum on 14 September 2016.

3. His asylum claim was based on his claim to have been politically active in Bangladesh with the Chatra Dal (student) branch of the BNP. Furthermore his family had rejected him because of a relationship he had in this country with a lady known as [J]. His human rights claim was based on his relationship with [GR], to whom he had become engaged to in April 2017 and married (via an Islamic ceremony) in February 2018; she had three sons from a previous relationship.

4. The First-tier Tribunal heard oral evidence, and made its findings of fact. It considered that the Appellant's asylum claim was brought very late and only after the Appellant had had an extended engagement with the immigration processes of the UK, and had provided untranslated documents which could be afforded no evidential weight. There were discrepancies in his account of how his family learned of his relationship with [J].

5. As to his family life claim, he could not satisfy the requirements of the Immigration Rules given that the parties had not registered a civil marriage and had not cohabited for two years. There were no very significant obstacles to the Appellant's integration back in Bangladesh and his immigration history (including working illegally as an overstayer) was appalling, such as to reinforce the public interest in refusing his claim. He and his wife would have been aware that his status was precarious when they formed their relationship. He spoke fluent English and had shown resourcefulness when working illegally in the UK. There would be no unjustifiably harsh consequences were he to be removed. Ms [R] would have the support of her mother with the children if the Appellant had to leave the country.

6. Of the Appellant's relationship with the children, the Tribunal stated “I accept that the Appellant has, to some degree, a relationship with the step children and that he assists in taking them to school and collecting them, although I am not entirely convinced that his involvement with the children is as involved as he claims” having given an account of being away in town until late at night on both days of the previous weekend.

7. Grounds of appeal argued that the First-tier Tribunal had erred in law in failing to indicate in the passage I have just cited whether the Appellant had a genuine and subsisting relationship with the children such as to engage section 117B(6) of the Nationality Immigration and Asylum Act 2002, and in failing to have regard to evidence demonstrating the Appellant did play a real life in the boys’ life as shown by a letter from Dr Echebarrieta stating that the Appellant was in “a stable relationship and … his presence is of great benefit to [G] and her children, and their marriage contributed clearly to their stability”, and to a letter from the school.

8. Permission to appeal was granted on 8 February 2019 on the basis that no findings had been made as to whether Ms [R]'s boys were qualifying children and whether the Appellant had a genuine and subsisting parental relationship with them.

9. Before me Mr Mustakim pointed to evidence (set out in my reasons below) that in his submission demanded attention as relevant to the proportionality of interfering with this family's Article 8 rights. Mr Whitwell pointed to para 111 of the refusal letter which had stated it was not established that the Appellant had developed a relationship such as to be unjustifiably harsh. It was in this context that the Judge's findings had to be considered. The school letter simply rehearsed information supplied by the boys' mother; and the doctor's letter was relatively brief.

Decision and reasons

10. Section 117B(6) of NIAA 2002 states:

> "**117B Article 8: public interest considerations applicable in all cases**
>
> ...
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

11. As stated by Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 §49, Ex.1 "establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary"; albeit that §73: "It may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling."

12. It is clear that the First-tier Tribunal did not conduct the enquiry mandated by section 117B(6) because in its estimation it was unnecessary to do so. However, it seems to me that there was rather more evidence to evaluate than that to which it referred in its conclusions. The only aspect of the evidence that received attention was the Appellant's evidence that he had stayed out late the previous weekend. That needed to be assessed in the context of multiple strands of evidence that demanded attention:

    (a) The letter from the Appellant which he adopted as his witness statement stated "[S] the eldest child has lots of problems with his behaviour [G] struggles with this but I feel as a man in guiding him in the best way I can he is getting better".

    (b) The letter from his partner [GR] stated that "[A] was very patient and understanding to myself and my children. He was absolutely amazing. In May we decided it would be nice for [A] to move in. Since then we have all been living together as a family I have found him to be a great support ... he is very supportive to my eldest son in these difficult times and also offers emotional

support to me and the other two children". The difficulties of which she spoke included emotional outbursts from the eldest son so extreme as to require police intervention.

(c) Dr Echebarrieta in his letter had stated that the relationship and "had a significant positive effect on [G] and her 3 children, as they have a father figure they can relate to" (there is also the letter from the school, which can no doubt be read as relating information garnered from the parents, but which might also take on a different light when read in the overall context).

13. This represents evidence from multiple sources which a decision maker who had appropriate regard to it might consider to have both cogency and depth. Unfortunately the Judge failed to engage with this material before coming to his somewhat equivocal finding as to the Appellant's lack of genuine parental responsibility for his partner's sons. This represents an inadequacy of reasoning, or a failure to take account of material evidence, of a scale that undermines the lawfulness of the decision.

14. There is no tenable challenge to the findings on the asylum ground of appeal and those should stand when any further assessment of the appeal takes place.

15. In the circumstances there is no alternative than to remit the appeal for hearing afresh. In so doing, I draw the First-tier Tribunal's attention to some features of the appeal.

(a) The Appellant cannot succeed under the Immigration Rules, because at the date of application he had not cohabited for a sufficiently long period to satisfy the GEN requirements of Appendix FM for the "partner" definition;

(b) Accordingly he has to demonstrate a "compelling" claim;

(c) Whilst he cannot meet the precise terms of the mainstream Appendix FM Rules themselves, as noted by Lord Carnwath in the Supreme Court in *Patel* [2013] UKSC 72 at [55], "the balance drawn by the rules may be relevant to the consideration of proportionality";

(d) From September 2017, GEN.3.2 was added to the Rules, essentially stating that "where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules … would result in unjustifiably harsh consequences";

(e) In the event that the First-tier Tribunal finds the Appellant does play sufficient role in his partner's sons' upbringing to enliven consideration under section 117B(6), as stated by Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 §49, Ex.1 "establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary"; albeit that §73: "It may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling";

(f) There has been a recent re-statement of the law regarding the best interests of the children in *KO (Nigeria)* [2018] UKSC 53. In so far as this makes clear that the sins of the parents cannot be visited on children for whom they have parental responsibility, doubtless the judgment resonates here. However, the comments made therein regarding the need for "reasonableness" not "to be considered otherwise than in the real world in which the children find themselves" must in this appeal be read subject to the claim of British citizen children to live in their country of nationality and to the fact that their mother is also a British citizen, herself entitled to live permanently in the UK.

Decision:

(1) The decision of the First-tier Tribunal contains a material error of law.

(2) The appeal is remitted for hearing afresh before the First-tier Tribunal at Hatton Cross: to be heard by any Judge except Judge Greasley.

Signed: Date: 20 March 2019

Deputy Upper Tribunal Judge Symes