



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

Appeal Number: IA/13957/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3 November 2014  
Prepared 3 November 2014**

**Decision & Reasons  
Promulgated  
On 22 December 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

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

Appellant

**and**

**MR HAMZA BENGHIDA  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms L Lenny, Senior Home Office Presenting Officer

For the Respondent: Respondent attending in Person

**DECISION AND REASONS**

1. In this appeal the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.
2. The Claimant, a national of Algeria, date of birth 25 February 1984, appealed against the Secretary of State's decision, dated 13 March 2014, to refuse to extend leave to remain pursuant to an application of 9 January 2014.

3. The appeal against that decision came before First-tier Tribunal Judge Devlin (the judge), who on 13 June 2014, having found that the Claimant's case did not succeed under the Immigration Rules, went on to consider whether or not the Claimant came within Appendix FM or paragraph 276ADE of the Immigration Rules HC 395 as amended. The judge concluded in both respects that the appeal failed. The judge went on to conclude that the appeal should succeed under Article 8 ECHR outside of the Rules.
4. In considering those matters it appeared to me that the judge simply treated Article 8 outside of the Rules as being the next step bearing in mind the case law the judge cited. The judge failed to consider whether in the context of MF (Nigeria) [2013] EWCA Civ 1192 and Nagre [2013] EWHC 720 (Admin) that there needed to be a consideration of whether the Secretary of States decision was ECHR compliant and secondly whether there were compelling/exceptional circumstances not sufficiently recognised under the Rules which rendered the Secretary of States decision disproportionate. From a reading of the judge's determination of paragraphs 87 to 91 it is clear that the judge started the exercise by deciding that there was a case under Article 8 ECHR and that the Secretary of State's decision was disproportionate. Having reached that conclusion, the judge therefore decided that there was a compelling case not sufficiently recognised by the Rules.
5. Putting aside any error of law in the judge's approach for one moment, it seemed to me it is clear on the evidence and documents before the judge, determining this matter on the papers the judge could do little on the evidence that was actually before him than reach the decision that the judge did on the application of the Immigration Rules.
6. I conclude that the judge's assessment was properly made on the issue, looking at the matter under of the Rules.
7. Unfortunately the judge's consideration of Article 8 ECHR and family life matters failed to consider if a claim to remain based upon his UK spouse's ill health was provided for under the Rules. It was not argued that there is such provision under Appendix FM or paragraph 276ADE or elsewhere in the Rules to enable the Claimant to remain in the UK.
8. The Claimant's typed grounds of appeal did give some information on his wife's reduced liver function (reduced to 22%, 16% and 6% Rt), diabetes and the problems of access to hospitals for dialysis, the costs of treatment and travel, their reduced income in Algeria, the lengthy travel to Bejaia (300km) and Oran (1,200km) and time taken for dialysis away from his home area of Guelma using coaches (with no on-board W.C. facilities) over several days. His wife needs to use a W.C. about every two hours.

9. In the case file before me there are simply no medical documents about the Claimant's wife's ill health, either from a GP, her treating doctor or the hospital whereby she was undergoing any regular treatment. This position was consistent with the judge's remarks at paragraph 90 of the determination that the claim has not been substantiated by evidence. The Claimant says that he sent to the Tribunal a 'big file' of medical information to confirm his wife's suffering from kidney problems and type 2 diabetes. The Claimant believed a letter from his wife's treating doctor at Guy's Hospital was sent to the judge.
10. This is a Secretary of State's appeal and it would seem that the Claimant was not alerted to the need to either raise further grounds in resisting the Secretary of State's application or alternatively argue for his part that documents had been provided and that the judge's findings of fact on the material evidence was wrong.
11. I concluded that the Claimant was being honest about the 'big file' of medical evidence he sent in. I find that the judge made a material error of law in failing to properly assess whether to look at the matter outside of the Rules. It also appears that there may well have been some procedural irregularity through the loss within the Tribunal system of relevant evidence submitted which would have borne upon the judge's assessment of the Article 8 claim.
12. In these circumstances I am satisfied that the only fair and proper course is for the appeal of the Secretary of State to be allowed.
13. The Original Tribunal's decision cannot stand.
14. The matter will have to be remade by the First-tier Tribunal.
15. No anonymity order was sought

## **DIRECTIONS**

- (1) Case to be relisted in the First-tier Tribunal not before First-tier Tribunal Judge Devlin or Judge T B Davey.
- (2) Please relist Taylor House, two hours.
- (3) Issues with the judge's findings on paragraph 284 of the Rules to stand;
  - (i) whether the medical health of the Claimant's wife should be taken into account as a material factor as part of exceptional circumstances and/or in assessing the outcome of an Article 8 claim outside of the Rules and
  - (ii) whether Article 8 outside the Rules is engaged.

- (4) No interpreter required.
- (5) Claimant to provide copies of the medical evidence ('big file') submitted to the First-tier Tribunal and any updated medical evidence.
- (6) Any additional documentation to be provided concerning the Claimant's claim and/or the health of his wife not less than fourteen days before the further hearing.

Signed

Date 17 December 2014

Deputy Upper Tribunal Judge Davey