



**The Upper Tribunal
(Immigration and Asylum Chamber)
number: IA/07457/2014**

THE IMMIGRATION ACTS

**Heard at Field House
On November 28, 2014**

**Decision and Reasons
Promulgated
On December 1, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

**MRS SALHI NOURA
MASTER MOHAMAD BOUDKHILA
(NO ANONYMITY DIRECTION MADE)**

Appellants

and

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

Respondent

Representation:

For the Appellant: Mr Youssefian (Legal Representative)
For the Respondent: Mr Whetwell (Home Office Presenting
Officer)

DETERMINATION AND REASONS

1. The appellants, born August 20, 1974 and December 2, 2011 are citizens of Algeria. The first named appellant came to the United Kingdom as a visitor and she

married Noureddine Boudkhila September 16, 2003 and they have lived together since that date. On January 12, 2004 she applied to change her status and extend her time in the United Kingdom but her application was refused on February 10, 2004.

2. Her husband arrived in the United Kingdom on January 10, 1999 and claimed asylum on January 20, 1999. He was granted refugee status and indefinite leave to remain on March 21, 2000. On May 18, 2001 he returned to Algeria because his father was ill and remained there until May 25, 2011. On March 6, 2004 he was issued with an Algerian passport and this fact coupled with his visit in 2001 led to the UK authorities refusing to grant him British citizenship and in January 2006 the respondent revoked his refugee status and indefinite leave to remain. Although he appealed this decision his appeal was dismissed on July 17, 2007. On April 14, 2008 he applied for leave to remain in the United Kingdom based on article 8 ECHR and in the absence of a decision by the respondent his solicitors submitted further written submissions on May 4, 2010. This was refused on May 23, 2011 and he was issued with removal directions. In a determination promulgated on July 20, 2011 he was granted discretionary leave to remain outside of the Rules until October 21, 2014.
3. The first appellant and her husband have three children namely the second appellant and two other children born March 11, 2005 and September 22, 2006. All of the children were born in the United Kingdom and the eldest two children are classed as British citizens because they were born in the United Kingdom at a time when their father had indefinite leave to remain. The respondent has never challenged their status.
4. On October 17, 2012 the appellants applied for leave to remain but this was refused on October 30, 2013 on the basis the appellant did not satisfy the Immigration Rules and there were no exceptional circumstances that merited consideration outside of the Rules under article 8 ECHR. The appellant was not issued a right of appeal as no removal notices were issued. The appellants' solicitors threatened the respondent with judicial review proceedings and the respondent then served removal notices dated January 22, 2014.
5. The appellants appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on February 6, 2014. On August 26,

2014 Judge of the First Tier Tribunal Grant (hereinafter referred to as the "FtTJ") heard their appeals. She dismissed their appeals under the Immigration Rules and article 8 ECHR in a determination promulgated on September 11, 2014.

6. The appellants lodged grounds of appeal on September 19, 2014 and on October 23, 2014 Judge of the First-tier Tribunal Simpson granted permission to appeal finding it arguable the FtTJ had erred because:
 - a. The FtTJ should have applied the guidelines in Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702* (formerly known as Devaseelan) in respect of the best interests of the children as these had been considered at the hearing in 2011 Tribunal hearing.
 - b. There was no reason to depart from the findings in Devaseelan because the factors had not materially altered.
 - c. The finding at paragraph [27] of the determination about the first-named appellant's intentions was unfair, as the finding had not been put to the first-named appellant.
 - d. The findings in EV (Philippines) [2014] EWCA Civ 874 were irrelevant because two of the children were British citizens.
7. The respondent filed a Rule 24 reply in which she stated:
 - a. The FtTJ was entitled to consider all of the circumstances when she considered the appeal and depart from the findings made in 2011 because the circumstances had changed for the reasons set out in paragraphs [30] to [32].
 - b. Private and family life was now within the Immigration Rules. The appellants could not meet the Immigration Rules.

SUBMISSIONS ON ERROR OF LAW

8. Mr Youssefian submitted as follows:
 - a. Grounds One and two: The FtTJ departed from the findings in the 2011 determination despite the fact there had been no material changes to the family

circumstances and the Judge of the First-tier Tribunal in 2011 found it was not in the best interests of the children that they be removed. As far as the children are concerned they have now been here longer and the FtTJ should have found that the position in the 2011 determination had strengthened. The FtTJ found material changes were

- i. The children could learn English and Arabic in Algeria but failed to balance that finding with the fact there are schools teaching Arabic in the United Kingdom.
- ii. The FtTJ attached weight to the fact the first-appellant's husband's leave was due to expire in October 2014 but as he was entitled to apply for it to be extended this was not a factor she should have had regard to.
- iii. The first-named appellant's health had improved since 2011 but the Judge in 2011 allowed her husband's appeal because it was not in the children's best interests for him and them to be removed.

Whilst British citizenship was not a trump card the FtTJ erred by failing to attach any discernable weight to the fact the children were British citizens and in particular the FtTJ failed to have regard to the comments in paragraph [41] of ZH (Tanania) [2011] UKSC 4.

- b. Ground Three. The FtTJ found at paragraph [27] of her determination that the first-named appellant planned to come to the United Kingdom and marry but she failed to put this issue to the witness at the hearing.
- c. Ground Four. The FtTJ materially erred by saying the children had no right to an education and relied on the decision of EV. Education in the United Kingdom is compulsory and two of the children are British. The FtTJ should not have relied on EV.
- d. Ground Five. The FtTJ should have considered the appeal outside of the Immigration Rules. The Court in R on the application of Halimat SA Adiya Damiola Aliyu and Fatima Oluwakemi Aliyu v SSHD [2014] EWHC 3919 (Admin) (approving the decision of The Queen on the application of Ganesabalan v SSHD [2014] EWHC 2712 (Admin)) made it clear that if there is an article 8 claim it should be considered.

In paragraph [27] the FtTJ erroneously found there were no compelling circumstances that required consideration outside of the Rules. This was an error in law.

9. Mr Whetwell responded to these submissions and submitted:
 - a. Grounds One and Two. The FtTJ had full regard to the earlier 2011 decision. The FtTJ identified four changes since 2011 and she was therefore entitled to depart from the 2011 conclusions. These factors were the first-named appellant's health, the passage of time and the requirement to consider the position on "real world facts", article 8 ECHR is now in the Rules and must be considered in that light and the children are all entitled to Algerian nationality (including the latest child).
 - b. Ground Three. Whilst the FtTJ did not specifically challenge the witness on this issue it is submitted it was not material to her decision.
 - c. Ground Four. Paragraphs [24] to [32] form the basis of her findings and regard should not be had to just one sentence in paragraph [32] especially as not clear she was referring to all of the children. The parents' immigration status cannot be overlooked when considering the appeal.
 - d. Ground Five. The FtTJ dismissed the appeal under article 8 ECHR. Alternatively, if the FtTJ found there were no compelling or exceptional circumstances then that was open to her on the facts before her.
10. In response to those submissions and matters raised by me Mr Youssefian submitted:
 - a. The medical issue had no bearing on the best interests of the children. Legal changes do not make any difference to an article 8 assessment. British citizenship should be given weight just as an entitlement to Algerian nationality. The children have continued to live here and socially integrate. Whilst there had been changes they were not material.
 - b. The FtTJ should have considered the wider issue of article 8 and there were clearly grounds to consider the case outside of the Rules and whilst the FtTJ

dismissed the article 8 claim this contradicted what she stated in paragraph [27].

11. I reserved my decision and both parties agreed that no further evidence was needed if I found an error in law was found.

DISCUSSION AND FINDINGS ON ERROR IN LAW

12. This family's history is not straightforward because the appellants and the first-named appellant's husband are Algerian but two of the children are British citizens by virtue of the fact the first-named appellant's husband was granted asylum. The father was refused British citizenship and also had his refugee status and indefinite leave to remain revoked in January 2006 but the two children retained their status for the reason set out in paragraph [3] above.
13. The second-named appellant's application is wholly dependant on the circumstances of the first-named appellant's claim and Mr Youssefian submitted both to the FtTJ and myself that her claim is inextricably linked to the two other children's position.
14. In short, his main submission is the FtTJ was wrong to depart from the findings of the 2011 determination. Mr Whetwell has argued the FtTJ reached a finding that was open to her because there had been a number of material changes both in the law and in the family's circumstances.
15. In Devaseelan the Tribunal was concerned with a human rights appeal, which followed an asylum appeal on the same issues. The Tribunal said that, in such circumstances, the first Tribunal's determination stands as an assessment of the claim the Appellant was making at the time of that first determination. It is not binding on the second Tribunal but there again the second Tribunal is not hearing an appeal against it. The Tribunal set out various principles:
 - a. The first decision is always the starting point;
 - b. Facts since then can always be considered;
 - c. Facts before then but not relevant to the first decision can always be considered;
 - d. The second Tribunal should treat with circumspection relevant facts that had not been brought to the first Tribunal's attention;
 - e. If issues and evidence on the first and second appeals are materially the same, the second

Tribunal should treat the issues as settled by the first decision rather than allowing the matter to be relitigated.

16. The Tribunal also gave a caveat and said that there will be occasional cases where the circumstances surrounding the first appeal were such that it would be right for the second Tribunal to look at the matter as if the first determination had never been made.
17. In B (Pakistan) 2003 UKIAT 00053 the Tribunal said that the Devaseelan guidelines are not limited to human rights appeals and should be applied to immigration appeals where the appellants have made a fresh application following the dismissal of a previous appeal. An Adjudicator must consider the determination of the previous appeal in the second appeal.
18. Turning to the facts of this appeal the FtTJ carefully set out in paragraph [23] of her determination the findings of facts made by the judge in the 2011 determination. She has been provided with a copy of that decision and I have referred back to this when considering the application before me.
19. At paragraph [13] of the 2011 determination the judge set out the submissions made on behalf of the husband/father. These submissions relied on established case law on children and families, the fact the children were British citizens who had been born and had subsequently lived all their lives in the United Kingdom, his personal circumstances, the delay in dealing with the appeal, the wife's pending surgery and the decision of Zambrano (Case C-34/09). At paragraph [17] the FtTJ found the husband/father had family life and there were no plans to remove his wife despite her having no status in the United Kingdom. He recorded the fact the children were British and the husband/father had to look after the family because of his wife's pending operation. Significantly at paragraph [20] the judge found that removing the husband/father would interfere significantly with his family and private life with his children and wife. At paragraph [23] the judge found removal was not proportionate because:
 - a. The children had a right to reside here in accordance with national and European law.
 - b. The mother was incapable of looking after the children alone.
 - c. It was in the children's best interests they continued to live here given their integration,

friendships and close relationships with their first cousins, lack of any connection to Algeria, their predominant use of English to communicate, their mother needed treatment.

- d. Delay in dealing with the appeal.
20. It is against this background that the FtTJ considered the current appeals albeit these appeals do not include the husband/father.
 21. The FtTJ approached the applications by firstly considering whether the Immigration Rules were met. Since July 9, 2012 this is the correct approach to take. She found that the first-named appellant did not satisfy the requirements of Section E-LTRPT 2.4 of Appendix FM because she had shared responsibility for the children and she had to demonstrate sole responsibility. Having found the appellants did not satisfy Appendix FM she then stated there were no compelling circumstances that required consideration outside of the Rules. This latter finding is ground 5 of this appeal and I will return to that later.
 22. The FtTJ then proceeded to make a number of findings about her claim and these were:
 - a. No evidence the family, including the husband/father and other children, could not return to Algeria. The husband demonstrated he was able to return and had done so and obtained an Algerian passport.
 - b. The first-named appellant had contact with family in Algeria.
 - c. The first-named appellant married in haste and she believed she always planned on marrying and remaining here (ground three of this appeal).
 - d. The parents speak Arabic and the children understand Arabic as it is the language spoken in the home.
 - e. The children could attend a bi-lingual school in Algiers if they wish to continue to be educated in English. They will have to learn to read and write Arabic as the Koran is written in Arabic and this would best be done in Algiers.

- f. The children are entitled to become Algerian citizens because their father is Algerian and his name appears on their birth certificates.
 - g. The children should live with both parents. The appellants have no right to remain here and the father's leave is shortly to expire.
 - h. The above factors override the first-named appellant's desire that the children remain here to continue their education.
 - i. The mother is no longer ill.
 - j. The husband's appeal was granted because the mother "was not in a position to look after the children alone and for those reasons and the extent of the children's ties to the United Kingdom her husband's appeal was allowed and he received a short grant of leave which expires next month. She is not ill or disabled anymore" (paragraph [31] of the FtTJ's determination).
 - k. The Rules have changed and the first-named appellant is no longer incapacitated.
 - l. Children cannot stay merely for an education.
23. Having considered the FtTJ's determination and having regard to the earlier 2011 findings I am satisfied the FtTJ did have regard to the approach set out in Devaseelan. The FtTJ was fully aware of the previous findings because firstly she set them out in her determination and secondly, she considered those findings and gave reasons why she found there had been change. Paragraph [31] is evidence of this because the FtTJ noted why the husband/mother had been granted leave but then went on to set out both in that paragraph and paragraph [32] why she felt the position was different.
24. Mr Yousefian has submitted the starting point is the 2011 determination. Despite the fact the appellant was different I agree with him that the findings do have some significance in the appeal that came before the FtTJ. However, this is an article 8 claim following a failure to meet the Immigration Rules and the relevant date is today's date and not 2011. This means that if facts, circumstances and the law change then the respondent and ultimately the FtTJ must have regard to

those changed factors and decide whether they materially change anything.

25. The FtTJ had regard to the circumstances in which the children retained their British citizenship but also noted the children were entitled to Algerian citizenship as were their sibling and their parents. The FtTJ rejected the first-named appellant's claim she had no ties to Algiers. She noted one of the reasons the first-named appellant's husband was granted leave to remain was because of his wife's medical condition and her inability to look after the children if he were forced to leave. She noted a material change in that situation. All these factors were matters the FtTJ was entitled to consider when assessing whether there had been any material changes. This was not an appeal where the FtTJ was required to make fresh findings on material issues but it was a case where the FtTJ had to consider the current situation and how that affected the previous determination. She assessed the evidence and concluded in paragraph [32] she could not follow the conclusion in the husband's determination.
26. I am satisfied that the FtTJ did not err in her approach as submitted in grounds one and two of this appeal.
27. In ground three Mr Youseffian argued the FtTJ found at paragraph [27] of her determination that the first-named appellant planned to come to the United Kingdom and marry but she failed to put this issue to the witness at the hearing. I have considered this submission and whilst I accept the question was not put to the witness I do not find the finding material to why this appeal was rejected. The FtTJ considered her explanation of why she came here and made a finding on that explanation-something she is entitled to do. However, when she ultimately assessed the claim it is not something she refers to in paragraphs [30] onwards when she considered the best interests of the children. I do not therefore find a material error on ground three of the appeal.
28. At ground four Mr Youseffian argued the FtTJ materially erred by saying the children had no right to an education. The finding in paragraph [32] cannot be said to apply to the two British citizens who clearly have a right to be educated but the youngest child clearly does not have a right to remain for an education. The statement was open to her and I am not persuaded she erred in paragraph [32].

29. The final ground of appeal related to the FtTJ's comment in paragraph [27] when she stated, "I find there are no compelling circumstances which require consideration outside of the Rules." If the FtTJ had ended her determination on that statement then I would have found merit in Mr Youseffian's submission but she did not. She proceeded to consider the whole of the claim and at paragraph [33] she dismissed the claim under article 8 ECHR.
30. Although Mr Youssefian put before me the cases of R on the application of Halimat SA Adiya Damiola Aliyu and Fatima Oluwakemi Aliyu v SSHD [2014] EWHC 3919 (Admin) and The Queen on the application of Ganesabalan v SSHD [2014] EWHC 2712 (Admin) I am satisfied that the FtTJ did actually consider the article 8 claim. She considered all of the factors raised in the husband's appeal and ultimately in paragraph [32] declined to follow the approach taken in the husband's appeal and she dismissed it. I am satisfied the FtTJ considered the matter outside of the Rules and reached a finding, for the reasons set out above, open to her. She had regard to the best interests of the children and found that despite the fact they were British citizens she found that as her mother and sibling had no status and their father had been granted limited leave for a combination of reasons it would be proportionate to require the family as a whole to leave. A different judge may have found otherwise but that is not the test I have to apply.

SKAL

DECISION

31. There was no material error of law The original decisions are upheld.
32. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

No fee award was made and I see no reason to alter that decision.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

A handwritten signature in black ink, appearing to read 'SPAL', with a horizontal line underneath it.