Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/13721/2016**

HU/22020/2016

HU/13730/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th February 2019	**On 8th March 2019**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MOLLIK MOHAMMAD MARUFUR RAHMAN (FIRST APPELLANT)
AFRAT JAHAN (SECOND APPELLANT)
A I (THIRD APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms F Shaw of Counsel, instructed by Haque & Hausman Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first and second appellants are husband and wife and the third appellant is their son, born on 8th May 2011. All are nationals of Bangladesh. An application was made in February 2016 by the first and second appellants for leave to remain on the basis of private and family life. The application by the first appellant was refused in a decision of 10th May 2016 on the basis that he was out of time in the lodging of an appeal

and therefore was without leave. The application by the second appellant was refused on 5th September 2016 essentially on the basis that her spouse had no leave to remain and no settled status.

2. An appeal was made against the decisions to the First-tier Tribunal essentially relying upon Article 8 of the ECHR. The appeal came before First-tier Tribunal Judge Farrelly at a hearing on 10th August 2017 and, in a determination promulgated on 31st August 2017, the appeals were dismissed.

3. Challenge was made to that decision and permission to challenge it was granted by Upper Tribunal Judge Grubb on 24th September 2018, particularly on the basis that the Judge had erred in the consideration as to whether the second appellant met the requirements of paragraph 276B and was thereby entitled to indefinite leave to remain based upon ten years' lawful residence.

4. Thus the matter came for appeal before the Upper Tribunal at a hearing scheduled for 8th November 2018.

5. It was argued at that hearing before me that, in relation to the first appellant he should be considered to have met the ten year Rule as reflected in paragraph 276B to D of the Immigration Rules. Insofar that he failed to meet strictly the continuous period of ten years, the break in that lawful leave was extremely small and indeed rose through the dishonesty and/or negligence of his then representatives. Reliance was placed upon the recent decision of the Upper Tribunal in **Mansur (Immigration adviser's failings: Article 8) Bangladesh [2018] UKUT 00274 (IAC)**, which held that if the matter were regarded as a "near miss" under the immigration rules, such remained relevant to the question of proportionality under Article 8 of the ECHR. In relation to the second appellant it was contended that she in fact did meet the ten year lawful residence and therefore that it would be wholly disproportionate to remove her. In terms of the third appellant he is now a qualified child and issue of whether his removal is reasonable falls for consideration.

6. Ms Shaw most helpfully set out her submissions in a skeleton argument filed. Mr Duffy, who represented the respondent on that occasion, sought time to respond to the submissions which were set out in some detail in the skeleton argument. Thus the matter was adjourned for that to be done.

7. The resumed hearing was on 20th February 2019. Mr Jarvis represented the respondent. Although no written response has been made to the submissions of Ms Shaw, Mr Jarvis most helpfully set out what was the position so far as the respondent was concerned. In effect, he invited me to allow the appeal in respect of all appellants on the basis of Article 8 of the ECHR. Given that invitation it is perhaps unnecessary to dwell over much upon the detail.

8. In summary, the first appellant arrived in the United Kingdom on 10th October 2006 and had valid leave until 7th January 2016. Thereafter, he was deemed to have been in the United Kingdom unlawfully.

9. The situation was that an application made in time to be a Tier 4 dependant was refused on 18th December 2015. The decision was the subject of a right of administrative review and solicitors were instructed to make that request. Unfortunately through the negligence of the solicitors that application when made was four days out of time and fell therefore to be rejected as invalid. When the appellant applied for indefinite leave based on ten years' continuous leave on 15th February 2016 he was met with the contention that he had overstayed in excess of the permitted 28 days. Thus his appeal fell for refusal. The negligence of the solicitors and the attempts by the appellant to pursue the matter against them is well documented in the papers and no issue of credibility arises. Thus it is said, and seemingly accepted by Mr Jarvis, that but for the out of time application caused by the negligence of the solicitors, the appellant would have had continuing leave such as to satisfy the ten year Rule. No adverse criticism is made of the first appellant and it is in reality either a near miss or a circumstance in which the Secretary of State would be able to overlook the short time break of leave in the grant of indefinite leave to remain.

10. In terms of the second appellant she arrived in the United Kingdom on 6th October 2005. It had been accepted that by the time her lawful leave expired on 7th January 2016 she had acquired ten years' lawful residence. Mr Jarvis concedes that on the material before him the second appellant would seem to meet Rule 276B. There were no adverse matters noted against her such as to cause that particular Rule to have no applicability to her.

11. Although the child had no separate appeal rights it was accepted that he was a qualified child and that the general best interests lay in his remaining in the United Kingdom.

12. Mr Jarvis concedes most helpfully that the second appellant does meet the requisite Immigration Rules, as does the first appellant. Alternatively, a near miss in respect of the First appellant is considered relevant to proportionality.

13. Without going into great detail he simply invites me to allow the appeal in respect of all three appellants. Ms Shaw has little to say in relation to that matter other than inviting me to highlight that the delay in the application by the first appellant was not his fault. The respondent was invited to take that into account in deciding whether to grant indefinite leave as opposed to a period of leave.

14. Regard was had to Section 117B and to Article 8 public interest considerations applicable in all case. There is no suggestion that the appellants will be a burden upon taxpayers. It was accepted that they have integrated into society and have demonstrated sufficient knowledge of the English language and have passed the requisite language requirements.

15. In all the circumstances the appeal is allowed.

Notice of Decision

In respect of each of the appellants the appeal is allowed on the basis of human rights Article 8 ECHR.

No anonymity direction is made.
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Signed Date 6 March 2019

Upper Tribunal Judge King TD