



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

Case No: UI-2023-002000
UI-2023-002001

First-Tier Tribunal No: HU/02802/2021
HU/01780/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated

30th October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**WASSILA ZAIDI - 1st appellant
RACHA KHEDOUDJA BELAYAT - 2nd appellant**

(Anonymity order not made)

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: The 1st appellant appeared in person
For the Respondent: Mr E Terrell, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 6 October 2023

The Appellants

1. The appellants are both citizens of Algeria. The first appellant who I shall refer to as the appellant was born on 6 February 1979. The second appellant is her daughter who was born on 28 June 2016. The appellant's appeal against a decision of Judge of the First-tier Tribunal Beg sitting at Taylor House on 15 March 2023. That decision was to dismiss the appellant's appeal against a decision of the respondent dated 26 March 2021 refusing the appellant's application for leave to remain in the United Kingdom. The appellants arrived in the United Kingdom on 16 November 2018 with entry clearance as visitors valid until 25 April 2019. They applied for leave to remain on 5 June 2020 after their visitors visas had expired. The appellant is married to Mr Lamine Balayet an Algerian citizen who has an EEA permit as the divorced spouse of an EEA citizen ("the sponsor"). The appellant and sponsor married on 9 November 2018 in Algiers.

The Appellants' Case

2. The appellant's case was that she and her daughter were family members of a settled person. There were insurmountable obstacles to the appellants enjoying their family life outside the United Kingdom. They should not be required to return to Algeria to make an application for entry clearance from there, partly because that would be a mere bureaucratic requirement given the strength of their case and partly because of the respondent's discretionary Covid policy (in force when they applied for leave). The policy recognised that some people might experience difficulties in travelling to their country of origin during the pandemic. In such cases there was a discretion for case workers to grant applications for leave to remain from such persons even if they were in the United Kingdom without leave. In relation to article 8 the appellant argued that it would be a disproportionate interference with the right to a family life to refuse the application. The sponsor was financially able to support them, the second appellant was in education and the appellant herself could speak English.

The Decision at First Instance

3. The judge found the marriage between the appellant and the sponsor to be genuine and subsisting. The appellant said it was not acceptable in Algerian society for a woman to be pregnant outside of marriage but at [24] the judge found no credible explanation why the appellant and sponsor did not have an Islamic ceremony of marriage either before the appellant was expecting a child or during her pregnancy.
4. The judge found the appellant was very familiar with Algerian society and had worked there. She and the sponsor had close family members in Algeria both having two brothers with families who could give some support. The main reason the couple did not want to return to live in Algeria was because their daughter the second appellant was in school in the United Kingdom. Although the judge accepted that the second appellant was settled in school with the support of her parents she would be able to enter the education system in Algeria. The second appellant spoke

English French and some Arabic and would be able to become more proficient in Arabic. The judge found at [36] that there would not be insurmountable obstacles to family life continuing for both appellant and the sponsor in Algeria.

5. The judge did not find the appellant or the sponsor credible on the issue of their intentions at the time the appellant arrived in the United Kingdom. The judge found it was the appellant's intention before she left Algeria to settle in the United Kingdom. The purpose in using a visit visa was to circumvent the immigration rules on entry clearance as a spouse. There would be a significant public interest in requiring an application to be made from abroad by an appellant using a visit visa with the intention of settling here. There was no credible explanation why the couple did not make an entry clearance application from Algeria before the appellant came to the United Kingdom on a spouse visa. Little weight in the balancing exercise could be afforded to their relationship.
6. The appellant could return to Algeria to make an entry clearance application from there. The temporary disruption this would cause would not be a disproportionate interference with protected rights. Both appellants were in good health. The first appellant had established a private life in the United Kingdom in the full knowledge she had no right to live here and it could therefore attract little weight. Any interference in the appellant's article 8 rights would be proportionate and would not result in unjustifiably harsh consequences.

The Onward Appeal

7. The appellant appealed against this decision on four grounds settled by Counsel who had appeared at first instance but who did not appear before me. The first ground was that the judge had intervened too often during the course of the hearing. No evidence was produced to support this allegation. The second ground was that the judge made certain mistakes of fact including a finding that the parties had made an Islamic marriage when they had not. The third ground was that the judge had overlooked the Covid concession issued by the respondent and the fourth was that the judge had failed to deal with the best interests of the second appellant. Permission to appeal was granted by the First-tier Tribunal on the grounds that it was arguable that the judge had descended into the arena, notwithstanding it seems the lack of evidence to support such an allegation. As permission was granted on that ground permission to appeal was granted on all grounds.

The Hearing Before Me

8. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

9. The appellant appeared in person. She said that her daughter spoke English but could not speak a word of Arabic. She and the sponsor spoke Algerian Arabic. The education system in Algeria was different to that in the United Kingdom where her daughter was presently in year three. Arabic used a completely different writing system. In Algeria there would be 40 children in the classroom and the teacher would not be able to spend time with the second appellant to give her a level playing field to progress. She might have to go back to year one. She had friends here. The appellant denied that it was her intention to stay here when she and her daughter came for a visit. The appellant had a cousin here who supported her. The appellant would like to work as there were opportunities for example in hospitality.
10. For the respondent it was argued, pursuant to the case of EV Philippines [2014] EWCA Civ 874 there was no right to an education. The judge did look at the best interests of the second appellant quite carefully, the grounds were wrong to say that she had not. The judge had noted that the second appellant did speak some Arabic and had looked at the Algerian education system. The findings she made were open to her on the evidence. The grounds did not suggest that the judge's findings were irrational they just said the judge had disregarded the best interests of the child.
11. The coronavirus concession was to be found at pages 62 and 63 of the electronic bundle. The policy applied to those who were unable to return to their country of origin to make an application from there and ran between 1 March 2020 and 31 August 2020. It was a discretionary policy which meant that the parties had to ask for it to be exercised. The policy refers to a short period of overstaying between when a visa expires and the application is made. In this case it was a long period. It was difficult to see how the policy was relevant to a human rights appeal. The argument seemed to go to the legality of the decision which the Upper Tribunal could not do. Even if the judge had referred to the concession it would have made no difference to the outcome.
12. In conclusion the appellant took up the point made in the grounds about the judge's reference to an Islamic ceremony. The appellant did not produce any background information on marriages in Algeria but she argued that the Nikah procedure (which exists in Pakistan) did not exist in Algeria. Only a civil marriage was valid and an Imam was not allowed to perform an Islamic marriage without there being a civil one. If a woman only had an Islamic marriage she would not be able to go to court and there were also financial implications to do with pensions.

Discussion and Findings

13. The appellant and her daughter the second appellant travelled to the United Kingdom on visit visas, officially to visit the sponsor. Although the appellant denied that her intention in travelling was to remain permanently in the United Kingdom, (something she repeated in her submissions to me), the judge at first instance did not accept the appellant's evidence on that point, see [45]. The judge pointed to discrepancies in the evidence and found that it was the appellant's intention before

she left Algeria to settle in the United Kingdom. That was a finding of fact which was based on the evidence the judge received and was open to her. What concerned the judge was that there was no explanation why the appellant had not made an application for entry clearance from Algeria on a spouse visa instead of applying for a visit visa. Whether the appellant believed that it would be easier to gain such a visa is to speculate but the judge found that the credibility of the appeal was undermined by the way entry was gained.

14. The determination is attacked (inter alia) on the grounds that there was procedural error in that the judge was said to have intervened too frequently during the hearing. The judge granting permission acknowledged that that conclusion could not be deduced from the wording of the determination itself. To make such an allegation without some supporting evidence inevitably reduces the weight to be given to such a submission, see BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC). What is needed on appeal in such cases is a statement from the advocate who appeared at first instance and some form of transcript to give an indication of what the questioning was. Although the grounds were settled by counsel who had appeared at first instance, there was no supporting statement from counsel. The grounds did not offer any kind of indication of how many questions the judge asked as opposed to how many questions the presenting officer had asked. In a situation where supporting evidence would be reasonably expected the absence thereof means I find no merit in that ground.
15. The difficulty for the appellant is that that was the main ground on which permission was granted and the other grounds were considered much weaker. The second ground relates to the Covid concession. The appellant made her application for entry clearance as a visitor on 5 June 2020 when the Covid concession was in force and at a time when her own visa had expired. The discretionary element of the concession allowed caseworkers to allow applicants to start, extend or complete a route to settlement on the basis of family or private life even if they were unable to meet the immigration status/continuous residence eligibility requirements of appendix FM. The appellant could not meet the requirements as she was present in the United Kingdom unlawfully, the appellants' visit visas having expired.
16. This was a discretionary policy. The respondent referred to the policy in the refusal letter in connection with the lifting of the English language requirement, but evidently felt that discretion under the policy should not be exercised in favour of the appellant when she made her application for leave to remain under article 8 outside the rules. The policy does not guarantee that an application will be granted but rather an application will not be rejected because the applicant has no status. The appellant's application was rejected principally because the respondent did not accept that there would be very significant obstacles to the appellant's integration into Algeria if she were required to leave and there were no unjustifiably harsh consequences of refusing the application.

17. The third ground was that the judge had made certain mistakes of fact and misunderstood the status of an Islamic ceremony in Algeria. The grounds complained that the point was not raised during the hearing. As I note at paragraph 12 above, I was not referred to any background evidence on the status of religious marriages in Algeria but whatever the actual position it is difficult to see what relevance any of this had to the issues in the case. The appellant and sponsor were validly married under Algerian law by the time she arrived in the United Kingdom, (the wedding was seven days earlier) and the appellant might have applied for a spouse visa to enter the United Kingdom. The judge pointed out that she had been given no explanation why this was not done.
18. The fourth ground, that the judge had not taken into account the best interests of the second appellant is not borne out by careful reading of the determination. It is clear from the appellant's submissions to me and the recording of the appellant's submissions in the First-tier Tribunal that the main reason why the appellant and the sponsor did not want to return to live in Algeria was because the second appellant was receiving an education in the United Kingdom. The judge was aware of the test to be applied in assessing the best interests of the child which in this case would be to continue to live with her parents. Since the adults could return together to Algeria there would be no separation. The judge accepted the appellant's evidence that the second appellant was settled in school and made friends but found at [33] that with the support of her parents the second appellant would be able to enter the education system in Algeria. The adults understood that system because they had both attended school in Algeria. They could help their daughter.
19. At [34] the judge dealt with the second appellant's language skills and noted at [35] that the second appellant would be able to relearn Arabic and become more proficient in it once she was in Algeria. She was not at a crucial stage of her education as she was aged six at the date of the hearing and is now seven. The judge did not refer in her determination to EV Philippines, whose ratio is relevant to this appeal. She did however look at the issue of the second appellant's education and her ability to be educated in Algeria in some detail. The judge found that there would not be insurmountable obstacles to family life continuing for both the appellant and the sponsor in Algeria. The appellant could not therefore succeed under the requirements of EX2 of appendix FM. She found that there would be a support network available to the family upon return, see [38], a finding open to the judge on the evidence.
20. In the original grounds of appeal against the respondent's decision the appellant had referred to the case of Chikwamba [2008] UKHL 40. That case would only apply where the application had been refused on the narrow procedural ground that the applicant must leave the United Kingdom in order to make an application for entry clearance. Even in such a case a full analysis of the article 8 claim is still necessary as the judge pointed out at [47] and which she did carry out. Given that there are factors on both sides of the balancing exercise in this case it cannot be said that the only basis

on which the appellant's application was refused was that she was in the United Kingdom and ought to return to Algeria.

21. Overall this was a carefully written determination by a specialist judge, the grounds of onward appeal do not demonstrate any material error of law in the determination and I therefore dismiss the onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 18th day of October 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge