Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00277/2015

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 7 December 2015	**On 4 January 2016**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MB

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Lane, instructed by Fursdon Knapper Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in order to protect the anonymity of the appellant who has claimed asylum. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellant. Any disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or court.

Introduction

2. The appellant is a citizen of Morocco who was born on 16 December 1996. He claimed asylum on 19 May 2011 having arrived in the UK as an illegal entrant on 12 May 2011. He was then 14 years of age.

3. On 2 July 2013, the Secretary of State refused the appellant's claim for asylum but granted him limited leave to remain until 16 May 2014 when he would be 17½ years of age under her policy applicable to unaccompanied asylum seeking children.

4. On 15 May 2014, the appellant made a further application for leave to remain based upon his human rights.

5. On 2 December 2014, the Secretary of State refused to grant him further leave on international protection grounds and on 10 December 2014 made a decision to refuse to vary his leave and to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006 to Morocco.

The Appeal

6. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 11 May 2015, Judge C Sweeney dismissed the appellant's appeal on all grounds. He found that the appellant's return to Morocco would not breach Arts 3 and 8 of the ECHR.

7. The appellant sought permission to appeal to the Upper Tribunal. Permission having initially been refused by the First-tier Tribunal, on 26 August 2015 the Upper Tribunal (UTJ Goldstein) granted the appellant permission to appeal.

8. On 10 September 2015, the Secretary of State filed a Rule 24 notice opposing the appellant's appeal.

9. Thus, the appeal came before me.

The Appellant's Challenge

10. The appellant challenges the decision of Judge Sweeney on five grounds set out in the grounds of appeal and the skeleton argument and oral submissions of Mr Lane who appeared on behalf of the appellant.

    1. The judge failed properly to consider all the evidence relating to the appellant's circumstances if returned to Morocco and, in particular, in reaching his finding that the appellant is a "capable adaptable and resourceful" individual in paras 59 and 77 of his determination.

    2. The judge erred in applying s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 in taking into account, as damaging of the appellant's credibility, his failure to claim asylum prior to coming to the UK when he lived in Spain between the ages of 9 and 14 after leaving Morocco.

3. The judge erred in law in concluding that para 276ADE did not apply to the appellant and, in particular, in finding that there were not "very significant obstacles" to his integration into Morocco given the evidence concerning the appellant's circumstances on return.

4. The judge had wrongly proceeded on the basis that the appellant had given his evidence through an interpreter which was not the case. That both infected the judge's application of s.117B(2) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") that the appellant could not speak English but more generally demonstrated that he had failed to apply anxious scrutiny to the appellant's claim.

5. The judge erred in law in dismissing the appeal under Art 8. Again, it is said, he failed to look at all the circumstances of the appellant in Morocco but also the exceptional closeness of the appellant to his foster carers in the UK. The judge's assessment of proportionality was flawed.

Discussion

11. I will take each of the grounds in turn. There is, however, a degree of overlap between the grounds. In particular, the points made in relation to ground 1, as Mr Lane acknowledged, spill over into ground 3 and ground 5.

Ground 1

12. Mr Lane focused his criticism on the judge's finding that the appellant was a "capable, adaptable and resourceful" individual. The judge set out his reasons for that finding at paras 59–61 of his determination as follows:

> "59. The appellant is capable, adaptable and resourceful. He was described by Mr [C] as intelligent. He has shown himself able to travel unaccompanied to foreign countries at a young age and has been able to take the necessary steps to ensure his basic needs are met. He has acquired skills, education and employment in the UK which would be available to assist him were he to return to Morocco.
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> 60. I agree with Ms Quan that the appellant will be in no worse situation than any other person in Morocco and thus the suggestion that he will starve, given the skills and resources that he has developed, is not one that I accept. He will certainly be as able as other residents of Morocco, and, in my judgement, most likely more able, to utilise such skills, education, intelligence, resourcefulness and adaptability as he has to secure work so as to meet his essential needs of daily life including food, shelter and clothing.
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> 61. No evidence has been put before me on behalf of the appellant which causes me to conclude that a person with his skills, capabilities and resources is likely to starve in Morocco."

13. The judge repeated that finding in relation to para 276ADE at para 77 of his determination and in relation to Art 8 at paras 90–92 of his determination.

14. Mr Lane submitted that the judge had failed to take into account that the appellant had left Morocco aged 9 and had lived in Spain until he was 14. He had lived there for five years but in very difficult conditions and was in care (see paras 4–6 of the appellant's witness statement dated 30 April 2015 at page 39 of the bundle). Mr Lane submitted that the judge had failed to consider this evidence and his finding, which Mr Lane accepted was central to the judge's ultimate conclusion, that the appellant was "capable, adaptable and resourceful", was flawed.

15. I do not accept this submission. The judge was clearly aware of the appellant's case on this issue which is specifically set out at para 14(q) of his determination. The evidence before the judge was that the appellant had survived in Spain (albeit in care) for five years and had learnt the Spanish language. He had been able to travel to the UK, aged 14 and, although again in care supported by foster parents, he had learnt English and acquired skills, education and employment in the UK. The evidence of his foster carers was that he was likely to have to move on from them in the near future. There was no suggestion in the evidence that the appellant would not be able to live independently in the UK, now aged 19, in the foreseeable future.

16. Mr Lane also criticised the judge's failure properly to consider the appellant's circumstances in Morocco. In particular, he submitted that it was not sufficient to take into account that he spoke Arabic given that he had not lived in the country for ten years but, more significantly, there was no evidence that he would have family or others to support him on return. He had left Morocco when he was aged 9.

17. The judge dealt with the appellant's circumstances, in particular in relation to any family in Morocco, at various points in his determination. At para 94, the judge said this:

> "94. It is not possible to determine what family the appellant has in Morocco as the appellant has given inconsistent accounts as to the location of, and his relationship with members of, his family and, in particular, his father, though there is certainly a significant possibility that he does have family in Morocco who can provide him with assistance if required."

18. The basis of that conclusion was twofold. First, the appellant had given an address in Spain as part of the family tracing process but when the Spanish police had attended at the address, as the judge noted in para 53: "They had failed to find anyone meeting the name or description he gave." As a consequence, the location of the appellant's parents was unknown.

19. Secondly, the appellant's evidence was wholly unsatisfactory on a number of issues. At paras 31–46, the judge identified a number of inconsistencies in the appellant's account which led him not to accept the appellant's credibility. But, even further, as the judge noted at para 43 the appellant acknowledged that he had lied during the course of his interviews. At para 45, the judge said this about the appellant's evidence concerning the whereabouts of his family:

> "45. Whilst some of the appellant's answers can be explained by his anxiety and his fear of being returned to Spain or Morocco, such anxiety and fear do

> not, in my judgement, provide a complete explanation for his inconsistency. For example, he gave an untruthful account of the number of siblings he has. His providing an untruthful account on this issue is not, in my judgement, explained by a fear of return. Whether he has two brothers and two sisters, or three brothers and three sisters, would seem to be of little effect as to whether or not he is likely to be returned to Morocco."

20. Mr Lane submitted that the judge should have proceeded, therefore, on the basis that the appellant had no family in Morocco to provide support.

21. In my judgment, given the nature of the appellant's evidence, the judge was entitled to find in para 94 that he could not determine precisely what family the appellant had in Morocco but nevertheless to take into account that there was a "significant possibility" that he did have family there.

22. In any event, the judge was entitled to find at para 95 that given the appellant's circumstances he would be able to adapt to life in Morocco. The judge said this:

> "95. However, I accept Mrs Quan's submission that the appellant is now an adult and given the capabilities he has demonstrated, in having adapted to life in Spain and the UK, that he will similarly be able to adapt to life in Morocco. He will certainly be in no worse position, and in my judgement is likely to be in a significantly better position, than other residents of Morocco given the training and education he has received in the UK which he can utilise in Morocco to secure his future there."

23. In my judgment, Mr Lane's submissions under ground 1 cannot succeed. The judge made findings on the basis of all the evidence before him and I am unable to say that his findings were not properly open to him on the basis that they were inadequately reasoned or irrational or perverse. The judge was entitled to find as he did, for example, in para 59 and apply that finding in reaching his decisions in respect of Arts 3 and 8 of the ECHR and also para 276ADE of the Rules.

24. For these reasons, I reject ground 1.

Ground 2

25. Mr Lane criticised the judge's approach to s.8 of the 2004 Act, at paras 47–50 of his determination. There, the judge says this:

> "47. I also bear in mind **Section 8 (2) and (4)** of **The Asylum and Immigration (Treatment of Claimants Etc) Act 2004**. I take into account the guidance given by the Court of Appeal in **JT Cameroon v Secretary of State for the Home Department 2008 EWCA Civ 878** where it was said that conduct within section 8 was potentially damaging to an appellant's credibility.
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> 48. I accept the respondent's submission that the appellant had ample opportunity to apply for asylum in Spain, which is a safe country. His failure to do so thus engages s**ection 8 (4) of the Asylum and Immigration (Treatment of Claimants Etc) Act 2004**, and is thus damaging to his

> credibility. No satisfactory explanation has been provided to me by the appellant as to why he did not apply for asylum in Spain if he has, as he contends, a valid Article 3 claim.
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> 49. Similarly, as above, I have found that the appellant's inconsistent accounts are damaging to his credibility independently of the provisions of **Section 8 (2)** of **The 2004 Act**, though the provisions of that act reinforce my conclusions in this regard.
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> 50. I have borne in mind that that is one factor to be taken into account when assessing the appellant's credibility. I have also taken into account that that person lies in relation to one issue does not mean that their whole account is untruthful."

26. Mr Lane submitted that the judge had failed to take into account the appellant's explanation, set out for example in his witness statement, that he was only 9 years old when he went to Spain and lived there until he was 14 and he had particular difficulties when he lived there. The judge was wrong to say that there was no "satisfactory explanation" for the appellant's failure to claim asylum.

27. In my judgment, there are two answers to this point. First, the judge was clearly aware of the appellant's circumstances in Spain. He set out the appellant's case on this point at para 14(b) of the determination namely that the appellant was afraid that he would be sent back to Morocco and beaten up again, as he claimed had previously been the case (see also para 63 of the determination). However, the judge did not accept this aspect of the appellant's claim which had only been raised at the hearing and was not mentioned in his SEF, asylum interview or witness statement. At paras 63–71, the judge rejected the appellant's account as, in effect, a recent fabrication that he had been beaten by the authorities in Morocco which he had consistently not mentioned until the hearing itself. Consequently, the appellant's own explanation as to why he did not claim asylum in Spain was rejected by the judge. It was not the appellant's case that he did not know how to claim asylum and, indeed, arriving in the UK aged 14 he immediately did claim asylum. I see nothing in Mr Lane's contention that the judge was not entitled to count as damaging of the appellant's credibility that he had not previously claimed asylum before arriving in the UK.

28. Secondly, as Mr Richards submitted it is also clear that s.8 only provided a basis for doubting the appellant's account. At para 50, which I have set above, the judge says it was "one factor" in assessing the appellant's credibility and at para 49 that it "reinforce[d]" the judge's conclusion based on other reasons that the appellant was not credible.

29. For these reasons, the judge was entitled to take into account, to the extent that he did, the appellant's failure to claim asylum and I reject ground 2.

Ground 3

30. Mr Lane sought to challenge the judge's decision under para 276ADE, in particular subpara (vi) that it had not been established that:

> "... there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK".

31. The judge's reasoning is at paras 76–77 as follows:

> "76. As regards paragraph 276 ADE, the appellant does not satisfy subparagraphs (iii) – (v) thereof. As regards subparagraph (vi), the appellant entered the UK on 19 May 2011 and has thus been present here for some four years. He has lived in Morocco for the first nine years of his life. He speaks Arabic. As referred to below, there is a significant possibility that he has family living in Morocco, though due to the appellant's own inconsistency on this issue, the precise position in this regard cannot be accurately ascertained.
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> 77. Given the initiative, skills, capabilities, adaptability and resourcefulness shown by the appellant in travelling independently to and creating a life for himself in Spain and subsequently the UK, taken together with the skills he has developed as a result of the foster care he has received, and the education and employment he has undertaken in the UK, all of which can be transferred to Morocco, I am satisfied that the appellant could integrate back into Morocco relatively quickly and without encountering significant difficulty were he required to return there. In the circumstances, I do not accept that there would be very significant obstacles to his reintegration into Morocco."

32. To the extent that this challenge mirrors the challenge in ground 1, it cannot be sustained. In addition, Mr Lane submitted that the judge had failed in para 76 to take into account that the appellant had been out of Morocco for ten years. Instead, he had simply focused on the fact that the appellant had lived there for the first nine years of his life and had lived in the UK for the last four years. In my judgment, the judge's words are not capable of the forensic dissection which Mr Lane invites me to make. The determination has to be read as a whole and there is no doubt that the judge was well aware of the fact that the appellant, having left Morocco aged 9, had not been there for ten years given that he was now aged 19 having subsequently spent five years in Spain and four years in the UK. The appellant's immigration and travel history is referred to on a number of occasions in the determination (see for example para 14(d)–(f)).

33. Given the judge's findings, which were themselves findings properly open to him, his finding that it had not been established that there were "very significant obstacles" to the appellant's integration into Morocco was also one properly open to him and not irrational or perverse.

34. Consequently, I reject ground 3.

Ground 4

35. Mr Lane submitted that the judge had wrongly stated that the appellant had given his evidence through an interpreter. It was wholly unclear why he had said this as that was not the case. That error affected the judge's finding in para 98 applying

s.117B(2) of the NIA Act 2002 and showed a failure to consider the appellant's claim with anxious scrutiny and cast doubts upon the sustainability of the judge's decision as a whole.

36. Having consulted the Tribunal's file, there is nothing to suggest that an interpreter was present at the hearing. None appears to have been requested by the Tribunal. Mr Richards raised the possibility, based upon an informal recollection of the Presenting Officer, that an interpreter may have been present. Given the content of the court file, I am not satisfied that was the case.

37. It is, consequently, most unfortunate that the judge in para 13 and again in para 98 stated that an interpreter was present and assisted the appellant to give his evidence. There is no explanation for this mistake. However, in my judgment, that error does not undermine the sustainability of the judge's determination.

38. First, in relation to s.117B(2) at para 98 the judge said this:

> "98. As to section 117B (2), the appellant is able to speak English to an extent. In the course of the oral hearing of his appeal, he gave his evidence in part in English and part of it through an interpreter. Accordingly, I bear in mind that he is not fluent in English, but has some capability of speaking English."

39. It is far from clear that the judge took into account adversely to the appellant that he could not speak English applying s.117B(2). In fact, he noted that the appellant had "some capability of speaking English". I was told that the appellant is in fact fluent in English. Reading para 98 as a whole, it looks very much like the appellant was given the benefit of s.117B(2) on the basis that he was able to speak English to an extent or had some capability in it. In any event, even if contrary to what I consider the judge actually did in para 98, he did take it into account adversely, it was not in my judgment of such significance that it undermines the judge's overall reasoning and conclusion in respect of proportionality.

40. Secondly, I do not accept Mr Lane's submission that the judge's inexplicable mistake that an interpreter was used at the hearing demonstrates a lack of "anxious scrutiny" by the judge to the appellant's evidence or to the case as a whole. As I understand the substance of this submission, it is both that it calls into question the judge's focus upon the material and also demonstrates a lack of fairness. However, Mr Lane did not point out or rely upon any mistakes in the judge's determination which could be said to stem from a lack of focus or careless consideration of the evidence. The determination is a careful and detailed one running to 109 paras over seventeen pages. It faithfully sets out the evidence, the appellant's case and submissions and reaches findings based upon the evidence as a whole as I have already concluded under Ground 1. I see no basis to uphold the submission that the judge failed to give "anxious scrutiny" to the appellant's case or that there was any manifest unfairness in reaching his decision to dismiss the appeal.

41. For these reasons, I reject ground 4.

Ground 5

42. Mr Lane submitted that the judge had failed to look at all the appellant's circumstances under Art 8. He relied upon the points he had made in relation to grounds 1 and 3. I need say no more about those points as, for the reason I have already given, the judge did fully take into account the appellant's circumstances both in Morocco and in the UK.

43. As an additional point, Mr Lane submitted that the judge had failed to give proper weight to the strength of the appellant's relationships in the UK, in particular the exceptionally close relationship with his foster parents. He relied upon a number of documents including the appellant's witness statement, letters of support and the Child and Care documentation (at pages 40–41, 62–65 and 76–92 respectively in the bundle). Mr Lane submitted that none of this evidence had been considered by the judge. Mr Lane submitted that the judge was wrong simply to address the issue that the appellant's private life could continue using 'modern means of communication'.

44. The judge's consideration of Art 8 is at paras 79–108 of his determination. Having correctly identified the five stage approach set out in Razgar [2004] UKHL 27 at para 80 of his determination, the judge went on to find that the appellant's relationship although "close" with his foster carers did not amount to family life. That finding is not challenged. Nevertheless, at paras 85 onwards, the judge concluded that the appellant's relationship with his foster carers was a feature of his "private life" together with his "social and religious links with a mosque in Torquay, and that he has been attending college and has secured part-time employment" (at para 85). At paras 86–87, the judge found that the appellant's removal to Morocco would, given the effect upon his private life, engage Art 8.1.

45. Then at paras 88–108 the judge considered the issue of proportionality as follows:

> "88. Nonetheless, I am satisfied that the appellant's relationship with Mr and Mrs [C] (and indeed with friends he has made in the UK) can be maintained, albeit in a different form, should he return to Morocco by use of modern means of communication such as telephone, Skype and similar methods of communication. It will also, of course, be open to Mr and Mrs [C] to visit the appellant in Morocco should they wish to do so.
>
> 89. The appellant is able to speak Arabic and thus will be able to utilise that ability in Morocco. He will similarly be able to practice his religion in Morocco should he wish to do so and will have the opportunity to build new relationships with friends there.
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> 90. The appellant has demonstrated his intelligence, resourcefulness, capability and adaptability having at a young age, independently travelled from Morocco to Spain and subsequently from Spain to UK. He remained in Spain for some five years and demonstrated resourcefulness and ability whilst living there in taking the necessary steps to ensure that his essential needs were met.
>
> 91. He subsequently showed the initiative and resourcefulness to be able to travel independently to the UK and, having lived here for some 4 years, has

demonstrated his ability to adapt to a different culture and environment. He has undertaken education in the UK, has obtained part-time employment and has made friendships.

92. He will be able to apply the benefit of the education he has had in the UK and the skills he has learned from his job to his life in Morocco and, in my judgement, given the intelligence, resourcefulness, capability and adaptability he has demonstrated, there is no reason why he cannot transfer, utilise and enhance those skills in Morocco to secure employment there and, should he wish, to fund his further education that.

93. The appellant confirmed that he has not made any enquiries to determine what assistance is available to him in Morocco, though Mr [C] confirmed that were the appellant to be removed to Morocco, Mr [C] would assist him in looking into that.

94. It is not possible to determine what family the appellant has in Morocco as the appellant has given inconsistent accounts as to the location of, and his relationship with members of, his family and, in particular, his father, though there is certainly a significant possibility that he does have family in Morocco who can prove him with assistance if required.

95. However, I accept Mrs Quan's submission that the appellant is now an adult and given the capabilities he has demonstrated, in having adapted to life in Spain and the UK, that he will similarly be able to adapt to life in Morocco. He will certainly be in no worse position, and in my judgement is likely to be in a significantly better position, than other residents of Morocco given the training and education he has received in the UK which he can utilise in Morocco to secure his future there.

96. I also take into account section 117 A – D of the 2002 Act.

97. S 117C has no application in the circumstances of this case as the appellant was not sentenced to a period of imprisonment of four years or more.

98. As to section 117B (2), the appellant is able to speak English to an extent. In the course of the oral hearing of his appeal, he gave his evidence in part in English and part of it through an interpreter. Accordingly, I bear in mind that he is not fluent in English, but has some capability of speaking English.

99. The appellant is not currently financially independent, though he is working 24 hours per week. Accordingly, I take into account, given the provisions of section 117B (3), that he has some financial resources, but is not financially independent.

100. The private life established by the appellant has not, in my judgement, been established when he has been in the UK unlawfully as it has been established whilst he has been granted discretionary leave to remain. Accordingly, in my judgement, section 117B (4) does not apply in the circumstances of this case.

101. However, in my judgement, the appellant's private life has been established when his immigration status has been precarious. He had entered the UK unlawfully in May 2011. His application for asylum was refused on 2 July 2013. He was granted limited leave to remain in the UK only until 16 May 2014 when he reached 17 ½ years of age.

> 102. Accordingly, the appellant had no expectation of remaining in the UK after reaching that age and his status was thus necessarily precarious. I bear this in mind when considering whether, per section 117A, removal of the appellant breaches his rights under article 8 ECHR.
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> 103. Section 117B (6) has no application in the circumstances of this case.
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> 104. Taking all of these matters into account, whilst I am satisfied that removal of the appellant would amount to an interference with his private life Article 8 rights, I am satisfied that the respondent has justified such interference.
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> 105. Such interference is in accordance with the law, namely the immigration rules and, I am satisfied, necessary and proportionate in the interests of the economic well-being of the country through the maintenance of a fair system of immigration control.
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> 106. As above, the appellant has the skills, capabilities, resources and adaptability to secure an independent life for himself in Morocco. He would be able to continue to maintain regular telephone, Skype and should they wish, visiting contact with Mr and Mrs [C]. He can pursue his education and his religious beliefs in Morocco should he wish to do so. He can use the transferable skills he has developed to secure employment in Morocco. Accordingly, the appellant will be capable of maintaining his private life if he returned to Morocco.
>
> 107. Accordingly, I am satisfied that the respondent has justified any interference that refusal of the appellant's application would cause to his private life and that such refusal is a proportionate response to the legitimate aim of maintaining immigration controls.
>
> 108. In the circumstances, I am satisfied that refusal of the appellant's appeal on the grounds of the maintenance of immigration control does not amount to a disproportionate interference with the private or family life of the appellant under Article 8."

46. There is no doubt, in my judgment, that the judge fully recognised the nature of the appellant's private life in the UK both with his foster parents and more widely in society including his education and employment. The judge took into account s.117B of the NIA Act 2002 including that the appellant's private life had been established whilst his immigration status was precarious as required by s.117B(5) of the NIA Act 2002. I have already concluded that the judge was entitled to find that the appellant was a "capable, adaptable and resourceful" individual. The judge took into account that contact between the appellant and his foster carer could be maintained by such methods as Skype. That is a mechanism which has, in recent years, revolutionised the ability of individuals to maintain face-to-face contact via the internet over large distances. As the judge had previously noted, Mr C's own evidence was that the appellant would shortly move on from them (see para 82).

47. In my judgment, the judge fully considered all the appellant's circumstances and, given that he could not succeed under the Immigration Rules, it was properly open to the judge to conclude that the public interest did outweigh the appellant's circumstances such that the decision to remove him was proportionate. The

appellant's circumstances were not "compelling" such as to outweigh the public interest and justify the grant of leave outside the Rules under Art 8.

48. Consequently, I also reject ground 5.

Decision

49. For these reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal under Arts 3 and 8 of the ECHR and the Immigration Rules did not involve the making of an error of law. That decision stands.

50. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal