Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/07573/2014
IA/07575/2014
IA/07590/2014
IA/07594/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 January 2015	**On 23 January 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Mokhtar Temimi
Zahoua Temimi
El-Hachmi Adam Temimi
Rayan Temimi
[No anonymity direction made]

Claimants

Representation:
For the claimants: Mr M Al-Rashid, instructed by David A Grand
For the appellant: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Martins promulgated 17.10.14, allowing the claimants' linked appeals

against the decisions of the Secretary of State, dated 29.1.14, to refuse their applications made on 25.9.12 for leave to remain in the United Kingdom outside the Immigration Rules on the basis of human rights, and to remove them from the UK by way of directions under section 10 of the Immigration and Asylum Act 1999. The Judge heard the appeal on 28.8.14.

2. First-tier Tribunal Judge Fisher granted permission to appeal on 20.11.14.

3. Thus the matter came before me on 7.1.15 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Martins should be set aside.

5. The relevant background to the appeal can be summarised as follows. The first claimant came to the UK as a visitor in 2003 and the second claimant in 2004, also as a visitor. They failed to leave and were thus overstayers. Both of their children were born in the UK. Their applications made on 25.9.12 for leave to remain were first refused on 11.9.13. However, the Secretary of State agreed to reconsider the applications under the Rules, Article 8 ECHR, and taking into account section 55 of the Borders Citizenship and Immigration Act 2009. That resulted in the refusal decisions of 29.1.14, which are the subject of this appeal.

6. Judge Martins allowed the appeals on both immigration and human rights grounds. The findings are set out briefly between §32 and §34. The judge concluded that all the second claimant child had to demonstrate is that he had been in the UK for some 8 years and that there was no reasonableness requirement. The Article 8 assessment is contained in part of a single sentence in §33, finding that, "the interference that would ensue in the private life of the appellants in all the circumstances, will be disproportionate to the legitimate aim pursued."

7. In essence, the grounds of appeal assert that the judge misdirected herself in relation to the correct test under paragraph 276ADE, and erred in allowing the appeal under Article 8 ECHR without engaging with the established principles.

8. In granting permission to appeal, Judge Fisher noted that the judge's findings are extremely brief. "Whilst brevity is undoubtedly a virtue in decision writing, the parties must be able to ascertain, from the determination, why they have won or lost. In her decision, the Judge states that the appeal (sic) is allowed on Article 8 grounds, without providing any detailed reasoning for that decision. Furthermore it is arguable that the Judge erred in failing to apply the "reasonableness" test which was introduced by HC 820 in all applications decided on or after 13th December 2013, regardless of the date of application. It is arguable therefore, that the judge erred in law, and so permission to appeal is granted. All grounds are arguable."

9. The First-tier Tribunal Judge made a significant error in law in finding that in respect of the oldest child, who had been in the UK for some 8 years, the version of 276ADE that applied to the application made on 25.9.12 and decided on 29.1.14 was that in

force as at 9.7.12. From that date 276ADE required only 7 years residence in the UK. That was added to with effect from 13.12.12 with the additional requirement under 276ADE (iv) that "it would not be unreasonable to expect the applicant to leave the UK." However, the changes provided that it would not apply to an application made but not decided before 13.12.12.

10. The judge failed to appreciate, however, that subsequent changes to the Rules and in particular Statement of Changes HC 820, provided that in respect of an application decided on or after 13.12.13 the changes implemented by HC760 shall apply to all applications decided on or after that date, regardless of the date of application. It follows that as the decision was not made until 29.1.14, the reasonableness test was a valid part of 276ADE in consideration of any private life claim of the claimants.

11. It follows that the judge materially misdirected herself in law, probably misled by the completely erroneous submissions of the claimants' representative, Mr Al-Rashid. At §32 the judge rationalised that as the second claimant had a right to remain in the UK, it followed that his parents and siblings were entitled to remain with him. Obviously, that was also in error. The result is that the decision of the Tribunal on immigration grounds cannot stand and must be set aside.

12. Further, without needing to set out in detail why, it is clear that the Article 8 ECHR assessment was entirely deficient and fundamentally flawed. Quite apart from being so brief that no adequate reasoning can be detected, it failed to take any account of the public interest and in particular the mandatory public interest considerations under section 117B of the 2002 Act, which came into force on 28.7.14. Mr Al-Rashid accepted that he had inadvertently misled the First-tier Tribunal Judge in his legal submissions. He also conceded that the Article 8 assessment amounted to an error of law and could not stand.

13. In the circumstances no part of the decision of the First-tier Tribunal can survive. It must be set aside and remade.

14. Consistent with the directions that the parties were to prepare for this hearing on the basis that if the Upper Tribunal set the decision of the First-tier Tribunal aside, any further evidence, including supplementary oral evidence, that the Tribunal may need to considered can be so considered at this hearing, I proceeded immediately to a rehearing of the appeal and heard oral evidence. I then acceded to Mr Al-Rashid's request for time to consider Mr Jarvis' skeleton argument and prepare his submissions on the remaking of the decision. The appeal was thus stood down whilst I dealt with a different case in the list.

15. Without needing to set out the reasons why, Mr Al-Rashid accepted that the claimants cannot meet the requirements for leave to remain as either partner, parents or children under Appendix FM.

16. In relation to paragraph 276ADE and private life, the third claimant falls for consideration on the basis that he has been in the UK since birth on 30.9.05, a period now in excess of 9 years. Whilst he meets the 7-year continuous residence requirement, it has to be shown that it would not be reasonable to expect him to

leave the UK. In relation to the first and second claimants, the test as amended, that it must be shown that there would be very significant obstacles to their integration into Algeria, can only apply to an application decided on or after 28.7.14. I do not accept Mr Jarvis' subtle argument that decision in this context means decided by the Tribunal. It follows that the relevant test is that of having lost all ties, including family, social and cultural, to Algeria. For the reasons set out herein, I find that the adult claimants have not shown that they have lost all such ties.

17. As the First-tier Tribunal decision set out, the adult claimants have spent the major part of their lives in Algeria, retaining their language and cultural identity. They both have family remaining in Algeria. In the circumstances, including taking account of the other matters set out herein, there is no basis on which the adult claimants can meet the requirements of 276ADE.

18. In relation to the third claimant, I am satisfied on the basis of the evidence taken as a whole, including my assessment those matters set out below, that it is entirely reasonable to expect him to accompany his family on return to Algeria. It is clear in this case that there is no basis for separation of the family; either they stay in the UK together, or they are returned to Algeria together.

19. It follows that none of the claimants can meet the requirements of the Immigration Rules for leave to remain in the UK. That there is an immigration route for private and family life claims, reflecting the Secretary of State's response to Article 8 private and family life rights, but that the claimants cannot meet those requirements is highly relevant to a consideration of the claim outside the Rules under Article 8 ECHR, on the basis that there are circumstances inadequately recognised in the Rules and which render the decision of the Secretary of State unjustifiably harsh or otherwise disproportionate, following the Razgar steps. For the reasons set out herein, I am satisfied that in the careful proportionality balancing exercise between on the one hand the legitimate and necessary public interest in protecting the economic well-being of the UK and on the other the private and family life rights of the claimants, the decision of the Secretary of State is entirely proportionate and does not produce a result which is unjustifiably harsh.

20. On the evidence, I find that the adult claimants are no more than economic migrants who came to the UK in search of a better life. With total disregard for immigration law they decided to settle in the UK and go on to raise two children, all with no intention at all of returning to Algeria. In my view their case is entirely without merit. The appellants claimed that they have remained in the UK since 2003 and 2004 without working, supported entirely by the first appellant's brother. They denied Mr Jarvis' suggestion that one or both of them must have been working illegally in the UK. According to the claimants, they have done nothing except remain at home at their absolute leisure and ease whilst they were financially supported by the brother, without any significant obligation or contribution on their part. I found this account completely without credit, especially as the brother was not called to give evidence to confirm his alleged extensive financial support, when one might reasonably have expected such evidence to be adduced. I reached the conclusion that the claimants

were not telling the truth about whether either of them had worked illegally in the UK. This served to undermine the credibility of other aspects of their claim.

21. Both adult claimants came to the UK as family visitors. I am satisfied on the evidence, despite their protestations to the contrary, that they came with the avowed intent to remain indefinitely and thus they gained entry clearance dishonestly and on false pretences. They had no right to remain in the UK. In her evidence, in cross-examination the second claimant admitted that she had no intention of returning to Algeria when she came to the UK. However, in re-examination she changed her account to say that she only intended to stay a few weeks. When asked when it was she changed her mind and decided to stay, she was unable to say, but eventually suggested it was just before they had to go back. Asked what it was that changed their minds, she said they just loved England and freedom. I do not accept her evidence was credible, reliable or truthful. I am satisfied that they both came to the UK with the intention of never returning, perhaps encouraged by the first claimant's brother who is allegedly settled in the UK.

22. I also heard from a family friend, Bridget Rosati, who has known the claimants through her daughter for some 9-10 years and has developed in her own view a relationship with the children akin to that of grandmother. I found Ms Rosati a rather eccentric, unreliable witness, unwilling to answer difficult questions and who has taken a rather rose-tinted and subjective view of the claimants. She admitted turning a blind eye to obvious issues as to the legality of their immigration status in the UK. She said she was concerned as to the effect there would be on the child Adam on being required to leave the UK. Although she had not discussed it with him, she 'sensed' that he was aware of something amiss and has come to look under strain and much more quiet than he was. She said she was worried for his sense of security. She said that she had become aware some 9-10 years ago that the family was illegally present in the UK but did not feel it was her duty to encourage them to regularise their status or for herself to contact the authorities. Asked directly if she was aware whether either of the two adult claimants had worked in the UK, she said she deliberately did not ask those questions and didn't want to know the answer. I found this witness' evidence was more telling in what she had purposely declined to enquire into than in her positive support for the child Adam. I was satisfied that she knew much more about the family's circumstances than she was prepared to disclose. Ultimately, I found that I could place no reliance on this evidence in support of the claimant's case, it being obviously partial, very biased and without objectivity.

23. Mr Jarvis produced the interview record of the first claimant prior to the grant of his visit visa in 2003. He stated then that he intended to remain only 10-15 days, taking leave from work for a honeymoon in the UK. He claimed to be employed at the US Embassy in Algeria as a security guard. I am satisfied, taking the evidence as a whole that that interview account was untruthful and that, as stated above, both claimants came to the UK with the intention of remaining indefinitely. This serves to undermine the credibility of their claim generally to the extent that I do not accept as truthful or reliable any part of the claimant's factual case.

24. There are family members in Algeria, although I was told that the first appellant's father is presently in the UK for a visit. However, there are other family members still in Algeria. If the brother in the UK has been prepared to assist the family financially for such a long period, there is no reason why he, if not also other siblings, would not be able to continue such financial assistance on the family's return to Algeria. Challenged on that the second claimant said that had not been discussed. She also has family in Algeria, with whom she remains in contact.

25. In relation to both children, the Tribunal applies section 55 of the Borders Citizenship and Immigration Act 2009 and takes the best interests of the children as a primary consideration, bearing in mind that they have lived all their lives in the UK and never known life in Algeria. However, the family would be returning together and the family unit would provide the support and protection necessary whilst the children became used to life in the country of their nationality. Even though they have, through no fault of their own, taken advantage of education in the UK, and will have developed friendships, associations and cultural identification with life in the UK, they are not British citizens and have no right to education or life in the UK. They will be able to continue primary education in Algeria and will quickly adapt to a lifestyle common to the rest of the family. They may not be fluent in Arabic but on the evidence it is clear that Arabic is spoken around the home on a daily basis and the second claimant accepted that the children understand some Arabic. Even thought there may be some degree of disruption, there is no evidence that there would be any insurmountable difficulty in providing for the social welfare or educational needs of the children in Algeria. The children will be able to continue to enjoy family life together.

26. Much reliance was placed on the elder child's interest in football, in respect of which he is said to have some talent. However, football is played in Algeria, which fields a national team for international competitions. There is no credible evidence to demonstrate that the child would not be able to continue to play football. He may not have access to coaching and national sporting organisation support that might be available in the UK, but he has no entitlement to such in the UK and it is in fact far from clear that at this stage his interest and talent would amount to anything other than being a keen amateur player. The second appellant suggested that there were no activities in Algerian schools, which I found difficult to believe and in respect of which there was no evidence in support of the contention. She also claimed that it was difficult to get into a club in Algeria. When challenged on these assertions by Mr Jarvis she retreated to saying that she was not really sure what facilities would be available. I find her evidence unreliable and untruthful. I find that she has done no research at all into this issue, and certainly was unable to produce any evidence of such, and that her assertions were invented to bolster their claim to remain in the UK.

27. In considering proportionality I have borne in mind section 55 and the need to take as a primary consideration the best interests of the claimant children, who, through no fault of their own, were born in the UK and have never lived in Algeria. They

have known only life in the UK and are enrolled at school and have commenced her education, with all the expected consequences flowing from that for her integration into life in the UK. However, I have to bear in mind that neither child is a British citizen and such private life in the UK was formed when they, through the illegal actions of their parents, had no lawful status.

28. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) the Upper Tribunal in considering the case law in relation to decisions affecting children identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

> "i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary .
>
> ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
>
> iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
>
> v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases."

29. In EV (Philippines) the Court of Appeal held that in answering the question whether it is in the best interests of a child to remain the longer the child has been in the UK the greater the weight that falls into one side of the scales. "In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hyopthesi*, the applicants have no entitlement to remain." "If it is overwhelmingly the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast, if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite." "The immigration history of the patents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

30. I find that it there is insufficient here to demonstrate an overwhelming best interest to remain. The children are not British and have no entitlement to education or life in

the UK at the expense of the tax-payer. All things being equal their best interests would be to remain here and take advantage of the benefits of life in the UK. But, as has been stated, all things are not equal and the UK cannot educate the world. Pursuant to EV (Philippines) and the skeleton argument I confirm that I have considered the following factors:

(a) The age of the child claimants;

(b) Length of time in the UK, in excess of 9 years for the older child;

(c) Length of time in education, since the age of four;

(d) To what extent they have become distanced from life and culture of Algeria. I accept that they have no direct experience of it and there will be a difficult period of adjustment;

(e) How renewable their connection will be. The family will be returning as a whole to a community and life and culture familiar to the parents and the children will have the support of their parents in the transition;

(f) To what extent they will have linguistic, medical or other difficulties in adapting to their life in that country. As set out herein, I accept that there will be difficulties of integration and adjustment, but as the children are young they will be able to adapt with the support of their parents;

(g) The extent to which the course proposed will interfere with their family life or rights if they have any) as British citizens. Neither child is a British citizen, but I accept that the decision to remove is a sufficiently grave interference so as to engage Article 8.

31. Although it predates the coming into force of section 117B of the 2002 Act, I have also carefully considered the President's guidance in the case of JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC), and in particular the need to be adequately informed and to conduct a scrupulous analysis of the children's best interests, making a careful examination of all relevant information and factors.

32. In considering the best interests of the children, I have also taken into account all those factors urged upon me by their representative, as well as those considered by Judge Martins, including the children's long residence, education and schooling, football talent, and the family's desire to settle in the UK, where they have other family members, and social life and activities. Mr Al-Rashid also took me at length through the claimant's bundle, including the glowing school reports, references, award certificates and photographs. The extent of this integration by at least the third claimant if not both children cannot be underestimated. It is highly significant that the older child has lived in the UK all his life and is 9 years of age. I also accept that all the children's friends and associates are in the UK and they speak English fluently. Life as they know it is English and Algeria must be a remote factor in their background. However, I have to set all of these matters in balance against the public interest and the background facts and history as set out above.

33. In considering that public interest in the proportionality balancing exercise I am obliged to have regard to section 117B of the 2002 Act:

> 117B Article 8: public interest considerations applicable in all cases
>
> (1)The maintenance of effective immigration controls is in the public interest.
>
> (2)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4)Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6)In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

34. Little assistance is gained by the claimants in the terms of 117B(6) as it amounts to the same test for the third claimant under 276ADE: whether it is reasonable to expect the child to leave the UK. It follows from section 117B that little weight should be given to any private life established by any of the claimant given that their immigration status was to say the least precarious from the outset and that the adult claimants overstayed in the UK and have been unlawfully present since at least 2004. It is also relevant that the claimants are not financially independent and have allegedly had to depend on the generosity of others for support, if not in fact engaging in illegal work.

35. In my view, taking the evidence as a whole and for the reasons set out herein, it is entirely reasonable to expect both children to accompany their parents to Algeria. I find that any private life as has been established by parents or the children and in particular the third claimant's lengthy residence in the UK, is in the balancing exercise outweighed by the public interest in removal so as to render the decision proportionate. The parents are returning to a life, culture and family background

they are already familiar with and which they must have known they would be returned if detected illegally present in the UK. All of the establishing of their life and circumstances in the UK must be taken to have been done at their own risk that they would be required to leave. They are not entitled to remain simply because that was their desire, to emigrate to the UK and settle here. Article 8 is not a shortcut to compliance with the Immigration Rules. However, the situation of the children is different. They are not at fault or responsible for being in the UK. However it is also true that they have no right to be here or to take advantage of life or education in the UK. They are not British citizens. Whilst there is going to be disruption, the children are still young and are in primary education. Their future life has not yet taken shape and their focus is still largely around the family unit, whilst they will have begun to establish relationships with others and not only become used to life in the UK, but known no other. However, they will be able to take advantage of the education, language and experience of life in the UK on return to Algeria. They will be returning with family. They may be leaving friends and associates behind, but in today's world it is not uncommon for career or other reasons for families to relocate to different countries, even with young children, and for families to have the experience of life in different countries and cultures. In my view, on an assessment of all the factors set out herein, I find that it is not unreasonable to expect either of the children, or their parents to return to Algeria. For the same, intertwined reasons, I find that the decision of the Secretary of State is proportionate to the individual and collective private and family life rights of the claimants, and does not produce an unjustifiably harsh outcome.

Conclusion & Decision

36. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade.

I set aside the decision.

I re-make the decision in the appeal by dismissing the appeal of each claimant.

Signed: Date: 21 January 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 appeals have been dismissed and thus there can be no fee award.

Signed: Date: 21 January 2014

Deputy Upper Tribunal Judge Pickup