



Upper Tribunal  
Immigration and Asylum Chamber

Appeal Number IA.20286.2013

**THE IMMIGRATION ACTS**

Heard at: North Shields  
On: 13<sup>th</sup> March 2014

On: 11<sup>th</sup> April 2014

Before

**Judge Aitken**  
**Deputy Chamber President (HESC)**

Between

**Ms M M**  
(Anonymity Direction in Force)

Appellant

and

**Secretary of State for the Home Department**

Respondent

For the Appellant: Mr Cleghorn  
For the Respondent: Ms C Johnson (Home Office Presenting Officer)

**Decision**

1. This matter appears before me leave to appeal having been granted by First Tier Tribunal Judge Hemmingway on the following terms:

*"1. The Appellant, a national of Algeria, has applied, in time, for permission to appeal against a decision of the First-tier Tribunal, promulgated on 11\* October 2013, dismissing her appeal against the Respondent's decision of 13<sup>th</sup> May 2013 refusing to vary leave to remain as a spouse.*

*2. The grounds of application, in summary, contend the Judges decision, with respect to article 8 of the ECHR was against the weight of the evidence.*

*3. Whilst the grounds, for the most part, are no more than a*

*disagreement with the Judges conclusions, it is arguable the Judge erred in failing to consider what weight should be attached to the Appellant's failure to meet the English language requirements contained within the Immigration Rules in the article 8 assessment, bearing in mind her conclusion that the Appellant spoke very good English and would pass an English language test with "top marks". Such an arguable error is potentially material because if the weight to be attached to the lack of compliance with the Rules, when assessing proportionality had been reduced, the outcome might have been different.*

*4. Permission to appeal is granted and all the grounds may be argued."*

2. In the reasons for refusal letter dated 13<sup>th</sup> May 2013, the Secretary of State made it plain that no consideration had been given to paragraph EX1(a) since there was no evidence that the appellant's spouse had a child or if so that they lived with the appellant.
3. In fact in relation to her 10 year old stepson who is a United Kingdom citizen the First Tier Tribunal found as a fact at paragraph 20

*"I am satisfied that she has a very genuine and warm relationship with her stepson who lives with them permanently whilst having contact with his biological mother twice a week."*

4. The judge went on further at paragraph 26:

*"I recognise that stepson has a close bond with the appellant".*

5. At paragraph 25 the judge made it plain that it was unreasonable to expect the child to leave the United Kingdom.

*"The appellant's stepson is thriving at school. The school report demonstrates this. It would not be appropriate for stepson and father to accompany the appellant to Algeria and continue family life there. This is because stepson has regular and frequent contact with his biological mother. It is crucial that he be allowed to continue with these arrangements which to the credit of all the parties involved work very well."*

6. Paragraph EX1(a) reads as follows:

**"Exception**

**Section EX: Exception**

*EX.1. This paragraph applies if*

*(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-*

*(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;*

*(bb) is in the UK;*

*(cc) is a British Citizen or has lived in the UK continuously for at least the 7*

*years immediately preceding the date of application ;and  
(ii) it would not be reasonable to expect the child to leave the UK; or  
(b) the applicant has a genuine and subsisting relationship with a partner who  
is in the UK and is a British Citizen, settled in the UK or in the UK with  
refugee leave or humanitarian protection, and there are insurmountable  
obstacles to family life with that partner continuing outside the UK.”*

7. It is plain from the findings of the First Tier Tribunal Judge that the requirements of EX1(a) were met, and in those circumstances the requirements of the Immigration Rules were met. The decision made by the First Tier Tribunal Judge therefore contains an error of law in dismissing the appeal and must be remade. Since there is no factual dispute over these matters it is not necessary to hear fresh evidence on the matter and I can remake the decision by allowing the appeal for the reasons given above.

### **Decision**

1. The decision of the First Tier Tribunal contains an error of law and must be remade.
2. The Appeal is allowed



Judge John Aitken  
Deputy Chamber President  
Health Education and Social Care Chamber  
Monday, 31 March 2014