Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/02335/2014**

AA/04830/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23rd December 2015	**On 20th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MB
SB
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Wortley; Wortley Legal Consultants
For the Respondent: Mr S Whitwell; Home Office Presenting Officer

DECISION AND REASONS

1. The First-tier Tribunal has made an anonymity order and for the avoidance of any doubt, that order continues. The appellants are granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the appellants and to the respondent. Failure to comply

with this direction could lead to proceedings being brought for contempt of court.

2. This is an appeal against a decision and reasons by First-tier Tribunal Judge Manyarara promulgated on 3rd September 2015 in which she dismissed the appeals by the two appellant's herein, both of whom are Bangladeshi nationals. The second appellant ("SB") is the daughter of the first appellant ("MB"). MB appealed against the decision of the respondent dated 9th April 2015 to remove her from the United Kingdom by way of directions under section 10 of the Immigration and Asylum Act 1999. SB appealed against the decision of the respondent dated 9th March 2015 to refuse to grant her asylum and to give directions for her removal from the United Kingdom. On 9 March 2015, a decision was also made to refuse to vary SB's leave to remain in the United Kingdom and to remove by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. Borrowing from the decision of the First-tier Tribunal Judge, I summarise the background:

> *"2. The appellants entered the United Kingdom on 18 August 2008 following successful appeals against the refusal of their visit visa applications. Both appellants were subsequently issued with visit visas which were valid from 30 July 2008 to 30 January 2009. On 31 December 2008, the first appellant applied for Indefinite Leave to Remain (ILR) and the second appellant applied for ILR as a child of a settled person in the United Kingdom, albeit that the first appellant was not settled given her own application for ILR. The appellants' appeals against the subsequent refusals were dismissed on 23 September 2009. The appellants then became Appeal Rights Exhausted (ARE) on 1 February 2010 and were notified as being overstayers, and therefore liable to removal, on 4 February 2014.*
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> *3. On 14 March 2014, the appellants claimed asylum. In essence, the appellants claimed to be refugees whose removal from the United*

Kingdom would be a breach of its obligations under the 1951 Geneva Convention relating to the status of refugees ("the Refugee Convention"); the basis of their claims being that they are at risk from an individual known as ..... as a result of the refusal of the first appellant to sell her business consisting of a fisheries business, cattle and farming land to him. ..... is suspected of having killed the first appellant's son,..., who had remained in Bangladesh looking after the first appellant's business during her visit to the United Kingdom.

The decision of First-tier Tribunal Judge Manyarara

4. The First-tier Tribunal Judge identifies the documents and evidence before her, at paragraphs [5] to [7] of her decision. At paragraphs [10] and [11] she summaries the appellants' claims and at paragraphs [12] and [13] of the decision, she summarises the matters relied upon by the respondent. The Judge had the benefit of hearing the oral evidence of the appellants and the evidence of MB's daughter. The evidence is set out at paragraphs [17] to [27] of the decision. The Judge's findings and conclusions as to the appeal against the refusal of asylum and humanitarian protection are to be found at paragraphs [41] to [69] of the decision. The findings and conclusions as to the appeal on ECHR grounds are to be found at paragraphs [70] to [76] of the decision.

The grounds of appeal and the hearing before me

5. The appellants' grounds of appeal contended that the Judge erred in a number of respects in the assessment of whether the appellants would face inhuman and degrading treatment, the assessment of the risk upon return to Bangladesh and whether the appeal should have been allowed on Article 8 grounds.

6. Permission to appeal was granted by First-tier Tribunal Judge Robertson on 29th September 2015. First-tier Tribunal Judge Robertson noted that the grounds at paragraphs 1-12, lack arguable merit and are no more than an attempt to re-argue the merits of the case. I agree. Permission

to appeal was granted on the basis that it is arguable that given the witness statements of the family members which were submitted in support of the appeal, it was necessary to conduct a proportionality assessment.

7. The matter comes before me to consider whether or not the decision of First-tier Tribunal Judge Manyarara involved the making of a material error of law, and if so, to remake the decision if I can do so, without having to hear oral evidence.

8. At the hearing before me, Ms Wortley, rightly in my view, confirmed that the appeal against the substantive asylum decision is no longer maintained. The appellants maintain that the Judge erred in her consideration of the Article 8 claim. Ms Wortley concedes that the appellants cannot succeed under Appendix FM and paragraph 276ADE of the immigration rules. She submits that there are exceptional circumstances in this case that required a full and proper consideration of the Article 8 claim outside the immigration rules. She submits that both the appellants are vulnerable and that the Judge failed to make any assessment of whether they enjoy a family life in the UK. She submits that the Judge failed to make any assessment of whether the relationships enjoyed by the appellants, go beyond normal emotional ties between adults such as to amount to a family life. Ms Wortley submits that there has been no assessment of the impact that the removal of the support network that the appellants enjoy in the UK would have upon the appellants, and there has been no proper assessment as to whether the appellants' removal from the UK would be disproportionate to the legitimate aim sought to be achieved.

9. The appellants have made an application in line with Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to admit a letter from Dr Karen Stanley regarding the mental health of MB. It is submitted that MB's mental health has deteriorated since the hearing before the First-tier Tribunal.

10. The respondent has filed a Rule 24 response dated 9th October 2015 that was adopted by Mr Whitwell. The respondent opposes the appeal and submits that the Judge properly considered the appeal on Article 8 grounds. It is submitted that at paragraph [73] of her decision, the Judge accepted that the appellants would have established family life in the UK, however they lived in Bangladesh whilst the first appellant's elder son and daughter were living in the UK, and they were able to maintain their relationships.

11. Mr Whitwell submits that the appellants simply disagree with the conclusions reached by the Judge. He submits that at paragraph [76] of her decision the Judge made a finding that the appellants cannot meet the requirements of the immigration rules and that there are no exceptional circumstances to go outside of the rules. He submits that that was a finding that was properly open to the Judge. He draws my attention to paragraph 2 of the witness statement of MB dated 15th January 2015 from which it is clear that the the appellants live with MB's sister, brother-in-law and their children. They do not live with MB's children that are settled in the United Kingdom. Mr Whitwell submits that there are a number of unchallenged findings made by the Judge, all of which inform the Judge's decision at paragraph [76] of her decision. The Judge found that the the appellants have lived for a number of years in Bangladesh, they have family in Bangladesh, MB was a successful businesswoman and upon return, the appellants will be able to continue to enjoy their family life together. He submits that even if the living arrangements are compelling and exceptional, the appellants would fail under s117 of the 2002 Act because they have remained in the United Kingdom unlawfully since 2010, and any private or family life established, has been established when they have had no lawful basis to be in the United Kingdom.

Discussion

12. It is useful to begin by setting out the conclusions that First-tier Tribunal Judge Manyarara came to. In her decision she states:

> *"71. In relation to Article 8, it is of note that the appellants have only been in the United Kingdom since 2008, and have spent by far the majority of their lives in Bangladesh where I am satisfied they have family to whom they can return. The first appellant has lived in Bangladesh as a widow since her husband died in 2002. The first appellant's daughter refers to the family home being in her father's village and this is the same place that ..... (referred to as ..... cousin) refers to other relatives being present. I have also had the benefit of seeing the letter from ..... (the first appellant's brother-in-law). It is also of note that the appellants' in laws travelled to Bangladesh in 2011 to attend the wedding of their own son (the first appellant's nephew). The previous Immigration Judge did not accept that the first appellant did not have any family remaining in Bangladesh (see paragraph 26 of the previous determination). I too have found that the appellants have family in Bangladesh.*
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> *72. Despite initially being granted a visa to come to the United Kingdom by virtue of the fact that she was a successful business woman, the first appellant has been presented as an illiterate and vulnerable woman. I do not accept that this is the case. It is clear that having been able to single-handedly run her farm for six (6) years after her husband's death in 2002, and being a single mother during that period, the first appellant cannot be considered to be someone who would be vulnerable as a woman living in Bangladesh. I accept the distress that has undoubtedly been caused to the appellants as a result of the murder of the first appellant's son. I have considered the letter from the first appellant's GP. The first appellant is stated to be suffering from depression and is in receipt of regular medication. This letter expressly states that the first appellant's age is not a factor.*
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> *73. I acknowledge the fact that the second appellant is a young woman however the appellants would be returning together to Bangladesh where I am satisfied they have family. I accept that the appellants would have established a family life in the United Kingdom.*

The appellants however lived in Bangladesh whilst the first appellant's elder daughter and son were living in the United Kingdom and they maintained their relationships then.

74. I have considered the report of Khaleda Rabbani. He does not set out which sources he referred to in reaching his conclusions and does not state the capacity in which he has been campaigning for equality in Bangladesh. Despite the statement of truth included in his report, he does not refer to his duty to the court in preparing this report. Mr Rabbani refers to a lack of education which deters women from equal participation in socio-economic activities. This cannot be used to describe the first appellant who, as a widow, ran a farming business in Bangladesh.

75. I have seen the money transfers included at pages 35 to 37 of the appellants' bundle. These were from the appellant's other son (.....) to ..... It therefore lies within the ability of the family members in the United Kingdom to send remittances to assist the appellants with living and other expenses.

76. In respect of family life, I find that the appellants cannot meet the requirements of the Immigration Rules and there is nothing that warrants consideration of these appeals outside the provisions of the Rules. I however acknowledge the distress that has arguably been caused to the appellants by the murder of the first appellant's son."

13. It is uncontroversial that the appellants cannot succeed under Appendix FM and paragraph 276ADE of the immigration rules. In **SSHD –v- SS (Congo) & Others [2015] EWCA Civ 387**, the Court of Appeal in a judgment handed down by Lord Justice Richards, stated;

"..The proper approach should always be to identify, first, the substantive content of the relevant Immigration Rules, both to see if an applicant for LTR or LTE satisfies the conditions laid down in those Rules (so as to be entitled to LTR or LTE within the Rules) and to assess the force of the public interest given expression in those rules (which will be relevant to the balancing exercise under Article 8, in deciding whether LTR or LTE

should be granted outside the substantive provisions set out in the Rules). Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules, they may seek to maintain a claim for grant of LTR or LTE outside the substantive provisions of the Rules, pursuant to Article 8. If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf Nagre , para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8."; [44]

14. The Judge found at paragraph [76] of her decision that the appellants cannot meet the requirements of the Immigration Rules and there is nothing that warrants consideration of these appeals outside the provisions of the Rules. However, at paragraphs [71] to [75] of her decision, the Judge makes a number of findings, that are not challenged, and which are relevant to an assessment of an Article 8 claim outside the immigration rules.

15. If one were to consider the findings of the Judge by reference to the decision of the House of Lords in **Razgar [2004] UKHL 27** and the step-by-step approach of Lord Bingham, the Judge appears to accept that the first four of the **Razgar** questions can be answered in the affirmative. That is, the proposed removal of the appellant will amount to an interference with the exercise of the appellant's right to respect for her family and private life. The Judge accepted at paragraph [73] of her decision that the appellants would have established a family life in the United Kingdom. Although the Judge does not expressly state as much in her decision, taking the appellants case at its highest, the interference will have consequences of such gravity as potentially to engage the operation of Article 8. There can be little doubt that the interference is in accordance with the law and the interference is

necessary in a democratic society in the interests of immigration control.

16. The issue that remains is one of proportionality, namely whether the interference with the appellants' family life is disproportionate to the legitimate public end sought to be achieved. To that end, the Judge noted at paragraph [71] of her decision that the appellants have only been in the United Kingdom since 2008, and have spent by far the majority of their lives in Bangladesh. She found, as had a Judge previously, that the appellants have family in Bangladesh. The Judge did not accept, at paragraph [72], that MB is an illiterate and vulnerable woman. She noted the evidence from MB's GP that MB is stated to be suffering from depression and is in receipt of regular medication. The Judge noted that the letter expressly states that the first appellant's age is not a factor. At paragraph [73] the Judge acknowledged the fact that SB is a young woman, but noted that the appellants would be returning to Bangladesh together, where they have family. The Judge also noted at paragraph [75] the money transfers previously made by MB's son in the UK, to MB's son who is now deceased. The Judge noted that it therefore lies within the ability of the family members in the UK to send remittances to assist the appellants with living and other expenses.

17. In this appeal, the appellants do not challenge those findings. They were right not to do so. In **R & ors (Iran) v SSHD [2005] EWCA Civ 982**, he Court of Appeal held that a finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence. The findings made by the Judge were plainly open to her.

18. The Judge does not formally carry out an assessment of proportionality, and to that extent there is an error of law. However, in my judgement that is not a material error of law capable of affecting the outcome because all of the findings that I have identified at paragraph 16 of this

decision are relevant to an assessment of proportionality and weigh against the appellant.

19. In my judgement, although the Judge states at paragraph [76] that there is nothing that warrants consideration of these appeals outside the provisions of the rules, she has in fact made findings as to matters that would be relevant to a consideration of Article 8 outside the immigration rules.

20. In any event, in any proportionality assessment the legitimate aim set out in Article 8(2) must now also be read in the light of **s117B Nationality, Immigration and Asylum Act 2002**, and particularly sub-paragraph (1) which holds that the maintenance of effective immigration control is in the public interest. The Judge was required to carry out a balancing exercise taking into account all the facts and factors of the case, but also giving regard to s117B of the 2002 Act. Of potential relevance were sub-paragraphs (4) and (5) which required the Judge to give little weight to a private life established at a time when the appellants were in the UK unlawfully, and to the private life established by the appellant at a time when their immigration status was precarious. These are matters that again, weigh against the appellants.

21. In reaching my decision I have had regard to the report of Dr Karen Stanley, dated 1st December 2015 that is now relied upon by MB as evidence that her health has deteriorated since the hearing before the First-tier Tribunal. Dr Stanley states that she has been asked to provide a letter of support with regard to MB's case to seek asylum in the UK and that she reviewed MB on 4th November 2015 following a referral from her GP with concerns over her mental health. Her impartiality and ability to assist the Tribunal as an independent expert is far from clear from the content of the letter. In any event, her impression is that MB is suffering from a moderate to severe depressive episode following the murder of her son, which is perpetuated by the threat of deportation

and ongoing uncertainty. It is said that MB is currently receiving treatment with antidepressants and her GP is monitoring her response. Dr Stanley feels there is a strong risk of self-neglect and a further deterioration in her mental health if she is unableto seek the support from her family and health professional that she needs. Dr Stanley is plainly unaware that the Judge has previously found that MB has family in Bangladesh. There is no suggestion in the letter that any support that MB might require from health professionals, would not be available to her in Bangladesh. In my judgement the letter adds nothing to MB's claim. The First-tier Tribunal Judge had already noted at paragraph [72] of her decision that MB is stated to be suffering from depression and is in receipt of regular medication. That remains the position now.

22. In my judgment, whilst the Judge stated at paragraph [76] that there is nothing that warrants consideration of these appeals outside the provisions of the Rules, the Judge makes a number of findings, that are not challenged, and which are relevant for the purposes of an assessment of an Article 8 claim outside the immigration rules. Although the reasoning given in the Judge's decision could have been better expressed, any error in the approach of the Judge is not material since the appeal permits of no other outcome than a dismissal on the facts of this case. I am therefore not satisfied that the First-Tier Tribunal decision involved the making of a material error of law and I uphold the Decision. Taking the positive findings made by the Judge that weigh in the appellants' favour and the findings made by Judge that are relevant to an assessment of proportionality, the appeal could not succeed even if I were to set aside the decision and remake it.

Notice of Decision

23. In my judgment any error of law in the Judge's approach is not one that is material or affected the outcome of the appeal.

24. The appeal is dismissed and the decision of the First-tier Tribunal stands.

25. An anonymity direction is made and I have not identified the names of individuals in this decision.

Signed Date 20 May 2016

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

26. As I have dismissed the appeal there can be no fee award.

Signed

Deputy Upper Tribunal Judge Mandalia