Upper Tribunal
(Immigration and Asylum Chamber)

Miah (section 117B NIAA 2002 – children) [2016] UKUT 00131(IAC)

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 29 September 2015	
	……

Before

The Hon. Mr Justice McCloskey, President
Upper Tribunal Judge Bruce

Between

JUNED MIAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr D Balroop, of counsel, instructed by KC Solicitors.
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer.

(i) In section 117B(1)-(5) of the Nationality, Immigration and Asylum Act 2002 parliament has made no distinction between adult and child immigrants.

(ii) The factors set out at section 117B(1)-(5) apply to all, regardless of age. They are not however an exhaustive list, and all other relevant factors must also be weighed in the balance. These may include age, vulnerability and immaturity.

*(iii) The juridical status of the relevant Home Office 'Immigration Directorate Instructions' must be appreciated. While these are subservient to primary and secondary legislation and the Immigration Rules, they rank as a **relevant** consideration, framed in flexible terms, to be taken into account by decision makers in every case where they apply.*

DECISION AND REASONS

Framework of this appeal

1. This is the decision of the panel to which both members have contributed.

2. By its decision dated 13 July 2015 (appended), the Upper Tribunal set aside the decision of the First-tier Tribunal (the "*FtT*"), promulgated on 09 February 2015, dismissing the Appellant's appeal against the decision of the Secretary of State for the Home Department (the "*Secretary of State*") dated 29 October 2014, whereby the Appellant's application for further leave to remain in the United Kingdom was refused.

3. We summarise the uncontentous history thus. The Appellant's date of birth is 11 January 1995 and he is, therefore, now aged 20 years. On 16 October 2008, then aged 13, he entered the United Kingdom having travelled on a direct flight from his country of nationality, Bangladesh. He promptly made a claim for asylum, which was refused on 12 February 2009. On account of his status of unaccompanied minor, he was granted discretionary leave to remain in the United Kingdom until 11 February 2012. This was later extended to 11 July 2012. On 07 July 2012 the Appellant made an application for further leave to remain. This application, for reasons which are unclear, was not determined until 29 October 2014, in the form of a refusal.

The Secretary of State's Decision

4. In the first of the two major decisions of the Secretary of State, that dated 15 March 2012, the decision maker repeated, at considerable length, the previous refusal of the Appellant's asylum claim. Next, in purported consideration of section 55 of the Borders, Citizenship and Immigration Act 2009 (the "*2009 Act*"), the decision maker concluded:

> "*While present in the United Kingdom, you are provided with necessary medical care, education and housing. While resident in the United Kingdom, you may achieve numerous qualifications which ultimately will benefit the nationals of the United Kingdom and/or Bangladesh. It is considered that the obligations necessitated by section 55 are satisfied by the actions of the UKBA and the local authority.*"

The narrow context and focus of this discrete assessment are striking. Next, the decision maker concluded that the Appellant's removal to Bangladesh would not infringe his rights under Article 8 ECHR.

5. The second of the major decisions of the Secretary of State, dated 29 October 2014, provides the impetus for this appeal. By this further decision, the Appellant's application for further leave to remain in the United Kingdom was refused, the decision maker, in the context of purporting to consider section 55 of the 2009 Act, stated:

> "*It is considered that your family were responsible for your emotional and physical welfare during your residence in Bangladesh and it is not accepted that you have no family to return to. It is noted that the Bangladeshi authorities actively support returning refugees and that independent financial assistance and support is available to you should you choose to request it. It is considered that on return to Bangladesh you can choose to return to residing with your relatives or to live independently with the assistance of RA on your return. It is not accepted that your return to Bangladesh would be against your best interests.*"

Next, under the rubric of "Family Tracing", the decision maker appeared to accept that the Government had failed to discharge its family tracing obligations (a concession formally – and properly – made at the hearing by the Secretary of State's representative), continuing:

> "*You have failed to demonstrate that there would be a risk upon return or that there would be any causative link between the Secretary of State's breach of duty and your claim to protection …. You have failed to establish that you have been disadvantaged to any degree.*"

6. The decision maker then proceeded to consider the Appellant's claim that he had lost contact with his family in Bangladesh, concluding:

> "*For the reasons given above, it is not accepted that you have provided a credible account of having lost touch with them.*"

Reference was then made to the uncontested fact that the Appellant had not sought the assistance of the British Red Cross for the purpose of re-establishing family contact. We shall revisit this topic *infra*.

7. The decision maker then turned to consider the Appellant's case under the umbrella of Article 8 ECHR. It was noted that in making his further leave to remain application, the Appellant had disclosed a conviction consisting of a breach of a non-molestation order, while not disclosing a police reprimand in respect of an alleged shoplifting incident. These events are dated 19 March 2014 and 02 March 2010 respectively. The penalty imposed consisted of a one year community order. The Appellant was also convicted of a second, related offence of harassment, giving rise to a protection from harassment restraining order of indefinite duration. Both orders remain current. At the time when the decision was made, the decision maker noted, correctly, that both prosecutions were pending. This is followed by the conclusion:

> "*For these reasons, the Secretary of State considers that your presence in the United Kingdom is undesirable and you therefore fail to fulfil S-LTR1.6 of Appendix FM of the Immigration Rules.*"

8. Having, notably, made no distinction between the Rules and Article 8 *simpliciter*, the decision continues, making two free standing conclusions:

> "*Consequently it is considered that you do not qualify under …. the Immigration Rules …..*
>
> *Therefore any Article 8 claim is refused under ……. the Immigration Rules and it is considered that your removal from the United Kingdom is proportionate and in pursuit of a legitimate aim under Article 8(2) of the ECHR.*"

The decision then drifts back into the territory of the Rules, rehearsing the private life provisions of paragraph 276(1)ADE, reasoning that the only route conceivably available to the Appellant was that provided by subparagraph (vi), which enshrines the test of:

> "*There would be very significant obstacles to the applicant's integration into* [his country of origin]."

This was followed by the assessment:

> "*It has not been accepted that you have lost contact with* [your parents and grandmother in Bangladesh] …. *All would be able to provide you with a network of support upon your return, should it be required. You remain fluent in Bengali and you have submitted no evidence to suggest that you would be unable to enter into employment upon your return to maintain and accommodate yourself.*"

Next, the decision maker purported to consider, and reject, the Appellant's case outwith the Rules.

9. Finally, consideration was given to paragraph 353B of the Rules. The core of the text which follows is found in the following passage:

> "*There is nothing in either your character or conduct which would warrant a grant of leave to remain in the United Kingdom. You have been issued with a police reprimand for theft, have had a non-molestation order issued against you and have a conviction for breaching that order,* ***as well as three impending prosecutions*** *…..*
>
> *Furthermore, whilst it is accepted that there has been a delay in the consideration of your application you have been aware since 2012 that your continued presence in the United Kingdom was solely down to your status as an unaccompanied minor and that upon reaching the age of 18 you would be returned to Bangladesh. It is not accepted that you have spent any significant period of time in the United Kingdom for reasons beyond your own control.*"

The omnibus conclusion expressed was that, based on the grounds and reasons summarised above, the removal of the Appellant from the United Kingdom would be appropriate.

Statutory Framework and Immigration Rules

10. Paragraph 276(1)ADE of the Immigration Rules (the "*Rules*") provides, in material part:

> "*The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:*
>
> *(i) does not fall for refusal under any of the grounds in section S-LTR.1.2 to S-LTR.2.3 and S-LTR.3.1 in Appendix FM; and*
>
> *…*
>
> *(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.*"

Paragraph S-LTR1.6, which forms part of Appendix FM, provides:

> "*The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.*"

11. Paragraph 353B of the Rules provides:

> " *Where further submissions have been made and the decision maker has established whether or not they amount to a fresh claim under paragraph 353 of these Rules, or in cases with no outstanding further submissions whose appeal rights have been exhausted and which are subject to a review, the decision maker will also have regard to the migrant's:*
>
> *(i) character, conduct and associations including any criminal record and the nature of any offence of which the migrant concerned has been convicted;*
>
> *(ii) compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable;*
>
> *(iii) length of time spent in the United Kingdom spent for reasons beyond the migrant's control after the human rights or asylum claim has been submitted or refused; in deciding whether there are exceptional circumstances which mean that removal from the United Kingdom is no longer appropriate.*
>
> *This paragraph does not apply to submissions made overseas.*
>
> *This paragraph does not apply where the person is liable to deportation.*"

12. The new provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*") must also be applied. Section 117A provides:

> "***117A*** *Application of this Part*
>
> *(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –*
>
> *(a) breaches a person's right to respect for private and family life under Article 8, and*
> *(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.*
>
> *(2) In considering the public interest question, the court or tribunal must (in particular) have regard –*
>
> *(a) in all cases, to the considerations listed in section 117B, and*
> *(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.*
>
> *(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). "*

By section 117B:

> ***"117B*** *Article 8: public interest considerations applicable in all cases*
>
> *(1)The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –*
>
> *(a) are less of a burden on taxpayers, and*
> *(b) are better able to integrate into society.*
>
> *(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –*
>
> *(a) are not a burden on taxpayers, and*
> *(b) are better able to integrate into society.*
>
> *(4) Little weight should be given to –*
>
> *(a) a private life, or*
> *(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.*

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

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom."

The Issues

13. The main issue which was argued before us was whether the Appellant satisfies the requirements of the Immigration Rules ("*the Rules*"). Both parties were further agreed that the Appellant's case would also have to be considered outwith the framework of the Rules if it does not satisfy their requirements. We also received some argument on the question of the applicability of section 117B of the Nationality, Immigration and Asylum Act 2002 ("*the 2002 Act*") to a child.

Factual Matrix

14. In evidence, the Appellant adopted his witness statement. The gist of the story recounted by him since arriving in the United Kingdom is that when aged eight years he was (in effect) hired by his parents to a master, to whom he became effectively enslaved, in a distant city. He claimed that he was beaten and ill treated generally. There were very few visits by his parents and contact was eventually lost. He was accompanied by his master to the United Kingdom and abandoned upon arrival. Since then he has lived with various foster parents and, at present, lives alone as a private tenant. He has had no interest in re-establishing contact with his parents since they abandoned him at such a young age and exposed him to the ordeal which he then suffered for some five years. His evidence includes the following:

"… I have no source of income, no place of accommodation, no social network or any family in Bangladesh. I do not speak properly Bangla anymore. I have no idea about the Bangladesh employment market. Therefore any removal direction will cause me to become a destitute and totally disrupt my future life."

Having considered all the evidence and evaluated the Appellant's account at first hand, we find, as a tribunal of fact, that the aforementioned claims are true. We are further satisfied that the Appellant has had no ties, family or otherwise, with Bangladesh since his arrival in the United Kingdom six years ago, aged 13.

Paragraph 276ADE(1)(vi), Immigration Rules

15. These findings made, we turn to consider whether the Appellant's case satisfies paragraph 276ADE(1)(vi) of the Rules. It is common case that, in determining this issue, we should take into account the relevant Home Office Immigration

Directorate's Instruction ("the IDI"). This is entitled 'Family Migration: Appendix FM, Section 1.0b' and was published in August 2015. This states, in material part, at paragraph 8.2.3.4:

> "*When assessing whether there are 'very significant obstacles to integration into the country to which they would have to go if required to leave the UK',* ***the starting point is to assume that the applicant will be able to integrate into their country of return, unless they can demonstrate why that is not the case.*** *The onus is on the applicant to show that there are very significant obstacles to that integration, not on the decision maker to show that there are not.* ***The decision maker should expect to see original, independent and verifiable documentary evidence of any claims made in this regard and must place less weight on assertions which are unsubstantiated.*** *Where it is not reasonable to expect corroborating evidence to be provided, consideration must be given to the credibility of the applicant's claims ….*
>
> *A very significant obstacle to integration means something which would prevent or seriously inhibit the Applicant from integrating into the country of return ….*
>
> *Very significant obstacles will exist where the applicant demonstrates that they would be unable to establish a private life in the country of return, or where establishing a private life in the country of return would entail very serious hardship for the applicant …. The decision maker should consider whether the applicant has the ability to form an adequate private life by the standards of the country of return – not by UK standards …. To establish a private life in all of its essential elements ….*"
>
> [our emphasis]

We highlight also the following significant passage, under the rubric "Family, Friends and Social Network":

> "*An applicant who has family or friends in the country of return should be able to turn to them for support to help them to integrate into that country …..*
>
> *The decision maker must consider the quality of any relationships with family or friends in the country of return …*
>
> *Where there are no family, friends or social networks in the country of return* ***that is not in itself a very significant obstacle to integration****…..*
>
> ***Lack of employment prospects is very unlikely to be a very significant obstacle to integration.***"
>
> [Our emphasis.]

16. Decision makers and Judges should take care to apply the correct prism when considering this IDI. Its legal status must be appreciated. It is not a statutory measure. It is, rather, a policy document. Being of this character, it attracts the application of a series of well established principles, four in particular. First, it is an obligatory material consideration in decision making processes. Second, it is not writ

in stone. Rather, its contents are to be viewed as a series of flexible and inexhaustive requirements. See Lumba (WL) v Secretary of State for the Home Department [2011] UKSC 12, at [21], [26] and [35], per Lord Dyson JSC. We would further emphasise that the IDI is not, and does not claim to be, an exhaustive code. To approach it as a collection of rigid rules and/or a comprehensive edict would be erroneous in law. Finally, it is trite law that IDI's and kindred instruments do not have the status of law and, thus, are subservient to primary legislation, secondary legislation and the Immigration Rules.

17. We also draw attention to two particular features of the text of the IDI, highlighted above. The first is the passage dealing with "*original, independent and verifiable documentary evidence*". We consider that this is to be applied with caution. Decision makers and Judges should be alert to the entire context, including relevant social and cultural factors, with their eyes firmly focused on the realities of life. Furthermore, the instruction to decision makers that they "***must** place less weight on assertions which are unsubstantiated*" is equally troubling, as it neglects two truisms. The first is that, in certain cases, assertions may not be capable of being substantiated. The second is that the applicant may be able to satisfactorily explain the absence of substantiation in respect of matters which one would expect to be substantiated. The final aspect of the IDI worthy of comment is its tendency to highlight individual considerations in isolation, detached from other factors. We would emphasise that the public law duty engaged is to take into account all material considerations, weighing them in the round. In this context, we record that, in response to a question from the bench, it was acknowledged on behalf of the Secretary of State that the age, gender, educational achievements and linguistic abilities of the person concerned are (inexhaustively) all material considerations.

18. We consider that paragraph 276(1)ADE(vi) of the Rules, considered in conjunction with the associated IDI, is to be applied to the Appellant in the following way. He has spent approximately two thirds of his life in his country of nationality, Bangladesh. He has unmistakable linguistic, cultural and social attachments to that country. Any loss of linguistic fluency will be quickly recovered. We have found that he has had no contact, direct or indirect, with his family since arriving in the United Kingdom aged 13. However, there is nothing to suggest that he does not know where they resided before he left. We take into account that he has no educational or vocational qualifications. However, we consider that as a matter of probability he would have remained the servant, or slave, of his master for several more years and he would not have secured any qualifications of this kind in Bangladesh. Having regard to the period during which he has resided in the United Kingdom and the very different culture, language, traditions and social setting to which he has become accustomed, the exercise of reintegrating in his country of nationality will undoubtedly be challenging and difficult. We are satisfied that it will entail hardships for the Appellant. However, taking everything into account, our confident expectation is that such reintegration will be achieved and will not, in the language of the rule, give rise to "*very significant obstacles*".

19. As regards paragraph 353B of the Rules, there can be no dispute about the decision maker's entitlement to take into account the offences of which the Appellant has

been convicted. However, a (mere) police reprimand does not have the status of a conviction, while the Appellant's two actual convictions belong to the bottom end of the scale of criminality and appear to have been actuated by a mixture of immaturity and emotional instability. We consider that refusal of his application on this ground alone would not have been sustainable in law. We now turn to consider Article 8 outwith the framework of the Rules and section 117B of the 2002 Act.

Article 8 & Section 117B of the 2002 Act

20. In setting aside the determination of the FtT the Upper Tribunal said the following of s117B:

> "*Whilst it is easy to understand why Parliament intended to weaken the private life claims of adults who have failed to meet the requirements of the Rules, it is less easy to understand why children brought, born or left here through no fault of their own should have the weight attached to their Article 8 rights diminished. Section 117B(5) mandates that the decision maker should attach 'little weight' to a private life established whilst the person only had precarious leave. If that were to be applied to the case of a child who had, say, spent seven years or more growing up in the United Kingdom, it would appear to contradict numerous policy statements made by the Secretary of State about the importance of stability, roots and relationships for such children. Of the six years that the Appellant has spent here, five were as a child.*"

We consider and develop these observations in the following paragraphs.

21. The Judge's observations are understandable and unexceptional. In the context of any young child or teenager trafficked to the United Kingdom it would be unlikely that he would be financially independent or have complied with immigration control or have learned to speak English to the minimum standard required. Notwithstanding, and irrespective of the circumstances of the child's arrival, Part 5A mandates that all these matters weigh against such a claimant in the proportionality balancing exercise. We juxtapose this new statutory provision with the indelible fact that the United Kingdom government has long recognised the particular significance to be attached to the private lives of children. Since the 'seven year policy' was set out in DP5/96, some two decades ago, successive governments have acknowledged that where children have spent a moderate period of time in the United Kingdom this will be a weighty factor in determining whether they should be removed (either with or without their parents)[1]. This policy is today expressed in the IDI noted in [14] above, at 11.2.4:

> "*Over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK and strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years".*

[1] See paragraphs 9-13 of Munir and Anr v SSHD [2012] UKSC 32 for Lord Dyson's concise narration of government policy in respect of the private lives of children.

22. These statements reflect the recognition that the private life of a child is of a qualitatively different nature from that of an adult. Quite apart from the fact that a moderate period of residence is likely to be of greater impact, influence and temporal significance in a relatively short life, it is less likely that a child will be aware of, much less responsible for, his immigration status.

23. That said, such policy statements cannot dilute the juridical reality of the new statutory regime. The primary legislation now enshrined in Part 5A of the 2002 Act makes no distinction between adult migrants and child migrants. There is no legitimate exercise of statutory construction which would entitle Judges to devise any such distinction. While the legislature has made special provision for children in the new regime, this has been confined to parental relationships with "*a qualifying child*", per section 117B(6). Accordingly, the legislative requirement that little weight be allocated to a private life established at a time when a person's immigration status is precarious applies to both children and adults, without distinction.

24. While the impact of sections 117B (1)-(5) on children will appear harsh and unfair to many, this is the unavoidable consequence of the legislative choice which Parliament has made. In this context, we draw attention to what this Tribunal decided in Forman (Sections 117A – C considerations) [2015] UKUT 412 (IAC). This decision emphasises that while it is obligatory to have regard to the considerations listed in Section 117B in all cases where proportionality under Article 8(2) ECHR is being determined, the statutory list is not exhaustive. Accordingly, in any given case, the obligatory statutory considerations will be weighed by the Tribunal with all other facts and factors which have a legitimate bearing on the issue of proportionality. In the case of a child it is possible to envisage, in the abstract, a series of considerations which could potentially outweigh the public interest. These might include matters such as parental dominance and influence; trafficking; other forms of compulsion; and the absence of any flagrant, repeated or persistent breaches of the United Kingdom's immigration regime by the child concerned. Furthermore, the child's age and personal circumstances at the commencement of the period under scrutiny and thereafter will be obviously material considerations. Viewed panoramically, it seems uncontroversial to suggest that an Article 8(2) proportionality exercise which strikes the balance in a manner which overcomes the public interests engaged is more likely to occur in the case of a child than that of an adult.

25. We give effect to the provisions of part 5A of the 2002 Act in the present case in the following way. As mandated by the legislature, we attribute little weight to the private life formed by the Appellant in the United Kingdom because his immigration status was at all times precarious. Furthermore, we must give effect to the discrete public interest that persons who seek to remain in the United Kingdom are financially independent: the Appellant is not now, even though an adult, such a person. We further give effect to the overarching public interest in the maintenance of effective immigration controls, per section 117B(1). In the balancing exercise, we take into account that the Appellant's transition to the United Kingdom clearly involved some form of compulsion, possibly parental and/or involving his slave master; he has lived in the United Kingdom throughout the entirety of his teenage

years, a period which is widely acknowledged to be the most important in every person's development; he has become integrated in United Kingdom society; and he has developed firm social, cultural and linguistic ties with this country.

26. The Appellant is a young adult, whose 21st birthday is approaching. He is wiser, more mature, more resourceful and better educated than he was upon his arrival in the United Kingdom. He suffers from no special vulnerability. He has no family ties with this country. While we acknowledge that he spent five years in the United Kingdom as a minor, his private life today is not defined by any particular relationships, beyond friendships that could be maintained or replicated abroad. We weigh all of these factors with our findings set out above. The conclusion, which follows inexorably is that this is a case in which the public interest prevails, clearly and decisively.

Conclusion

27. Accordingly, we dismiss the appeal under the Immigration Rules and, outwith the Rules, Article 8 ECHR.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 16 November 2015

APPENDIX

THE IMMIGRATION ACTS

Heard at: Field House
On: 21st May 2015

Determination Promulgated

……

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

JM
(anonymity direction not made)

Appellant

And

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Karim, Counsel instructed by KC Solicitors
For the Respondent: Mr Duffy, Senior Home Office Presenting Officer

DECISION ON ERROR OF LAW

1. The Appellant is a national of Bangladesh born January 1995. He appeals with permission against the decision of the First-tier Tribunal (Judge Chamberlain) to dismiss his appeal against a decision to refuse to vary his leave and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006.

2. The Appellant arrived in the UK in October 2008. It is accepted that he was then aged 13. He was granted Discretionary Leave in accordance with Home Office policy but was refused asylum. The appeal before the First-tier Tribunal arose after an application for further leave to remain was refused on the 29th October 2014.

3. The Appellant did not pursue asylum grounds before the First-tier Tribunal. His case was that he should be given leave to remain on the basis of his long residence/ private life. The Tribunal heard evidence from the Appellant. It rejected his claims to have, in effect, been trafficked here by an "employer", and his claim to have lost contact with his family in Bangladesh. It followed that the Appellant could not succeed under paragraph 276ADE(1)(vi). Even if the Tribunal was wrong about his contact with his family, it reasoned, he still had cultural, linguistic and religious ties to Bangladesh such that he could not meet the high *Ogundimo* test in sub-paragraph (vi).

4. In respect of Article 8 'outside of the Rules' it was accepted that the Appellant had established a private life in the six years that he had spent growing up in London and that if removed there would be an interference with that right such that Article 8 would be engaged. In its assessment of proportionality the Tribunal properly directed itself to consider the public interest matters set out in 117B of the Nationality, Immigration and Asylum Act 2002. It is noted that it is in the public interest to maintain immigration control. Applying s117B(5) it is noted that as a person with DL his status was always precarious, and as such little weight should be attached to his private life. The Tribunal further weighs against the Appellant the fact that he has a criminal record for shoplifting, breaching a non-molestation order and failing to abide by bail conditions. Taking all the other factors into account the Tribunal was satisfied that the decision to remove the Appellant was proportionate and the appeal was dismissed.

5. The grounds of appeal are that the First-tier Tribunal erred the following respects:

   i) Improperly characterising Discretionary Leave as "precarious";

   ii) In weighing in against the Appellant his criminal offending the Tribunal has failed to have regard to his young age and the submission that he is a "home grown criminal": Maslov [2009] INLR 47 ECtHR;

   iii) The finding that the Appellant has contact with his family in Bangladesh is based on inference alone and was against all of the other evidence, including the fact that the Secretary of State had failed in her attempts to trace his family;

iv) In its consideration of 276ADE(1)(vi) the Tribunal applied the "no ties" test whereas by the date of decision the rule had been amended to contain the "significant obstacles to reintegration" test;

v) Failing to consider or make findings on the extent of the Appellant's private life in the UK.

Error of Law

6. At the outset of the hearing we brought to Mr Karim's attention the decision of the Upper Tribunal (Judge Ockelton and Judge Holmes) in AM (s117B) Malawi [2015] UKUT 00260 (IAC), reported for what it says about the meaning of the term "precarious" in s117B:

> "Those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or remain. A person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave"

7. Mr Karim was aware of the decision and sought to persuade us that it was wrong. It is not a binding decision, merely persuasive, and as such we are under no obligation to follow it. He submitted that the term was drawn from the European jurisprudence and in that context it was used to denote persons on, for instance Temporary Admission.

8. We do not accept that to be the case. The person who has no status, either because of illegal entry or overstaying, is here "unlawfully" – that much, we presume, is uncontroversial. The person on temporary admission is not, as a matter of law, in the UK at all. That leaves persons who are here "precariously". Whilst it might be argued that the Tribunal in AM has cast the net very wide in defining this category of persons, we are satisfied that persons with DL must be caught firmly within it. The Appellant's continued presence is dependent upon his obtaining a further grant of leave and as such his status must be "precarious".

9. That is not however the end of the matter. Mr Karim raises a further query about the application of s177B. It is apparent from the statutory scheme that it is intended to apply to anyone subject to immigration control who raises Article 8 arguments, and yet it does not appear to contemplate that the applicant himself may be, or have been, a minor. Whilst it is easy to understand why parliament intended to weaken the private life claims of adults who have failed to meet the requirements of the Rules, it is less easy to understand why children brought, born or left here through no fault of their own should have the weight attached to their Article 8 rights diminished. Section 117B(5) mandates that the decision maker should attach "little weight" to a private life established whilst the person

only had precarious leave. If that were to be applied to the case of a child who had say, spent seven years or more growing up in the UK, it would appear to contradict numerous policy statements made by the Secretary of State about the importance of stability, roots and relationships for such children. Of the six years that the Appellant has spent here, five were as a child. We find that this is a relevant factor and that some consideration should have been given to his young age in determining what weight should be attached to his private life. We find ground (i) to be made out, and it follows from what we have said that (ii) and (v) are infected by the same error.

10. Ground (iv) is also made out. Mr Duffy accepted that at the relevant date paragraph 276ADE had been amended. The test was no longer the "no ties" *Ogundimo* question, but was one of "significant obstacles to integration". Mr Duffy may in the end be proven correct in his submission that nothing will turn on the distinction, but given our findings about the remaining grounds we are prepared to re-make the decision as a whole. The same can be said for ground (iii). The submission made is that the First-tier Tribunal failed to take relevant evidence into account, namely the fact that the Secretary of State had attempted to trace the Appellant's family in Bangladesh, and failed. Whilst that factor does not feature in the Tribunal's reasoning, it remains to be seen how relevant that is. If the Appellant had provided full details of his parents and former home, it may prove extremely relevant. If he furnished the Secretary of State with no details at all, it will count for very little in the assessment of 276ADE(1)(vi).

Decisions and Directions

11. The determination contains an error of law and it is set aside.

12. The matter will be remade before us.

13. We were not asked to make a direction as to anonymity and on the facts we see no reason why one should be made.

14. The parties are to file and serve skeleton arguments addressing the matters raised in this appeal, including Mr Karim's submission that s117B is not intended to, or cannot sensibly be thought to, apply to children. The skeletons must be served no later than 7 working days before the next hearing.

Deputy Upper Tribunal Judge Bruce
13th July 2015