



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

Appeal Number: HU/16008/2016

THE IMMIGRATION ACTS

**Heard at Piccadilly Exchange,
Manchester
On 11th January 2018**

Decision and Reasons Promulgated

On 30th January 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ABDELHAFID [L]

Respondent

Representation:

For the Appellant: Mr C Bates, Senior Home Office Presenting Officer

For the Respondent: Ms G Patel, counsel, instructed by Ashwood solicitors

DECISION AND REASONS

1. Mr [L] appealed the decision dated 13 June 2016 by the SSHD to refuse his human rights claim which was based upon his marriage to a British Citizen. The application was considered under the 10-year partner and private life routes contained within Appendix FM and paragraphs 276ADE-CE of the Immigration Rules and outside the rules on the basis of exceptional circumstances. The SSHD accepted Mr [L] met the suitability requirements but did not accept that he met the eligibility requirements namely it was not accepted he was in a genuine and subsisting relationship with his claimed partner, Andrea [N]. First-

tier Tribunal judge Heatherington found the couple were in a genuine and subsisting relationship and allowed the appeal under the Immigration Rules.

Error of law

2. The SSHD sought and was granted permission to appeal on the grounds that the judge had failed to consider EX.1 and it was incumbent upon the judge to consider whether there were insurmountable obstacles to Ms [N] going to Algeria with him; the SSHD argued that the judge had failed to make findings of fact on a central issue once the existence of the relationship had been found to be in the appellant's favour.
3. Ms Patel, relying upon the Rule 24 response filed by the solicitors, submitted that the only issue before the judge was whether the relationship was genuine and subsisting; having found that it was there was no necessity for the judge to consider other aspects of the Immigration Rules.
4. The First-tier Tribunal judge allowed the appeal against the rejection of the human rights claim under the Immigration Rules. He failed to consider the Rules in their totality. The SSHD's decision was predicated upon a conclusion that there was no genuine and subsisting relationship. In those circumstances and on that basis for her to go on to consider issues such as finance and accommodation would be futile because it was the SSHD's position that he would not in any event have met the requirements of the Rules. Ms Patel submitted that Mr [L] had addressed the case against him and it was unfair that matters should be raised of which he was not aware.
5. This is a surprising submission. Solicitors who specialise in Immigration know that compliance with the Immigration Rules requires compliance with all aspects of the Rules. They also know that to succeed on a human rights claim, the requirements of s117B Nationality Immigration and Asylum Act 2002 have to be met. The judge did not begin to address this. Furthermore, the SSHD in the decision letter addressed whether there were significant obstacles to Mr [L] returning to Algeria and the judge failed to address this.
6. Although Ms Patel did not formally concede that there was a material error of law in the First-tier Tribunal judge's decision she did not make any further submissions on this point or identify where the judge had considered the relevant requirements.
7. The First-tier Tribunal judge erred in law in failing to make findings and reach conclusions on material matters. I set aside the decision to be remade, the only finding preserved is that there is a genuine and subsisting relationship between the couple.

Remaking the decision

8. The starting point is that there is a genuine and subsisting relationship between the couple. They first met in April 2010 and they started living together in 2012. They were married in an Islamic ceremony on 25th April 2015. They underwent

a civil marriage on 23rd September 2017 and Ms [N] has changed her name to [L].

9. Ms [L] owns the property they live in, subject to a mortgage. Mr Bates did not dispute that this property was suitable and met the requirements of the Rules.
10. Ms [L] has two adult sons. The oldest has recently moved out of the family home to live close by with his fiancée. The youngest (who is aged 24) still lives at home. He is employed and has no medical needs. Mr Bates did not dispute this evidence.
11. Ms [L] had a very traumatic first marriage. Her first husband attacked her (about 20 years ago) and she received 11 stab wounds resulting in two collapsed lungs and she nearly died. Her ex-husband was sentenced to seven years in prison and has since been released from prison with a condition that he makes no contact with her. The two boys do not have any contact with him. I was not provided with details of the offence or the sentencing judge's remarks or medical evidence to support her oral evidence or evidence as to the long-term psychological effect this had on her or the treatment she received for this. Mr Bates did not challenge this evidence and, having seen Ms [L] give evidence I am entirely satisfied that she told the truth. I am entirely satisfied that the incident had a profound and long-term effect on her and has resulted in her, her two boys and her parents being far closer and emotionally dependent upon each other than would otherwise be the case.
12. Ms [L]'s evidence of the development of her relationship with Mr [L] is symptomatic of the profound effect the attack had upon her. She describes the cautiousness with which she approached the relationship, her concern for her two boys and her parents and the effect it would have upon them as a family. This was even though the two boys were, at the time the relationship commenced, approaching adulthood. Her description of the two boys' protectiveness of her because of the past history and their gradual acceptance of Mr [L] as a family member are a testament to the strength of the relationship and the profound closeness of the family unit.
13. Mr Bates raised some objections because neither boy gave oral evidence and there was no witness statement from them or Ms [L]'s parents. Ms [L] explained that the two boys were at work and her mother had a hospital appointment which her father had taken her mother to. Ms Patel had not asked for an adjournment. It is perhaps surprising that solicitors who profess to be experts in this field of law did not provide up-dating witness statements, particularly because the parents and one son had been at the First-tier Tribunal hearing and the directions sent with the Notice of Hearing make clear that if an error of law is found the re-making may follow. Nevertheless, I note that supporting statements, although brief, were submitted with the original application. I found Ms [L] to be an impressive and truthful witness and I am entirely satisfied that Mr [L] is an integral member of this close knit family unit and has become so because of his care and love for his wife.

14. Ms [L]'s parents (Mr and Mrs [B]) have some physical disabilities. They are mobile but with aids. Mr [B] can drive. They live close to Mr and Mrs [L] who call in most days and undertake various supportive tasks for them. Mr [L] slightly exaggerated their lack of mobility but I am satisfied that her parents are dependent upon Mr [L] and his wife for assistance. That assistance is not physical in the sense that they could not cope without it but consists of assistance with tasks around the house, and, very importantly, emotional support. This derives from the very close bond between Ms [L] and her parents after her ex-husband's attack upon her. The physical tasks undertaken by Mr and Ms Lakhal, for example housework, taking them out on trips, "odd jobs" around the house, could be undertaken by other people – possibly Ms [L]'s sons. The presence of Mr and Ms [L] is not necessary, physically, for Mr and Mrs [B] and there was insufficient evidence before me to find that they would suffer unduly if Mr and Ms [L] were to leave the UK permanently or for a period of time.
15. I was provided with extracts from Human Rights Watch and the Home Office Country Guidance. Ms Patel stated it was not possible to obtain information about the position that Ms [L] would find herself in. I am surprised she did not refer me to the FCO travel advice, which is in the public domain and which has a bearing on the position that Ms [L] would find herself in if she were to travel to Algeria to be with her husband.
16. I made directions on 15th January 2018 in the following terms:

Having heard submissions in this appeal on 11th January 2018 and having considered the evidence before me, I am minded to take into account, in reaching my decision, the current FCO advice on travel to Algeria.

I therefore direct that any written submissions by either party which they wish me to consider, on that Advice, are to be filed and served by 4pm on 26th January 2018. I shall thereafter take my decision on the basis of the evidence and submissions before me.
17. I received written submissions on behalf of Mr [L], which I have taken into account but none on behalf of the SSHD.
18. The travel advice includes:

The Foreign and Commonwealth Office (FCO) advise against all travel to areas within:

 - 30km of the borders with Libya, Mauritania, Mali and Niger
 - 30km of the border with Tunisia in the provinces of Illizi and Ouargla and in the Chaambi mountains area

The FCO advise against all but essential travel to within 30km of the remainder of the border with Tunisia.

Terrorists are very likely to try to carry out attacks in Algeria, including kidnappings. Terrorist attacks have focused on the Algerian state, but attacks could be indiscriminate and include foreigners. There's also a risk that lone actors could target foreigners. You should be vigilant at all times and take additional

security precautions, especially in: towns and cities; the southern, Libyan and Tunisian border areas; rural and mountainous areas in the north; and the Sahara.

The threat from terrorism is higher in some parts of the country:

- the southern border (where the kidnap risk is concentrated)
- the Libyan and Tunisian borders
- rural, and particularly mountainous, areas in the north and between Tunisia and Algiers
- the Sahara

The Algerian authorities devote considerable resources to the safety of foreign visitors. In cities there's a clear security presence, which can feel intrusive. Authorities will want to know your travel plans when travelling outside major cities and may assign police or gendarmes to protect you.

If you're travelling independently you should notify the Ministry of Foreign Affairs or local authorities of your plans. Your hotel should be able to help you with contacting local authorities. This doesn't apply if you have dual Algerian nationality. You should accept any security escort you're offered and co-operate with authorities. See Terrorism.

When moving around Algiers and the other main cities, you should avoid areas that you don't know, especially after dark. Travelling in rural areas and at night is particularly risky and it's always advisable to travel with a reputable guide or companion in these areas. Avoid travel by road at night outside the major cities and motorways. See Crime and Local travel

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Local travel

Seek the advice of your hosts about appropriate security measures. If possible you should arrange to be met on arrival in Algiers. You should stay at one of the main hotels where proper security precautions are taken.

Where possible, make journeys by air and stay in pre arranged accommodation at your destination. Business visitors without established contacts should seek advice in the first instance from the British Embassy, Algiers or the Algeria desk in UK Trade and Investment.

Tourists should confirm travel arrangements before arrival in Algeria, using a reputable tour operator with good local knowledge.

It's generally safe to move around the centre of Algiers during the day. Ideally, travel around with someone who knows the city well. Avoid areas that you don't know, particularly in the suburbs of the city and especially after dark. Don't carry large amounts of money or valuables around with you. If you plan to tour the Casbah area of Algiers, use a good local guide and make sure local police and your hosts/hotel know about your plans. Don't accept lifts from people you don't know - use a taxi service recommended by the hotel.

19. There was no evidence before me where Mr [L]'s family live and with whom the couple could be expected to live, at least for the first few months that they re-located there. The couple's evidence was that it would be extremely difficult for Ms [L] to obtain employment because of her ethnicity and lack of language ability. Although Mr [L] thought there might be some personal pressure from his parents for her to convert to Islam, he did not consider this would be anything

more than their personal desire. Mr [L] said that his parent's accommodation was small – 3 bedrooms with 8 people already living there.

20. Mr [L] said that there was very little tourism in Algeria and he would also find it difficult to obtain employment. He expressed his concern at the level of terrorism in Algeria.
21. I accept Mr [L]'s evidence regarding the availability of accommodation and the significant difficulties that Ms [L] would face in finding employment. Because I do not know where Mr [L]'s family live, I have taken the view that they are in Algiers rather than in a rural area. Because there are 8 people in a 3-bedroom house I have concluded that they are not particularly well-off but there would be accommodation available in the short term, although they may well have to share a bedroom with other adults. Although Mr [L] may find it difficult to find employment because he has been in the UK for so long, he has during his time in the UK acquired excellent English language skills and there was very limited evidence before me as to the lack of possible job opportunities in Algeria for him. I am satisfied, given the absence of evidence otherwise, that he would be able to find some sort of employment.
22. Ms [L] gave oral evidence that she earns £28,500 per annum. A letter from her employers confirms she is employed as a Litigation Department Manager but does not provide details of her income. Although wage slips were provided to the SSHD with the application (according to the covering letter for the application) they were not before me. Nor have bank statements been produced. Nevertheless, both Mr and Ms [L] confirmed her income; she is paying a mortgage and the job she holds is a responsible job. I accept her evidence of her income.
23. Mr [L] arrived in the UK in 2000. Although not specified the SSHD accepts that he is an overstayer rather than an illegal entrant.
24. It was not submitted by Ms Patel, realistically, that Mr [L] would face very significant obstacles to his integration into Algeria – he is Algerian, he speaks Arabic, French and English, he spent the first 26 years of his life in Algeria, all his family continue to live there and he has no mental or physical problems that could affect his integration.
25. In terms of Paragraph EX.1¹ the issue is whether there are insurmountable obstacles to family life between the couple continuing outside the UK. This is amplified as “very significant difficulties...which could not be overcome or would entail very serious hardship for” either of them.

¹ EX.1. This paragraph applies if

(a)

(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.

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

26. Ms Patel submitted both that there was no public interest in removing Mr [L]; he has been resident in the UK for some 17 years and in a strong and subsisting relationship with a British Citizen. She referred to the above matters and in addition submitted that were Mr [L] to leave the UK and apply for entry clearance he would be granted such entry clearance and therefore the public interest in removing him was significantly diminished.
27. She also however submitted that he would not succeed in his entry clearance application because he is a long time overstayer and thus, because of the enormous difficulties that would be faced by Ms [L] in Algeria and that she could not leave her sons and her parents, it would mean the end of their family life.
28. Although the decision in *Agyarko* [2017] UKSC 11 is well known, I set out below the relevant paragraphs for ease of reference:

“45. By virtue of paragraph EX.1(b), “insurmountable obstacles” are treated as a requirement for the grant of leave under the Rules in cases to which that paragraph applies. Accordingly, interpreting the expression in the same sense as in the Strasbourg case law, leave to remain would not normally be granted in cases where an applicant for leave to remain under the partner route was in the UK in breach of immigration laws, unless the applicant or their partner would face very serious difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship. Even in a case where such difficulties do not exist, however, leave to remain can nevertheless be granted outside the Rules in “exceptional circumstances”, in accordance with the Instructions: that is to say, in “circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate”. Is that situation compatible with article 8?

...

48. The Secretary of State’s view that the public interest in the removal of persons who are in the UK in breach of immigration laws is, in all but exceptional circumstances, sufficiently compelling to outweigh the individual’s interest in family life with a partner in the UK, unless there are insurmountable obstacles to family life with that partner continuing outside the UK, is challenged in these proceedings as being too stringent to be compatible with article 8. It is argued that the Secretary of State has treated “insurmountable obstacles” as a test applicable to persons in the UK in breach of immigration laws, whereas the European court treats it as a relevant factor in relation to non-settled migrants. That is true, but it does not mean that the Secretary of State’s test is incompatible with article 8. As has been explained, the Rules are not a summary of the European court’s case law, but a statement of the Secretary of State’s policy. That policy is qualified by the scope allowed for leave to remain to be granted outside the Rules. If the applicant or his or her partner would face very significant difficulties in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship, then the “insurmountable obstacles” test will be met, and leave will be granted under the Rules. If that test is not met, but the refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Rules on the basis that there are “exceptional circumstances”. In the absence of either

“insurmountable obstacles” or “exceptional circumstances” as defined, however, it is not apparent why it should be incompatible with article 8 for leave to be refused. The Rules and Instructions are therefore compatible with article 8. That is not, of course, to say that decisions applying the Rules and Instructions in individual cases will necessarily be compatible with article 8: that is a question which, if a decision is challenged, must be determined independently by the court or tribunal in the light of the particular circumstances of each case.

...

51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*.

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56. The European court’s use of the phrase “exceptional circumstances” in this context was considered by the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544. Lord Dyson MR, giving the judgment of the court, said: “In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual’s article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be ‘exceptional’) is required to outweigh the public interest in removal.” (para 42) Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as the Master of the Rolls made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, “something very compelling ... is required to outweigh the public interest”, applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in *Hesham Ali*.

57. That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State’s policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are “insurmountable obstacles” or “exceptional circumstances” as defined. It must also consider all factors relevant to the specific case in

question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.

58. The expression “exceptional circumstances” appears in a number of places in the Rules and the Instructions. Its use in the part of the Rules concerned with the deportation of foreign offenders was considered in *Hesham Ali*. In the present context, as has been explained, it appears in the Instructions dealing with the grant of leave to remain in the UK outside the Rules. Its use is challenged on the basis that the Secretary of State cannot lawfully impose a requirement that there should be “exceptional circumstances”, having regard to the opinion of the Appellate Committee of the House of Lords in *Huang*.

59. As was explained in para 8 above, the case of *Huang* was decided at a time when the Rules had not been revised to reflect the requirements of article 8. Instead, the Secretary of State operated arrangements under which effect was given to article 8 outside the Rules. Lord Bingham, giving the opinion of the Committee, observed that the ultimate question for the appellate immigration authority was whether the refusal of leave to enter or remain, in circumstances where the life of the family could not reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudiced the family life of the applicant in a manner sufficiently serious to amount to a breach of article 8. If the answer to that question was affirmative, then the refusal was unlawful. He added: “It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* [*R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368], para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test.” (para 20)

60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word “exceptional”, as already explained, as meaning “circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate”. So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that “exceptional” does not mean “unusual” or “unique”: see para 19 above.”

29. As can be seen from the extract from *Agyarko* set out above, the essential issue in this case is an issue of the proportionality of refusal of leave to remain in the context of the public interest in the maintenance of immigration control. In the vast majority of cases, the refusal of leave to remain for an applicant who has been an overstayer for some 17 years but has a genuine and subsisting relationship with a British Citizen of 7 years will not sustain a conclusion that the decision is disproportionate. That is not to say that there must be some exceptional feature; rather that when considering the whole of the circumstances including the particular characteristics not only of an applicant but also the family unit and in particular the spouse and whether the obstacles faced would be significant and harsh.
30. In this case one of the defining features is the terrible attack sustained on Ms [L] by her ex-husband and the consequences to her. Although I was not provided with medical details it must be the case that to have come so close to death with two young children would inevitably lead to an intensely close relationship with her parents and her children and a perceptible reluctance to embark on a new relationship. The relationship she has with Mr [L] is close and integral to the family. Although her two children are adults, one remains living at home and the other lives close by. Her parents, although not in need of her care, are provided with care by her, albeit that care is non-essential. She clearly feels an immense sense of duty to them and such duty cannot be replaced by arranging for her sons to undertake visits for 'odd jobs' or trips out. If she goes to Algeria she will be away from the daily contact she has with those who have supported her in her recovery from the traumatic attack and enabled her to develop to the extent that she now holds down a responsible job and has brought up two sons who are both employed. Although she will be with her husband, she will not, I am satisfied, be able to obtain employment and will, because of the culture of Algeria and her lack of language skills and ethnicity, find herself living a very restricted life in Algeria. She will be isolated when her husband is at work. She will not only have given up a well-paid job in the UK and embarked on a life with limited face to face contact with her other family members but will, on the basis of the FCO advice, be living in a dangerous society. Such a prospect would be formidable for any British woman but for Ms [L], with her personal history of having sustained serious and severe violence, to live in such a society where she would be unable to communicate with anyone other than her husband or travel around unaccompanied and be surrounded by danger and be unemployed, would be harsh in the extreme.
31. Weighed against this is the long-term overstaying of Mr [L]. There is little evidence that he has done anything other than casual work whilst in the UK and it is difficult to understand why he should have remained for such a long period of time in such circumstances. He gave no explanation for this. He did not disclose to his wife for several months that he was an overstayer. They have not discussed her going to Algeria with him in any detail, it being apparently understood that she would find it tremendously hard to integrate into such a society without her wider family and for the reasons given above. The couple have not investigated how long they would be apart whilst Mr [L] returned to Algeria in order to obtain a 'spouse' visa, it being realistically accepted by them that because of his long term overstaying he would be very unlikely to obtain

such a visa even though their relationship is of such length, closeness and financially secure.

32. Taking all of these findings into account and placing the required weight upon the public interest in maintaining immigration control, I am satisfied that there are insurmountable obstacles to family life continuing if Mr [L] is refused leave to remain. Those obstacles cannot be overcome without entailing very serious hardship for Ms [L]. Relocation to Algeria for her would be unduly harsh and would entail very serious hardship.
33. This case is therefore one of very few cases where the appeal succeeds.

Conclusions:

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

I set aside the decision

I re-make the decision in the appeal by allowing Mr [L]'s appeal against the decision to refuse his human rights claim.



Upper Tribunal Judge Coker

Date 29th January 2018