Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12165/2019 (V)**

THE IMMIGRATION ACTS

Heard by Skype for business
On the 10 February 2021

Decision & Reasons Promulgated
On 01 March 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

HUSNA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss M. Hussain, on behalf of the appellant (Maya Solicitors)
For the Respondent: Ms R. Pettersen, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Parker (hereinafter referred to as the "FtTJ") promulgated on the 21 October 2019, in which the appellant's appeal against the decision to refuse her human rights application dated 16 June 2019 was dismissed.

2. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal.

3. The hearing took place on 10 February 2021, by means of *Skype for Business*. which has been consented to and not object1d to by the parties. A face- to -face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant who was present in the room with Ms Hussain and she was able to see and hear the proceedings being conducted. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

4. I am grateful to Miss Hussain and Ms Pettersen for their clear oral submissions.

Background:

5. The appellant is a national of Bangladesh. The appellant's immigration history set out in the papers and expressly considered in the decision letter. The appellant first entered the UK on a visit visa valid from 23 February 2005 to 23 August 2005 and 17 January 2006 to 17 July 2006. The appellant last entered on a visit visa valid from 29 November 2006 to 29 May 2007. The evidence on file was that she had entered the United Kingdom on 11 January 2007.

6. Whilst in the UK on 24 May 2007 she submitted an application for indefinite leave to remain as the child of a settled relative (her brother). The basis for that application was set out in a witness statement dated 14/9/07 (as exhibited in the respondent's bundle). The appellant had entered the United Kingdom as a visitor to visit her brother. Two months after her arrival she was informed that her mother had died. The appellant lived with her cousin and not her brother at the date of the application as there was insufficient room. It was stated that her brother had decided that she should apply to stay in the United Kingdom because she had no one to return to. While she had family relatives in Bangladesh including two sisters it was stated that they were married. It was stated that she could not return to live on her own.

7. This application was refused with an in country right of appeal on 13 August 2007.

8. The appeal was heard by Immigration Judge Lambert and in a decision promulgated on 8 October 2007 the appellant's appeal was dismissed. There is a copy of that decision exhibited in the respondent's bundle marked "F".

9. The judge heard evidence from the appellant, her brother and her first cousin. At paragraphs 4.1 – 4.6 the judge set out her reasons for dismissing the appeal. The judge considered the circumstances in Bangladesh alongside the evidence

of her witnesses and on the basis that she could not live alone from either a financial or practical point of view (4.1). However the judge found that her evidence was "progressively less credible. This is because it became apparent she was vague to the point of evasive when pressed as to key issues." Furthermore the judge identified that there were "significant discrepancies" between her evidence and that of her brother. The judge set out those discrepancies at paragraph 4.2 which related to financial support available, who looked after the family land and the whereabouts of her uncle.

10. At paragraph 4.3, the judge concluded that "the cumulative effect of the above lead me to conclude that the appellants and her brother's evidence that there is no support for her in Bangladesh of either a financial or a practical nature is simply not credible". The judge went on to find that the appellant had accepted that the family land which had supported the family financially was still available, it was in her mother's name and that there was no suggestion that the house was not still physically available for occupation by her. The judge found that it was clear that her uncle and two single male cousins lived very close by, or in the same house or compound and that there was no substantial relationship problem likely to impact on their family responsibility for her welfare. The judge also found that she had two married sisters who remained within striking distance.

11. At paragraph 4.5 the judge concluded that she did not accept that the appellant would be required to live entirely alone and unprotected or would be without any assistance. The judge found that she was an adult and would be able to in time along with her male relatives' guidance to learn to manage the land as their own evidence had been that her widowed mother had done the same. The judge found that neither the long-term nor in the immediate future following a return to Bangladesh would there be any serious compelling family or other considerations making her exclusion from the UK undesirable.

12. At 4.6, the judge also found that there was no particular relationship of dependence between the appellant and her adult sibling in the United Kingdom making the decision of the Secretary of State disproportionate for the purposes of Article 8.

13. By 16 October 2007, the appellant was "appeal rights exhausted".

14. The appellant remained in the United Kingdom.

15. On 15 March 2011, a letter was sent from the Case Resolution Directorate and the appellant responded to this letter on 1 April 2011 providing a passport and photographs.

16. The appellant was served with an IS.151A liability notice and an IS. 96 letter on 7 July 2011 and was given reporting restrictions. The decision letter states that she did not comply with the reporting and that no events were attended.

17. It is asserted that no contact was received from the appellant until a letter dated 11 June 2018 was received which contained human rights submissions from her legal representative.

18. The appellant was issued with a RED 0003 notice, inviting additional grounds of consideration on 5 June 2019. Response was received on 19 June 2019 providing a statement of additional grounds.

19. On 28 June 2019, the respondent considered those human rights submissions made on 16 June 2019 but refused them in a decision letter of that date.

20. The appellant's immigration history was set out at page 2. Under the heading "family life", the respondent noted that the appellant had not provided representations about a partner, parent, or dependent children in the United Kingdom, therefore the family life rules under Appendix FM had not been considered.

21. In relation to her private life, it was noted that she was a national of Bangladesh who last entered the UK on 11 January 2007 at the age of 17 and at the date of the application was 29 years and 11 months. She therefore lived in the UK for 12 years and five months that had not lived continuously in the UK for at least 20 years. She was over the age of 18 and not between the ages of 18 and 25 and therefore could not meet the requirements of paragraph 276ADE (1) (iv) or (v).

22. As to paragraph 276 ADE (1) (vi) it was not accepted that there would be very significant obstacles to her integration into Bangladesh if she were required to leave the UK because she resided there up to the age of 17, a period which included her childhood and significant portion of her formative years. During the time in the UK, she had lived with her brother and his family and that it was accepted that she would have retained some knowledge of the life, language and culture and would not face significant obstacles to reintegrating into life in Bangladesh.

23. Consideration was given to the claim made that she was residing with her brother and his family in the United Kingdom and that she had lived with them since her mother passed away and that her brother had been financially supporting her and that she had no one else to rely upon in Bangladesh. There was a copy death certificate relating to her uncle to confirm that he could not support her in Bangladesh. The respondent considered that the appellant was an adult citizen and that there was insufficient evidence to confirm that she would be unable to seek employment or support herself or for her family to support her from overseas should they wish to do so. In the application in 2007

she stated that she had sisters living in Bangladesh however no information been provided relating to her sisters in her current submissions.

24. The respondent went on to consider whether there were "exceptional circumstances" which would render refusal a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for her or another family member.

25. The respondent concluded that based on the information provided, there were no such "exceptional circumstances" that would warrant a grant of leave to remain outside of the immigration rules.

26. The respondent gave reasons for that decision as follows:

- the appellant relied upon her claim that she had lived in the UK since she was a minor, entering with her mother to visit her brother. Her mother had died, and she had been living with her brother and family since that time. It was claimed that there were no close family members in Bangladesh and that she not been there for 12 years.
- The respondent acknowledged that she may have established a family and private life but for it to exist there must be dependency on emotional ties beyond the norm for such relationships and no evidence had been provided to show ties which indicated that there were emotional ties beyond the norm.
- Whilst it was acknowledged that she had been living with her brother and his family, including nephews who had written in support of the case, it was deemed reasonable that she would be to maintain contact with the family overseas via telephone contact and online communication methods. Section 55 of the 2009 Act been considered in relation to the nephews, however they are not young children and are residing in the UK with their biological parents. Whilst her departure from the UK may affect their current routine, there was no evidence provided to indicate that their parents could not provide sufficient care without her assistance. It would be open for the family in the UK to visit the appellant in Bangladesh.
- in summary it was considered that whilst she had resided in the UK since she was 17, she was now an adult citizen entitled to work in Bangladesh and could support and accommodate herself upon return.
- in respect of the claim that she would find it difficult to return to Bangladesh, it was noted that she only had leave to enter as a visitor and subsequent applications were refused and she was fully aware when developing any private life or ties that she had no expectation that she could remain in the UK indefinitely.
- in respect of the issue of delay in dealing with her claim, the Home Office had previously stated that there was no outstanding consideration nor had the Secretary of State agreed to reconsider the case. In view of this,

the appellant did not make any further attempt to regularise her status and lost contact with the Home Office. Whilst the appellant believed the consideration was outstanding since 2011, it was noted that she did not request any update until it was prompted by contact from returns preparation in 2018.

- As to her claim that she been depressed following a relationship breakdown, no medical evidence been provided to indicate such a diagnosis. Even in the event of such formal diagnosis, treatment and medication if required would be available in Bangladesh.

The appeal before the First-tier Tribunal:

27. The appellant's appeal against the respondent's decision to refuse leave came before the First-tier Tribunal (Judge Parker) on the 11 October 2019.

28. In a determination promulgated on the 21 October 2019, the FtTJ dismissed the appeal on human rights grounds. The judge heard evidence from the appellant through an interpreter and also heard evidence from her brother and her nephew.

29. The First-tier Tribunal recorded that the appellant could not meet the requirements for a grant of leave to remain under Appendix FM of the Immigration Rules or on grounds of private life (Paragraph 276ADE) but had advanced the claim on article 8 grounds "outside of the rules", which included family life with the appellant's brother and nephews, on her long residence in the UK and the delay on the part of the respondent(see [12]).

30. The FtTJ set out the decision of Judge Lambert from 2007 where the appellant's appeal had been dismissed and considered the evidence relating to her present circumstances (at paragraphs 13 – 22).

31. The judge set out the factual background namely that the appellant entered the United Kingdom as a visitor with leave, but which had expired on 29 May 2007 and that she had remained in United Kingdom since that date. Her mother had died in Bangladesh while she was in the United Kingdom. She was a single young woman with no children and not in a relationship. He accepted that she lived in United Kingdom for more than 13 years.

32. When considering the issue of family life with members of her extended family (her brother and nephews) the judge reached the conclusion that there was nothing to suggest that the appellant's relationship with the nephews and nieces went beyond anything more than mere emotional ties; that she had not taken the place of their mother and was not in "loco parentis". The judge found that her nephews lived with their mother and the appellant did not currently care for them; they were nearly all adults but the FtTJ accepted that she had become a significant family member in the household. Reference was made to the nature of the family life which included picking them up from school, going

together to restaurants and the judge noted that they will be upset if she had to return (at [47]). The FtTJ did not accept that the appellant had established "family life". However in the alternative he considered family life on the basis of the evidence and also accepted that she had a private life.

33. In respect of her private life, the judge took into account her length of residence, that she was not studying and that on the basis of the medical report she had anxiety poor sleep and low mood but that this was not a "severe mental health problem". She did not work, and her private life consisted of her family members.

34. The judge found that she could not meet any of the rules and therefore considered whether there were any circumstances that would lead to a grant of leave "outside the rules". When considering the issue of proportionality, he addressed the issue of delay at paragraphs 54, 61, 62. The judge considered the factual background but reached the conclusion that she had not made an application to the Home Office following the refusal of her appeal in 2007 and that she had replied to the letter from the Home Office sent in 20 11 but nothing more. He found that whilst delay could reduce the impact of the public interest, the blame for the appellant remaining in the United Kingdom and unlawfully had been due to the appellant's failure to make any application. The judge took into account that the Home Office could have "dealt with the case better" but that she had not made any formal application since 2011 and simply returning the form with photographs was not sufficient to show a "willingness to engage in the immigration process." The judge found that there was no evidence that she had been to an MP or that any formal application been made, there had been no chasing of the Home Office following the letter sent in April 2011. The judge considered that even if there had been delay on the part of the Home Office, the appellant had not extended family connections by entering into a subsisting relationship with a partner, there were no children, she continued to live the brother's home and that she had not strengthened the family ties to any great extent because of the alleged delay (see paragraphs 62 and 63). The judge found that she had been a burden on the State by receiving NHS treatment on a regular basis, and that she could not speak English (s117B(2)).

35. The FtTJ considered the circumstances in Bangladesh and concluded that there was a family home available to her and in the light of the lack of credibility found both by the previous judge and himself, the judge found that the appellant had a married sister available to help the appellant upon return. The judge also considered that there was no reason why her brother could not continue to support her by sending money (at [64] and [66].

36. After taking into account the relevant factors including her length of residence, the issue of delay and her relationships with her extended family, the judge reached the conclusion that the public interest outweighed her rights under Article 8 and that there were no " compelling circumstances " or any

unjustifiable harsh consequences, for a grant leave on Article 8 grounds. The FtTJ therefore dismissed the appeal.

37. Permission to appeal was issued on the 17 March 2020, permission to appeal was granted by FtTJ EM Simpson stating:-

> "Permission to appeal is granted because in the appellant's human rights appeal involving private and family life, as asserted, the decision arguably disclosed:
>
> (1) an overall inadequacy of consistent consideration and reasoning matters at issue, viz fact-finding on family life, with a preponderance of contradictory reasoning and findings and whether article 8 family life with her brother and his family had been established in the course of 12 years in the UK living with them to meet the Kugathas test (30, 43 – 49, 62, 69);
> (2) failure to give weight to material matters in the closing proportionality assessment, including delays on the part of the respondent following upon informing her that her case was being treated as a legacy case in 2011, but having not further responded in the intervening eight years before her HR application leading to the decision against which she appealed, together therein with an inadequacy of accompanying reasoning on that matter of delay:
> (3) all grounds are arguable.

<u>The hearing before the Upper Tribunal:</u>

38. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 1 April 2020, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face- to -face hearing. A reply was provided by the respondent to those directions and on 6 August 2020 written submissions were received from the appellant.

39. Further directions were given for a remote hearing to take place and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.

40. Miss Hussain on behalf of the appellant relied upon the written grounds of appeal and the written submissions.

41. There were written submissions filed on behalf of the respondent. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions.

<u>The grounds and the submissions made:</u>

42. The grounds of appeal dated 30 October 2019 and the written submissions set out the following:

(1) that the FtTJ failed to consider paragraph 276 ADE of the Immigration Rules dealing with long residence noting that the appellant had lived in the UK for less than 20 years but indicated that she had significant obstacles to living in Bangladesh. In the written submissions it was asserted that there were "insurmountable obstacles", both practically and realistically for her to live in Bangladesh. She would be a lone female, vulnerable with mental health conditions without the support network of her relatives with whom she had lived with for many years.

(2) The grounds cite the decision in *Bossadi (paragraph 276 ADE suitability and ties),* and it is asserted that the judge omitted to consider this aspect of the legislation thus the judge erred in law by failing to consider the relevant legislation applicable to the appellant.

(3) It is further submitted that the judge at [30] stated that he was not satisfied that the appellant and her extended family had family life in the UK, but the judge omitted to give reasons as to how we came to that finding. At [43] the judge contradicted his own finding and failed to give reasons why the appellant's brother and nephew statements were disregarded. The judge was either accepting that she had a family life or not and if not the judge should have given reasons for reaching such a conclusion. In the written submissions it was submitted that there had not been a careful assessment under the "Kugathas" test (in relation to family life).

(4) The grounds state that it was noted at [47] the appellant had played an integral role in family life by taking the children to and from school. It was submitted that while the judge assessed her private life as having been formed while his status was unlawful, the Home Office had given indication that her case is being assessed under the long residence legacy case and the delay was attributed to the failure of the Home Office. The judge also indicated that she been a drain on public funds, but she never claimed benefits have been provided for by her brother and nephew.

(5) In the written submissions a further point was raised which was in line with the decision of *R(on the application of MBT) v SSHD (restricted leave ILR disability discrimination* [2020] UKUT 00414. It was submitted that removing the appellant from the care of her relatives in the United Kingdom would have a distinct and acute impact upon the health of the appellant.

(6) In the written submissions it was also submitted that the judge failed to give weight in the proportionality assessment to the issue of delay which was in excess of eight years to finalise a decision. A substantial part of a family and private life was accrued under the presumption that the Home Office would consider her case within the legacy aspect. It was submitted that in 2011 she received a letter from the CRD for further documents which she complied with.

43. In her oral submissions Miss Hussain submitted that the FtTJ had correctly identified the decision of *Kugathas* at [44] but erred in law by failing to carefully consider the family life the appellant had in the United Kingdom since she was 17 years of age. It had been argued that she had been cared for by her brother and had been supported practically and financially. Whilst the judge had said there was nothing more than emotional ties this was not a correct assessment. The appellant had been part of her brother's family life and had grown up with the children and had seen as a very close family member. She had had two failed relationships in the UK and her brother had stepped in and supported her. She submitted that it was unclear why the judge had said there were only emotional ties as it was clear that the appellant was unable to forge personal relationships with other partners. In support of that submission she referred to the witness statement of the appellant's brother (at paragraph 12: Page 6 AB) which meant that she could not have a meaningful family life in Bangladesh.

44. She submitted that whilst the respondent argued that she could have an alternative family life in Bangladesh the judge failed to understand the gravity of the family life in the UK and that the sisters had confirmed that they would not be able to look after her. Furthermore her brother had stated at paragraph 10 that the home was not in his possession.

45. Ms Hussain then turned to the medical issues and submitted that the judge did failed to adequately consider the evidence and the GPs letter and the reference to being deported increasing her anxiety (see GP letter at page 8). In this context the case law quoted in the written submissions *(R (on the application of MBT v SSHD)*) applied and that the judge was wrong to say that her medical issues were minor.

46. Ms Hussain submitted that it was not clear whether these issues were raised before the FtTJ as the appellant had different representatives and that she was not sure what cross examination was carried out as to why her relationships failed in the United Kingdom, but her brother had said that she would have problems maintaining a normal family life on her own. Miss Hussain cited the decision in *Huang* and that people are said to be social animals heavily dependent upon others. In this case she was accustomed to her brother to provide support.

47. As to the issue of delay, she submitted that she had received notification that her case was being considered under the legacy scheme and it was unclear why she did not have that benefit.

48. As to paragraph 276ADE, she submitted there was no reference to this in the decision of the FtTJ and she had not been in United Kingdom for 20 years but there were exceptional circumstances. Therefore the rules had not been considered carefully.

49. Ms Pettersen on behalf of the Secretary of State relied upon the written submissions dated 18 May 2020.

50. Those written submissions make the following points:

(1) The judge did correctly apply the relevant Immigration Rules; the appellant had been in United Kingdom for less than 20 years at the date of the decision and also at the hearing. While she continued to assert that there were obstacles to her reintegration to Bangladesh, that was not found to be credible by the judge who concluded that she would have a house to live in and could receive financial support from a brother in the United Kingdom that she also had a sister in Bangladesh.

(2) As to the issue of family life, at paragraph 48, the judge found that even if he was wrong about his assessment of whether there was "family life", he considered the case in the alternative. Thus there is no error of law or failure to make a finding on family life.

(3) Dealing with the issue of the legacy point and the delay, the respondent submitted that the appellant was served with an enforcement notice in 2011 and failed to make any contact or report. The judge dealt with this at paragraphs 62 and 63 of the decision and that the appellant failed to contact the respondent between 2011 -2018. There were no outstanding applications during a seven -year period and even if the judge found that there was, the appellant had failed to take any chasing action during that period. The written submissions assert that the appellant was now wrongly seeking to use the delay point to undermined= the decision of the FtTJ.

(4) It is also submitted that the grounds seek to argue that the delay meant that the appellant was in the United Kingdom lawfully. That was clearly wrong and as a matter of fact the appellant had not had leave to enter or remain since 2007.

(5) Insofar as the grounds assert that the judge was wrong to find that the appellant was not financially independent and that she had no recourse to public funds, the judge found that she had made use of the NHS and this went to whether she could use public funds. The fact that she claimed benefits was not relevant.

51. In her oral submissions, Ms Pettersen submitted that whilst the FtTJ did not expressly set out paragraph 276 ADE, he clearly considered whether the appellant will be able to meet Article 8 outside of the rules. The appellant had been resident in the UK for less than 20 years and the FtTJ considered the potential circumstances in Bangladesh and thus by definition he considered whether it was proportionate for the appellant to leave.

52. In terms of the submissions made before the tribunal during the hearing, she submitted that the judge did take account of the medical evidence at paragraphs 49 and 53 of the decision and the only medical evidence was that from the GP. Whilst the GP stated that the appellant did not want to go to Bangladesh because she had no family members there which contrasted with the brother's witness statement at paragraph 11 which referred to having family relatives, the judge in any event had regard to the medical evidence.

53. Ms Pettersen submitted that the judge did consider family life in the alternative and also carried out a comprehensive analysis of the issues raised when considering the proportionality balance including the issue of delay but that the appellant nor her brother had attempted to chase up the respondent or make any further application during that period of time. She submitted that the decision was one reasonably open to the FtTJ to make on the evidence available.

54. At the conclusion of the hearing I reserved my decision which I now give.

Decision on error of law:

55. Dealing with the first ground advanced on behalf of the appellant, Miss Hussain submits that the FtTJ failed to consider whether the appellant met the Immigration Rules under Paragraph 276ADE.

56. I am satisfied that there is no error of law in the FtTJ's decision on the basis of that submission. I observe that the FtTJ recorded at paragraph [12] the submission made by Counsel at the hearing that the basis of the appeal he was relying on was said to be "Article 8 outside of the rules" which was later referred to at [50]. That would accord with the skeleton argument Counsel had produced the hearing where general authorities referencing Article 8 were set out and other references were made to the applicable test "outside the rules".

57. Furthermore, on the basis of the factual findings of the FtTJ the appellant could not meet the rules as the FtTJ concluded at [50].

58. In terms of paragraph 276 ADE (1) (iii)-(iv) the appellant entered the United Kingdom on 11 June 2007 and therefore had not lived in United Kingdom for at least 20 years nor was she aged between 18 – 25 years. As to paragraph 276 ADE (1) (vi) the appellant was required to show that there would be very significant obstacles to her integration into Bangladesh. The FtTJ's factual findings on the circumstances were set out in his decision. They can be summarised as follows. The appellant had lived in Bangladesh all of her childhood and formative years up until the age of 17 when she entered as a visitor (at [42]). The appellant had continuing and subsisting family ties in Bangladesh which included her sister (at [42]) and cousins who could provide assistance and that the family home was available for her to return to (at [64]) there is no dispute that the appellant retained her language and cultural ties of

Bangladesh given that she gave her evidence with the aid of a Bengali interpreter (at [30]) and the judge found that she would retain the financial support from her brother (at [66]).

59. When considering very significant obstacles the assessment of integration is considered relevant and Sales LJ in the decision of the Secretary of State for the Home Department v Kamara [2016] EWCA Civ 2016 held that integration called for a:

"broad evaluative judgement to be made as to whether the individual be enough of an insider in terms of understanding how life in the society in that other country is carried on and the 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 variety of human relationships to give substance to the individual's private or family life."

60. The factual circumstances in the case of Kamara are different to the present appeal; that was a deportation appeal but the reference to a "broad evaluative judgement" is the necessary assessment to be made on all appeals when considering whether there are "very significant obstacles". Whilst the FtTJ did not expressly state that there were no very significant obstacles to her integration, I accept the submission made by Ms Pettersen that in the light of the factual findings made by the FtTJ that they properly dealt with the relevant test set out in the authorities.

61. Whilst it was submitted that the appellant was a lone female with no support, that submission fails to take into account the factual findings made concerning the circumstances of the appellant.

62. I now turn to the second ground relied upon by Miss Hussain which relates to the FtTJ's assessment of the issue of family life. In her submissions, Miss Hussain accepted that the FtTJ did apply the correct test set out in the decision of *Kugathas* and that the issue related to whether there were real, committed, and effective support between the adult members concerned (I refer to the FtTJ decision at [44 – 45]). However, she submits that the FtTJ failed to give reasons why the appellant's brother and nephew statements were disregarded. She submits that the judge made contradictory findings on whether family life had been established and had failed to give sufficient reasons.

63. I have carefully considered those submissions in the light of the decision of the FtTJ and the evidence that was before the tribunal. The FtTJ's assessment of the issue of family life is set out at paragraphs [43] – [48] and after considering the test set out in *Kugathas* and the evidence provided on behalf of the appellant he reached the conclusion at [46] that there was nothing to suggest that the appellant's relationship with her nephews and nieces "goes beyond anything

more than mere emotional ties. She has not taken the place of their mother and is not in loco parentis". At [47] the FtTJ stated "the nephews/nieces live with their mother and currently the appellant does not care for them. They are nearly all adults. I accept that she has been here over 14 years she has become a significant family member in the household. She has picked them up from school and there is a letter from the school which confirmed this. They went together to restaurants and they will be upset if she had to return." At [48] he concluded on the evidence that overall the relationship between the appellant's brother and herself and her nephews and nieces did not go beyond "mere emotional ties".

64. Whilst Miss Hussain submitted that the witness statements of the nephews/nieces were not considered, the FtTJ expressly recorded at [43] that he had read the witness statements of the appellant's brother and her nephews, and then went on within the decision to consider the nature of the family life identified in those statements.

65. It is relevant to consider the contents of those witness statements. The witness statement of the appellant's brother is set out at pages 5 – 6 of the bundle. It sets out that after entry to the UK that his sister was living with his family and children in the UK. Pausing there, I note that the witness statement of the appellant in 2007 provided for the hearing before IJ Lambert, stated that she did not live with her brother because there was insufficient room but that she had lived with other family members. Nonetheless the appellant did return to live with her brother on a date unspecified. Reference was made at page 7 to the four children and that the appellant had accompanied them to school and looked after them. At paragraph 8 it was said that she had made sure they attended school and paragraph 9 that the children loved the appellant and again reference is made to them being taken to school and that she was part of the family. No other particularisation is of family life was set out in the witness statement. The letters provided from the nephews were set out at pages 31 – 34 of the bundle. As the judge noted, two of the appellant's nephews were adults (aged 21 and 19) and the other two children were 17 and 14 (at paragraph [26]). It did not appear that any of them relied upon assistance from the appellant to care for them given their ages. The thrust of those letters is that they lived together in the past as a close family and reference is made to the appellant picking them up from school and that they would eat out at restaurants and that they were attached to her (page 31). The second letter is in similar terms at page 33.

66. The relevant evidence in the appellant's witness statement is set out at paragraph 17 where it was recorded that she had a strong relationship with her nephews and that she had accompanied them to school and made sure that they are fed and looked after at home and had been doing so since they were very young. No further evidence was given of the nature of family life in light

of their ages now or any elements of dependency or support other than that set out at paragraph 17.

67. When looking at the decision of the FtTJ, he identified that the relevant family members are adults (brother and elder two nephews) and two older aged children are 17 and 14 and expressly accepted those matters set out in the witness statements that the appellant played a part of family life picking them up from school, going to restaurants with them and that she had become a significant family member. Whilst the FtTJ stated at [48] that there was nothing to suggest that the relationships went beyond mere emotional ties and that therefore family life was not established as a result, the judge did not end his consideration there. At [48] the judge went on to consider family life in the alternative and on the basis of the evidence summarised above and then went on to consider issues of proportionality. Consequently, there is no contradiction in the FtTJ's analysis as a judge plainly set out that whilst he did not consider there was family life, in the alternative he proceeded on the basis that there was family life established on the evidence which he had considered which was followed by an assessment of proportionality. As set out, the evidence of the nature of the family life was not particularised in any great detail nor did it go beyond that set out briefly in the witness statements. As the judge noted, two of the nephews were adults and the other two nephews were 17 and 14. Whilst the appellant had assisted in their care at a younger stage such as taking to school and cooking meals, the judge was entitled to find on the evidence that they had not taken the place of their mother and that there was no evidence for her acting "in loco parentis" (at [46]). However, the judge properly accepted that the appellant had become a significant family member in the household and that they would naturally be upset if she were to leave.

68. Therefore even if the FtTJ was wrong to conclude that the evidence was insufficient to found a family life with members of the extended family, I am satisfied at the judge in the alternative proceeded on the basis that there was family life. Had he ended his consideration of family life on that point, he would have been in error but as the respondent's reply sets out, the judge did not fall into error because he went on to consider family life based on the evidence that was before the tribunal in the alternative. I am also satisfied that he considered the nature of the family life in accordance with the evidence given the lack of any real particularisation beyond that which I have referred to above.

69. Miss Hussain in her submissions directed the court's attention to the witness statement of the appellant's brother in support of her submission that the judge failed to take account of her dependency on the family in the UK and in particular paragraph 12 of the witness statement where reference is made to her suffering from "slow learning" and that she was "unable to maintain a normal family life of her own". This was not a point raised in the grounds nor can I find

any evidential support for this in the GPs report or in any other evidence. As Miss Hussain accepted she could not say what evidence had been put before the FtTJ or what arguments had been submitted by the appellant's previous counsel. Whilst Miss Hussain sought to draw an analogy between the two failed marriages and paragraph 12 of the witness statement, there was no evidential basis for that submission before the FtTJ. The only reference to the failed marriages is that set out at [57] stating that the appellant had entered into two religious marriages which had not ultimately been successful, and it is recorded that the appellant indicated that there was some immigration advantage in getting married (although it is right to note also that the appellant's brother indicated that it was not to do so). There was nothing stated in the evidence concerning the ending of either of the two marriages or that the appellant was therefore unable to maintain her own family life.

70. A further point relied upon by Miss Hussain, although not set out in the original grounds, related to the FtTJ's consideration of the appellant's medical needs. It was submitted both in the written submissions and her oral submissions that the medical evidence was not properly considered by the FtTJ.

71. I have considered the evidence that was before the tribunal which was in the form of a report from the appellant's GP (set out at page 8). As Ms Petterson observed the contents of the report were not entirely accurate because the GP recorded the appellant's account to him that she had no family in Bangladesh which was inconsistent not only with the factual findings of the judge but also the evidence of the appellant's brother. The report did set out that the appellant had been suffering from anxiety and a low mood for some time and that her mental state had become worse recently and that she suffered from anxiety and poor sleep. Having considered the decision of the FtTJ it cannot be reasonably said that the judge failed to give consideration to the medical report and he expressly considered its contents at [49] and at [53] noting that she suffered from anxiety, poor sleep and a low mood and had been taking medication for this. He also took into account that she failed to attend the specialist appointment (which had been referred to in the GP letter) and that she did not have any specialist consultant. The judge concluded that the appellant did not have "a severe mental health problem". In the light of the contents of the GPs letter that was a finding that was reasonably open to the judge to make and even if the reference to it being "minor" did not reflect how it would be perceived by the appellant, the finding that her mental health condition was not severe was one that was open to him. The decision letter also set out, that there would be sufficient treatment available in Bangladesh (see page 4 of the decision letter).

72. I do not consider that there can be any analogy drawn between the case cited in the written submissions of *R(MBT)* (as cited) and the facts of this current appeal. The decision concerned the operation of the restricted leave policy and the effect upon an appellant's mental health having repeated grants of restricted

leave. That was not the factual basis of the appeal before this judge. However, I am satisfied that judge took into account the medical evidence when considering the appellant circumstances and did so in accordance with the evidence that was provided.

73. The last point relied upon by Miss Hussain is that the judge failed to give weight to a material matter in the proportionality assessment and that this related to the "legacy" point relied upon before the FtTJ.

74. The written submissions state that on 15 March 2011 the appellant received a letter from the Case Resolution Directorate requesting further documents and that the appellant complied by sending photographs and evidence of her identity. It is therefore submitted that the respondent had given an indication that her case was being assessed under the old long residence legacy cases and that there was a delay on the part of the Home Office coming to a decision in a reasonable time.

75. No further submissions were made by Miss Hussain by reference to the position of the appellant and the legacy policy referred to in the grounds save that it is recorded in the decision at [54] that counsel had argued that the respondent consented to the appellant remaining in the country by not removing her and that "when questioned he said that he was not relying on any specific policy mainly on the case law and the delay".

76. The point Miss Hussain made was the broad submission that the FtTJ failed to give weight to the delay on the part of the respondent.

77. The legacy programme was an operational programme launched by UK Borders Agency on 25 July 2006 to resolve a large number of unresolved asylum claims which led to the setting up of a directorate called the "Case Resolution Directorate". By the end of 2006 there was a backlog of asylum/human right applications with 500,000 outstanding applications received prior to 5 March 2007 and transferred to the CRD.

78. The legacy programme has been the subject of litigation in a number of cases before the Upper Tribunal, the Administrative Court, and the Court of Appeal. In the decision of *Jaku*, Ouseley J stated:

> "6. At the heart of much of the litigation over the years have been eventually largely fruitless and in my judgment misconceived attempts by claimants to show that there was a special and more favourable policy which should be applied to those in the legacy Programme, derived from a target or aim as to the date by when decisions would be made. This target then was elevated into a legitimate expectation; missing it was said to create unlawful delay such as to create an historic injustice, leading to arguments that particular forms of leave should be granted, that policies should be treated as frozen, that particular periods of residence should be given great weight, all

deriving from a misreading of policy and especially of alleged policy documents at a level below the EIG."

79. There was no such thing as a legacy policy as such and as Counsel submitted before the FtTJ, he did not seek to identify any such specific policy. Insofar as it was submitted that the Home Office had consented to the appellant remaining in the UK by not removing her, the Secretary of State was entitled to proceed on the basis that those unlawfully in the UK will leave of their own account and as such the Secretary of State is not obliged to remove any individual or issue a removal decision (see decision of the Supreme Court in Patel [2013] UKSC).

80. Looking at the letter sent to the appellant and against the general background, there was no outstanding asylum claim or any human rights claim that had been made by the appellant. As the judge identified within his decision in several paragraphs, the only application that was made by the appellant was one that was made in 2018 (see [55]). Whilst the letter referred to "your case is in the backlog of older applications" there was no dispute that the appellant had made no application and other than providing her photograph and identification, no additional grounds or submissions were provided either at that stage or any further submissions made setting out the appellant's claim until April 2018 and later additional grounds provided in 2019 which the respondent addressed in the decision letter dated 28 June 2019 and thus with little delay.

81. Nonetheless, the FtTJ did address those circumstances within his decision. The judge found that there was no evidence that the appellant chased up the Home Office between 2011 until making a further application in 2018 (at [55]). He considered the issue of delay in accordance with the decision of *EB (Kosovo)* at [61] setting out the relevance of delay. At [62] the judge considered the effect of the delay upon the appellant and found that the appellant had not strengthened her family ties to any great extent because of the delay. He found that she had not made an application and that the reply to the letter was nothing more than a reply and did not rank as an application.

82. Nonetheless in my judgement he was right to identify at [67] that delay can reduce the impact of the public interest in firm and fair immigration control (set out in section 117B(1) of the public interest considerations) but that the appellant had remained in the UK unlawfully mainly due to the failure to make an application following the refusal of her claim by the tribunal in 2007.

83. The judge did place weight on the failure of the Home Office to take steps to her removal as can be seen by his reference at [67] that "the Home Office could have dealt with the case better". However he considered the issue of delay against the factual background and concluded that there had been a previous decision which had found the appellant not be credible and which found that she could return to Bangladesh. There had been no further applications since

the reply to the letter sent in 2011 and that "simply returning the form with photographs on it is not sufficient to show a willingness to engage in immigration process. We have no evidence that she has been to an MP or that a formal application has been made. There appears to be no chasing of the Home Office relating to the letter sent in April 2011. Even if this been a delay on the part of the Home Office the appellant has not extended family connections by entering into a subsisting relation with a partner. There are no children. She continues to live at her brother's home."

84. Thus, the judge concluded that even if the Home Office had delayed, the appellant had not strengthened her family ties by establishing family life with a partner or by the birth of children and that her family life had continued as it had before living with family members.

85. Consequently, the judge did consider the issue of delay as part of the proportionality balance. He expressly directed himself to the effect of delay set out in the decision of *EB (Kosovo)* and its significance for an Article 8 claim noting that in her case, no application or supporting evidence had ever been provided until 2018. He also recognised that the delay (if it could be attributed to the Home Office) would have the effect of reducing the weight afforded to the requirements of fair and fair immigration control. However, as Carnworth LJ observed in *Akaeker v SSHD* [2005] EWCA Civ 947 at paragraph 25:

"Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal"."

86. On the facts of the appeal, the judge did not consider that it was a case of a dysfunctional system yielding unpredictable, inconsistent, or unfair outcomes between individuals or classes of individuals but rather that if there had been any delay, it could only be seen in the context of the first type identified in *EB (Kosovo)* and the effect if it has, if any, on the development of closer personal and social ties and the establishment of deeper roots. Those matters were properly considered by the FtTJ within his decision and he did attach weight to the issue of delay when carrying out the proportionality exercise. The weight attributed to that factor was a matter entirely for the FtTJ.

87. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or Tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see Hesham Ali v SSHD [2016] UKSC 60 and see R (MM and others) (Lebanon) v Secretary of State for the Home Department

[2017] UKSC 10, the Supreme Court at [43]. Whilst the decision is not particularly well structured, when reading the decision as a whole, the FtTJ took into account the relevant factors in the proportionality balance, including the length of residence, the nature of the family and private life, her medical circumstances, the issue of delay and the S117 public interest factors, and reached a conclusion that was reasonably open to him to make.

88. Whilst the decision reached by the FtTJ is not one that the appellant agrees with, the question whether the decision contains a material error of law is not whether another Judge could have reached the opposite conclusion but whether this Judge reached a conclusion by appropriately directing himself as to the relevant law and assessing the evidence on a rational and lawful basis.

89. The judge had the advantage of considering all the evidence in the case including oral evidence from the appellant and her family members. As the Supreme Court stated in Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600 at [62]:

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

90. In any given case an evaluative exercise of this kind under Article 8 may admit of more than one answer. If so, provided all the appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in a sense of falling outside the range of permissible decisions. Miss Hussain did not seek to argue that the decision of the judge or his assessment of the evidence was either irrational or perverse.

91. Consequently, it has not been demonstrated by the grounds as argued by the appellant that the decision of the FtTJ involved making of an error on a point of law. It follows that the decision of the FtTJ shall stand.

Notice of Decision.

92. The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision stands.

Signed *Upper Tribunal Judge Reeds*

Dated 15 February 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.