



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

Appeal Number: AA/13844/2009

THE IMMIGRATION ACTS

**Heard at Field House
On 22 May 2013**

**Determination Sent
On 3 July 2013**

Before

**UPPER TRIBUNAL JUDGE ESHUN
DEPUTY UPPER TRIBUNAL JUDGE C MAILER**

Between

MR ABDUL MALEK BENYOUCEF

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Naik, Counsel

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Algeria born on 21 November 1961. He left Algeria on 10 October 1993 and travelled to Pakistan. He arrived in the United Kingdom on or around 21 July 1994. He claimed asylum on 29 July 1994. On 13 September 1999 a letter was sent to him regarding the backlog process.

2. His wife Lynda Mecheti entered the United Kingdom illegally 2000/2001 and claimed as his dependant. The couple have two children who were born in the UK; Safie, born on 25 February 2003 and is 10 years old, and Youcef, born on 26 December 2005 and is 7 years old. Youcef is dependent on the appellant's claim. Safie, who was also dependent on the appellant's claim was on 26 April 2013 registered as a British citizen.
3. On 22 August 2005 the appellant submitted an application under the ILR exercise. This was refused on 30 November 2006. The appellant's asylum claim was finally considered and refused on 8 April 2008, a delay of almost fourteen years. The respondent made a decision to remove the appellant and the dependants on 6 June 2008. The decision was served on the appellant on 21 October 2009, a further delay of 16 months. The appellant's appeal against the respondent's decision was dismissed by Immigration Judge Head in a determination dated 17 February 2010 on asylum, Article ECHR and humanitarian protection grounds and under Article 8 of the ECHR.
4. On 22 April 2010 the appellant was granted permission to appeal the Immigration Judge's decision. Senior Immigration Judge Warr said that the very lengthy delay in this case may arguably require further consideration in the context of Article 8. All the grounds of appeal may be argued but it was this point principally on which permission to appeal was granted.
5. The appellant's appeal came before Upper Tribunal Judge Eshun and Deputy Upper Tribunal Judge Rimington. For the reasons set out in their decision dated 30 August 2012, the Upper Tribunal found that there was an error of law and the decision was set aside.
6. The reasons of the Upper Tribunal are set out below:-
 - "11. In this instance the Appellant had been in the United Kingdom for 14 years prior to a decision being taken on his asylum claim. The only justification given by the Respondent for the delay was that it had advised the Appellant's solicitors of the progress of the case. Weight in relation to the Appellant's private life was assessed by the First-tier Tribunal Judge in terms that there was no evidence before her to show that the Appellant and his wife had commitments, responsibilities or ties either in their immediate community or in the wider community. It was however part of the evidence presented that both the children were at primary and nursery school respectively. Further his criminal conviction had been taken into account by the First-tier Tribunal Judge but no certificate in relation to the length of the Appellant's conviction was produced by the Respondent.
 12. There was no reference to **EB (Kosovo) v SSHD [2008] UKHL 41** where the House of Lords considered the matter of delay and decided that weight be given to both the importance of family life

and to the need for firm and fair immigration control. However, delay in determining an application may affect the weight given to immigration control in that the applicant might develop closer personal ties and a tentative quality of a relationship would be diminished as time elapsed and enforcement did not take place. Delay could diminish the weight to be accorded to the requirements of firm and fair immigration control if it resulted from a dysfunctional system which yielded unpredictable, inconsistent and unfair outcomes.

13. We consider that the appropriate balancing exercise regarding whether interference was proportionate to the legitimate public end to be sought, had not been undertaken as the relevant factors and the weight given to those factors had not been duly considered.
14. Secondly, at the date of the First-tier Tribunal Judge's determination Section 55 of the Borders Citizenship and Immigration Act 2009 was in force. This confirms that the welfare of the children must be safeguarded and promoted. We accept that Section 55 was not in force at the date of the Respondent's decision and we accept that the Judge did give some consideration to the children's interests at paragraph 48 of her determination. We also note that **ZH (Tanzania)** expands the concept of the consideration of the welfare of the child by expounding the best interests principle and was determined in February 2011. Indeed the UN Convention of the Rights of the Children was ratified by the United Kingdom government in 1991. However, there was little exploration of the welfare of the children and the consideration in relation to the children was given insufficient weight and priority.
15. The Judge made an adverse finding of credibility against the Appellant. However it was not clear what factors the Judge accepted in relation to the Appellant. She appeared to reject his account and chronology of his detentions, time spent in hiding, summonses, his arrest warrant, and the death sentence but with regards to his profession as a teacher, his time in Pakistan, his work for the Islamic Charity and his time spent out of Algeria there did not appear to be clear findings. With this in mind it is not altogether apparent what profile the Appellant is considered by the Judge to have and thus the assessment under **AF** and the comparison with the Appellant in AF was not made based on clear findings. The assessment therefore did not meet the requirement of identifying the risk factors that are relevant in AF and applicable at present.
16. For the reasons above we found that there was an error of law and we proceeded to set aside the decision."

7. The appellant's case came before Upper Tribunal Judge Craig on 26 February 2013. During the course of the hearing, Mr Melvin on behalf of the respondent informed the Tribunal that it was very likely indeed that the appellant and his family would be granted a period of discretionary leave. On behalf of the appellant, Miss Naik of Counsel reserved the appellant's position pending negotiations with the respondent as to the period of leave which would be granted. The appeal came before me for mention on 19 April 2013. Mr Melvin said that the appellant and his family would be granted leave to remain for two and a half years in line with the discretionary leave policy. Miss Naik and the appellant were not happy with the period of leave as a result of which Mr Melvin withdrew the offer of discretionary leave. The appellant's appeal on asylum and Article 8 grounds was listed for hearing on 22 May 2013.
8. Both parties submitted skeleton arguments in support of their case.
9. At the hearing the Tribunal indicated to Mr Melvin, in particular, that we were of the view that the appellant had strong grounds on which we could allow his Article 8 appeal despite Mr Melvin's written submissions to the contrary. Mr Melvin acknowledged that his Article 8 argument was not a strong one. He submitted that the evidence seemed to suggest that the appellant was not living with his wife and two children although they had all appeared in court today. We took the view that even if he was separated from his wife, on his own account, he did have a very strong Article 8 claim particularly in view of the fact that the Secretary of State had taken almost fourteen years to decide his asylum application. This went against the principle of legitimate immigration control. In those fourteen years and to date the appellant has established a strong family and private life in the UK. Not only that he now has a daughter who is a British national and cannot be removed from the UK. Therefore no useful purpose would be served in separating the family.
10. We also indicated to Counsel that our view was that the appellant did not have a strong asylum claim. There were two reasons for our view; the first was the lapse of time since the appellant first made his application for asylum; and secondly, in her skeleton argument of 20 pages, only two pages had been devoted to the appellant's asylum claim as an alternative argument. We allowed Counsel time to take instructions from the appellant and her instructing solicitors. Counsel then informed the Court that the appellant wished to withdraw part of his case, that is, the asylum claim; he was pursuing his Article 8 claim.
11. We accepted the withdrawal of the appellant's asylum case in accordance with Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Article 8 ECHR

12. As the respondent made her decision on 6 June 2008, we find that the new Immigration Rules which incorporated Article 8 into the Immigration Rules

and which came into force on 9 July 2012 do not apply to the appellant's case. We note however that at paragraph 46 of her skeleton argument, Counsel submitted that the appellant would fall within one of the defined exceptions. This is where the applicant has a genuine and subsisting parental relationship with a child who is under the age of 18; is in the UK; is a British citizen or has lived continuously in the UK for at least 7 years immediately preceding the date of application and it would not be reasonable to expect the child to leave the UK. Furthermore the new rules provide for the grant of leave on the basis of private life where an applicant is under the age of 18 and has lived in the UK for at least 7 years (discounting any period of imprisonment).

13. Counsel's argument is flawed for two reasons; the first is that the children were both born after the date of the appellant's application for asylum and, secondly, the appellant is not under the age of 18, he is 52. Neither child has made an application to remain in their own right. We find that the appellant does not fall within any of the exceptions under paragraph 276ADE of the Immigration Rules.
14. In any event we find that the appellant does not fall within any of the exceptions under paragraph 276 ADE of the Immigration Rules. He has not lived continuously in the UK for at least twenty years. He also has a conviction for which he served 4 months in prison.
15. We now consider the appellant's appeal under Article 8 of the ECHR in the context of the **Razgar** principles.
16. We find that the appellant, his wife and two children have established family and private life in the UK. The appellant has been in the UK since 21 July 1994, a period of almost nineteen years. The respondent did not decide his asylum claim for another eighteen years, which is extraordinary. The respondent has not provided an explanation for the delay. The appellant's wife entered the UK in 2001, albeit illegally, and has been in the UK for about twelve years. Their two children were born in the UK. In a report by Dr Bell, which is dated 22 February 2013, we learned that the appellant about three months ago had moved back in with his wife and children. The appellant, his wife and children attended the hearing today. As far as we are concerned, they are a family unit. Even if he is separated from his wife from time to time for whatever reason, we find that this does not affect his Article 8 appeal. The appellant has been in the UK long enough and the fact that he is back with his children shows that there is a family and private life which is worth protecting and which engages Article 8(1).
17. We find that the decision of the respondent will interfere with the appellant's established family and private life. The interference will lead to grave consequences.

18. The respondent's extraordinary delay of fourteen years before deciding the appellant's asylum claim indicates to us that the respondent was not mindful of the need to maintain immigration control in this case.
19. We now consider proportionality.
20. The appellant has been in the UK for nineteen years, his wife for twelve years and his two children were born in the UK. The daughter is now a British national. His son is 7 years old. The appellant has a conviction for possession of a false document which he admitted obtaining in order to seek employment. He was convicted on 20 August 2002 and served a period of four months. As of now we find that his sentence may have become spent.
21. We take into account that during the appellant's time in the UK he has been diagnosed with various adverse health conditions, tuberculosis and HIV for which he is receiving treatment.
22. The appellant's daughter Safie is a British citizen and cannot reasonably be expected to relocate to Algeria. She is doing well at school. Youcef was born in the UK and is 7 years old. He is in primary school and having lived here all his life we find that it is not reasonable to expect him to relocate to Algeria. We rely on Renee Cohen, the Independent Social Worker's opinion that the children have lived all their lives in the UK and it would be utterly against their best interests to be uprooted from their settled lives. The appellant's wife has been in the UK for twelve years. She is the carer of their British born daughter and son and it is not reasonable to expect her to relocate to Algeria with the appellant. The best interests of the children we find lies with both parents.
23. We find that the delay in deciding the appellant's asylum application has had a detrimental effect on the appellant. He has been unable to work and provide for his family. This has led to the appellant becoming depressed and feeling that there is nothing to live for. In his interview with Dr Bell he said that his wife gets fed up with him and he understands this because he feels life is too difficult for her. On the other hand he knows his wife would never leave him but he links this to her religious convictions rather than her love for him. Dr Bell says that the appellant continues to suffer from feelings of despair, nihilistic ideations, pervasive feelings of guilt, self blame and particularly shame and believes that his life is not worth living. There is suicidal ideation, although he has never acted upon this. Whilst we do not find that his diagnosis reaches the high threshold of Article 3, it does fall to be considered as part of his Article 8 appeal. We find on this evidence that the appellant's removal from the UK would adversely affect his mental condition.
24. The appellant told Dr Bell that he sees friends only rarely and that he is very socially isolated. Occasionally friends visit him but not regularly. He

has a circle of Algerian friends but they have become rather distanced from him, although they remain important to him in some ways.

25. On the totality of the evidence before us we find that it would be disproportionate to remove the appellant and his dependants from the United Kingdom.
26. The appellant's appeal is allowed.

Signed

Date

Upper Tribunal Judge Eshun