Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04100/2015
HU/04101/2015
HU/04102/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th June 2017	**On 10th July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

SHOTNA B – 1st Appellant
NF – 2nd Appellant
MAH – 3rd Appellant
(Anonymity order not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim of counsel
For the Respondent: Mr K Norton, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are all citizens of Bangladesh. The first Appellant (who I shall refer to as the Appellant) was born on [ ] 1979 and is the mother of

the 2nd and 3rd Appellants who were born on [ ] 2001 and [ ] 2005 respectively. They appealed against a decision of the Respondent dated 30th of July 2015 to refuse them leave to remain pursuant to Appendix FM and paragraph 276 ADE of the Immigration Rules. Judge of the First-tier Tribunal Cameron sitting at Taylor House on 21st of July 2016 allowed their appeals. For the reasons which I gave in my determination dated 25th of April 2017, I found material errors of law in that determination and overturned it. I have reheard the appeals and now give my decision in this determination. A copy of my previous determination finding an error of law is attached to this determination.

The Appellant's Case

2. The Appellant came to the United Kingdom with her husband and children on a visitor's visa on 13th of September 2008 and overstayed thereafter. She separated from her husband in 2010 but did not return to Bangladesh as her husband had made the decision for the family to stay, she had nowhere to go in Bangladesh and the children wished to stay in this country. Her parents-in-law live in Bangladesh and she has a sister who lives there but neither her sister nor her parents-in-law would be able to look after her if she returned there. The Appellant's parents were currently in London living with her brother. The Appellant had a number of other family members in this country. She was supported by her family and friends who would give her food and clothes. She also worked unlawfully. Her son the 3rd Appellant received free school meals from the London Borough of Tower Hamlets. The children understood a little Bengali but otherwise spoke English. They are both doing well at school. Her daughter is now 16 years old and her son is now 12 years old. They have lived in the United Kingdom for 9 years. They do not wish to return to Bangladesh. The Appellant's husband passed away last year. Her first cousin Mr Miah had been providing free accommodation to her and the children since September 2016.

The Written Evidence Relied Upon

3. In addition to the bundle which was before the First-tier tribunal which included a witness statement of the Appellant and birth certificates and education documents for the other Appellants, the Appellant relied for the hearing before me on an additional bundle which comprised a further witness statement of the Appellant, documentation regarding her cousin Mr Miah including a letter of support from him, a letter of support from other individuals and further documents in relation to the children's education.

The Hearing Before Me

4. At the outset of the hearing before me counsel indicated that he was not proposing to call the Appellant to give evidence. I queried this in the light of the fact that I had indicated in my earlier determination finding

material errors of law that whilst there was not a substantial degree of fact finding to be carried out at this hearing, an explanation was needed as to the Appellant's living conditions. What I had referred to at paragraph 14 was the apparent coincidence that the Appellant had brought herself to the attention of the authorities once the two children had been here for 7 years. Counsel in response indicated that he did not intend to call the Appellant to give evidence.

5. Counsel relied on his skeleton argument which quoted at some length from the Immigration Rules, section 55 of the Borders, Citizenship and Immigration Act 2009 and the Nationality Immigration and Asylum Act 2002. The skeleton argument indicated that there were two issues to be resolved. The first was whether it was reasonable to expect the minor Appellants to relocate and the second was whether as a lone woman with 2 children returning to Bangladesh the Appellant would face societal difficulties.

6. In relation to the first issue it was submitted very weighty reasons were needed to justify separating a child from a community in which they had grown up and lived for most of their life. Although the family would be removed together the Appellants had a strong attachment to the UK. Residence of over 7 years with children well integrated into the educational system indicated that the welfare of the children favoured regularisation of their status. 7 years from age four was likely to be more significant than a child in the first 7 years of life. The only negative factor against the Appellant was the overstaying. The 2nd Appellant was at a crucial stage of her life namely midway through her GCSEs. The case of **EV Philippines [2014] EWCA Civ 874** could be distinguished because the children in that case had been in United Kingdom for less than 4 years. The length of residence, academic progress, ties, friends, extracurricular and other social activities meant that the removal of the of the children in this case was unreasonable.

7. On the second point the Appellant did not have close male relatives in Bangladesh. As a single woman returning without any family support it would be against her welfare and that of the children to return. The skeleton argument quoted from a country guidance case on women who are the victims of domestic violence which appears not to be the situation in this case. The education the children had received was not deemed to be a public fund according to the Respondent's guidance. It could not be in the children's best interests to relocate to Bangladesh. The appeals should be allowed.

8. In oral submissions counsel reiterated much of what was in the skeleton argument and said that the children should not be penalised for the decision of their father to stay in this country. It would be wholly unreasonable for these children to relocate to a country from where they had been absent for 9 years. The Respondent argued that the fact that the children had been here for more than 7 years and were thus

qualifying children was a consideration but it was to be balanced against the public interest. The children had been in United Kingdom receiving education but it was reasonable to expect them to relocate to their country of origin. The children both spoke Bengali and there was no good reason why family life could not continue in Bangladesh with support from family members settled here.

Findings

9. The first issue I have to decide is whether any of the Appellants can come within the Immigration Rules. Paragraph 276 ADE sets out the requirements to be met by an applicant for leave to remain on the grounds of their private life. Where an applicant is under the age of 18 years as are the 2nd and 3rd Appellants, the test is whether it would or would not be reasonable to expect that the Appellant to leave the United Kingdom. For those aged 18 years or above (as the Appellant is in this case) but who has lived continuously in the in the United Kingdom for less than 20 years (she has lived here for 9 years) until 28 July 2014 she would have had to show she had no ties including social cultural family with Bangladesh. After that date the paragraph was amended and the test now in force is that there would be very significant obstacles to the applicant's integration into the country to which they would have to go if required to leave the United Kingdom.

10. Given that the Appellant speaks Bengali and has at least one family member on her own admission in Bangladesh, it is difficult to see how the Appellant could have satisfied the earlier test in relation to her private life. I deal in more detail later on with her claim that there would be very significant obstacles to her reintegration into Bangladesh society because of her status as a lone female. In relation to the children the test is whether or not it would be reasonable to expect them to leave the United Kingdom. This same test reappears in section 117B (6) of the 2002 Act if one is assessing the claim under Article 8 but outside the Immigration Rules.

11. In effect this is a decision on proportionality. To that end I must first assess what is the best interests of the children and then weigh that in the scales with all the other relevant factors such as the countervailing argument on the Respondent's side that great weight should be given to the Appellant's immigration history. I accept the evidence as the Judge at first instance accepted that the children are well established at school and are doing well academically. Although their command of Bengali is said to be limited, I see no reason why their knowledge of that language would not improve upon return. The educational system in Bangladesh may or may not be superior to that of the educational system in this country but I do not consider that to be a particularly significant factor since the children would be able to continue their education in Bangladesh no doubt building on benefits they have received from education in this country.

12. The children's wishes as expressed by the Appellant are to remain in this country. That is hardly surprising as they have no doubt made friends at their school and they have relatives living here. It is not however clear to me what the Appellant has said to her children about life in Bangladesh. She did not give evidence before me to be questioned on that point but I see no reason why the children who have evidently adapted to a way of life in this country different to what they knew in Bangladesh could not equally readapt back to life in their country of origin. This is not a case of children who were born in the United Kingdom and have never seen the country of which they are citizens.

13. The proportionality exercise in this case in relation to the children comes down to the weighing of two different factors. On the children's side is the fact that they have been here for more than 7 years and therefore very significant reasons must be given why they should be expected to leave this country. In other words, there must be very significant weight on the Respondent's side of the scales to outweigh what is very significant weight on the Appellant's side. On the Respondent's side is the argument that the private and family life built up by the Appellant and the children in this country has been built up whilst there has been no leave.

14. The Respondent relies on the decision of the Upper Tribunal in the case of **Rajendran [2016] UKUT 138**. This decision established that precariousness was a criterion of relevance to family life as well as private life cases. Although the little weight provisions of section 117B (4) and (5) were confined to private life claims established by person at a time when their immigration status was unlawful or precarious, this did not mean that when answering the public interest question a court or tribunal should disregard precarious family life criteria. This analysis was reinforced by the Court of Appeal decision in **MA Pakistan [2016] EWCA Civ 705**. That case reminds the tribunal that where a child has been here for 7 years that fact must be given significant weight when carrying out the proportionality exercise. Further it was submitted to me that the longer the children stayed in this country beyond the 7-year mark, the greater the weight that should be given to their private and family lives here.

15. However, **MA Pakistan** is important for one further matter which I alluded to in my decision finding an error of law. What is required in assessing reasonableness is a balancing exercise of all relevant factors taking a holistic approach. It is not the case that a child is a trump card and it is not the case that merely because a child has been here for more than 7 years and is thus a qualifying child that that should carry significant weight but no other factor will. What is of significance and must be given appropriate weight is the fact that the children have built up their private and family lives as has the Appellant at a time when they did not have status here. It is difficult to get to the bottom of how

that situation has arisen again in part because the Appellant would not give evidence in front of me. The Appellant claims that she overstayed because of she was acting under the instructions of her husband. Yet on her own case she separated from him in 2010 at a time when the family had only been here for 2 years. Although there were letters of support for the Appellant none of the makers of those letters made themselves available to be questioned by the Tribunal. It was not therefore possible to establish that the Appellant had continued to evade the authorities and live under the radar because she was continuing to act under the instructions of her husband or because she was aware that it was not until the passage of 7 years' residence here that her immigration position and that of the children would be significantly strengthened.

16. The Appellant seeks to address this point in her most recent witness statement where she said she had no knowledge of the immigration system until she met her solicitors in 2015. The difficulty with this argument is that a number of members of the Appellant's family with whom she has been in regular contact throughout had direct experience of the immigration law system in this country and would therefore been in a position to advise the Appellant on her immigration status. As I have indicated this matter could not be investigated notwithstanding that I raised with counsel at the outset of the hearing that it was a matter I was concerned about. I am not satisfied with the answer given by the Appellant in her witness statement. On reflection, I find it difficult to find that it is a coincidence that the Appellant brought herself to the attention of the authorities once the children had been here for 7 years. I consider that both the Appellant and her husband have sought to manipulate the immigration system for their own benefit and that of the children.

17. The Appellant's skeleton argument seeks to brush aside what is on the Respondent's side of the scales by saying it is overstaying by the Appellant. Had the Appellant been here lawfully for 9 years I accept that there would have been very little weight to be placed on the Respondent's side of the scales but that is not the position here. The Appellant evaded the attention of the immigration authorities whilst incurring public expenditure on the children's education. The Appellant's argument in response to that last point is that the Respondent's guidelines do not consider public education to be a reliance on public funds.

18. I do not accept that argument. Firstly, those guidelines do not have the force of law and secondly, I am bound by the Court of Appeal decision in **EV Philippines**. Whilst it is correct to say that the children in that case had not been in the United Kingdom as long as the children in this case had been, the general principle that this country is not under an obligation to educate the world is valid for all cases. At a time when educational budgets are severely stretched it is not reasonable to impose an added burden on local authorities caused by an individual (that is the parent) who has no right to be in this country. If the presence

of children in this country is a trump card, then the public interest considerations are outweighed. However, that is not what the existing jurisprudence on Article 8 suggests. This is not a case of visiting the sins of the parents upon the children. This is a case of balancing the public interest against the best interests of the children (and taking into account all other relevant factors) when making a proportionality decision within or outside the Immigration Rules.

19. As I have indicated if the children had been born in this country (and thus would be approaching a stage where they can apply for British citizenship) or if their status here had been lawful throughout the public interest in their removal would be considerably reduced but that is not the situation here. In my view, it is reasonable to expect these children to return to Bangladesh with their mother.

20. I do not accept the argument that the Appellant would be returning to Bangladesh without any support. She claims to have generous support from her family and others and I see no reason why they should not continue to support her upon return. They do not say in their letters of support that they will stop their support upon her return. The Appellant is a widow and while there is background material to indicate that single women including widows would experience difficulty accessing services, this relates primarily to those without support. This Appellant is not without support from her family. Her position can be contrasted with victims of domestic violence who would face such societal discrimination as to interfere with their rights under Articles 3 or 8. The Appellant separated from her husband but his death recently means that she can explain quite truthfully why she is a single woman, because she is a widow. The Appellant's evidence on what family she still has in Bangladesh was vague but it appears to be accepted that she has at least one close relative there. I do not consider therefore that the Appellant can show there are very significant obstacles to her returning to Bangladesh with the children nor can she show that it is unreasonable to expect the children to leave the United Kingdom with her. The Appellants do not come within the provisions of Section EX1(a) (ii) to Appendix FM for the reasons I have given.

21. Having rejected the appeal under the Immigration Rules I must go on to consider the matter outside the Immigration Rules under Article 8. I adopt the step-by-step approach required by the House of Lords decision in **Razgar [2004] UK HL 27**. The three Appellants have a family life together in this country and they have each a private life. Their family life can be continued elsewhere in Bangladesh as they will be returned as a family unit and I do not accept the arguments put forward as to why they would face difficulties in that regard. It might be argued that there would be a loss of communication with family members and other supporters. I can only repeat that those people did not come along to court to give evidence to be questioned about that and the weight that I can ascribe to their written statements untested in cross examination is

a necessity somewhat limited. I accept that they would like the Appellant and the children to remain in this country and that they would support the Appellant and the children if the three Appellants were allowed to remain but I do not find their evidence supports the contention that the Appellants must remain in this country or that there would be a lack of support from these people once the Appellant had returned.

22. The removal of the Appellants would be in accordance with the legitimate aim of immigration control because there has been a very substantial evasion of immigration control in this case. As I have indicated the Appellant seeks to minimise her overstaying but I consider that it was more premeditated than she is prepared to admit. The question under the Razgar principles is whether the interference in the Appellants' private lives and family life caused by their removal to Bangladesh is proportionate to the legitimate aim pursued. I adopt the reasons that I have given earlier when finding that it was reasonable to expect the children to return to Bangladesh since for all practical purposes the wording of the Immigration Rule is the same as the wording of section 117B (6) in the 2002 Act. Such private and family life as the Appellants have built up in this country has been built up whilst their immigration status here was precarious and as the Upper Tribunal indicated in **Rajendran**, that is of great significance. For the reasons which I have given above and which I repeat here I find that the Respondent's decision to refuse to grant leave to remain to the Appellants is a proportionate interference with the private and family lives built up by the Appellants. I therefore dismiss the appeal under both the Immigration Rules and the Human Rights Convention.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision by dismissing the Appellant's appeals under the Immigration Rules and the Human Rights Convention against the decisions of the Respondent.

The Appellants' appeals are dismissed.

I make no anonymity order in relation to the Appellant as there is no public policy reason for so doing. There will be an anonymity order in relation to the 2nd and 3rd Appellants.

Signed this 7th day of July 2017

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was allowed at first instance and I have dismissed the appeal and therefore there can be no fee award.

Signed this 7th day of July 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU041002015
HU041012015
HU041022015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 11th of April 2017	
Prepared on 21st of April 2017	.....

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

SHOTNA B – 1st Appellant
NF – 2nd Appellant
MAH – 3rd Appellant
(Anonymity order not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Miah, Solicitor
For the Respondent: Mr P Armstrong , Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are all citizens of Bangladesh. The first Appellant (who I shall refer to as the Appellant) was born on 20th of February 1979 and is the mother of the 2nd and 3rd Appellants who were born on 30th of January

2001 and 2nd of February 2005 respectively. They appealed against a decision of the Respondent dated 30th of July 2015 to refuse them leave to remain pursuant to Appendix FM and paragraph 276 ADE of the Immigration Rules. Judge of the First-tier Tribunal Cameron sitting at Taylor House on 21st of July 2016 allowed their appeals and this matter comes before me as an onward appeal by the Respondent against that decision. For the sake of convenience however I shall continue to refer to the parties as they were known at first instance.

The Appellant's Case

2. The Appellant came to the United Kingdom with her husband and children on a visitor's visa on 13th of September 2008 and overstayed thereafter. She separated from her husband in 2010 but did not return to Bangladesh as her husband had made the decision for the family to stay, she had nowhere to go in Bangladesh and the children wished to stay in this country. Her parents-in-law live in Bangladesh and she has a sister who lives there but neither her sister nor her parents-in-law would be able to look after her if she returned there. The Appellant's parents were currently in London living with her brother. The Appellant had a number of other family members in this country. She was supported by her family and friends who would give her food and clothes. Her son the 3rd Appellant received free school meals from the London Borough of Tower Hamlets. The children understood a little Bengali but otherwise spoke English.

The Decision at First Instance

3. The Judge found that both children had been in the United Kingdom in excess of 7 years and it was not reasonable to expect either of them to leave the United Kingdom, see paragraph 276 ADE (iv). The Appellant had used her brother's address as a care of address and for the purposes of obtaining school places for her children. However, the Appellant had told the Judge that she could not live with her brother. The Appellant's evidence as to how she supported herself in the family was described at paragraph 67 of the determination as "somewhat confusing". The Judge found that it would not be reasonable to expect the Appellant to return to her in-laws in Bangladesh or expect them to support the family upon return. The Appellant and her children had established a family life together and had a substantial private life. The children could undertake education in Bangladesh but there would be a disruption to it in the case of the 2nd Appellant less so in the case of the 3rd Appellant. The children's connections to Bangladesh had weakened over the period they have been in this country. At paragraph 89 the Judge wrote that he had taken into account the fact that the Appellant did not have leave to remain and overstayed her visit visa as a result of the Appellant's husband's decision. He found the Respondent's decision was disproportionate to the legitimate aim pursued and allowed the appeals.

The Onward Appeal

4. In her grounds of onward appeal the Respondent argued that any assessment of the reasonableness of expecting children to return to their country of origin should be two sided. The Tribunal had simply listed features in favour of not removing the children to Bangladesh but not taken account on the other side of the scales of the children's nationality, their familiarity with Bangladeshi culture through their family and social connections, their language ability and their good health. There was no reason why the children could not settle back into Bangladesh after a brief period of readjustment.

5. The Judge's assessment should also have included an understanding of how the children came to be in their current situation. The timing of the applications under the Rules were the result of a familiarity with immigration procedures. The children's immigration status was kept deliberately uncertain with the possible intention of maximising the abuse of procedures. The Appellant's appeal was on the back of the children's cases and thus stood or fell with them. The Article 8 assessment carried out by the Judge did not have due regard to the public interest as expressed by matters such as language ability and the absence of any financial independence. **MA Pakistan [2016] EWCA Civ 705** required inclusion of the adverse immigration history as part of the balancing exercise. Paragraph 89 of the determination simply noted this rather than acted on it.

6. The application for permission to appeal was refused at first instance by Judge of the First-tier Tribunal Andrew who said that the grounds were essentially a disagreement with the findings of the Judge which were open to him on the evidence. The Judge had taken note of the heritage of the Appellants and their connections with Bangladesh as well as having regard to the public interest.

7. This led the Respondent to renew her application for permission to appeal. The renewed grounds added one further point by relying on the Court of Appeal decision of **Rhuppiah [2016] EWCA Civ 803.** This held that the requirement that little weight should be given to a private life established at a time when a person's immigration status was precarious might be overridden where the private life in question had a special and compelling character. In order to justify an exceptional case compelling reasons would have to be shown. The grounds argued that the Judge's decision was contrary to section 117B (2) and (3) of the Nationality Immigration and Asylum Act 2002. It was in the public interest for a person to be able to speak English and be financially independent. In this case the absence of such factors should weigh against the Appellants.

8. The renewed application came before Upper Tribunal Judge Grubb on the 21st of February 2017. In granting permission to appeal he found that the Respondent's grounds disclosed an arguable error of law. It was arguable that the Judge failed to take into account sufficiently or at all the public interest when carrying out the balancing exercise and reaching his findings on reasonableness, contrary to **MA Pakistan**. The Judge also failed to take into account the public interest as set out in section 117B (2) and (3) of the 2002 Act given the Appellant's language and financial position. The materiality of an error would be an issue for the Upper Tribunal. There was no Rule 24 response from the Appellant.

The Hearing Before Me

9. For the Respondent, it was argued that the first error in the determination was the Judge's misinterpretation of reasonableness within the Immigration Rules. Following **MA Pakistan** the immigration history of the parents was relevant. The mother's visa had expired on 13 December 2008 and yet no application for regularisation was made until 7 years later in May 2015. This was a blatant attempt to circumvent the rules. The Judge had failed to consider the immigration status of the parties when conducting the balancing exercise. There was nothing exceptional about this case that it should be allowed outside the Immigration Rules. Whilst the children might be being educated in this country, following the Court of Appeal dicta in **EV Philippines**, the United Kingdom could not be expected to educate the world. The family were still being paid for by the British taxpayer. The Appellant would have been aware of what she needed to do to regularise her status but did not do so. There was little evidence about her in-laws and in any event the Appellant had a sister in Bangladesh. The Appellant did not speak English well which would restrict her ability to work.

10. For the Appellant, it was argued that if the Upper Tribunal were to find a material error of law in the First-tier decision the case should be heard de novo at the First-tier but with the Judge's findings of fact preserved. Whilst it was correct that one of the children was receiving free school meals that was because it was the policy of the London Borough of Tower Hamlets not to means test school meals, every child had a free meal.

11. The Tribunal, it was submitted had taken all relevant matters into account. At paragraph 8 the Judge had set out the Appellant's immigration history. There was no requirement for the Judge to go beyond what was already said. The Judge had given the Respondent's case a fair hearing. At paragraph 89 the Judge made it clear that he had considered the fact that the Appellant did not have leave to remain and overstayed, the Judge was not required to go into more detail than that. The Judge had also considered whether or not there was anyone else the Appellant could return to. The Appellant's grandmother had passed away and there were no other family members. The Respondent in her grounds of

onward appeal was disagreeing with the Judge's findings of fact that for example the sister in Bangladesh or her in-laws were unable to support the Appellant.

12. At paragraphs 75 to 77 the Judge dealt with the best interests of the children and the disruption they would face if returned. The Judge was well aware of the children's heritage. The Respondent was arguing that the Appellant should have brought herself to the attention of the authorities but the authority of **MA Pakistan** did not say that the 7-years residence must be lawful continuous residence before very strong reasons were required to remove children who have been here for that time. **EV Philippines** could be distinguished from the present case. In that case the application was made 2 years after the children had arrived whereas here the children had been in the country for more than 7 years. In looking at the case under Article 8 a holistic approach had to be taken. The case of **Ruppiah** could be distinguished. The Judge had correctly balanced the public interest against the claims made by the Appellants and had arrived at a finding open to him. It was not surprising that the First-tier Tribunal had refused to grant permission to the Respondent in this case.

Findings

13. As Upper Tribunal Judge Grubb pointed out the crucial issue in this case was whether it was reasonable to expect the two child Appellants to leave the United Kingdom and return to Bangladesh. In order to carry out a proper assessment of reasonableness the Judge needed to take into account all relevant factors and to be able to explain the reason for the decision such that the losing party could see why they had lost. The Judge needed at least to have set out the more important points briefly or otherwise which weighed in the balance. The difficulty in this case is that it is not at all clear what the Judge has taken into account on the Respondent's side of the scales. This was a family with a poor immigration history. Even if the Judge were minded to reject the submission that the Appellant had manipulated the position (by waiting 7 years before drawing herself to the attention of the authorities) there had been a substantial breach of immigration control by reason of the very long period that the Appellant had lived in this country unlawfully.

14. During that time both children had had access to the educational system and thus were a burden to the public purse. That too was not taken into account by the Judge. The Judge accepted that the Appellant overstayed because of the instructions of her husband but as the Respondent pointed out in the onward grounds of appeal many of the Appellant's family had migrated to this country and were therefore familiar with the immigration system. In those circumstances, and given the apparent coincidence that the Appellant brought herself to the attention of the authorities once the children had been here for seven years, it is difficult to overlook the issue that the Appellant may have been deliberately

avoiding the attention of the authorities to better her position. The apparent disregard of that point by the Judge may have affected his assessment of reasonableness within the Immigration Rules.

15. The case of **MA Pakistan** is authority for the proposition that in assessing reasonableness one does not simply focus on the children themselves but must take into account wider factors such as the parent's immigration history. It was argued before me that the paragraph in the Immigration Rules which stipulated 7 years residence said nothing about whether that residence should be lawful or not. Little weight attaches to this argument since one still has to look at a parent's immigration history and if they have been here unlawfully the unlawful residence may still weigh in the balance against the Appellant. The decision in **MA Pakistan** was recently confirmed by the Court of Appeal in the decision of **AM [2017] EWCA Civ 180**. In that case notwithstanding that the children's best interests were to remain in the UK, the Judge held that they should be refused leave to remain which necessarily meant that the other three applicants' cases had to fail also. The reason in that case was that their parents had shown a blatant disregard for immigration law, choosing to remain illegally on the expiry of their visas. They did not seek to regularize their status for many years.

16. As in the instant case before me the Appellants in **AM** had put their case on the basis that the appropriate test was that of reasonableness under paragraph 276ADE of the Immigration Rules. In **AM** the Court of Appeal rejected the argument that there was any difference in the definition of reasonableness between the Immigration Rules at paragraph 276ADE and outside the Rules under section 117B (6) of the 2002 Act. The Judge was required to carry out a balancing exercise between the competing interests in the case. Whilst the Judge set out the Appellant's case in some detail it is hard to see from reading the determination what factors on the Respondent's side of the argument were taken into account.

17. The Judge mentioned that the Appellants did not have leave to remain and overstayed their visas but it is not possible to see from paragraph 89 what weight if any the Judge gave to that consideration. It is not the case that the Judge viewed this appeal through the prism of the Immigration Rules. What is required in this case is for the proportionality exercise to be carried out again. This will entail giving due weight to both sides of the balance in determining first of all under paragraph 276ADE the reasonableness of expecting the children to leave the United Kingdom. If the Appellants cannot succeed under the Rules it will be necessary to go on to consider the case outside the Immigration Rules taking into account the statutory provisions referred to in the grounds of onward appeal.

18. I have considered the application to have this matter remitted back to the First-tier for this to be done but I do not consider such a course to be necessary. That is because there is not a substantial degree of fact finding to be carried out but rather what is required is an assessment of proportionality on the basis of the present position with perhaps some

evidence which I accept may be necessary. One point which I raised with the Appellant's solicitor was what the Judge meant at paragraph 68 of his determination when he referred to the Appellant living "at various addresses on an ad hoc basis returning to her brother's on her evidence at the weekend". Taken at face value this paragraph would appear to suggest that the Appellant was living a peripatetic existence with her children moving from one address to another and only staying for short periods with her brother. That might bring the family to the attention of social services (although I have seen no evidence of any such involvement). If the Judge did not mean that it is difficult to see what he did mean. When I raised this point neither advocate was able to assist me.

19. Some rather better evidence should therefore be provided as to what are the living conditions of the children since otherwise paragraph 68 might by itself be taken to be a factor in the Respondent's argument that it is reasonable to expect the children to leave the United Kingdom. The Appellant should also be in a position to give better evidence as to how she supports herself and her family given the Judge's description of the Appellant's evidence at paragraph 67 as "somewhat confusing". It is not clear from the determination whether the children's father has any form of contact with them or in anyway supports them. The Appellant could also deal with this aspect in an updating statement. Any such further evidence should be filed and served at least 14 days before the resumed hearing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside and allow the Respondent's appeal against the First-tier's decision. The rehearing of the appeal and the remaking of the decision will take place on the first available date at Field House time estimate 2 hours

I make no anonymity order as there is no public policy reason for so doing.

Signed this 25th day of April 2017

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was allowed at first instance and therefore there can be no fee award.

Signed this 25th day of April 2017

.....
Judge Woodcraft
Deputy Upper Tribunal Judge