IAC-AH-KRL-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/07309/2019

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 28 February 2020** | **On 23 April 2020** |

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**JA**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr R Wilcox, Counsel, instructed by Londonium Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Bangladesh born in 1993. He arrived in the UK in 2011 as a student.

2. On 9 July 2019 the respondent made a decision to refuse a protection and human rights claim. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Bibi ("the FTJ") at a hearing on 2 September 2019.

The protection claim was dismissed but the appeal was allowed on human rights grounds with reference to Article 8 of the ECHR.

3. Permission to appeal in relation to the decision allowing the appeal under Article 8 was granted to the Secretary of State. There was no appeal on behalf of the appellant in relation to the protection claim.

4. The Article 8 claim was in terms of the appellant's family and private life. He is married to a British citizen, the marriage having taken place on 21 May 2019. At the time of the hearing before the FtJ they were expecting their first child, in January 2020.

5. The appeal comes back before me after a hearing on 19 December 2019 following which I decided that the decision of the FtJ allowing the appellant's appeal on human rights grounds with reference to Article 8 of the ECHR, was to be set aside for error of law and for the decision to be re-made in the Upper Tribunal.

6. The reasons I gave for finding that the FtJ erred in law in her decision are as follows:

> "32. The FTJ was clear in her conclusions to the effect that there would not be insurmountable obstacles to family life continuing in Bangladesh for the reasons that she gave from [65] which I have quoted. That consideration included taking into account the extent to which the family was settled in the UK, the extent to which they could provide for themselves (the FTJ finding that the appellant's wife could seek to find work in Bangladesh), and their familiarity with the country from which they both originate.
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> 33. Whilst I do not rule out the possibility that an individual may succeed on Article 8 outside the Rules notwithstanding that there is a finding that there would be no insurmountable obstacles to family life, here the FTJ's Article 8 assessment outside the Rules failed to have regard to her earlier findings in relation to insurmountable obstacles. Whilst I acknowledge that the FTJ considered the position with reference to the expected birth of their child, there does not appear to have been any acknowledgment of the earlier findings. For example, the FTJ earlier concluded that the appellant's wife would be able to find work in Bangladesh or at least seek it. She referred to the appellant and his wife both being resourceful individuals. Those are relevant factors for her to have taken into account in the assessment of Article 8 outside the Rules. Thus, at [75] the FTJ seemed to accept at that point that the appellant would have no employment or income in Bangladesh, contrary to her earlier findings.
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> 34. At [70] the FTJ referred to [*TZ (Pakistan) and PG (India) v Secretary of State for the Home Department* [2018] EWCA Civ 1109] in particular [30] – [31]. The latter paragraph talks about the need for a Tribunal to factor into its evaluation of whether there are exceptional circumstances in terms of Article 8 outside the Rules both the findings of fact that have been made and the evaluation of whether or not there are insurmountable obstacles. I am not satisfied that the FTJ did that in this case in her assessment of Article 8 outside the Rules.
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> 35. In addition, the FTJ's assessment of the *Chikwamba* point, albeit not with specific reference to the decision in *Chikwamba* itself, erroneously concludes that the fact that the appellant would be unsuccessful in an application for entry clearance is a

matter that militates in his favour. Furthermore, the FTJ's decision in this respect fails to take into account the limited circumstances in which the *Chikwamba* principle applies. I do not accept the contention on behalf of the appellant that the *Chikwamba* point is not raised in the grounds.

36. Similarly, I am not satisfied that the FTJ had regard to s.117B(4) of the 2002 Act which provides that little weight should be given to 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. That is not to say that no weight can be attached to that relationship but the FTJ ought to have given that statutory provision specific consideration. Whilst I acknowledge, as was submitted on behalf of the appellant, that the FTJ noted at [79] that the appellant's stay in the UK has been on a temporary and therefore precarious basis, that is not a consideration of s.117B(4). In addition, precariousness under the 2002 Act refers to private life considerations.

37. Further, whereas the FTJ cited [*AM (S 117B) Malawi* [2015] UKUT 0260 (IAC)], it seems to me looking at [80] of her decision, that she found that the fact that the appellant has shown that he has been financially independent in the UK and can speak English were positive factors in his favour, contrary to the guidance in *AM (Malawi)*.

38. For all these reasons, I am satisfied that the FTJ's decision is marred by error of law in terms of Article 8 such as to require her decision to be set aside."

7. In addition to the evidence that was before the First-tier Tribunal, for the re-making hearing there was an additional bundle consisting of 18 pages. I heard oral evidence from the appellant and his wife, MP, which I now summarise.

***The oral evidence***

8. The appellant and his wife gave evidence through an interpreter in Sylheti. The appellant adopted his witness statement dated 23 August 2019 in examination-in-chief. In cross-examination he said that if he is allowed to remain in the UK he would work. His wife would then be the primary carer for their daughter, born on 23 January 2020.

9. In Bangladesh he has two younger brothers who live with his mother in a property owned by the family. He has offered his mother financial support in the past.

10. He would not be able to live with them in Bangladesh if he was returned, even temporarily, because he has financial problems and there is a lack of space. He also has "asylum problems".

11. His siblings in Bangladesh do not work. They study. There is a brother in France who supports them in their studies and a brother who passed away left some money for them.

12. He does intend that his mother should meet her granddaughter, even if that involves him and his wife travelling to Bangladesh.

13. MP adopted her witness statements dated 23 August 2019 and 26 February 2020, in examination-in-chief. She is a British citizen and does not have any other nationality. She works in a shop. At the moment she is on maternity leave which ends in August this year. She then intends to return to work. She earns £10,000 per annum.

14. In cross-examination she said that she does not have any savings. Her parents do not help her financially because she is now married. She and her husband live in a housing association property for which they pay rent. They have lived there for five years.

15. Her maternity pay is on the basis of a reduced amount each month. It does not include statutory maternity leave. It is all paid for by her employer.

16. She was born in Bangladesh and arrived in the UK on 8 December 2005 as a Bangladeshi national. She has not renounced her Bangladeshi citizenship. They do go to Bangladesh on visits. Her parents are here but her father's brothers are in Bangladesh. She last visited in 2010 and has not been back since. She does not still have a Bangladeshi passport.

17. As to whether she would be entitled to go to the Bangladeshi Embassy and renew her Bangladeshi passport, she said that if she needed to she would be able to do so.

18. She would love to take her daughter to Bangladesh to meet her paternal grandmother and maternal relatives. At the moment she is too young but she hopes to do so when she grows up a little.

19. She intends to return to work in August even if her husband works full-time. They had planned it so she would do morning shifts and he would do evening shifts. They would look after her in that way.

20. If her husband had to go back to Bangladesh to apply for a visa, her mother would not be able to assist looking after their daughter because she does not know how to look after her as much as she does. She has her own house and family. She also has a broken leg so it would be very difficult. Her mother has her own problems and her sister and brother work.

21. Before she married she met her husband twice on 5 November 2018 and 28 December 2018. Her family knew everything about him and that he had no immigration status in the UK. The decision-making power belongs to the father in the Bengali community.

***Submissions***

22. In her submissions, Ms Cunha relied on the evidence that emerged during cross-examination. She submitted that there would be no insurmountable obstacles to family life continuing in Bangladesh. On the question of insurmountable obstacles, I was referred to *Lal v Secretary of State for the Home Department* [2019] EWCA Civ 1925.

23. Ms Cunha further submitted that the appellant could obtain employment in Bangladesh. He would be able to reintegrate and family life could continue. His wife was born in Bangladesh and previously had a Bangladeshi passport.

24. In relation to GEN 3.2.(2), there were no exceptional circumstances in this case. Furthermore, in the alternative, the appellant could apply for entry clearance. As was said at [39] of *TZ Pakistan and PG (India) v Secretary of State for the Home Department* [2018] EWCA Civ 1109, the facts are not analogous to the circumstance in *Chikwamba* because the outcome of a subsequent entry clearance application was not certain.

25. On the question of "reasonableness" of their British citizen child leaving the UK, she could remain with her mother. The fact is that she was born to a Bangladeshi family and one of them has precarious status. British citizenship is a weighty factor but it is not determinative.

26. They married in circumstances where they both knew of the appellant's precarious immigration situation. The fact that he does not meet the Immigration Rules is a weighty factor.

27. In his submissions, Mr Wilcox argued that paragraph EX.1(a) applies because the appellant has a genuine and subsisting relationship with a British citizen child. The only reason that the Rules would otherwise not be met is in terms of the financial requirements and therefore EX.1 was relevant. That provision replicated s.117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). GEN3.2 represents a third stage but in practice the assessment outside the Rules is the same.

28. As regards *Chikwamba*, it is far from clear that the appellant would succeed in an application for entry clearance as they would not meet the minimum income threshold. However, *Chikwamba* is not really relevant to the circumstances of this appeal.

29. Again, in relation to paragraph EX.1, it was submitted that that provision is designed not only to comply with international obligations in terms of Article 8 but also the UN Convention on the Rights of the Child. Mr Wilcox relied on the dicta in *MA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 705. It was submitted that although that case dealt with a child who has been in the UK for seven years, the same principle applies in terms of British citizen children.

30. The respondent's own guidance, interpreting *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, does not indicate that it would be reasonable to expect a child to return to the country of origin with the child's parents. I was referred to [18] and [51] of *KO (Nigeria)* in terms of the relevance of conduct, in that at [51] of *KO (Nigeria)*, the parents' conduct was relevant only in that it meant that they had to leave the country. It was in that context that it had to be considered whether it was reasonable for the children to leave with them.

31. In this case one of the parents is a British citizen and there is no question of her being required to leave the UK. It was in the child's best interests to remain in the UK because she is a UK citizen. She does not have citizenship of Bangladesh, even if she could acquire it.

***Assessment and conclusions***

32. Since the hearing before me on 19 December 2019 there has been a significant change in the family's circumstances with the birth of the appellant and his wife's daughter on 23 January 2020. The appellant's wife is a British citizen and so also, therefore, is their daughter.

33. So far as findings made by the FtJ are concerned, Mr Wilcox submitted that it ought not to be a preserved finding that in terms of paragraph 276ADE(1)(vi) there were no very significant obstacles to the appellant's integration, Mr Wilcox relying on the fact that the couple now have a child.

34. Whilst the relevance of his having a child to his integration in Bangladesh is not immediately obvious, there was no opposition to Mr Wilcox's proposition in that respect by Ms Cunha. For my part, I can see that the changed family dynamic ought, in fairness, to mean that this finding by the FtJ ought not to be preserved. However, I cannot see how it could be said that there would be very significant obstacles to the appellant's integration in Bangladesh in circumstances where he came to the UK in 2011 as an adult and when he has close family members in Bangladesh; his mother and siblings. In the circumstances, I do not accept that there would be insurmountable obstacles to his integration there.

35. Otherwise, as agreed between the parties, reflecting my own view of the extent of the findings that ought to be preserved, the only finding that realistically can be preserved is that at [74] of the FtJ's decision, namely that the appellant's wife's family are all residing in the UK.

36. Both parties agreed that paragraph EX.1(a) must be considered. That provides as follows:

> "EX.1. This paragraph applies if
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> (a)
>
> (i) the applicant has a genuine and subsisting parental relationship with a child who-
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK…".

37. The question to be answered then in relation to EX.1, is in this case whether, taking into account the child's best interests as a primary consideration, it would be reasonable to expect the child to leave the UK.

38. The starting point must be to assess what is in the appellant's child's best interests. Those best interests can, probably, incontrovertibly be said to be ideally to remain with both parents.

39. Similarly, I doubt that it would be contentious to hold that the child's best interests are best served by her being able to take full advantage of the rights and privileges accruing to her as a British citizen.

40. Her best interests are to be assessed without reference to the conduct of her parents. Thus, in the context of the child's best interests, the fact that her father has overstayed his leave by some years and that her parents started their relationship in circumstances where they both knew that the appellant's immigration status was precarious, and his stay was unlawful, are not to be taken into account.

41. The best interests assessment does, however, have to take into account the "real world" scenario, as explained by the Supreme Court in *KO (Nigeria)*. There it was said as follows:

> "19. [Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245, [2017] ScotCS CSOH_117] noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, para 58:
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> > "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"
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> To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves."

42. According to the appellant's witness statement dated 23 August 2019, if he had to return to Bangladesh it would mean the end of his relationship with his wife because she has told him on numerous occasions that she does not want to return to Bangladesh. She fears she would not be able to reintegrate and she feels that the best

interests of their daughter lie in remaining in the UK. He refers to the implications for him as a father and his daughter being brought up without a father.

43. In her witness statement dated 23 August 2019, the appellant's wife refers to all her family being in the UK and it being impossible for her to reintegrate into Bangladesh. She feels that her (then unborn) child's best interests are for her to remain in the UK.

44. Her further witness statement dated 26 February 2020 repeats that her parents and siblings live in the UK and she has no family or friends in Bangladesh. She refers to their financial difficulties being likely to increase if they had to live in Bangladesh.

45. As regards their daughter, she refers to the privileges that she has in terms of access to education, healthcare and other benefits as a British citizen and their hope that she will benefit from those advantages. She contrasts that with the situation in Bangladesh in terms of healthcare and education. She states at [7] that it is now "more impossible" for her to move to Bangladesh to continue their family life and that if the appellant has to leave, their daughter would be deprived of his fatherly guidance and emotional support which is necessary for her spiritual and intellectual growth. She also refers to the difficulties she would have in looking after their daughter on her own. She refers in this context to her suffering from depression for which she takes medication.

46. The "real world" scenario is that the appellant has no leave to remain. On the facts, I am satisfied that his wife is firm in her commitment to her daughter in not wanting her to leave the UK and lose the advantages of British citizenship.

47. British citizenship is not, as has long been recognised, a trump card in an Article 8 case. Nevertheless, it is a matter of very great significance. The evidence in this case reveals that if, on the hypothetical scenario, the appellant's daughter had to leave the UK, aside from the advantages of British citizenship that she would lose for as long as she was outside the UK, her mother would not have the support that she has in the UK in terms of family.

48. I accept her evidence that she does not have family in Bangladesh and indeed it is a preserved finding that her family are all residing in the UK. Whilst there is no reason to think that the appellant at least, whilst his wife looks after their daughter, could not obtain employment, it is reasonable to assume that their financial circumstances would be less secure in Bangladesh than in the UK.

49. The appellant's wife would be looking after their child in circumstances where she lacks the immediate emotional support that she is able to gain from her family in the UK and in circumstances where she would be bringing up the child, albeit with the support of the appellant, whilst suffering from depression.

50. The facts are clear in establishing that the child's best interests are to remain in the UK with both her parents. I accept that the appellant's wife would not leave the UK with their daughter to live with the appellant in Bangladesh. In those circumstances

the child would be brought up with her father's physical presence. Her best interests are to be brought up in a family unit with both parents.

51. I also take into account what was said in *(MA) Pakistan* at [49], namely:

> "However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."

52. I agree Mr Wilcox's submission that although *MA (Pakistan)* did not involve a child who was a British citizen, but a child who had lived in the UK for seven years or more, the same principles apply in terms of the need for there to be "powerful reasons" as to why leave should not be granted. The Court of Appeal's analysis in *MA (Pakistan)* was itself based on dicta in *EV (Philippines) & Ors v Secretary of State for the Home Department* [2014] EWCA Civ 874 which was itself a case involving British citizen children.

53. Taking all those factors into consideration, I am not satisfied that in this case it could be said to be reasonable to expect the child to leave the UK, taking into account her best interests. Thus, I am satisfied that paragraph EX.1(a) applies. Accordingly, the appeal is to be allowed. In those circumstances, there is no need to consider Article 8 outside the Rules or with reference to GEN.3.2.

*Decision*

54. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, the decision is re-made, allowing the appeal under Article 8.

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek Date: 08/04/2020

**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**