



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/02568/2013

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 22<sup>nd</sup> November 2013

Determination Promulgated  
On 13<sup>th</sup> December 2013  
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Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

NOUREDDINE NAFIL

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

**Representation:**

For the Appellant: Mrs Z Preston of the Immigration Legal Advice Centre  
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. This is the Appellant's appeal against the decision of Judge Mensah made following a hearing at Bradford on 21<sup>st</sup> August 2013.

## **Background**

2. The Appellant is a citizen of Algeria, born on 10<sup>th</sup> September 1973. He applied to come to the UK as the spouse of Naida Mohammedi on 30<sup>th</sup> September 2012 but was refused entry clearance on 11<sup>th</sup> April 2013 on the grounds that he could not meet the financial requirements of the Immigration Rules.
3. The judge recorded that the Sponsor's gross income was £12,090. She said that the only basis upon which she was being asked to consider the case was under Article 8. The judge wrote:

“In effect the Sponsor explained that the father of her children passed away and that is why she has remarried. The Sponsor is now pregnant and wishes for her husband to join her.”
4. In a very brief determination the judge said that, while she accepted family life existed, the financial requirements were important public interest requirements, and there was no clear evidence before her that there were insurmountable obstacles to the Sponsor and Appellant living abroad or maintaining their family life as it has existed since the marriage. She dismissed the appeal.

## **The Grounds of Application**

5. The Appellant sought permission to appeal. The Sponsor said that it was offensive that the Immigration Judge stated that her first husband had passed away and that is why she had remarried. She had remained a widow for ten years and had been a single mother for that time.
6. The judge displayed a complete disregard for the fact the couple have a son who is 2 years old, and British, and suffers from health problems including anaemia and severe eczema. Furthermore her two eldest children have lived in the UK for over seven years and have indefinite leave to remain. Their best interests have not been considered.
7. Permission to appeal was granted by Judge Brunnen on 30<sup>th</sup> September 2013 for the reasons stated in the grounds.
8. On 17<sup>th</sup> October 2013 the Respondent served a reply defending the determination but at the hearing Mrs Pettersen sensibly conceded that it could not stand and that the decision needs to be remade.

## **Consideration of whether there is a Material Error of Law**

9. This has the hallmarks of a hurried determination. The judge records the Sponsor as representing the Entry Clearance Officer and her shorthand referral to her widowhood was bound to cause distress, although she did say that she had much sympathy with her and she was clearly a hardworking lady.

10. The judge erred in law because the proportionality of the Respondent's decision could not be properly assessed without taking into account the best interests of three children, one of whom is British; (ZH (Tanzania) v SSHD [2011] UKSC 4).
11. The decision is set aside.

### **The Sponsor's Evidence**

12. Nadia Mohammad explained that she first came to the UK with her two children in 2001 and claimed asylum. She was refused and her subsequent appeal was dismissed. They returned to Algeria in 2002 and very shortly afterwards her first husband died there. They stayed together in Algeria for four years until, in 2006, she came back to the UK and again applied for asylum. She was granted indefinite leave to remain in 2009 under the Legacy Programme.
13. In January 2010 she met her second husband, the Appellant. He had come to the UK in 2007 and had overstayed.
14. The Appellant returned to Algeria so that he could apply for entry clearance. Their son was 40 days old when his father returned to Algeria.
15. Since he went back the Appellant has visited him four times. On the first visit she took her oldest son and the baby, the second and third times just the baby and the fourth time she went on her own. She explained how hard it was because each time she visited, she travelled 700 Km, twelve hours by minicab, to see her sister who lived in the desert. She explained that she did not feel safe in Algiers because she was still frightened because what had happened to her there in the past. The Appellant lives with his parents in Algiers but when she visited they went together to her sister's because she could not stay with him there. The main reason was because of her safety, but also the house in Algiers was overcrowded.
16. Her youngest child suffers from anaemia and severe eczema. She produced a large amount of medication. She accepted that she could get what the child needed in Algeria.
17. The Sponsor is now pregnant with another child.

### **Submissions**

18. Mrs Pettersen did not seek to challenge the strong evidence of the Sponsor. Nor did she suggest that it would be in the best interests of the older children to be removed and she acknowledged the right of the British child to remain in the UK.

### **Findings and Conclusions**

19. The Sponsor's evidence was compelling. Whether or not she had a well-founded fear of persecution in Algiers, her subjective fear of a return there was clear for everyone in the court to see.

20. It is accepted that the Sponsor's earnings are below the level set by the financial requirements of Appendix FM.
21. Section EX1 of Appendix FM reads as follows:

"EX1. This paragraph applies if (ai) the applicant has a genuine and subsisting parental relationship with a child who -

  - (aa) is under the age of 18;
  - (bb) is in the UK;
  - (c) is a British citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and

(ii) it would not be reasonable be expected 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."
22. Section EX1 does not apply to the Appellant, who is making an application for entry clearance. Had he decided to stay in the UK and make an application for indefinite leave to remain as a spouse rather than doing the correct thing, and returning to Algeria and applying for entry clearance through the proper channels, it would have done.
23. In this case there is a 2 year old British citizen child. It was not argued that it would be reasonable to expect him to leave the UK. He lives with his two brothers, who are aged 15 and 13, who both have indefinite leave to remain here and are in school. The eldest is shortly to take public examinations. They have now been here seven years although not at the date of the application. It would not be reasonable to sever this family.
24. Whether or not there were insurmountable obstacles to family life continuing outside the UK so far as the Sponsor was concerned, was not a matter which was explored at the hearing because it was not necessary to do so. The Sponsor's asylum claim on the second occasion was never determined because she was granted indefinite leave to remain under the Legacy Programme. I would observe, however, that it was abundantly clear that she has a subjective fear of a return to Algiers, that she is clearly devoted to her husband and that if she thought that she could live with him safely in Algeria she would have done so.
25. The fact that the Appellant is in a worse position than he would have been had he made an in country application for settlement, in that he meets the requirements of EX1 is a factor in deciding whether this refusal is proportionate.

26. The Sponsor enjoys family life with her spouse by virtue of their relationship and she enjoys family life with the three children who live in the UK.
27. The refusal of entry clearance represents an ongoing interference with their right to enjoy family life but, because the Sponsor is not in a position to meet the financial requirements of the Rules the decision is lawful. The legitimate aim identified here would be the economic wellbeing of the country although in this particular case the Sponsor is working and the Appellant's arrival would not in practice result in any further recourse to public funds other than the tax credits to which the Sponsor is already entitled. The Appellant is a graduate and was taught for his degree in English and has previously worked for the US Embassy in Algeria. It is likely that he will gain employment in the UK and be able to further support his family here. There is not likely to be an economic disbenefit to the UK by his arrival, but there is a legitimate aim identified namely the maintenance of immigration control since he does not meet the financial requirements of the Rules.
28. The crucial issue in this appeal is the proportionality of the decision. The best interests of the British citizen child must be considered first, as must the best interests of the Sponsor's two older sons, both of whom are settled in the UK and have been since 2006. It is clear that their best interests lie in staying here. The oldest children would not be removed to Algeria and their primary carer is their mother. The youngest child is British. Mrs Pettersen rightly did not suggest that any of the children should go and live in Algeria.
29. The only countervailing factor is the Appellant's overstaying between 2007-10, which is mitigated by his decision to follow the proper procedures and apply for entry clearance outside the UK. In these circumstances the best interests of the children will dictate the outcome of this appeal.
30. The Sponsor is 25 weeks pregnant. It would be helpful to this family if entry clearance could be issued to the Appellant in time for the birth of his child.

### **Decision**

31. The judge erred in law and her decision is set aside. It is remade as follows. The Appellant's appeal is dismissed under the Immigration Rules but allowed on Article 8 grounds.

Signed

Date

Upper Tribunal Judge Taylor