



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

**Appeal Numbers: HU/17769/2018  
HU/17771/2018  
HU/17774/2018  
HU/17779/2018  
HU/17783/2018**

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 31 May 2019**

**Decision & Reasons Promulgated  
On 26 June 2019**

**Before**

**UPPER TRIBUNAL JUDGE HEMINGWAY**

**Between**

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

**Appellant**

**and**

**T  
A  
W  
S  
F**

**(ANONYMITY DIRECTED)**

**Respondents**

**Representation:**

For the Appellant: Mr M Diwnycz (Senior Home Office Presenting Officer)  
For the Respondent: T (in person)

**DECISION AND REASONS**

1. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it sent to the parties on 11 February 2019. The tribunal, in making its decision, allowed the appeals of all five claimants against decisions of the Secretary of State, all made on 31 May 2018, refusing to grant each individual claimant leave to remain in the United Kingdom (UK) on human rights grounds.

2. I have decided to grant anonymity to each claimant. The tribunal did not do so and I was not invited to do so at the hearing before me. But three of the claimants are minor children and I think there is a case for saying that their privacy, at least, ought to be protected. Further, that cannot be effectively achieved without my also affording similar protection to the adult claimants.

3. By way of background, all of the claimants are nationals of Algeria. B and A are married to each other. W, S and F are the children of T and A. As to the adult claimants, T was born 14 January 1971, and A on 27 June 1982. As to the child claimants, W was born on 15 August 2010, S was born 16 May 2012, and F was born 25 March 2018. B and A entered the UK on 7 March 2010. Each had leave to enter as a visitor, such leave being valid from 12 February 2010 until 12 August 2010. Neither, however, departed the UK upon expiry of leave and W, S, and Y were all born in the UK. On 14 April 2015, T and A were served with immigration enforcement notifications and, on 13 May 2015, T claimed asylum with the other claimants as his dependants. However, that claim was refused with only an out-of-country right of appeal. Since all the claimants remained in the UK no such appeal was pursued. On 2 January 2018 applications were made by or on behalf of all of the claimants for leave to remain on human rights grounds on the basis of their family and private life in the UK. The Secretary of State, though, refused each application, concluding that none of the requirements of what are sometimes referred to as the Article 8-related Immigration Rules were met and that none of the claimants were able to succeed under Article 8 of the European Convention on Human Rights (ECHR) outside the rules.

4. The claimants were unrepresented before the tribunal. The Secretary of State was represented by a Presenting Officer. It appears that both T and A gave oral evidence. It is clear and unsurprising that the primary focus of the appeal was upon the situation of W who had, by the time of the hearing before the tribunal, been living in the UK for a period in excess of seven years. Since he had been born in the UK that logically followed once he had passed his 7<sup>th</sup> birthday. That fact brought into play two legal provisions one of which is contained in the Immigration Rules and one of which is contained in statute law. I shall set them out. Paragraph 276 ADE(1)(iv) of the Immigration Rules relevantly provides:

**'Requirements to be met by an applicant for leave to remain on the grounds of private life**

276 ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant: ...

(iv) is under the age of eighteen years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; ...'

5. Section 117B (6) of the Nationality, Immigration and Asylum Act 2002 relevantly provides:

**'117B Article A: public interest considerations applicable in all cases**

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) ...
- (3) ...
- (4) ...
- (5) ...
- (6) In the case of a person who is not liable to deportation, the public interest does not require the persons removal where –
  - (a) the person has a genuine and subsistent parental relationship with a qualifying child, and
  - (b) it would not be reasonable to expect the child to leave the UK.'

6. Section 117D of the same Act defines a “qualifying child” as a person under the age of eighteen who is a British Citizen or has lived in the UK for a continuous period of seven years or more. The key composite question for the tribunal, therefore, was whether W fell within the terms of paragraph 276 ADE (iv) and, if so, whether that meant, because he would then be a qualifying child (since a person who satisfies 276 ADE (iv) is a “qualifying child”) the other claimants would be able succeed under Article 8 outside the rules because the public interest would not then require the removal of T and A (the parents) and because the family could not then lawfully be split.

7. The tribunal noted, in setting out the background circumstances, that T had used false documents in order to secure employment in the UK and support his family. The tribunal noted that both T and A had “an extensive family network” in Algeria. The tribunal accepted that such family members would be able to at least provide emotional and practical support if the family were to have to return to Algeria. The tribunal recognised that both T and A had spent the majority of their lives in Algeria and so were familiar with life in that country. The tribunal then turned its attention to the particular situation of W and the potential knock on effect if W could not be removed from the UK. It paid particular attention to W’s response to the news that the claimant’s applications for leave to remain had all been refused by the Secretary of State. The tribunal’s evaluation as to that was as follows:

“41. The Appellant has also provided a letter from the GP and his eldest child’s teacher date 22 June 2018 and 11 June 2018 respectively. The GP recommended that the family be allowed to stay in the UK for the well being of all the children. The GP stated:

“I saw [the child with the Appellant] on 13 June 2018 regarding concerns regarding his mood and behaviour over the past 2 weeks coinciding with the family discovering that the application to remain in the UK has been rejected and is pending an appeal. [The child] being the oldest of the children is at the age where he is able to understand the significance of the outcome. [The Appellant] being originally from Algeria and living in the UK since 2010 with [the child] being born in the UK and living his entire life

here. Understandably the prospect of being forced to leave his home has caused him significant distress. The symptoms that his dad describes with [the child] becoming withdrawn not sleeping well, losing his appetite and having regular nightmares. These changes have also been confirmed and supported by his school who have contacted the family regarding a significant change in his behaviour at school where he was once engaging and enthusiastic in class he has become quiet and withdrawn. Previously [he had been a] fit healthy and happy young child performing well at school and with plenty of friends. [The child] is clearly having a stress reaction to the consequences of the possibility of being removed from his home and I have referred him to the Child Psychiatry Team (CPT) in order to help with extra support whilst the appeal process goes on [sic]

However, ultimately his mental health and well being will only deteriorate further unless the child unless the child and his family are allowed to stay in the UK.”

42. As was noted by the Presenting Officer, the GP is primarily reliant on information provided by the Appellant. However, significantly, the Appellant also provided the letter from child’s teacher. The teacher stated that she was advising of the impact of the decision on the ‘life of this lovely little boy’. She said:

“[The child] is a well brought up, fun-loving, intelligent boy who works hard in class. He is a friendly child who has a wide range of friends.

However, since he was told the news of his impending deportation, [the child] has become anxious and withdrawn. He no longer plays as much with his friends and is much quieter. Sometimes he exhibits irritability with his friends. He still strives to work, but is finding it very difficult to concentrate. His progress is subsequently being affected.

I believe the decision is detrimental to the health happiness and well being of the child who is exhibiting signs of childhood anxiety. I strongly urge to reconsider.”

43. I note that in support of the application, the Appellant had provided a letter from the Headteacher of the school, dated 21 July 2017. The head had stated that the child is *‘happy and very well settled in school... he is very confident and is making good progress and has developed strong friendships with other children in the class’*. This is consistent with both the teacher and GPs’ assessment of the child, prior to the Respondent’s decision.

44. The Appellant stated that prior to writing the letter, the child’s teacher had spoken to him about a change in the child and asked him whether anything had happened in the family. He then advised her that they had received the negative decision from the Home Office.

45. The Appellant also told me that the child has not been seen by the CPT and he now seems back to normal. The Second Appellant also told me that she had become very upset by the change in the child, but he does seem settled again now. She thought it had helped him to attend a local community after school club.

46. The Presenting Officer appreciated that the decision may have caused the child some distress, but she submitted that it does not seem to have had an extreme long term negative impact. She noted he is not on any medication and is not receiving any ongoing treatment. The Presenting Officer submitted that, in

any event, the child is only eight and his life will still be centred around the family unit. She concluded that it was reasonable to expect the child to go to Algeria with his parents.

47. In my view the issues in this appeal are finely balanced. Overall, I have no doubt the child has established strong ties to the UK, including close friendships with classmates. However, I agree with the Presenting Officer ultimately his life will still be centred round the family unit. He has not commenced studying towards a recognised qualification, such as GCSEs and he is not at a critical stage of his education or his own personal development.

48. Further, the child may not have any (or only very limited) cultural and social ties to Algeria. However, his parents will have retained knowledge of the life, language, and culture in Algeria. They will be to assist him to adapt and he is still young enough to be able to adapt.

49. On the other hand, I have evidence that the Respondent's decision had a significant impact on the child's well being. The GP letter is of limited assistance, as it is based primarily on information provided by the Appellant. However, the letter from the child's teacher is compelling. She would have been his teacher since September 2017 and would have seen him on a daily basis. She was therefore very well placed to comment on any changes in him.

50. I appreciate that the child has settled again. In my view, it is to the Appellant's credit that he did not attempt to bolster his case and suggest that the decision was still having an adverse impact on the child.

51. I am satisfied the Respondent's decision to refuse the family leave to remain in the UK had an adverse impact on the child. The impact may have been only short term, but it was clearly sufficiently serious to cause his teacher concern. I cannot be sure, why he has improved, but, in my experience, children are quite resilient. Especially, when they have the love and support from caring parents, such as the First and Second Appellant in this case. Equally, as time went on, the immediate threat of removal is likely to have dissipated and the child is likely to have thought he can stay in the UK.

52. In conclusion although there are not insurmountable obstacles to the First and Second Appellants' integration into Algeria and, as such, generally the young children would be expected to go with them, I am satisfied that the Third Appellant cannot reasonably be expected to leave the UK. I have attached significant weight to the teacher's letter. I appreciate that the evidence suggests that there has not been any long term impact on the child's well being following the Respondent's decision. However, I am satisfied that a further negative decision is likely to trigger a more profound and damaging emotional response, which might have a long term impact on the child's emotional development and his education. I cannot be sure how likely this would be, but I am satisfied the risk is more than a mere possibility. As such, the Respondent's decision that the Appellant should leave the UK is not in the Third Appellant's best interests and I find that the Third Appellant cannot reasonably be expected to leave the UK.

53. On balance, I am satisfied that the Third Appellant meets the requirements of paragraph 276ADE(1)(iv) of the rules.

54. However, this is not determinative of all the appeals and, in accordance with section 117A of the 2002 Act, I confirm that, when considering the public interest question, I have also had regard to the factors listed in section 117B of

the Act. I note that the Appellants' private lives have been established and developed when they were unlawfully in the UK. As such little weight should be attached to their private lives.

55. On the other hand, the Respondent reused the Appellant's asylum claim in October 2015, but appears to have taken no steps remove the family from the UK until after the Appellants lodged the application, which is the subject of this appeal (see paragraph 16 of the Appellant's statement). I find this surprising, as the Respondent would have appreciated that as time goes on, the children are likely to develop stronger ties to the UK.

56. In any event, the Third Appellant has been in the UK for over 7 years. As such, he is qualifying child for the purposes of section 117B(6) and I have found that he cannot be reasonably be expected to leave the UK. Accordingly, the public interest does not require his parents to leave the UK.

57. Further, I note that Section 117B(1) of the 2002 Act as amended states that the maintenance of effective immigration controls is in the public interest. I am satisfied that 'effective immigration control' includes recognising that those individuals who meet the requirements of the rules ought to be allowed to remain in the UK. Especially as *"the rules are statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests"* (paragraph 46 of **R (Agyarko) v SSHD; R (Ikuga) v SSHD [2017] UKSC 11**).

58. On balance, I am satisfied that the interference with the Appellants' private lives is unnecessary and disproportionate. Their rights outweigh the Respondent's legitimate interests in ensuring economic and social order, whilst maintaining a coherent system of immigration control. In reaching this conclusion the determining factor is my finding that the child cannot reasonably be expected to leave the UK."

59. Accordingly, I am satisfied that the decisions are incompatible with the Appellants' human rights. I allow the appeals.

8. The grounds of appeal to the Upper Tribunal were, it seems to me, not entirely unfairly described by the granting judge as "repetitive". But permission was nevertheless granted and the granting judge relevantly said this:

"2. In brief, the rather repetitive grounds argue that the judge erred:

First, inadequately reasoning his conclusion that the appeals of the whole family should succeed, based best interests of the sole qualifying child, such conclusion being inadequately evidenced and reasoned; second, in failing to consider the immigration history of the first and second appellants (*KO (Nigeria) v SSHD [2018] UKSC* relied upon).

3. It is arguable the judge's consideration of the evidence relating to the sole qualifying child is flawed, for the reasons referred to in the grounds. It is also arguable that the judge has failed to give adequate consideration to the public interest issue, bearing in mind the adverse immigration history of the two adult appellants. Permission is granted on the grounds as pleaded."

9. I should add that one of the contentions made in the grounds was that the tribunal's conclusions with respect to the likely impact of further enforcement action on W was speculative.

10. Permission having been granted there was a hearing before the Upper Tribunal (before me) so that it could be decided whether the tribunal had erred in law and if it had what should flow from that. The Secretary of State was represented by Mr Diwnytc and T represented himself and the other claimants. The thrust of Mr Diwnytc submission was that the tribunal had reached conclusions, at paragraph 52 of its written reasons, without any evidence at all to underpin them. T sought to make some factual points regarding W and how he had reacted to the threat of removal. He also asserted that the Secretary of State was attempting to punish him (I think for overstaying) and that UK law confers a right upon children to be safe. T also pointed out that another child claimant, S, had now been in the UK for seven years though that was not the position at the time the tribunal had heard and decided the appeals.

11. The evidence before the tribunal was that W had had an adverse reaction to the negative news regarding the claimant's applications (which is understandable) but that having "*become anxious and withdrawn*" as his teacher had put it in the letter referred to at paragraph 42 of the written reasons, he had seemed to be "*back to normal*" (see paragraph 45 of the written reasons). Indeed, it is apparent from what is said at paragraph 45 that both T and A had given evidence to the effect that W had, as A put it "*settled again*". The tribunal went on to say it could not "*be sure why he has improved*" (see paragraph 51 of the written reasons) but observed "*equally, as time went on, the immediate threat of removal is likely to have dissipated and the child is likely to have thought he can stay in the UK*". Pausing there, it does not seem to me that there was any evidence before the tribunal to suggest that W had thought that because removal had not taken place straightaway it was not going to happen. Perhaps he did think that and it might not be surprising that a child would do so. But I cannot see any indication that any evidence to that effect was given by T or by A or that the tribunal asked about it. Nor is there any suggestion to that effect in, for example, any correspondence emanating from W's teacher.

12. The tribunal then went on to state that whilst it appreciated the evidence suggested there had "*not been any long-term impact on the child's wellbeing following the respondent's decision*" it was nevertheless "*satisfied that a further negative decision, is likely to trigger a more profound and damaging emotional response, which might have a long-term impact on the child's emotional development and his education*". It added that it could not be sure how likely that would be but it was nevertheless "*satisfied the risk is more than a mere possibility*". Again, though, I cannot see any evidence, medical or otherwise, to suggest that there was any enhanced risk of a profound and damaging emotional response. Nor, indeed, does it appear that either T or A, in evidence, had raised that possibility at the hearing. I would also observe that the tribunal's comment that such risk was "*more than a mere possibility*" might be taken to suggest it was applying a somewhat lower standard of proof than that of a balance of probabilities which is what it was required to apply.

13. Of course, the claimants were all unrepresented. It is possible had they had legal representation some form of expert opinion evidence perhaps from a social worker or a child psychiatrist might have been obtained. The tribunal had to do its best with what it had. But, in my judgment, it did cross the barrier into unjustified speculation. Quite simply, there was no evidential basis for its key conclusions that there was a risk of a profound and damaging emotional response on the part of W, or that any response would be worse than the previous one or that any such response might have a long term impact on W's emotional development. Indeed, if anything it might be thought, looked at from one perspective, that his apparent relatively quick return to normality after the previous reaction suggested some form of permanent adverse emotional response was not likely though I am not purporting to make any finding at all about that. I suppose the tribunal could have asked T and A what they had thought might happen to W if the appeal failed and, depending on what they had to say, might have been persuaded that there was such a risk bearing in mind that they will, of course, know their own child well. But I cannot see that the tribunal did do that. Certainly, it did not say that it did. Accordingly, whilst the tribunal's decision is an otherwise careful and compassionate one, I have concluded that it did err in law through making relevant findings without any real evidential base for them and that its decision with respect to each claimant, must be set aside.

14. My having set aside the tribunal's decision I have also decided to remit for a complete rehearing. That is because it may be that further useful evidence with respect to W can be given, because there may need to be findings of fact with respect to S's situation as another qualifying child and because, in my judgement, fairness demands that matters be looked at entirely afresh.

15. My having decided to remit, I am statutorily obligated to give directions for the rehearing of the appeal. But I need not be detailed or prescriptive. I simply direct that there be a complete rehearing of the appeal before a differently constituted First-tier Tribunal (a different Judge) at the Bradford Hearing Centre. All other directions regarding listing arrangements may be left to the First-tier Tribunal.

## **Decision**

The tribunal's decision, with respect to each claimant, involved the making of an error of law. Accordingly, the tribunal's decision is set aside. The case is remitted to the First-tier Tribunal for re-determination by way of a complete rehearing.

M R Hemingway  
Judge of the Upper Tribunal  
Dated 25 June 2019



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## **Anonymity**

I grant anonymity to each claimant pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall identify any claimant or any family member of any claimant. This grant of anonymity applies to all parties to the proceedings. Failure to comply might lead to contempt of court proceedings.

M R Hemingway  
Judge of the Upper Tribunal  
Dated 25 June 2019