



IAC-AH-SC-V1

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

Appeal Number: IA/36171/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham

**Decision &
Promulgated**

Reasons

On 22nd April 2016

On 9 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**ANAS MANSOUR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Ali of Counsel instructed by ASR Legal Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against a decision of a panel of the First-tier Tribunal (the FTT) promulgated on 15th December 2014.

2. The Appellant is an Algerian citizen born 1st January 1973 who entered the United Kingdom as a visitor on 25th April 2014. He had a visit visa valid between 22nd August 2012 and 22nd August 2014.
3. On 22nd May 2014 the Appellant applied for leave to remain in the United Kingdom, to enable him to enjoy a family life with his four daughters who are now aged 18, 14, 13, and 4 years of age respectively.
4. The Appellant lived in Algeria with his wife who is a Syrian citizen. His daughters are Algerian citizens. The Appellant's marriage broke down, his wife left him and returned with one of her daughters to Syria. However because of conditions there, the Appellant's wife returned to Algeria, collected her other three daughters, and travelled to the United Kingdom without the Appellant's knowledge.
5. The Appellant's wife and his four daughters arrived in the United Kingdom in October 2012. They have been granted refugee status which gives them limited leave to remain in the United Kingdom from 5th March 2013 until 9th February 2018.
6. On 4th September 2014 the Respondent refused to vary the Appellant's leave to remain, and decided to remove him from the United Kingdom. The Appellant appealed to the FTT.
7. The appeal was heard on 3rd December 2014. It was acknowledged that the appeal could not succeed under the Immigration Rules, and therefore the FTT considered Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules. The FTT accepted that the Appellant had a genuine and subsisting relationship with his daughters and enjoyed family life with them. The FTT noted that the Coventry Family Proceedings Court had granted the Appellant contact with his children from 3.15pm on Friday until 3pm on Sunday each week. That order was dated 24th February 2014. The appeal was however dismissed as the FTT found that it would be reasonable to expect the children to return to Algeria with the Appellant, or alternatively the Appellant could return to Algeria and make an application for entry clearance under the Immigration Rules.
8. The Appellant applied for permission to appeal to the Upper Tribunal, contending that the FTT had erred materially by finding that the Appellant's children had been granted indefinite leave to remain as refugees. The FTT described the children as being settled in the United Kingdom, but it was contended that this was incorrect, as evidence had been submitted to the FTT to prove that the children had been granted refugee status, which gave them limited leave to remain for a period of five years.
9. It was contended that the FTT had made a perverse finding at paragraph 10 of its decision, in finding that if the Appellant left the United Kingdom and applied for entry clearance from abroad, he would have a reasonable

but not inevitable prospect of meeting the Immigration Rules' requirements, subject to evidence of financial independence and English language. It was contended that this was wrong, because E-ECPT.2.2(c) required that the children must be British citizens or settled in the United Kingdom. The Appellant therefore could not succeed with an entry clearance application from abroad under the Immigration Rules.

10. It was contended that the FTT had reached an irrational conclusion in finding that it would be reasonable for the children to leave the United Kingdom, as the travel documents issued to them as refugees, would not allow them to travel to the country of their nationality, and the children's mother would not give consent for them to leave the United Kingdom, and the family court order stated that her consent or the consent of the Family Court would be required to enable them to leave.
11. Permission to appeal was granted by Judge Lambert of the FTT who found that the FTT had arguably erred in concluding that the Appellant's children's children were settled in the United Kingdom and that the FTT conclusion that the children could reasonably relocate with the Appellant to Algeria was questionable, and there was an absence of consideration whether either the mother or the Family Court would be likely to agree to such a proposal.

Error of Law

12. At a hearing on 18th January 2016 I heard submissions from both parties regarding error of law. It was accepted on behalf of the Respondent that the FTT had clearly erred by mistakenly concluding that the children had settled status. The FTT was also wrong in law to find that the Appellant would have a reasonable prospect of succeeding if he made an entry clearance application under the Immigration Rules, as he could not succeed because his children are not British citizens or settled in this country, as required by E-ECPT.2.2. It was argued that the errors were not material because the finding that it was reasonable to expect the children to return to Algeria was sustainable. The children need not rely upon the travel documents they had been issued as refugees in this country, because they could travel on their own Algerian passports.
13. I set out below my conclusions and reasons for finding an error of law and setting aside the decision of the FTT;

"17. The FTT erred in law (as conceded by the Respondent) in finding that the Appellant's four daughters have indefinite leave to remain and are settled in the United Kingdom. This finding is recorded by the FTT at paragraphs 2 and 28. Paragraph 6 of the Immigration Rules defines the phrase 'settled in the United Kingdom' as meaning that the person concerned is free from any restriction on the period for which he may remain. Because the Appellant's daughters are refugees, they are not settled, but have limited leave to remain. The FTT did therefore consider the appeal, based in part at least, upon a mistake of fact.

18. The issue is whether this is material. I find that this error influenced the FTT when considering whether it was reasonable for the Appellant to leave the UK and make an entry clearance application from abroad. The FTT found in paragraph 10, having set out the requirements of the Immigration Rules;
‘On the evidence before us, the Appellant would have reasonable but not inevitable prospects of meeting all those requirements, subject to evidence of financial independence and English language.’
 19. The FTT did not appreciate that the Appellant could not satisfy E-ECPT.2.2(c) which requires that his children must be British citizens or settled in the United Kingdom. The error is repeated in paragraph 34, with the FTT finding the Appellant would only have to demonstrate financial and accommodation independence and English skills, in order to satisfy the Immigration Rules.
 20. I conclude that the findings made by the FTT as to it being reasonable to expect the Appellant to make an entry clearance application from abroad are based upon a mistake, and therefore are not safe and cannot stand.
 21. The FTT also found that it would be reasonable for the Appellant’s children to leave the United Kingdom. As they are Algerian citizens they would not need to use the travel documents issued to them as refugees, as they could use their Algerian passports. There was no evidence before the FTT to indicate that the children had been granted asylum because of a fear of persecution in Algeria. The FTT in paragraph 27 gave five reasons why it would be reasonable to expect the children to return to Algeria. However I find that there has been inadequate consideration, and inadequate reasons given, as to why it would be reasonable to expect the children to return to Algeria without their mother, who the evidence indicates has been their primary carer, and with whom they live, for five out of seven days in a week.
 22. For the above reasons I conclude that the decision of the FTT must be set aside.”
14. As there had been no challenge to the conclusion reached by the FTT that the Appellant has a genuine and subsisting relationship with his daughters and enjoys family life with them under Article 8, and that his removal would interfere with that family life, and that it would be in the childrens’ best interests to continue to have such a relationship with their father, those findings were preserved. 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 dated 22nd January 2016.

Re-Making the Decision - Upper Tribunal Hearing 22nd April 2016

Preliminary Issues

15. I ascertained that I had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed.

16. I had the Respondent's bundle that had been before the FTT with Annexes A - D. I had the Appellant's bundle that had been before the FTT, comprising 142 pages to which I will refer as the first Appellant's bundle. I had a second Appellant's bundle comprising 195 pages, and a third Appellant's bundle comprising 30 pages. I received from Ali a skeleton argument.
17. Mr Ali advised that no further oral evidence would be called. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

The Respondent's Oral Submissions

18. Mr Mills acknowledged that the Appellant's estranged wife is a Syrian citizen, and there was no indication that she had any intention to return to live in Algeria. Therefore if the Appellant's children returned to Algeria, it would be without their mother. Mr Mills stated that he was not arguing that it would be reasonable for the children to return to Algeria.
19. Mr Mills acknowledged that if the Appellant returned to Algeria to make an entry clearance application under the Immigration Rules, he could not succeed because his children are not settled in the United Kingdom and are not British citizens.
20. Therefore if the Appellant was removed from the United Kingdom he would be separated from his children and the issue that must be decided, is whether that would be proportionate, and whether the public interest in maintaining effective immigration control was sufficient to outweigh the best interests of the children in having contact with their father.
21. Mr Mills submitted that it may be proportionate for the Appellant to be removed, as he cannot satisfy the requirements of the Immigration Rules. Mr Mills acknowledged that it was appropriate to consider Article 8 outside the Immigration Rules, and it was a matter for the Tribunal as to whether the need to maintain effective immigration control, should be given more weight than the best interests of the children in having physical contact with their father.

The Appellant's Oral Submissions

22. Mr Ali relied upon his skeleton argument. He maintained that it was in the best interests of the Appellant's children to remain in the United Kingdom and it would be disproportionate to expect the Appellant to return to Algeria without them. It was common ground that the Appellant could not succeed in making an entry clearance application under the Immigration Rules.

23. The mother of the children would not give permission for them to leave the United Kingdom, and the Family Court contact order prohibited the removal by the Appellant of the children from the United Kingdom.
24. Mr Ali submitted that it would clearly be unreasonable for the children to be separated from their mother to live with the Appellant in Algeria. The travel documents issued to the children as refugees, did not permit travel to Algeria. The three eldest children, had submitted statements confirming the close relationship that they had with the Appellant, and confirming their wishes for him to remain in the United Kingdom.
25. At the conclusion of oral submissions I reserved my decision.

My Conclusion and Reasons

26. I have taken into account all of the evidence placed before the Tribunal. It is accepted by the parties that the Appellant's application for leave to remain could not succeed under Appendix FM of the Immigration Rules because he could not satisfy E-LTRPT.3.1 which provides that an applicant must not be in the United Kingdom as a visitor.
27. As this appeal is based upon the Appellant's family life with his children, he does not rely upon private life established in the United Kingdom, and therefore does not rely upon paragraph 276ADE(1).
28. The issue before me, is therefore whether the Appellant can succeed by relying upon Article 8 of the 1950 Convention, outside the Immigration Rules. It was conceded before the FTT that it was appropriate to consider Article 8 outside the rules, and Mr Mills confirmed before me that it was accepted that Article 8 outside the Immigration Rules should be considered.
29. I find as a fact that the Appellant's wife, who is a Syrian citizen, left him in Algeria, and took his four children to the United Kingdom without his knowledge. I find that when the Appellant discovered their whereabouts, he applied for a visit visa which was granted, and he subsequently visited his children in the United Kingdom. The Appellant and his wife remain separated and estranged. The basis of the asylum claim was a fear of persecution in Syria.
30. The Appellant's children have been granted refugee status, and copies of their residence permits have been produced showing that they have limited leave to remain until 9th February 2018.
31. I set out below in part, paragraph 23 of the FTT decision, which summarises the preserved findings;

“23. We have no hesitation in finding that the Appellant has a genuine and subsisting relationship with his daughters and enjoys family life with them under Article 8, that his removal would interfere with his and their family life following Beoku-Betts, and indeed that it would be in the children’s best interests to continue to have such a relationship with their father.”

32. I have seen a copy of the Coventry Family Proceedings Court order dated 24th February 2014, which orders that the Appellant should have contact with his children three days per week. The Appellant is to pick the children up from school on Friday at 3.15pm, and return them to their mother on Sunday at 3pm. The order confirms that the children may not be removed from the United Kingdom without the written consent of every person with parental responsibility for the children, or the leave of the court.

33. It is also the case that the Appellant has supplied an IELTS English language test certificate as evidence of his English language ability, and it was confirmed before the FTT (paragraph 6(iii)) that it was not suggested that the Appellant is not financially independent. The Appellant is a qualified dentist, and has financially supported himself from his own resources while in the United Kingdom, and there has been no reliance by him on public funds.

34. When considering Article 8 outside the Immigration Rules it is appropriate to adopt 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?”

35. It is accepted that the Appellant has established a family life with his four children and Article 8 is engaged. As to whether the proposed inference with that family life is in accordance with the law, I find that it is, insofar as the Appellant cannot satisfy the requirements of the Immigration Rules.

36. I find that it is necessary for a state to have effective immigration control, and therefore the issue to be decided is whether, in this case, the Respondent’s decision to remove the Appellant from the United Kingdom is proportionate to the legitimate public end sought to be achieved.

37. Although it has been found that the best interests of the children are to continue to have a relationship with the Appellant in the United Kingdom, I remind myself that while the best interests of children are a primary consideration, they are not the paramount consideration, and their best interests can be outweighed by countervailing considerations, such as the need to maintain effective immigration control.
38. I have taken into account section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). Sub-section (1) confirms that the maintenance of effective immigration controls is in the public interest. Sub-sections (2) and (3) confirm that it is in the public interest that an individual seeking to remain in the United Kingdom can speak English, and is financially independent. I find that the Appellant can speak English and is financially independent, although these are not positive factors to be taken into account when assessing his application, as they are neutral factors. As explained in the second paragraph of the headnote to AM Malawi [2015] UKUT 0260 (IAC);

“An Appellant can obtain no positive right to a grant of leave to remain from either s117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources.”

39. The Appellant is not and has not been in the United Kingdom unlawfully so sub-section (4) does not apply, and sub-section (5) is not relevant, because although the Appellant’s immigration status is precarious, his application and subsequent appeal is not based upon his private life.
40. Sub-section (6) is not relevant, because although the Appellant has a genuine and subsisting parental relationship with his children, they are not qualifying children, because they are not British citizens, and they have not lived in the United Kingdom for a continuous period of seven years or more.
41. The Supreme Court in ZH (Tanzania) [2011] UKSC 4 at paragraph 29 confirmed that;

“When considering the best interests of a child, consideration must be given as to whether it is reasonable to expect the child to live in another country.”

In this appeal Mr Mills did not seek to argue that it would be reasonable to expect the Appellant’s four children to return to Algeria. In my view that was a fair and appropriate stance to take. The mother of the children is Syrian, and is estranged from the Appellant. She has refugee status in the United Kingdom. It was not suggested that she would be willing to return to Algeria. Therefore if the children were returned to Algeria, this would involve separating them from their mother, who has been their primary carer, and with whom they live in the United Kingdom for five out of seven days. The order made by the family court clearly envisages that the best interests of the children are to remain living with their mother, and to have two days per week living with the Appellant. I conclude, that it would not be reasonable to expect the children to return to Algeria with the

Appellant, notwithstanding that they have only been resident in the United Kingdom since October 2012. It is now common ground that if the Appellant returned to Algeria and made an application for entry clearance under the Immigration Rules, he could not succeed. This is because he could not satisfy E-ECPT.2.2(c) because his children are not British citizens and not settled in the United Kingdom. Therefore if the Appellant returned to Algeria, and his children remained in the United Kingdom, this would involve a separation of the family.

42. I have to decide whether this would be proportionate. I place significant weight upon the need to maintain effective immigration control, and that the Appellant cannot satisfy the Immigration Rules in order to be granted either leave to remain, or entry clearance from abroad. I find that the only reason that he could not satisfy the requirements for entry clearance, is that his children are not British citizens or settled in the United Kingdom.
43. I also bear in mind, as explained in paragraph 33 of SS (Congo) [2015] EWCA Civ 387, that in order to succeed with an Article 8 claim outside the Immigration Rules, compelling circumstances would need to be identified. This formulation is not as strict as the test of exceptionality or a requirement of very compelling reasons.
44. I find that there are compelling circumstances in this appeal. The situation that the Appellant finds himself in is not covered by the Immigration Rules. It is clear from the finding of the FTT, the evidence of the Appellant's eldest three children who have made witness statements, and the conclusions of the family court, that the best interests of the children are served by the current arrangements. Those are that they reside with their mother as their primary carer, but that they reside with the Appellant at weekends.
45. The Appellant has not entered the United Kingdom illegally, or remained here unlawfully. He has complied with the Immigration Rules, in order to maintain contact with his children. The Appellant has not had recourse to, and would not need to have recourse in the future, to public funds.
46. I appreciate that Article 8 is not a general dispensing power, neither does it give an individual the right to choose in which country he or she wishes to live. In this case the Appellant only came to the United Kingdom because his wife took his children away from Algeria without his knowledge.
47. I conclude that the weight to be given to the best interests of the children to remain in physical contact with the Appellant, outweighs, on the somewhat unusual facts of this case, the weight to be attached to the need to maintain effective immigration control.
48. I therefore conclude that the Respondent's decision is not proportionate, and to refuse the Appellant leave to remain would breach Article 8 of the 1950 Convention, in relation to the Appellant's family life with his children.

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 appeal is allowed on human rights grounds, pursuant to Article 8 of the 1950 Convention, outside the Immigration Rules.

Anonymity

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

Signed

Date

Deputy Upper Tribunal Judge M A Hall

26th April 2016

**TO THE RESPONDENT
FEE AWARD**

Although the appeal is allowed I do not make a fee award. The Tribunal considered evidence and representations that were not before the initial decision maker.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

26th April 2016