Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/35582/2013**

THE IMMIGRATION ACTS

Heard	**at**	**Field House**
		Determination promulgated
On 17 June 2014		**On 12 September 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department

Appellant

and

Toumiat Yassine
(Anonymity direction not made)

Respondent

Representation
For the Appellant: Mr. P. Duffy, Home Office Presenting Officer.
For the Respondent: Mr. Z. Nasim of Counsel instructed by Lee Valley Solicitors.

DETERMINATION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Gillespie promulgated on 14 March 2014 allowing Mr Yassine's appeal against the Secretary of State's decision dated 12 August 2013 to remove him from the UK.

2. Although before me the Secretary of State is the appellant and Mr Yassine is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Mr Yassine as the Appellant and the Secretary of State as the Respondent.

Background

3. The Appellant is a national of Algeria born on 8 December 1969.

4. The First-tier Tribunal Judge accepted the credibility of the Appellant and his supporting witnesses, and set out the Appellant's personal and immigration histories in accordance with the evidence at paragraphs 3-8 of the determination. It is unnecessary to repeat that history in detail here. I note, however, because of its subsequent significance in these proceedings, that although the Appellant last entered the UK in 1995, he had previously entered the UK in 1991 and had been absent on two occasions for about three months each in 1994 and 1995.

5. On 27 September 2012 the Appellant applied for leave to remain in the UK relying on Article 8 of the ECHR.

6. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter dated 12 August 2013, and a decision to remove the Appellant in consequence was made by way of a Notice of Immigration Decision also dated 12 August 2013.

7. The Appellant appealed to the IAC. The First-tier Tribunal Judge allowed the Appellant's appeal for reasons set out in his determination.

8. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Simpson on 24 April 2014.

Consideration: Error of Law

9. In my judgement the First-tier Tribunal Judge made the following material errors in determining the appeal:

(i) The Judge proceeded on a factual misconception amounting to an error of law in characterising the Appellant's

circumstances when initially entering the UK as being "*of genuine subjective need*" (paragraph 19). The Judge stated "*I observe no more than at the time of his claim for protection in 1995, the appellant was perceived as having certain genuine fears of return, which, however, were thought not to amount persecution involving risk of death. It is a relevant factor that his departure from Algeria and his resort to deception to avoid returning there was actuated by some genuine subjective fear of harm, and he was not simply an economic migrant*". Such an observation was either made in disregard of, or without explaining any reason for departing from, the finding of Special Adjudicator Yelloly who dismissed the Appellant's asylum appeal in a determination promulgated on 10 October 1995 (ref HX/78829/95), concluding – "*Looking at the evidence as a whole, I have come to the conclusion that neither the subjective nor the objective element of a well-founded fear of persecution for Convention reason has been made out to the required degree*" (Appellant's bundle before the First-tier Tribunal, page 53).

(ii) The Judge was in error to place weight on the circumstance that the Appellant met the requirements of the previous Immigration Rules in respect of 14 years long residence (paragraph 276B) at a time when that particular Rule was still in force. The Judge specified this to be "*a highly relevant factor*" (paragraph 15). The matter is put succinctly in the Respondent's grounds: "*The Secretary of State was entitled to change the Rules. She duly did so. The Appellant was entitled to apply under the Rules before their change. He did not do so.*" It is important to note that the changes in the Rules represented an express intent to accord more weight to the imperative of maintaining effective immigration control when considering cases involving periods of unlawful residence. To accord weight to the balance struck under the previous Rules was to disregard the shift in that balance represented by the change of emphasis in the new Rules, and thereby to fail to give proper regard to the Respondent's public interest justification for refusing the Appellant's application. The Appellant's application – and in turn appeal - required to be decided by reference to the current zeitgeist and not by reference to policy issues that had been superseded

(iii) Further in the context of the change in the Rules, in my judgement the Judge was also in error in according weight to the Respondent's failure to respond to enquiries about 'Legacy' as a contributory factor in the Appellant's failure to make an application under the previous Rules: determination at paragraph 16. It has not been shown that the Appellant was entitled to consideration under 'Legacy', far less a favourable

consideration. At best, it appears that his representatives raised an enquiry (not an application) with the Respondent in this regard (eg see Appellant's own email to his solicitors dated 22 June 2011 – "*what we send is not application just a request*"). Whilst it is the case that there was no prompt response to such an enquiry or chasing letters, there is absolutely nothing in the raising of such an enquiry that would have prevented the Appellant from making an application under paragraph 276B of the Rules. Moreover, there is not apparent any evidence that the Appellant refrained from doing so in part because he was awaiting a response to the enquiry concerning 'Legacy': indeed the contrary is indicated by the email quotation set out above. The Judge has in effect found the Respondent's conduct to have contributed to a failure of the Appellant to make an application under Rule 276B prior to it ceasing to have effect: there is no basis for such an evaluation and the Judge was in error to accord weight to such a circumstance in considering the Article 8 proportionality balance.

10. Because the Judge has expressly given weight to these matters in the Article 8 proportionality balancing exercise, the errors identified are necessarily material. Accordingly I conclude that the decision of the First-tier Tribunal must be set aside.

Re-making the decision

11. It is not necessary for further evidence to be filed or further testimony to be heard in order to re-make the decision. Accordingly I heard submissions from the representatives as to how the appeal should be remade on the basis that the First-tier Tribunal Judges findings of primary fact were sound and unchallenged.

12. The analysis set out above in respect of error of law is relevant to the remaking of the decision. I do not accord weight to any of those matters in respect of which, in my judgement, the First-tier Tribunal Judge should not have accorded weight.

13. It is common ground before me that the Appellant does not meet the requirements of paragraph 276ADE in respect of private life, or Appendix FM in respect of family life. Neither party seeks to persuade me to take any different view from that expressed by the First-tier Tribunal Judge at paragraphs 12 and 13.

14. Whilst the Rules are intended to be Article 8 compliant and to give expression to the Executive's view on where the balance between individual rights and public interest is to be struck, they are not a complete code. In **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)** and **Nagre [2013] EWHC 720 (Admin)**, guidance was given to the effect that where an Appellant does not meet the requirements of the Rules the Tribunal must turn its mind to the question whether there is good reason to give consideration to the case beyond the express wording of the Rules, mindful that if so it will be necessary to explore whether there are exceptional circumstances which would result in unjustifiably harsh consequences if the Appellant were removed from the UK. Whilst some disapproval of the 'intermediate step' referred to in **Nagre** has now been expressed in **MM (Lebanon) [2014] EWCA Civ 985** (paragraph 128), recent case law – including **Nagre** and **Shahzad [2014] UKUT 85 (IAC)** (which effectively followed **Gulshan**) – is not disapproved (paragraphs 87, 88, and 131). The necessity remains "*to identify other non-standard and particular features of the case of a compelling nature to show that removal would be unjustifiably harsh*".

15. Mr Duffy in an admirably brief submission invited me to conclude that on the particular facts of this case the Rules provided a complete answer to the Appellant's claim. He had not completed 20 years continuous residence in the UK by the date of his application, he should not be afforded any benefit by reason of a 'near miss', and whilst the First-tier Tribunal Judge had plainly found that he had established a private life in the UK, there was nothing in his circumstances not covered by the Rules that warranted taking an exceptional approach to relax the requirements of the Rules.

16. Mr Nasim, in addition to pleading the merits of the case by reference to the length of time in the UK since last entry and the favourable findings in respect of private life by reference to presence of family members, friendships in the UK, and employment (determination of First-tier Tribunal paragraphs 6 and 7), submitted that there were two unusual features that warranted exceptional consideration. Firstly that the Appellant had been in contact with the Respondent at a time when he could have had the benefit of the old paragraph 276B; secondly, although the Appellant had last entered the UK in 1995, he had initially entered in 1991, and had only been absent for two brief periods prior to his last entry – as such he in effect now had a 23 year association with the UK.

17. I am not persuaded in respect of the first of these matters – essentially for the reasons explored in considering 'error of law'.

18. In respect of the second matter, Mr Nasim's submission is to the effect that if the Rules recognise that the fact of 20 years continuous residence in the UK would in itself reflect an establishment of a private life that should be respected and allowed to continue in the UK, a period of association and residence dating back over 23 years and only interrupted by two short absences abroad should also be considered to reflect the establishment of a private life that should be allowed to continue. The Appellant's previous residence in the UK prior to his last entry is not a matter adequately reflected in the Rules and is, it is submitted, a matter that sets him apart from another applicant without such an association with the UK prior to the commencement of the last continuous period of residence.

19. I agree with this submission. The quality of private life established over 23 years, notwithstanding the two short interruptions is, in my judgement, and in the absence of any countervailing factors, to be accorded a similar weight to a continuous period of 20 years, such that the proportionality balance is to be struck in a similar way. There are no countervailing factors in this particular appeal, and indeed much that is said, favourable to the Appellant in the primary findings of the First-tier Tribunal Judge. The overall period of residence in the UK is a non-standard and particular feature not recognised in the Rules and is of a compelling nature.

20. Accordingly, in respect of the five **Razgar** questions, there is no real issue that the first and second questions are to be answered in the Appellant's favour. Further, there is no issue between the parties in respect of the third and fourth **Razgar** questions. As regards the fifth question, proportionality, whilst I take into account the public interest in maintaining effective immigration control through the consistent application of published Rules, and take into account the Appellant's previous use of deception to secure entry, I find that the very particular circumstances of this case mean that the impact on the private life established by the Appellant would be unduly harsh if he were to be removed in consequence of the Respondent's decision: the proportionality balance favours the Appellant.

21. I find that the removal of the Appellant in consequence of the Respondent's decision would involve a disproportionate breach of his Article 8 rights.

Decision

22. The decision of the First-tier Tribunal Judge contained an error of law and is set aside. I re-make the decision in the appeal.

23. The appeal is allowed.

Deputy Judge of the Upper Tribunal I. A. Lewis 11 September 2014