Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49809/2013

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**
On 22 July 2014 **On 05 August 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Wadih Hannah Chouery
[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr D Balroop, instructed by Asghar & Co
For the appellant: Mr Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Wadih Hannah Chouery, date of birth 13.3.69, is a citizen of Lebanon.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Wyman, who allowed the claimant's appeal against the decision of the respondent, dated 6.11.13, to refuse his application made on 4.4.13 for indefinite leave to remain (ILR) under the long residence criteria of the Immigration Rules. The Judge heard the appeal on 12.2.14.

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3. First-tier Tribunal Judge Foudy granted permission to appeal on 12.3.14.

4. Thus the matter came before me on 15.4.14 as an appeal in the Upper Tribunal. I found an error of law in the making of the decision of the First-tier Tribunal and set it aside, reserving the making of the decision to myself. I gave leave to the parties to lodge and serve further evidence in relation to any claimed private life under article 8 ECHR, in particular to bring matters up to date. I also preserved the factual findings of the First-tier Tribunal, with the exception of §57 and those in relation to article 8.

5. The continuation hearing was then listed before me for the 29.5.14. By letter dated 16.5.14 the claimant's representative sought an adjournment on the basis that a subject access request had been made of the Home Office and a pre-action protocol letter issued regarding the status of his Legacy application. It was submitted that without further information on the Legacy application the appeal could not be justly determined.

6. Upper Tribunal Judge Eshun considered but refused the application, on the basis that the case could be determined without the further information.

7. The claimant's representative then submitted an application to add a further ground of appeal in relation to a Legacy claim. The relevant chronology is that it is said that the claimant made an application on 10.10.07 for his case to be considered under the Legacy programme, chased by further letters and representations including in March and April 2012 seeking ILR on the basis of 14 years long residence. In response, it is said, on 21.1.13 the Secretary of State forwarded a SET(O) application form, which was completed and submitted, resulting in the decision which is the subject of this appeal.

8. Based on the recent authority of Edgehill & Anor v SSHD [2014] EWCA Civ 402, Mr Balroop intended to argue that as there was an effective application for consideration under the 14-year long residence provisions, made prior to the wholesale changes in the Immigration Rules of 9.7.12 introducing Appendix FM and 276ADE, with a 20-year long residence requirement, the transitional provisions state that the new Rules would not apply to applications for leave to remain made prior to that date.

9. That argument was made more complicated by the recent case of Halemuddin [2014] EWCA Civ 558, which appears to contradict Edgehill and suggests that the Rules must be applied at the date of decision.

10. These issues impinge on the existing appeal and the remaking of the decision. I accept the submission of both Mr Jarvis and Mr Balroop that it would make no sense not to resolve the Legacy/14-year long residence argument in the Upper Tribunal, leaving the matter to be pursued by Judicial Review. However, Mr Jarvis was taken somewhat by surprise in Mr Balroop's new argument, supported by his skeleton argument served only today.

11. In the circumstances, I agreed with both parties that the Secretary of State should have the opportunity to consider and respond to this newly raised issue and consider her position in relation to the Legacy claim. I therefore adjourned the hearing and issued further directions.

12. I did not grant leave to add the further ground of appeal, wishing to first hear from the Secretary of State on the matter. However, the Secretary of State should be prepared to deal with the ground if I do give leave at the continuation hearing.

13. The relevant background to the appeal can be summarised as follows. The claimant first came to the UK on 10.4.97 on the basis of a multiple entry visit visa. During the currency of his leave he applied for but was refused further leave to remain. His appeal against that decision was dismissed on 8.6.00. However, the claimant did not leave and was thus an overstayer in the UK. He made his present application to vary leave on 18.2.13, on the basis of the long residence provisions of the Immigration Rules.

14. The application was refused on 1.11.13 following consideration of paragraph 276B of the Immigration Rules. The claimant was in the UK without valid leave from 2.10.97. In the circumstances he could not demonstrate compliance with paragraph 276B(v).

15. His application also failed under paragraph 276ADE in relation to private life and there was no evidence of a partner or child in the UK in order to found a family life claim.

16. At §62 of the determination Judge Wyman found that the claimant could not meet the requirements for long residence under paragraph 276B. The judge also found that as the claimant still had ties with Lebanon, with a large number of siblings there, he did not meet the requirements of paragraph 276ADE. Those findings were entirely justified on the evidence and have been preserved.

17. There is no merit in the Legacy claim aspect of the appeal. As the Court of Appeal held in RN [2014] EWCA Civ 938, legacy cases were those where applications were made before 5.3.07 but not resolved by July 2011. The alleged application made on 10.10.07 could not properly be considered a legacy case. In any event, the Legacy Scheme did not confer any additional substantive rights on the Legacy cohort; it's purpose was administrative and organisational and bore no resemblance to an amnesty. A legacy case confers no particular entitlement on the claimant and he cannot build a claim of entitlement on that basis. In Jaku v SSHD [2014] EWHC 605 (Admin) Ouseley J stated, " At the heart of much of the litigation over the years have been eventually largely fruitless and in my judgement misconceived attempts by claimants to show that there was a special and more favourable policy which should be applied to those in the Legacy programme, devised from a target or aim as to the date by which decisions would be made. Their target was then elevated into a legitimate expectation; arising it was said to create unlawful delay such as to create an historic injustice, leading to arguments that the particular forms of leave should

be granted, that policies should be treated as frozen, that particular periods of residence should be given great weight, all deriving from a misreading of policy…"

18. The reality is that even if this were a legacy case, all that it implied is that the Secretary of State would consider the application on the basis of the Rules in force at the time of consideration.

19. For the reasons set out below, I also reject the submission that the 'Old Rules' apply and that the claimant should be judged on the basis of a 14-year residence requirement.

20. Paragraph 276ADE containing the 20-year long residence requirement was brought into force under HC194 with effect from 9.7.12. However, the statement of changes provided that "if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the rules in force on 8 July 2012."

21. The Statement of Changes HC760, brought into force on 13.12.12 "provided that those changes to the Rules on family and private life were to take effect on 13 December 2012 and that if an applicant had made an application for entry clearance or leave before 13 December 2012 and the application had not been decided before that date, it would be decided in accordance with the Rules in force on 12 December 2012." However, the Statement of Changes HC 820 came into force on 13.12.12. The policy statement within the Statement of Changes explained that whilst transitional provisions continued to apply to family member applications under Part 8 of the Rules, "Where other applications made before, on or after 9 July 2012 raise issues relating to family or private life, those issues will be decided according to the Immigration Rules in force at the date of decision."

22. The decision in this case was made on 6.11.13 and the Secretary of State applied the Immigration Rules in respect of the claimant's private life claim, namely paragraph 276ADE, and was correct to do so, regardless of when the application can be said to have been made.

23. Although Mr Balroop relied on Edgehill, it is clear when reading the judgement of the Court of Appeal that it was based on the transitional provision in existence at the date of decision in relation to 276ADE. In the case of JE, the application was made on 22.8.11 and refused on 7.3.12. The error was in the Upper Tribunal's reliance on 276ADE on the basis of determining an article 8 claim on the basis of the Rules in force at the date of hearing, i.e. 276ADE rather than applying. It is not clear when the application of HB, the other claimant, was decided, but as neither 14 nor 20 years had been achieved the appeal was dismissed. Edgehill did not consider at all the situation in this appeal, that the transitional provisions for 276ADE had been removed prior to the decision of the Secretary of State.

24. In Haleemudeen, the claimant's application under 276B on 28.2.12, prior to the 'New Rules,' was refused on 1.10.12. Again, I note that the refusal decision was before the removal of the transitional provision for 276ADE. The refusal in Haleemudeen was based on a criminal conviction, which was a bar to 276B, and the error of the Tribunal was to consider that there had been a break in the continuous lawful residence and

thus miscalculated the period. The claimant did not in fact meet the requirements of the Rules and the question at issue was a proportionality assessment outside the Rules. Haleemudeen does not assist the claimant in the appeal before me.

25. Having heard the submissions of the representatives and considered both the evidence and case law, I reject the argument that there was an effective application in 2007 under the 14-year long residence provisions and that notwithstanding the changes in the Rules from 9.7.12 the claimant is entitled to leave to remain. The only relevant application was the one made on 4.4.13. The communications in 2007 was not an application and the assertion that it was accepted as such is a red herring in this case. In any event, on the evidence I do not accept that the claimant was ever accepted under the scheme. Even if he was, all that entailed was that his application would be decided on the basis of the Immigration Rules applicable at the date of decision.

26. I also reject Mr Baldroop's argument based on an extrapolation from Kishver (limited leave: meaning) Pakistan [2011] UKUT 410 (IAC), that on the basis that the Secretary of State had dealt with the case as if there had been a valid application was an implicit acceptance that it was valid. He relied on regulation 17 of the Immigration (Leave to remain) (prescribed forms and procedures) Regulation 2007. Those regulations do not apply to the claimant's representations as to 14-year long residence in correspondence sent in 2012. Rule 34 as amended was in force at that time. This requires an application to be made on the specified form. Rule 34A provides that any application not complying will be invalid and not considered. The Secretary of State rejected those letters (A57 & 61), and sent the claimant the correct specified form in January 2013 and rejected his application as invalid in the Home Office letter of 16.3.13. It was not until 18.2.13 that the claimant made what could be considered as a valid application.

27. There is no merit in a 'near miss' argument, to the effect had an appropriate application been made in 2012 he may well have been granted leave to remain on the then-prevailing long residence requirement of 14 years.

28. The claimant's application was properly considered under paragraph 276ADE. This makes provision for the situation where an applicant does not meet the 20-year long residence requirement but can demonstrate that he has no ties, including social, cultural and family with the country to which he would have to go if removed. I have preserved the findings of Judge Wyman, including those at §67 that the claimant does still have ties with Lebanon, "as he has a large number of siblings who remain living there. Even though the claimant has not seen them for the past seventeen years, he clearly shares family and cultural ties." His appeal thus failed under 276ADE. Mr Baldroop has not sought to argue that the claimant meets the requirements of 276ADE. Instead, he relies on consideration of private and family life outside the Rules under article 8 ECHR.

29. I reject Mr Baldroop's argument that there is no provision in Appendix FM for a person in the claimant's circumstances and that thus there are exceptional

circumstances justifying consideration outside the Rules. Section R-ILRDR provides a reasoned approach to a claim for leave to remain as an adult dependent relative. It is also of note and relevant to any article 8 proportionality assessment that there is a route for entry clearance for such a dependant relative. He fails to qualify for indefinite leave to remain because he is not in the UK with valid leave. However, he could return to Lebanon and make application under section E-ECDR, provided he can demonstrate that he meets E-ECDR 2.4 and 2.5, to the effect that he requires long-term personal care to perform everyday tasks, and unable to obtain the required level of care in the country in which he is living because either it is not available or not affordable. In any event the claimant has not demonstrated on the present evidence that he meets such criteria relating to long-term personal care needs, so that it is not clear that such an application would succeed. This must be highly relevant to whether it would be proportionate to allow him to remain, when he cannot meet the Rules provided for such a person.

30. Although Judge Wyman went on to consider private and family life under article 8 ECHR outside the Immigration Rules, on the basis of current case law, there is no need to consider article 8 outside the Rules, unless there are compelling circumstances insufficiently recognised in the Immigration Rules which would justify, exceptionally, allowing the application under article 8 on the basis that the decision produced a result that was unjustifiably harsh.

31. Before I could consider the claimant's private and family law rights outside the Immigration Rules, I would have to find compelling circumstances insufficiently recognised in the Rules so as to justify, exceptionally, allowing the appeal outside the Rules under article 8 ECHR on the basis that the decision is unjustifiably harsh. Although the case law continues to develop, the current position is perhaps best expressed in paragraph 135 of R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985:

> "135. Where the relevant group of IRs [immigration rules], upon their proper construction provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law."

32. However, I am satisfied that on the facts of this appeal the Immigration Rules do fully and adequately address the claims of the claimant's private life by the considerations required under paragraph 276ADE of the Immigration Rules and amount to a complete code, involves a reasonableness or proportionality assessment, such that there is no need to consider article 8 outside the Rules. I find no sufficiently compelling circumstances on the facts of this case and thus no justification for considering article 8 private life outside the Rules, contrary to the way in which Judge Wyman determined the appeal in the First-tier Tribunal.

33. Even if I am wrong and consideration of private life under article 8 ECHR is justified outside the Rules, I am satisfied that on the application of the Razgar 5 steps that the interference with any private life acquired in the UK whilst the claimant was illegally present is insufficiently grave to engage article 8.

34. Even if article 8 is engaged, in conducting the proportionality balancing exercise between on the one hand the right of the claimant to respect for his private life and on the other the legitimate and necessary aim to protect the economic well-being of the UK through the objective application of immigration control, the balance would come firmly and clearly down in favour of the Secretary of State's decision to remove him from the UK. In reaching that conclusion, the following factors, amongst others, have been taken into consideration. I specifically did not preserve the findings of the First-tier Tribunal in relation to the article 8 assessment. Mr Baldroop's submission in his skeleton argument that I did is mistaken. However, in addition to all those matters urged upon me by Mr Baldroop and set out in the claimant's bundle, the following relevant factors would need to be considered in any article 8 proportionality assessment. I have carefully considered all the evidence together in the round, even if I do no specifically mention it below, I have given anxious consideration to all those matters and factors on the alternative consideration basis that there is not a complete code and that the circumstances do justify assessment of proportionality outside the Immigration Rules on the basis of article 8 private and family life.

35. The claimant, who is single and with no children, claims family life with his brothers Camil and Joseph Chouery, which is really an aspect of his private life. He has lived with them for approximately 17 years. He has now been found to have Down's Syndrome. He is evidently a close part of the family of his brothers and I accept that there is a close and supportive relationship. On this claimant's circumstances and with his disabilities that may go beyond the normal emotional ties to be expected between adult siblings, but that is only one factor to be considered in the round with all other relevant factors in assessing proportionality.

36. Whilst I take into account the lengthy residence of the claimant in the UK, and the argument that there has been some delay on the part of the Secretary of State in reaching her decision, which is not the fault of the claimant, there are other more significant factors weighing against the length of residence and delay. I also take the view that some of the responsibility for that delay lies at the claimant's door.

37. The claimant had overstayed his permitted leave and he knew throughout his time here that his status in the UK was unlawful and precarious, and that he was at risk of being required to leave. The evidence of his family members has to be taken cautiously not only because they may well have a natural tendency to exaggerate his conditions, because they want him to stay, but also because they must have deliberately encouraged and facilitated his illegal stay in the UK over many years. Any private life accrued during such circumstances can carry little weight in the balancing exercise. Deception was practised in that there was no real intention for him to return to Lebanon when he came. In ZS (Jamaica) & Anr [2012] EWCA Civ

1639, Lord Justice Davis held that on any view such behaviour is a serious matter and should be accorded commensurate seriousness as a countervailing factor in the balancing exercise in any proportionality assessment.

38. Also considered is that the claimant has mild/moderate learning disabilities now diagnosed as Down's Syndrome, and had been abused in Lebanon and it is alleged he would face abuse on return. I note that at p164 of the 1998 report in the claimant's bundle, Ms Nash is quoted and relied on. She envisaged that at some point the claimant would return to Lebanon to live with his family at some point in the future, but with a far greater repetoire of skills, and greater confidence in his abilities than he had previously shown, acquired during his stay with Ms Nash. "She hopes that his greater independence will be acknowledged by his family who will continue to support him in his personal development upon his return." Surprisingly, given her role in assisting him, Ms Nash was not called to give evidence on the claimant's behalf. It is also surprising that there is not more evidence as to circumstances in Lebanon and particularly from the claimant's family there.

39. I take into account the country expert Dr Fatah's report of 14.5.14 suggesting in the headnote at section 6 that there is a stigma attached to mental illness in the general population. However, the source for the opinion appears, at least in part, to be a 2011 report in the Lancet, which in fact reports positive improvements in mental health care in Lebanon, including the provision of MSF clinics and training to practitioners and mid-level staff on mental disorders. Having considered that report, I am not satisfied that it significantly advances the claimant's case by the generality of the discussion.

40. I take into account Dr Shah's report of 1.5.14 that the claimant's removal to an unfamiliar environment after 16 years absence that environment may affect his psychological and emotional functioning. I have also considered the psychology report of Dr Nias but find that it's objectivity is skewed by the reliance that had to be made on not only the questionable use of interpretation through the claimant's brother but the acceptance of the family's assertions at p227 that the long, drawn-out process has seriously affected his mental well-being, and reliance on letters from friends of the claimant. Much of the assessment seems to be about the stress of awaiting the outcome of the appeal process, all of which will be resolved one way or the other before removal. The report notes that there is considerable support from his brothers, and that it appears far from certain that help and other support anywhere near this level could be offered in Lebanon. This is not expert evidence but rather a reflection of the absence of evidence rather than of positive evidence. The report does not in fact conclude that he cannot return and seems primarily concerned with a resolution to the present uncertainty.

41. However, these medical and health concerns do not cross the article 3 threshold. Whilst he has been in the UK since 1997, the claimant spent the majority of his life in Lebanon, including his youth and formative years and education. He still speaks the language and has some family there, including siblings, although his parents have passed away. Even though he may not have spoken with some of his family for some

time, he would be familiar with the culture and customs and there is no reason why he could not re-establish contact with his family and be supported by them. Any medical problems he has he also suffered from whilst in Lebanon, where he can obtain appropriate treatment. He could also receive financial assistance from his family in the UK and maintain contact and emotional support with them through modern means of communication.

42. I take into account that the claimant has been fully supported by his brothers in the UK and that the claimant's wishes are to remain in the UK. However, there was no cogent evidence that the claimant's family could or would not continue to support him in Lebanon. I note that there is a paucity of reliable and satisfactory evidence as to circumstances in Lebanon and in particular social attitudes the claimant may face because of his disability. I also note that on the limited evidence available the claimant has failed to demonstrate that he would even meet the requirements for entry clearance as an adult dependent relative, which must be relevant to the proportionality balancing exercise.

43. Weighing all the evidence together in the round, I am satisfied for the reasons set out above that in any proportionality balancing exercise, on the facts of this case the balance falls clearly in favour of removal.

Conclusions:

44. For the reasons set out above, I find that he claimant has failed to demonstrate that he meets either the requirements of the Immigration Rules for leave to remain or that his circumstances are such that leave should be granted outside the Rules on the basis of article 8 ECHR.

Decision

The appeal on immigration grounds is dismissed.

The appeal on article 8 grounds is dismissed.

Signed: Date: 27 July 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed on all grounds.

Signed: Date: 27 July 2014

Deputy Upper Tribunal Judge Pickup