



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01524/2019 (V)

**THE IMMIGRATION ACTS**

Heard Remotely by Skype for Business  
On 7 January 2021

Decision & Reasons Promulgated  
On 15 February 2021

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

KAMEL AMIRA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the appellant: Mr N Sedeghi, Counsel, instructed by JML Solicitors  
For the respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant is a citizen of Algeria, born on 29 July 1974. This is his appeal against the decision of First-tier Tribunal Judge Carroll (“the judge”), promulgated on 11 December 2019, by which she dismissed the appellant’s appeal against the refusal of his human rights claim by the respondent on 11 January 2019.
2. In essence, that claim was based on the appellant’s lengthy residence in the United Kingdom, the great majority of which had been lawful. Having arrived with leave in

October 2003, his status remained lawful until 19 May 2010 after which it is accepted that there was a gap until further leave was granted as a Tier 1 Migrant on 20 June 2011. An in-time extension application in the same category was made and then refused. A subsequent appeal was allowed and the appellant was granted further until 9 February 2018. 10 August 2016 the appellant made an application for indefinite leave to remain on the basis of five years' lawful residence in the Tier 1 category. This was refused solely under paragraph 322(9) of the Immigration Rules ("the Rules") because of an allegation that he had failed to respond to a request for information relating to his tax affairs. In the absence of a right of appeal, the appellant sought Administrative Review, but on 21 August 2017 the refusal decision was maintained. On 9 February 2018 (the last day of his grant of leave as a Tier 1 Migrant), the appellant made an application for indefinite leave to remain on the basis of his long residence. This application was treated as a human rights claim, the refusal of which led to the appeal in the First-tier Tribunal.

3. It can be seen from the above that the appellant continues to have leave to remain, pursuant to section 3C of the Immigration Act 1971.

### **The judge's decision**

4. I am satisfied that the appellant put his case to the judge in the following way. First, that he had been in the United Kingdom lawfully for many years and had lost meaningful ties to Algeria. Second, the gap in leave between 2010 and 2011 was down to poor advice by previous legal representatives and should not be held against him. Third, that the respondent's refusal of the indefinite leave to remain application on the basis of paragraph 322(9) of the Rules was wrong and therefore he should have been granted settlement, this being relevant to the issue of proportionality. Fourth, all of the relevant circumstances rendered the respondent's refusal of his human rights claim unlawful.
5. The judge addressed the paragraph 322(9) issue at [11]-[17] of her decision. She concluded that this provision did not apply, and never should have applied, to the appellant. For reasons that will become apparent, that was a significant finding.
6. The judge went on to consider the appellant's private life (family life not having been relied on). At [19]-[22] she concluded that the appellant would not face very significant obstacles to his re-integration into Algerian society and could not rely on the alleged incompetence of previous legal representatives in respect of the gap in leave between 2010 and 2011.
7. In considering Article 8 in its wider ambit outside the scope of the Rules, the judge recognised the "significant period of time" the appellant had spent in the United Kingdom. She noted that this leave had been on a precarious basis throughout. Towards the end of [24] the judge said the following:

"It is well established that, in the case of non-settled migrants, it is only in exceptional circumstances that a decision to remove would give rise to a breach of Article 8. There are no exceptional circumstances in the case of the appellant and I

find that the decision under appeal is in accordance with the law, necessary and proportionate and that it does not give rise to a breach of Article 8.”

8. Then, the judge referred to the appellant’s assertion that, but for the respondent’s error in applying paragraph 322(9) of the Rules to him, he would have been granted indefinite leave to remain some years previously. In respect of this, at [26] the judge stated that:

“I make no findings in relation to the alternative route for leave to remain proposed by the appellant. It is [a] matter for him to pursue with the respondent.”

9. The appeal was duly dismissed.

### **The grounds of appeal and grant of permission**

10. Three grounds of appeal were put forward: first, that the judge had erred in respect of the failings of the previous legal representatives; second, that she failed to have any or any adequate regard to the appellant’s lawful residence in the United Kingdom, in particular that relating to Tier 1 and the argument that he should have been granted indefinite leave to remain by the respondent previously; third, that the judge had failed to conduct an adequate balancing exercise.
11. Permission to appeal was granted by First-tier Tribunal Judge Cruthers on 15 May 2020.

### **The hearing before me**

12. Mr Sedeghi relied on the grounds of appeal and his skeleton argument. He submitted that the failure of the judge to engage with the consequences of her finding on paragraph 322(9) of the Rules in the context of the appellant’s Article 8 claim was a material error.
13. Having applied her customary careful consideration to the issues, as set out in the grounds of appeal and then expanded on in oral submissions, Ms Everett accepted that the judge had indeed committed a material error, as alleged by Mr Sedeghi.

### **Decision on error of law**

14. In my judgment, the concession made by Ms Everett was entirely appropriate. Once the favourable finding on the paragraph 322(9) issue had been made, it was then incumbent on the judge to factor that in to the rest of the appellant’s Article 8 case, as it was put to her. That included the argument that the overall lawful residence in the United Kingdom, but in particular the continuous period spent as a Tier 1 Migrant, was highly relevant to the issue of proportionality. The effect of the judge’s finding on paragraph 322(9) was that the appellant had suffered a “historical injustice”, as described by the Upper Tribunal in the recent case of Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351 (IAC). Such cases are highly fact-sensitive. What the judge should have done was to address the Tier 1/indefinite leave to remain issue directly and incorporate that into the proportionality balancing exercise. Her failure

to do so, as evidenced by her disinclination to make any findings, was in my view clearly a material error.

15. On this basis, I set the judge's decision aside.
16. I would add a further point. Whilst it did not feature in Ms Everett's concession, I agree with the grounds of appeal to the extent that, at [24], there is a distinct probability that the judge was interpreting the need to show "exceptional circumstances" not simply as a description of outcomes, but a threshold question to be overcome by the appellant. This constituted an additional error of law which I would regard as material.

### **The re-make decision**

17. Having announced my decision on the error of law issue at the hearing, both representatives agreed that I could and should re-make the decision in this case on the materials before me.

### ***Submissions***

18. Ms Everett highlighted what she described as the lack of any real evidence on the establishment of meaningful ties by the appellant in the United Kingdom, notwithstanding his lengthy residence. It was clear that he would not face very significant obstacles to re-integrating into Algerian society. As to the historical injustice point, she accepted that it was relevant and that the weight attributable to this was a matter for the Tribunal. She submitted that this issue did not tip the balance in the appellant's favour.
19. Mr Sedeghi relied on his skeleton argument and the evidence contained in the appellant's bundle which had been before the First-tier Tribunal. He submitted that the time away from Algeria was very significant. The appellant had made good use of his time in the United Kingdom and would be an asset to this country if allowed to stay. Reliance was placed on the historical injustice issue.

### ***Findings and conclusions***

20. I find that the appellant's immigration history is as set out in paragraph 2, above. Therefore, the appellant has been in the United Kingdom now for 17 years and 2 months, with all but 394 days of this period being lawful (those days representing the gap between 2010 and 2011 referred to previously). The appellant currently has statutorily extended leave pursuant to section 3C of the Immigration Act 1971. Indeed, as of 20 June 2021, the appellant will have been lawfully and continuously in this country for 10 years.
21. It is common ground that the appellant has, as result of his lengthy residence, established a private life in this country. There is no reliance on any family life aspect of Article 8. It has also agreed that the respondent's decision interferes with the private life.

22. There is no sound reason for me to simply reject the entirety of the appellant's evidence as to the cause of the gap in his leave as being untruthful. It is unfortunately fairly common to see instances of poor legal advice. I am prepared to accept that the appellant genuinely believes that he was let down. Having said that, he has not put these allegations in a detailed manner over the course of time, nor has he provided any evidence to indicate that he has presented a complaint to those representatives or any other supervisory body. Having regard to Mansur (immigration adviser's failings: Article 8) Bangladesh [2018] UKUT 274 (IAC), I am not satisfied that there was professional negligence on the part of his previous representatives. In any event, this issue does not, on the particular facts of this case, take the appellant's Article 8 claim any further.
23. The gap in the appellant's leave between 2010 and 2011 has the effect that he has never been able to rely on paragraph 276B of the Rules.
24. I find that the appellant had continuous leave as a Tier 1 Migrant between 20 June 2011 until 9 February 2018, whereupon that leave was statutorily extended.
25. For the same reasons set out by the judge in her decision (none of which have been criticised by the respondent), I too find that paragraph 322(9) was erroneously applied to the appellant in respect of his application for indefinite leave to remain made on 10 August 2016. I have seen the decision letter refusing that application, dated 24 July 2017, together with the Administrative Review decision, and it is plain that the sole basis of refusal was paragraph 322(9). It is in my view an inescapable conclusion that but for the respondent's erroneous application of that provision, the appellant would have been granted indefinite leave to remain at that time. That is, in the particular circumstances of this case and for the reasons set out below, a very significant factor.
26. The decision in Patel rightly urges caution when assessing what should properly be described as a historical injustice. Difficulties encountered by individuals relating to employers or teaching institutions are, in the main, unlikely materially reduce the public interest in maintaining effective immigration control. The present case is different in nature. The injustice was a direct result of the respondent erroneously applying a general ground of refusal to the appellant's application for indefinite leave to remain. As noted previously, it was the sole basis for refusing a grant of settlement. I take account of the fact that the refusal decision and Administrative Review were not (as far as I am aware) the subject of judicial review proceedings. That may be seen to count against the weight attributable to the respondent's error. On the other hand, it is a fact that at the time the appellant still had extant leave to remain as a Tier 1 Migrant and he was, in my view, justified in making a further application for leave to remain prior to the expiry of that leave, rather than launching a legal challenge.
27. What emerges from the above is a strong example of a "but for" situation in which the respondent error was *the* causative basis for denying the appellant settlement.
28. The fact that the appellant would have been entitled to a grant of indefinite leave to remain but for the respondent's error is significant because it distinguishes this case

from one in which an individual had simply sought an extension of limited leave to remain. The appellant had, by virtue of his leave as a Tier 1 Migrant, been at the very end of the the path to settlement and thus, whilst his status was precarious, it was less so than in respect of someone who could not at the time have applied for indefinite leave to remain.

29. In assessing the weight to be placed on this feature of the appellant's case, I guard against double counting (see Patel at paragraph 84). When considering the mandatory considerations in section 117B of the Nationality, Immigration and Asylum Act 2002, as amended, I conclude that the public interest subsection (1) is, in the particular circumstances of this case, significantly reduced as a consequence of what is undoubtedly a historical injustice suffered by the appellant.
30. I take full account of subsection (5) and therefore attach little weight to the appellant's private life itself, although this of course is to be seen in what I have said in the preceding paragraph.
31. It is right that there is not a great deal of detailed evidence relating to the ties established by the appellant whilst in the United Kingdom. I accept that he has worked, formed friendships, and to put it bluntly, got on with his life in this country in a relatively non-descript manner. In that sense (and leaving aside the historical injustice issue), there are no particularly strong or compelling features of his private life. Whilst I have no doubt that the appellant would continue to work and contribute to the general economy of the United Kingdom if permitted to remain, it cannot properly be said that his contribution to society is of such significance as to amount to an important factor in the balance exercise.
32. I agree with the judge's analysis of the very significant obstacles issue. The appellant has been away from Algeria for a long time. However, on the evidence before me he is a well-educated and capable individual who retains family connections in that country and would, with or without specific support, be able to re-integrate into Algerian society without facing very significant difficulties. I take this into account in respect of my overall balancing exercise.
33. I take account of the fact that the appellant is unable to meet any of the specific Rules relating to Article 8. This clearly counts against him and in favour of the respondent.
34. The appellant clearly speaks good English and is financially independent. These are both neutral factors.
35. Bringing all of the above together, I conclude as follows. It is rare indeed for an appeal based on Article 8 to succeed by a wide margin. The present appeal is not such a case. However, having conducted a balancing exercise involving all matters relevant to the question of whether the respondent's refusal of the human rights claim strikes a fair balance between protected rights and the public interest, I am satisfied that the appellant succeeds. His overall very lengthy lawful residence in this country is clearly important. However, of predominant significance is the historical injustice suffered by the appellant in the context of what would otherwise have been a certain (or as close to certain as needs be) grant of indefinite leave to remain. It is

this factor which reduces the public interest sufficiently for the appellant to show that the respondent's decision under appeal is disproportionate and therefore unlawful under section 6 of the Human Rights Act 1998.

**Anonymity**

36. The First-tier Tribunal made no anonymity direction and there is no reason for me to do so. I make no such direction.

**Notice of Decision**

37. **The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

38. **I set aside the decision of the First-tier Tribunal.**

39. **I re-make the decision by allowing the appeal on Article 8 grounds.**

Signed: *H Norton-Taylor*

Date: 20 January 2021

Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award of £140.00.

Signed: *H Norton-Taylor*

Date: 20 January 2021

Upper Tribunal Judge Norton-Taylor