



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA163442014

**THE IMMIGRATION ACTS**

**Heard at Centre City Tower, Birmingham  
On 27<sup>th</sup> May 2016**

**Decision & Reasons  
Promulgated  
On 8<sup>th</sup> June 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

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

Appellant

**and**

**ALI ABULGASEM ERRABOU  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer  
For the Respondent: No legal representation

**DECISION AND REASONS**

**Introduction and Background**

1. The Secretary of State appealed against the decision of Judge Cheales of the First-tier Tribunal (the FTT) promulgated on 30<sup>th</sup> September 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the FTT and I will refer to him as the Claimant.
3. The Claimant is a male Libyan citizen born 6<sup>th</sup> January 1995 who is now 21 years of age. He applied for leave to remain as the dependant of his father, a points-based system migrant.
4. The application was refused on 30<sup>th</sup> April 2013 with reference to paragraph 322(5) of the Immigration Rules, the Secretary of State finding it undesirable to permit the Claimant to remain in the United Kingdom in the light of his conduct because he had been “convicted of a number of violent robberies.”
5. The Claimant’s appeal was heard by the FTT on 2<sup>nd</sup> September 2014 and dismissed with reference to paragraph 322(5), the FTT finding that the Secretary of State was correct to refuse the Claimant’s application for leave to remain under this paragraph. The FTT stated that the nature and seriousness of the Claimant’s offences had been taken into consideration and noted that although the Claimant stated that he was not involved in robbery, he had pleaded guilty.
6. The FTT found that the Claimant’s family and private life could not be considered with reference to Appendix FM and paragraph 276ADE(1) because he had not made a valid application for leave to remain relying on Article 8. The FTT went on to consider Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules, and on this basis allowed the appeal, taking into account that the Claimant had lived in the United Kingdom since he was 11 years of age, and his family currently remained in the United Kingdom.
7. The Secretary of State was granted permission to appeal to the Upper Tribunal on the basis that it was arguable that the FTT had erred when considering proportionality under Article 8, by failing to consider sections 117A-117D of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

## **Error of Law**

8. At a hearing on 18<sup>th</sup> January 2016 I heard submissions from both parties regarding error of law. It was contended on behalf of the Claimant that the FTT had not materially erred in law. I set out below my conclusions and reasons for finding that the FTT had erred in law, and therefore the decision of the FTT was set aside;
  - 14 The FTT erred in paragraph 20 in finding that an Article 8 claim could not be considered under the Immigration Rules and had neglected to consider GEN.1.9(a)(iii) of Appendix FM which provides that the requirement to make a valid application for leave to remain relying on Article 8, does not apply in an appeal.
  - 15 The FTT did not materially err in proceeding to consider Article 8 outside the Immigration Rules, but did materially err in its

consideration of Article 8. This is because there is no reference whatsoever to sections 117A–D, and in particular section 117B which sets out the public interest considerations which are applicable in all cases, and which must be considered. Sections 117A–D were brought into effect on 28<sup>th</sup> July 2014, and applied to all appeals heard on or after that date.

- 16 Failure to refer to section 117B is not an error, if the decision demonstrates that the considerations set out therein have been considered. The FTT decision does not demonstrate that those considerations have been properly taken into account.
- 17 In particular the FTT has neglected to consider section 117B(5) which states that little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious. In this case the Claimant had always had limited leave to remain, and therefore had always had a precarious immigration status. The FTT should have considered this, and was bound by statute to attach little weight to that private life.
- 18 It is not clear if the FTT allowed the appeal based upon the Claimant’s family or private life or both. If the appeal was allowed with reference to the Claimant’s family life, the FTT erred as there was no adequate consideration of whether the Claimant had established a family life that would engage Article 8. He is an adult, and therefore the FTT should have considered whether it had been demonstrated that the Claimant had more than the normal emotional ties with his family. There is no such consideration.
- 19 Having set aside the decision of the FTT I indicated that the only finding preserved was the conclusion that the Claimant’s appeal could not succeed with reference to paragraph 322(5) of the Immigration Rules. There had been no challenge to that finding.
- 20 Mr Sarwar indicated that the Claimant wished to adduce further evidence and I agreed that it was appropriate to adjourn so that further evidence could be given and considered.

9. Full details of the application for permission to appeal, the grant of permission, and the submissions made by both parties are contained in my error of law decision promulgated on 29<sup>th</sup> January 2016.

### **Re-making the Decision - Upper Tribunal Hearing 27<sup>th</sup> May 2016**

10. There was no attendance by or on behalf of the Claimant. There had been a previous hearing on 7<sup>th</sup> March 2016 when the Claimant and his father attended together with the Claimant’s solicitor. That hearing was adjourned at the request of the Claimant’s solicitor because the Claimant’s case had not been prepared. The Tribunal file indicates that on 23<sup>rd</sup> March 2016 the Claimant’s solicitors notified the Tribunal that they had ceased to act for the Claimant.
11. Mr Mills submitted that it was appropriate to proceed with the hearing in the absence of the Claimant. I considered rule 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008, which provides that if a party fails to attend a hearing, the Upper Tribunal may proceed with the hearing if satisfied that the party has been notified of the hearing or that reasonable

steps have been taken to notify the party of the hearing, and considers that it is in the interests of justice to proceed with the hearing.

12. I was satisfied that proper notice of the hearing had been given to the Claimant on 7<sup>th</sup> April 2016, advising that the resumed hearing would take place at Centre City Tower, Birmingham on Friday 27<sup>th</sup> May 2016 at 10 a.m. That notification was not returned to the Tribunal by Royal Mail. The Claimant had not notified the Tribunal of any change of address and I was therefore satisfied that the Claimant had been notified of the hearing. There was no application for an adjournment, and I took into account the length of time that had elapsed since the Secretary of State's decision was made, which was on 30<sup>th</sup> April 2013, and the length of time that had elapsed since the error of law hearing. I decided that it was appropriate and in the interests of justice to proceed with the hearing.
13. I heard oral submissions from Mr Mills. He advised that the Appellant and his father had made claims for asylum but the Secretary of State had not yet made decisions on those claims.
14. Mr Mills submitted that the Claimant's appeal could not succeed with reference to paragraph 276ADE(1) of the Immigration Rules, by reason of sub-paragraph (i) which provides that the application should 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 of Appendix FM. Mr Mills submitted that the Claimant could not succeed because of S-LTR.1.4 and 1.6 in that his presence in the UK is not conducive to the public good because he has been convicted of an offence for which he was sentenced to imprisonment for less than four years but at least twelve months, and because of his conduct, character, and associations which made it undesirable to allow him to remain in the United Kingdom.
15. In relation to Article 8 outside the Immigration Rules Mr Mills submitted that the Appellant had not established family life that would engage Article 8.
16. In relation to his private life it was accepted that the Appellant had been in the United Kingdom since 2006, but I was asked to take into account that he had engaged in criminality and anti-social conduct. The Appellant had always had a precarious immigration status in that he had only ever had limited leave to remain, and therefore little weight should be attached to his private life. Mr Mills submitted that there was a significant public interest in removing the Appellant because of his criminal behaviour.
17. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

18. I have taken into account all the documentary evidence that was placed before the FTT. This includes the Secretary of State's bundle, and the

Claimant's bundle comprising 46 pages, together with the Notice of Appeal submitted by the Claimant, and the Claimant's PNC record.

19. That record shows the Claimant received a reprimand for taking a motor vehicle without consent on 13<sup>th</sup> July 2011, and that on 25<sup>th</sup> May 2012 at Warwick Crown Court he received a detention and training order of eighteen months, for three offences of robbery, two offences of attempted robbery, and two offences of affray.
20. I have taken into account the witness statements made by the Appellant and his father, both of which are dated 22<sup>nd</sup> August 2014. I also note a letter of support from the National Probation Service dated 29<sup>th</sup> July 2014, and a letter of support from Coventry Youth Offending Services dated 30<sup>th</sup> July 2014, and Stoke Heath Community Centre dated 25<sup>th</sup> July 2014. I also note that Coventry University on 3<sup>rd</sup> July 2014 made a conditional offer to the Claimant to undertake a computing engineering and science course.
21. I find that the Claimant has resided in the United Kingdom since September 2006 as the dependant of his father who had leave as a Tier 4 Student.
22. I remind myself that when considering the Immigration Rules in relation to Article 8, the burden of proof is on the Claimant, and the standard of proof is a balance of probability.
23. The finding made by the FTT that the Claimant's appeal cannot succeed with reference to paragraph 322(5) is preserved. Paragraph 322(5) is set out below;

'the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security.'
24. The Claimant places no reliance upon Appendix FM.
25. I find that the appeal cannot succeed by reliance upon paragraph 276ADE(1) because of sub-paragraph (i) which provides that the application;

'(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;'
26. I set out below S-LTR.1.4 and 1.6;

'1.4 The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for less than four years but at least twelve months.

1.6 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.’

27. I consider that the appeal cannot succeed because of the above suitability requirements. The judge who sentenced the Claimant and others stated;

“But I have to look at the gravity of the matters that you have pleaded guilty to and in particular, the robberies are grave robberies because they involve people who are in the city centre in the evening. You are part of a group, you are hooded, you are menacing. You attack like cowardly jackals with overwhelming force and do use force, in some instances the victims are badly hurt. And I simply cannot ignore the gravity or the need that people in Coventry would expect me to take into account to ensure that their town centre is as safe as possible.”

28. Therefore the Claimant’s appeal cannot succeed by reliance upon paragraph 276ADE because he cannot satisfy 276ADE(1)(i).

29. I find that it is appropriate to consider Article 8 outside the Immigration Rules, having taken into account the guidance given by the Court of Appeal in SS (Congo) [2015] EWCA Civ 387 and in particular paragraph 33 in which it is stated that the general position is that compelling circumstances would need to be identified to support a claim for a grant of leave to remain outside the Immigration Rules.

30. Article 8 provides;

- ‘1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

31. In considering Article 8 outside the Immigration Rules I have adopted the five-stage approach advocated in Razgar [2004] UKHL 27 which involves answering the following questions;

- (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant’s right to respect for his private or (as the case may be) family life?
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- (3) If so, is such interference in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being

of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

32. I do not find that the Appellant, as an adult, has proved that he has established a family life in the United Kingdom that would engage Article 8. There is no evidence that he is married or has children. The Court of Appeal in Kugathas [2003] EWCA Civ 31 decided that family life is not established between an adult child and his parents or other siblings unless something more exists than normal emotional ties.
33. The Upper Tribunal in Ghising [2012] UKUT 00160 (IAC) recognised that family life may continue between a parent and child even after the child has attained his majority and there should be no blanket rule in cases such as this, but each case should be analysed on its own facts, as each case is fact sensitive.
34. The Claimant has provided no up-to-date evidence as to his family circumstances, and in the absence of such evidence, I do not find that he has proved that he has established a family life that would engage Article 8.
35. However I accept that the Appellant has lived in the United Kingdom since September 2006 and has established a private life and therefore Article 8 is engaged on that basis.
36. I find that his proposed removal would be an interference with his private life, and the interference would have consequences of such gravity as potentially to engage the operation of Article 8.
37. Dealing with the third Razgar question, I find that the proposed interference would be in accordance with the law, in that the Appellant cannot satisfy the Immigration Rules in order to be granted leave to remain.
38. I find that it is necessary for a state to maintain effective immigration control, which is necessary in the interests of the economic well-being of the country.
39. I must decide whether the proposed interference with the Claimant's private life is proportionate to the legitimate public end sought to be achieved. In considering this, I take into account section 117B of the 2002 Act. Sub-section (1) provides that the maintenance of effective immigration controls is in the public interest.
40. Sub-section (2) provides that it is in the public interest that a person seeking to remain can speak English. I accept that the Claimant can speak English as he gave his evidence to the FTT in English. However the Upper

Tribunal decided in AM (Malawi) [2015] UKUT 0260 (IAC) that an applicant can obtain no positive right to a grant of leave to remain from either section 117B(2) or (3) whatever the degree of his fluency in English or the strength of his financial resources.

41. In relation to sub-paragraph (3) I do not find that up-to-date evidence has been provided to prove that the Appellant is financially independent.
42. Sub-paragraph (5) provides that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. It was confirmed in AM (Malawi) that a person has a precarious immigration status if their continued presence in the United Kingdom is dependent upon them obtaining a further grant of leave. Therefore a person with limited leave to remain has a precarious immigration status.
43. The Claimant has only ever had limited leave to remain as the dependant of his father. I therefore have to attach little weight to the private life that he has established since his arrival in this country in September 2006.
44. In any event, I must take into account the criminal offences committed by the Claimant, and because of this I find that there is particularly strong weight to be attached to the public interest in maintaining effective immigration control.
45. I also attach weight to the fact that the Appellant cannot satisfy the Immigration Rules in order to be granted leave to remain.
46. The Appellant did not attend the hearing to give oral evidence, and has not submitted up-to-date evidence, despite having been given every opportunity to do so. I have not been provided with any up-to-date background evidence in relation to the current situation in Libya. That may well be a matter to be considered in relation to the Claimant's separate asylum claim.
47. In relation to the issues before me, I conclude that the weight to be attached to the public interest, and the need to maintain effective immigration control outweighs the weight to be attached to the wishes of the Claimant to remain in the United Kingdom. I find that the Secretary of State's decision does not breach Article 8 of the 1950 Convention.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The Claimant's appeal is dismissed under the Immigration Rules.

The Claimant's appeal is dismissed on human rights grounds.



**Anonymity**

There has been no request for anonymity and I see no need to make an anonymity order.

Signed

Date 2<sup>nd</sup> June 2016

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT  
FEE AWARD**

The Claimant's appeal is dismissed. There is no fee award.

Signed

Date 2<sup>nd</sup> June 2016

Deputy Upper Tribunal Judge M A Hall