Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11364/2015**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 15 February 2018	**On 8 March 2018**

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

ENTRY CLEARANCE OFFICER- Paris

Appellant

and

HAMZA DIF ALLAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Ms S Hussain of RH & Co, solicitors

DECISION AND REASONS

1. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in

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respect of this Appellant. Having considered all the circumstances and evidence we do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge J C Grant-Hutchison, promulgated on 4 August 2017 which allowed the Appellant's appeal against the respondent's refusal to grant entry clearance as the spouse of a British citizen.

Background

3. The Appellant was born on 20 August 1980 and is a national of Algeria. On 23 October 2015 the Respondent refused the Appellant's application for entry clearance as the spouse of a British citizen under appendix FM of the Immigration Rules.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge J C Grant-Hutchison ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 6 September 2017 Resident Judge Martin gave permission to appeal stating

> 1. The respondent seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge Grant-Hutchison) who, in a decision and reasons promulgated on 4 August 2017, allowed the appellant's appeal against the entry clearance officer's refusal to grant him leave to enter the UK on human rights grounds.
>
> 2. It is arguable, as asserted in the grounds that the Judge has erred in consideration of paragraph S-EC.1.5 of appendix FM which does not require a criminal conviction and is referring to past conduct, not likely future conduct.

The Hearing

5. (a) For the respondent, Ms O'Brien moved the grounds of appeal. She told us that the Judge had misdirected herself both in fact and in law. She conceded that at [16] of the decision the Judge acknowledges the appellant's poor immigration history, but told us that at [17] the Judge was wrong to focus on the absence of criminal convictions rather than the appellant's conduct. The absence of a conviction is relevant to S-EC 1.4, when the Judge should have been considering S-EC 1.5.

(b) Ms O'Brien told us that the Judge failed to properly consider the appellant's conduct. Ms O'Brien told us that the decision does not contain an article 8 proportionality assessment and reminded us that the Judge

has allowed this appeal under the immigration rules, when, in fact, it is an appeal on article 8 ECHR grounds only. She urged us to find that there is a material error of law and to set the decision aside

6. For the appellant Ms Hussain told us that the sole ground of appeal is a failure to give adequate weight to material matters. She told us that even if that is established, it does not amount to a material error of law. She told us that the decision does not contain errors, material or otherwise, and that the decision contains a fair and balanced consideration of the appellant's case. She told us that the Judge manifestly balanced the positive aspects of the evidence against the appellant's poor immigration history (set out in detail at [15] of the decision). At [16] the Judge considers the appellant's past conduct against positive features demonstrating change in his overall outlook since meeting the sponsor. Ms Hussain told us that at the end of [18] the Judge was clearly referring to is S-EC1 .5, and that, there, the Judge takes account of the absence of evidence to suggest that his future actions will bring him to the adverse attention of the authorities. She urged us to allow the decision to stand and to dismiss the appeal.

Analysis

7. At [15] of the decision the Judge sets out the appellant's poor immigration history, recording the appellant's illegal entry to the UK in 2009, his use of a false identity, and his illegal stay in Northern Ireland until he was encountered by immigration officers on 19 September 2012. The Judge records the appellant's failure to attend interviews to support his application for leave to remain in the UK and his refusal to reply to correspondence from the Home Office throughout 2013 and 2014.

8. At [16] the Judge balances that poor immigration history against the positive influence the Judge finds the sponsor has had on the appellant. The Judge clearly finds that the relationship between the appellant and sponsor has brought a Copernican change in the appellant's attitude to immigration law, leading to a responsible maturity in his conduct. The Judge finds that the appellant has made no attempt to enter the UK illegally in the two years since he and the sponsor decided to live together, and that the sponsor voluntarily returned to Algeria to make an application for entry clearance from there.

9. At [19] the Judge makes a finding which starkly contradicts the findings which favour the appellant at [16]. It is there that the Judge finds that the appellant's immigration history did not end with an attempt to enter the UK with a false passport in September 2012. It is clear from the Judge's findings at [19] that the appellant relocated to the Republic of Ireland in 2013, and then, in December 2013, (to be reunited with the sponsor) he entered the UK illegally. The illegal entry to the UK in December 2013 is not factored into the Judge's consideration at [15] and [16]. It is also clear from the Judge's findings of fact that when the appellant completed his

application for entry clearance in 2015 he did not mention illegal entry into the UK in 2013, so that the Visa application form is neither candid nor accurate.

10. The appellant's entry to the UK in 2013, and his failure to disclose illegal entry in his visa application form in 2015, demonstrates that the Judge's conclusion that the appellant turned over an entirely new leaf when he met the sponsor is not safe.

11. Section S-EC of the rules sets out a number of general grounds for refusal. Mandatory grounds for refusal are set out in S-EC.1.2 to 1.7. Discretionary grounds for refusal are set out in S-EC.2.2 to 2.5. At [17] the Judge clearly focuses on the absence of criminality. In this case that is an irrelevant consideration. Criminal behaviour is dealt with in S-EC 1.4, which says

> (S-EC.1.1. The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2. to 1.9. apply)
>
> S-EC.1.4. The exclusion of the applicant from the UK is conducive to the public good because they have:
>
> > (a) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years; or
> >
> > (b) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months but less than 4 years, unless a period of 10 years has passed since the end of the sentence; or
> >
> > (c) been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 12 months, unless a period of 5 years has passed since the end of the sentence.

12. In this case the relevant considerations are S-EC 1.1 and S-EC1.5, which say

> S-EC.1.1. The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2. to 1.9. apply.
>
> S-EC.1.5. The exclusion of the applicant from the UK is conducive to the public good because, for example, the applicant's conduct (including convictions which do not fall within paragraph S-EC.1.4.), character, associations, or other reasons, make it undesirable to grant them entry clearance.

13. S-EC 1.5 is a mandatory ground for refusal. The determinative question is the appellant's conduct. The Judge's consideration of the negative aspects of the appellant's conduct at [16] is incomplete. Her assessment of the negative aspects of his conduct fails to take account of

illegal entrance the UK in 2013 and the selective history given in the visa application form in 2015.

14. The Judge allowed the appeal under the immigration rules. The appellant's application was submitted in August 2015. There is only one competent ground of appeal, and that is on article 8 ECHR grounds. Although the Judge was correct to consider the immigration rules, that consideration forms part of the background to the appeal. The Judge did not go on to carry out an article 8 proportionality balancing exercise.

15. The absence of full consideration of article 8 ECHR grounds of appeal, the purported success under the immigration rules, and the failure to take account of illegal entry to the UK in December 2013 all amount to material errors of law. We must set the decision aside.

16. Although we set the decision aside there is adequate material before us to enable us to substitute our own decision. We invited parties' agents to make submissions on article 8 ECHR grounds to assists us.

The Facts

17. The appellant is Algerian national born in 1980. The sponsor is a British national born in 1968. The sponsor has children from a previous relationship who are now adults and who do not live with her. The sponsor has a granddaughter. The sponsor's son is the father of the sponsor's granddaughter. He is separated from the sponsor's granddaughter's mother, with whom the sponsor's granddaughter lives.

18. The sponsor's granddaughter is nine years old. Since her granddaughter's birth, the sponsor has provided childcare for her granddaughter every Friday. That arrangement helps the child's mother to work. The sponsor is employed full-time. She has elderly parents who still pursue an independent life.

19. In 2009 the appellant entered the UK illegally using a Polish passport and an assumed identity which he purchased in Greece. The sponsor took up residence in Northern Ireland. He was not encountered by enforcement officers until 19 September 2012. When confronted he admitted using a false identity. He was detained and only then made an application for asylum. His application was unsuccessful. He appealed against refusal of his protection claim, & his appeal was dismissed. Between May 2013 and April 2014 the Home Office tried to contact the appellant but he did not respond.

20. The sponsor met the appellant in Belfast in March 2011. They exchanged telephone numbers, and when the sponsor returned to Scotland they remained in contact. In April 2011 the sponsor returned to Belfast for a date with the appellant, and a relationship developed. The sponsor then visited Belfast once every 2 to 3 months to see the

appellant. In October 2011 the appellant told the sponsor that he was an overstayer and said that he could not return to Nigeria. The relationship between the sponsor and the appellant continued to grow stronger.

21. In September 2012 the appellant was detained for four days. It was then he told the sponsor that he had been using a false passport. In June 2013 the appellant moved to the Republic of Ireland. The relationship between the appellant and sponsor continued and the sponsor continued to travel to visit the appellant. The sponsor & the appellant then started to discuss their long-term plans, and then talk turned to the appellant joining the sponsor in Scotland so that they could live together permanently.

22. In December 2013 the appellant entered Scotland illegally to be reunited with the sponsor. On 31 December 2013 they agree to marry and on 6 June 2014 they married. They then consulted a solicitor who helped the appellant submit an application for leave to remain in the UK on 22 October 2014. That application was refused on 20 January 2015. The appellant had no right of appeal. In June 2015 the appellant returned to Algeria voluntarily. He has remained there since. He made an application to enter the UK as the spouse of the sponsor on 26 August 2015. The respondent refused that application on 23 October 2015. That refusal is the subject matter of this appeal.

23. The sponsor has visited the appellant in Algeria several times since June 2015. The sponsor and the appellant are husband and wife. They have a genuine and subsisting relationship. They want to live together in the UK.

24. The sponsor works as a medical receptionist in a medical practice in Oban. The sponsor's mother is 70 years old. Her father is 76 years old. The sponsor visits her parents several times each week. The sponsor's father has kidney disease and asthma. Her mother has an irregular heartbeat and Polymyalgia. The sponsor has two adult children, both of them are around 30 years of age. The sponsor's brother is an adult with his own family. He lives in Dunblane. The sponsor is in regular contact with her brother and his family.

25. The respondent accepts that the appellant meets the financial requirements and English language requirements of appendix FM, but did not accept that the appellant met the relationship requirements or the suitability requirements for entry clearance.

26. The sponsor and the appellant are in daily contact using Internet messaging services.

27. The sponsor owns the house that she lives in. The appellant has met the sponsor's family, who all extend a welcome to him. The appellant has met the sponsor's granddaughter.

Submission

28. Ms Hussain asked us to find that the respondent's decision is a disproportionate interference with the article 8 family life rights of the appellant and the sponsor. She told us that they are parties to a valid and subsisting marriage. She told us that the respondent's decision will cause the sponsor to leave the UK, and that as the sponsor is a British citizen whose parents and children are in the UK, whose job is in the UK and whose house is in the UK, then the decision is a disproportionate interference with the right to respect for family life. She emphasised the relationship between the sponsor and her granddaughter and the desire of the appellant and sponsor to pursue family life in the UK.

29. Miss O'Brien, for the respondent, submitted that the decision is not a disproportionate interference with the article 8 rights of either the sponsor or the appellant. She emphasised strong features in public interest which she argued must be given great weight. She told us that the sponsor's existing family relationships are principally relationships with adults and not beyond the normal range of relationships, because none of the relationships have any element of dependency. She told us that the relationship between the sponsor and her granddaughter can continue, and that there is nothing to stop the sponsor from going to Algeria. She urged us to uphold the entry clearance officer's decision.

Article 8 ECHR

30. Because of his age and the length of time the appellant was in the UK, he cannot meet the requirements of paragraph 276 ADE of the immigration rules. The appellant's own conduct in returning to Algeria tells us that there are no insurmountable obstacles to his integration there,

31. The respondent accepts that the appellant meets the language and financial requirements of appendix FM. On the facts as we find them to be the appellant and sponsor are married and want to live together permanently. For a period between 2014 and 2015 they lived together in the UK. They have nurtured their relationship with daily contact and with the sponsor's visits to Algeria. The appellant meets the relationship requirements of appendix FM.

32. The appellant cannot meet the suitability requirements of appendix FM. The appellant entered the UK illegally using a false passport in 2009. He then remained in the UK illegally, evading enquiry from the Home Office throughout 2013 and 2014. He made an unsuccessful claim for asylum, which his subsequent voluntary return to Algeria tells us had no foundation. The appellant entered the UK illegally in December 2013 to further his relationship with the sponsor. The appellant's conduct falls well within the range of conduct which engages paragraph S-EC1.5 of the immigration rules. On the facts as we find them to be the respondent is

correct to rely on paragraph S-EC 1.5, which is a mandatory ground of refusal. The appellant cannot meet the requirements of appendix FM

33. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deportation case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed…"

34. We have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8
(ii) If so, has the right to respect for this been interfered with
(iii) If so, was the interference in accordance with the law
(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

35. Section 117B of the 2002 Act tells us that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

36. On the facts as we find them to be the appellant and the sponsor are married and want to live together. Family life within the meaning of article 8 therefore exists. That finding must be viewed against the fact that the appellant and sponsor committed themselves to each other when they knew that the appellant did not have the right to be in the UK. The appellant and sponsor did not know, when they entered into marriage, which country their future lay in. It is a striking feature of this case that it was only after marriage that the appellant and sponsor sought legal assistance to submit an application for leave to remain.

37. What is pled for the appellant is that because the sponsor is a British citizen with a home, with employment and with an established family in the UK, then the respondent's decision must be a disproportionate interference. The problem with that submission is that it is nothing more than an expression of choice

38. In SS (Congo) and Others [2015] EWCA Civ 387 Richards LJ drew a distinction in entry clearance cases, on the one hand, involving someone outside the United Kingdom who applies to come here to take up or resume family life when family life was originally established in ordinary and legitimate circumstances at some time in the past, rather than in the knowledge of its precariousness in terms of United Kingdom immigration controls; and cases, on the other hand, where someone from the United Kingdom marries a foreign national or establishes a family life with them at a stage when they are contemplating trying to live together in the United Kingdom, but when they know that their partner does not have a right to come here. In the latter cases, the relationship will have been formed under conditions of known precariousness and it will be appropriate to apply a similar test of exceptional circumstances before a violation of Article 8 will be found to arise in relation to a refusal to grant Leave to Enter outside the Rules.

39. In terms of section 117D of the 2002 Act the sponsor is a qualifying partner because she is a British citizen. Section 117B(4)(b) of the 2002 Act tells us to attach little weight to the relationship between the appellant and the sponsor. In this case great emphasis is placed on the sponsor's established life in the UK and on her British citizenship. We are told little about the appellant's circumstances in Algeria.

40. The sponsor has visited the appellant several times in Algeria since he returned there in 2015. There is no reliable evidence placed before us to indicate that family life between the appellant and sponsor cannot continue in Algeria. The weight of reliable evidence indicates that the sponsor's parents are not dependent upon her, and the sponsor's adult children are no longer dependent upon her. The sponsor has a job which she will relinquish if she moves to Algeria. She must have known that when she married the appellant.

41. The maintenance of effective immigration control is in the public interest. The respondent's decision is not a breach of the right to respect for family life because the appellant and the sponsor did not know, when they married each other, where their future lay. When the sponsor and the appellant were married the appellant had no right to be in the UK. The respondent's decision does not change that. Family life for the appellant and sponsor can continue. The impact of the respondent's decision is simply that it cannot continue in the country they have selected as their first choice.

42. If the sponsor decides to leave the UK then she will leave behind her home, her employment, her parents, her adult children and her granddaughter. There is no evidence that the termination of her weekly contact with the last will materially affect the child. She will be able to maintain contact with each of her relatives by instantaneous means of communication. There is nothing to stop the sponsor from returning to visit her relatives. The sponsor will leave her home and employment, but

for many people that is an inevitable part of the changes brought about by marriage. That must have been something the sponsor thought about before entering into marriage with a man who has no right to be in the UK.

43. When we consider all of these matters we can only find that the respondent's decision is not a disproportionate breach of the right to respect for family life for either the appellant or the sponsor.

44. It is, of course, possible for the appellant to submit a new application for entry clearance. As a matter of comparative justice, it may be that any entry clearance officer looking at a future application from this appellant will bear in mind that it is possible to apply for revocation of a deportation order to facilitate re-entry to the UK after the expiry of three years. By analogy, we wonder if the importance of the appellant's immigration history will diminish because of the passage of time when consideration is given to any future application made by this appellant. Although we are critical of the appellant's immigration history we are also mindful of the fact that it is now almost 3 years since he voluntarily returned to Algeria.

45. After considering all of the evidence we still know nothing of the appellant's home, his habits and activities of daily living, his significant friendships, any integration into UK society, or any contribution to his local community. There is no reliable evidence of the component parts of private life within the meaning of article 8 of the 1950 convention before us. The appellant fails to establish that he has created article 8 private life within the UK.

46. We dismiss the appeal on article 8 ECHR grounds.

CONCLUSION

47. The decision of the First-tier Tribunal promulgated on 4 August 2017 is tainted by a material error of law. We set it aside.

48. We substitute our own decision.

49. The appeal is dismissed on article 8 ECHR grounds.

Signed Paul Doyle Date 7 March 2018
Deputy Upper Tribunal Judge Doyle