



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

Appeal Number: VA/18857/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18 December 2014**

**Determination Promulgated  
On 31 December 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**ENTRY CLEARANCE OFFICER - PARIS**

Appellant

**and**

**ALGUALIA LARGUAT TAIB  
(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr C Avery of the Specialist Appeals Team

For the Respondent: None

**DECISION AND REASONS**

**The Respondent**

1. The Respondent to whom I shall refer as “the Applicant” is a citizen of Algeria born on 23 July 1982. She is married to Maamar Taib who is a British citizen of Algerian descent, born on 26 August 1966. By his previous marriage he has five children. On 5 April 2010 in Algeria he married the Applicant. They have a son born on 1 June 2014.

2. The Applicant states she continues to live in Algeria because she cares for her aged parents and her husband who is her Sponsor has visited her on a number of occasions.
3. She previously applied for entry clearance as a visitor which was refused by the Appellant (the ECO) on 1 February 2013. She did not appeal the February decision to refuse her entry clearance but re-applied on 19 September 2013. Her second application was refused on 10 October and on 4 November 2013 through her husband she lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act).
4. The ECO refused her entry clearance as a visitor because he did not consider the Applicant would be a genuine visitor intending to return to Algeria at the end of her proposed visit as required by paragraphs 41(i) and (ii) of the Immigration Rules.
5. The grounds of appeal are contained in a statement signed by the Applicant on 31 October 2013. They refer to her marriage and the application leading to the decision under appeal. Mention is made that she cares for her elderly parents with whom she lives in Algeria and that her husband sends her about £80 each month. The Applicant asserts she had never thought of living outside Algeria and leaving her parents and friends and family. Her husband lived in London because of his commitments which included work and his children by his previous marriage. The grounds assert the Applicant has a right to visit her husband in the United Kingdom at any time.

### **Change in the Law**

6. On 25 June 2013 Section 52 of the Crime and Courts Act 2013 came into force effectively restricting the grounds of appeal against refusal of entry clearance for a family visit to human rights grounds only.

### **The First-tier Tribunal's Determination**

7. By a determination promulgated on 29 September 2014 Judge of the First-tier Tribunal Canavan allowed the Applicant's appeal on human rights grounds. She noted that shortly after the Applicant married the Sponsor's brother and two sons had died in a road traffic accident and the brother's daughter had been badly injured. By 2013 the Sponsor's family situation in Algeria had settled and he decided it was time for his wife, the Applicant to visit him in the United Kingdom. The Judge was satisfied the husband had provided a reasonable explanation why he and his wife continued to live in separate countries and that he would like her to spend some time in the United Kingdom with him before they took any decisions about their future married life. She considered there were no "pressing public interest considerations to justify refusing to grant entry clearance on the facts of this particular case".

8. The ECO sought permission to appeal. The grounds of the application for permission to appeal assert the Judge erred in her approach to the Article 8 assessment.
9. The grounds refer to the judgment in *MF (Nigeria) v SSHD [2013] EWCA Civ 1192*, *R (OAO Nagre) v SSHD [2013] EWHC 720 (Admin)* and the determination in *Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC)*. They go on to state the refusal of entry clearance to the Applicant did not prevent her and her husband continuing their family life as before and mentioned *Patel and Others v SSHD [2013] UKSC 72* where at paragraph 57 the Supreme Court noted that Article 8 is not a general dispensing power.
10. On 14 November 2014 Judge of the First-tier Tribunal TRP Hollingworth granted permission to appeal on the basis it was arguable that inadequate reasons had been given by the Judge to justify allowing the appeal and insufficient weight had been given to the fact the Applicant and her husband lived apart out of choice.

### **The Upper Tribunal Hearing**

11. The Sponsor attended the hearing but otherwise the Applicant was unrepresented. I explained in simple terms the purpose and procedure adopted in error of law hearings and the criteria applicable to ascertain whether the First-tier Tribunal's determination contained an error of law.
12. I referred Mr Avery to the recent judgment in *R (oao Oludoyi and Others) v SSHD (Article 8 – MM Lebanon) and Nagre (IJR) [2014] UKUT 00539 (IAC)* and put it to him that in the light of this judgment and what had been said about *Nagre* in *R (oao MM and Others) v SSHD [2014] EWCA Civ 985* I was likely to find an error of law based on the matters referred to in paragraphs 3-5 of the grounds for appeal.
13. Mr Avery submitted that in most cases refusal of entry clearance for a family visit could not engage the State's obligations under Article 8 of the European Convention to respect the right to a private and family life. Further, if the Applicant and her husband could live outside the United Kingdom then any claim based on Article 8 was fatally undermined. He relied on the finding in *Patel and Others* that Article 8 is not a general dispensing power. He referred me to paragraph 12 of the Judge's determination where she had recorded the Sponsor had said that since his parents had died he had fewer members of his family in Algeria and so he would prefer not to have the visit quite so often. He had grown up in the United Kingdom and would like to spend some time with the Applicant in the United Kingdom as well as in Algeria. The ECO's decision did not amount to an interference with the private and family life of the Applicant or of her husband because they could continue to see each other in the same manner as they had been doing since their marriage.
14. I attempted a brief summary of the points in non-technical language for the benefit of the Sponsor. Mr Avery agreed it was a fair summary. I asked the Sponsor if he had any comments. He told me he had been married for some four years but his

wife had never visited the United Kingdom and he did not want to go to Algeria to visit her. He insisted he had a right that his wife should be able to visit him in the United Kingdom. She would definitely return. He also added that they now had a son born on 1 June 2014.

15. I enquired of the Sponsor why it appeared from the Judge's determination that the birth of this child had not been mentioned. Indeed, there was no other reference to the child in the documents in the Tribunal file. The Sponsor replied he did not inform the Judge because he was not questioned on the point. He added that the Applicant could not apply for entry clearance as his spouse because she could not meet certain conditions although he did not specify which conditions. Mr Avery had no further submissions.

### **Error of Law Consideration**

16. The Judge's treatment of the claim under Article 8 which was the sole issue in the appeal came after a lengthy consideration of the facts and references to how a Judge should approach a claim under Article 8 and the substantive jurisprudence. However, the Judge's assessment of the claim under Article 8 was dealt with comparatively briefly at paragraph 22 of her determination. There was no reference to any of the legitimate objectives listed in Article 8(2) against which the assessment of the proportionality of the ECO's decision had to be made. More importantly, there was no proper balancing exercise carried out and there was no reference to the factors referred to in Section 117B of the 2002 Act. A lack of a reference to Section 117B shows that the Judge did not take sufficient account of the ECO's view of how Article 8 should be interpreted and applied.
17. The parties agreed that having found an error of law I should proceed to dispose of the substantive appeal.

### **Findings and Substantive Consideration**

18. Mr Avery submitted that the Applicant's circumstances, absent any other evidence and there was none, were insufficient to engage the State's obligations under Article 8. The decision did not constitute any real interference with the private and family lives of the Applicant and her husband because their private and family lives could continue in the same manner as before.
19. The Sponsor referred to his children by his first marriage. They were British citizens, they had never been to Algeria and their mother would not agree to him taking them for a visit to Algeria. They had a right to have their recently born brother visit them.
20. I explained to the Sponsor that because this was an out of country appeal I was only able to consider evidence relating to matters at or before the date of the decision under appeal, 10 October 2013. He responded that he needed to remain in the United Kingdom to work and he wanted his wife and youngest son to visit him. I explained that because of Section 52 of the Crime and Courts Act of 2013 the

appeal could only be considered on human rights grounds. This was different from an appeal under the Immigration Rules. Under the Rules if the Applicant satisfied the requirements of the Rules then there was a presumptive right to be granted leave to enter or remain. This was not so in appeals based on human rights claims where it was for the Applicant to show that a refusal of leave to enter or remain amounted to an interference with the private and family life of the Applicant and her family and for the Tribunal to find such interference so serious that the refusal was disproportionate to the need to maintain proper immigration control or any other lawful objective.

21. I understand both the Applicant and her husband have good reasons for wanting her to visit the United Kingdom and that it is the husband's preference that she visit him rather than he visit her, particularly if he is to introduce his recently born son to his half-siblings.
22. I adopt the approach to appeals on grounds of Article 8 as summarised in paragraphs 7-12 of *EB (Kosovo) v SSHD [2008] UKHL 41*. Each of the Applicant and her husband has a in effect a separate private and family life, she in Algeria and he in the United Kingdom. For the past four years they have pursued their marital family life by means of visits by the husband to the Applicant in Algeria. The decision to refuse the Applicant entry clearance is an interference with her private and family life and indeed that of her son as well as her husband. As the husband put it, he would now prefer the Applicant visit him rather than he visit her. Of course, I understand the husband would like to introduce his older children to their new half-brother. There was no mention of introducing his new wife to them or evidence beyond assertion that the mother of the older children would not allow the husband to take them to Algeria.
23. Neither the Applicant nor her husband has given any other reason to support the claim. Neither of them have any inherent right to require the state to respect their wishes as to how they choose to conduct their marital life insofar as it engages the state's right to control immigration, as provided for in the case of the United Kingdom by the Immigration Rules.
24. I remind myself that the interference is merely preventing the Applicant visiting her husband in the United Kingdom and nothing more. I do not find that any duty which might be imputed to the State to foster family life is so extensive as to enable a visit of the type contemplated by the Applicant and her husband. These circumstances do not establish on the balance of probabilities that the refusal of entry clearance is a sufficiently serious interference to engage the United Kingdom's obligations under Article 8 of the European Convention. It follows that the appeal must be dismissed.

### **Anonymity**

25. There was no request for an anonymity direction or order. Having heard the appeal, I find none is warranted.

**DECISION**

**The determination of the First-tier Tribunal contained an error of law and is set aside. The following decision is substituted:-**

**The appeal is dismissed on human rights grounds (Article 8).**

**No anonymity direction or order made.**

Signed/Official Crest

Date 31. xii. 2014

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal

**TO THE RESPONDENT: FEE AWARD**

The appeal has been dismissed so there can be no fee award.

Signed/Official Crest

Date 31. xii. 2014

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal