Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33378/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 August 2017	**On 21 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

TAHMINA AKTAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E L Cantor of Counsel on the Bar Direct Access Scheme
For the Respondent: Mr S Walker a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant, a Bangladeshi national, appeals the decision of Immigration Judge Beg (the Immigration Judge) in the First-tier Tribunal (FTT). In his decision promulgated on 16 October 2015 the Immigration Judge decided to dismiss the appellant's appeal against the respondent's decision to refuse further leave to remain in the UK.

Background

2. The appellant came to the UK as a student on 23 January 2011 with valid entry clearance until 31 October 2012. She was given leave to extend her stay, which expired on 19 April 2015. However, due to an investigation by the respondent, the educational institution at which the appellant was studying ceased to be an approved educational institution. This led to a curtailment of her leave. On 30 March 2015, however, the appellant applied for further leave to remain on the basis that she qualified under Article 8 of the European Convention on Human Rights (ECHR), but the respondent refused the application on 24 October 2015. The appellant's representatives have claimed (in the grounds for permission to appeal to the Upper Tribunal) that the appellant did not receive the notice of curtailment when she made her application for further leave to remain on human rights grounds, which lead to the present appeal. I will consider the relevance of that issue later in this decision.

3. The appellant appealed against the respondent's decision to refuse leave to remain on human rights' grounds to the First-tier Tribunal. The Immigration Judge heard her appeal at Taylor House on 22 November 2015.

Basis for the appellant's human rights' application

4. The appellant in her application pointed out that she had begun a relationship with a Mr Martin Peter Real, a British citizen born on 1 September 1958. Mr Real had children by a previous relationship and had a child with the appellant, called S. Mr Real and the appellant, as S's mother, were providing a stable family environment for the child in an enduring relationship. Having formed a family life in the UK, the respondent's decision to refuse further leave to remain would constitute an unlawful interference with her protected human rights and specifically her rights under article 8 ECHR to continue her private and family life in the UK.

5. The Immigration Judge heard evidence given in English from the appellant. She was unrepresented at the hearing but was cross-examined by the respondent's representative, Mr P Whitehead, a Presenting Officer. Mr Real also gave evidence. He said that they had begun cohabiting in May 2013 and that the appellant had become pregnant within five months. Their child was born in August 2014. The appellant accepted during her evidence before the FTT that her leave to remain in the UK was curtailed with effect from May 2014.

The Proceedings before the Upper Tribunal

6. The appellant appealed the decision of the FTT to the Upper Tribunal. This was considered by First-tier Tribunal Judge Lambert on 5 July 2017. Judge Lambert decided that the criticism in the grounds of appeal to the Upper Tribunal against the Immigration Judge's finding that the appellant had fraudulently obtained a visit visa, was by unarguable. The Immigration Judge's finding was sustainable on the material placed before him. But Judge Lambert found that there were arguable merits in the complaint that

the appellant had been unaware of her curtailment of leave when she had made her application in March 2015. Judge Lambert found that this gave rise to an arguable error of law. A further ground for the application relating to the period of cohabitation is based on a typing error. Judge Lambert found an arguable error of law in relation to the one matter identified.

7. At the hearing before the Upper Tribunal, initially, some concern was expressed as to the precise chronology of events including the day when the appellant received the curtailment of leave. It was suggested by Ms Cantor that the burden lay on the respondent show this had been properly served on the appellant. This would enable the Tribunal to ascertain exactly when the leave had been curtailed and on what basis. Helpfully, Mr Walker carried out some enquiries in a short adjournment and he was able to indicate to the Tribunal following his enquiries that in fact the curtailment of leave had been sent by an e-mail 14 March 2014, but he accepted that he was unable to assist me as to who the e-mail was sent by and to, or as to the precise content of the curtailment of leave. However, he was able to remind me of the acknowledgment in by the appellant during her oral evidence that her leave had indeed been curtailed. The present application was not made until 30 March 2015 following the curtailment of that leave.

Discussion of the Issues

8. Section 117B of the Nationality, Immigration and Asylum Act 2002 provides that certain public interest considerations are applicable to all cases involving Article 8 of the ECHR and sub- paragraph (5) of Section 117B provides that "little weight should be given to a private life established by a person at a time when the person's immigration status is precarious". Ms Cantor, who appeared for the appellant under the Bar Direct Scheme, candidly accepted that her client's immigration status was precarious at the time she made her application. However, she argued strongly that it ought nevertheless to be for the respondent to produce the relevant curtailment of leave to justify the decision to interfere with the appellant's protected human rights. The burden rested on the respondent in that respect to establish that curtailment was justified. The curtailment of leave was a highly material matter, without which the First-tier Tribunal had not been justified in reaching the conclusions that it had reached. She said there were several compelling factors in this case not least of which is the fact that the appellant has a young child, S, by Mr Real. If the appellant were forced to return to Bangladesh, the most likely scenario would be that S would have to return with her. It may have a long-term effect on the child's relationship with his father who would, presumably, remain in the UK. The alternative scenario would be that the child would remain in the UK with Mr Real. It was suggested that this scenario was an unrealistic one in the light of all the circumstances. S was born on 20 August 2014 and starts school in September 2017. The parties had cohabited since May 2013 and, whilst the appellant's immigration status in the UK was precarious, I was urged to accept that the Immigration Judge ought to have allowed the appeal and recommended to the respondent or directed the respondent to grant further leave to remain. It was suggested

that the "Wednesbury principles" were applicable to this situation and that it was unjust and inappropriate to allow the decision to stand. The appellant may face significant difficulty in re-entering the UK, even if it was on a different basis than that previously advanced, because with her history of deception. Ms Cantor's client would find it difficult to obtain the necessary entry clearance. I pointed out that no attempt had been made to renew the permission to appeal application, by enlarging the grant, following the refusal of permission to appeal against the finding of fraud. It was open to her instructing solicitors, or indeed her client, to make that application. I noted in this context that her client was married to a solicitor.

9. In argument, it was accepted on behalf of the respondent that it would have been better for the Upper Tribunal to have the actual decision by which the leave had been taken away (i.e. the curtailment of leave document). Mr Walker apologised to the Tribunal for not having that document, but he pointed out that it had been produced before the FTT and was referred to by the Immigration Judge in decision at, for example, paragraph 33. Furthermore, the appellant had accepted the fact that leave to remain in the UK had been curtailed in May 2014. Furthermore, Mr Walker stood by the respondent's Rule 24 response. He said that the appellant's private life in the UK had been formed precariously. It had not been established that there was any other basis for the appellant to remain in the UK. He relied on the Upper Tribunal in the case of **AM Malawi [2015] UKUT 0260.** He said the decision of the First-tier Tribunal was sustainable and he sought to uphold the decision which had been reached having heard evidence and given the matter proper consideration.

Conclusions

10. I have considered whether the decision of the First-tier Tribunal can stand given the fact that the curtailment of leave decision has not actually been produced before the Upper Tribunal. The Immigration Judge demonstrated that he fully considered the plethora of recent case law in relation to Article 8, including **EA (Nigeria)** [2011] UKUT 00315, a decision of the Upper Tribunal, **ZH (Tanzania)** [2011] UKSC 4, a decision of the Supreme Court and **AM Malawi** [2015] UKUT 0260. The Immigration Judge set out fully the test for Article 8 including quoting Section 117B of the 2002 Act. He took into account that the appellant had been in the UK, for the most part lawfully, but that she accepted that she no longer had a right to remain in the UK. Even if there were an error of law in relation to failing to take into account the terms of the curtailment of leave that would not be material to the decision. The appellant has been in the UK for a relatively short period of time (since 2011) and has chosen to embark on a family life knowing that she would ultimately have to return to Bangladesh. In those circumstances, I find that there is no sound basis for interfering with the decision of the Immigration Judge. In so far as there was an error of law, I am satisfied it was not a material error of law since the appellant admitted that her leave had been curtailed. Additionally, the case law under Article 8 suggests that although the respondent has a duty to

safeguard and promote the welfare and interests of children in the UK, children who are born in this country are not be used by illegal immigrants as a “trump card” to avoid removal. The duty towards the child under section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote their welfare is not absolute. It must be balanced against the need to consider the wider public interest, including the interest in ensuring proper balanced and controlled immigration into the UK. That was likely to be a weighty factor here, particularly having regard to the Immigration Judge’s findings in relation to the appellant’s fraudulent obtaining of a visit visa. I have no doubt that these principles were borne in mind by the Immigration Judge when he reached his decision.

Notice of Decision

The appeal against the decision of the FTT is dismissed.

The decision to refuse the appeal on asylum, human rights grounds stands.

No anonymity direction was made by the FTT and I make no anonymity direction.

Signed Dated 20 September 2017

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Dated 20 September 2017

Deputy Upper Tribunal Judge Hanbury