Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05446/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th November 2018	**On 10th December 2018**

Before

UPPER TRIBUNAL JUDGE COKER

Between

MOHAMED [A]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Aitken, instructed by UK Lawyers & Advisors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Mr [A] made an international protection and human rights claim. Both were refused by the respondent for reasons set out in a decision dated 22nd May 2017. For reasons set out in a decision promulgated on 3rd August 2017, First-tier Tribunal Judge J K Swaney dismissed the appeal against the decision to refuse international protection and allowed the appeal against the decision to refuse the human rights claim (Article 8).

2. The respondent sought and was granted permission to appeal the decision allowing the Article 8 claim. The appellant did not seek permission to appeal the dismissal of his international protection claim.

3. For the reasons set out in a decision promulgated on 11th April 2018, Upper Tribunal Judge Lane found material errors of law in the decision by the First-tier Tribunal, set aside the decision in so far as it was concerned with Article 8 to be remade, no findings preserved. A transfer order was made, and the appeal eventually came before me for hearing on 13th November 2018.

4. The appellant's solicitors had not filed the documents on which they intended to rely, in accordance with directions I made in September 2018. Nevertheless, I had some of the documents which had been handed in in September and on conclusion of the hearing on 13th November Mr Aitken provided me with his bundle of documents. I also had two letters from Chelsea and Westminster Hospital in connection with the appellant's niece and Mr Aitken's skeleton argument prepared for this hearing and his skeleton prepared for the hearing before the First-tier Tribunal.

5. I heard oral evidence from the appellant, his sister and his brother-in-law. Although there was an interpreter present, Mr [A] gave virtually the whole of his evidence in English and it was evident that he was fluent in English. Mr [A]'s sister required some assistance from the interpreter and his brother-in-law required none.

Undisputed background

6. The appellant is an Algerian Citizen, born on 12th September 1988. He is single. He first arrived in the UK on 3rd August 2009 as a visitor and returned to Algeria on completion of his visit on 16th November 2009. A second application for a visit visa was refused. His next application for a visit visa was granted and he came to the UK on 21st December 2013 as a visitor. He did not leave the UK on expiry of his visit visa. Throughout his time in the UK he has lived with his sister, brother-in-law and their children.

7. On 1st September 2016 he was convicted of possession/control of identity documents with intent and possession/control of documents belonging to another for which he received a six-month sentence, suspended for 12 months, a 3-month sentence suspended for 12 months to run concurrently and an electronically monitored curfew for 2 months.

8. The appellant's sister, a British Citizen, was born on 21st November 1974 in Algeria. She has been in the UK for over 20 years. She is diagnosed with Type II diabetes and high blood pressure for which she is prescribed medication. She is the full-time carer of her husband and receives the full Carers Allowance.

9. The appellant's brother in law, date of birth 17th February 1962, and married to the appellant's sister, has been in the UK for over 20 years. He worked as a black cab driver until about a year ago when he was forced to give up work because of serious illness. He is a British Citizen. He has a brother here in the UK, who is also a black cab driver, who is married with three

children aged under 16. He sees his brother every couple of weeks or so when his brother is in the area. The brother and his family do not and cannot, I accept, provide any physical care or support. He has other relatives in Algeria including his parents. The evidence from the medical reports that were sent to his GP from his various treating oncologists say the following:

- In February 2016 he was diagnosed as having right sided lung cancer;
- In May 2016 he had a right sided lobectomy
- In September 2017 there were recently identified adenocarcinoma cells in right sided pulmonary effusion
- October 2017 a letter confirms he has metastatic adenocarcinoma to both lungs with EGFR mutation of the exon 19 deletion
- He has asthma
- He has Crohns disease
- Between November 2016 and January 2017, he had five admissions to hospital
- he is troubled with viral infections, and although infections may resolve themselves he is at risk of further infections and lung related problems including pleural effusions which require drainage.

10. The appellant's brother-in-law and sister travelled to Algeria for about 5 weeks during the summer for the expressed purpose of the brother-in-law being able to say "good-bye" to his family there, having been told in July 2017 that his life expectancy was much reduced, to some two years.

11. There are four children (all born in the UK and all British citizens), 3 boys and a girl: the oldest two, boys, are in their late teens and are young adults; one is going to university in January 2019 and the other is at college. The youngest, also a boy, is now just 9 years old. The daughter, is 15 and has had serious physical health issues and continuing stress related issues.

12. In 2017, after numerous recurrent episodes of loss of consciousness and sharp chest pain, the daughter was diagnosed with secundum atrial septal defect. In March 2018 she underwent percutaneous closure of the ASD with a septal occlude which has been successful. She spent some 6 weeks in hospital. On review in October 2018 the paediatric cardiologist notified her GP that the procedure appeared successful but that she was still having recurrent symptoms of vasovagal-type episodes and left sided chest pain. The report states that there was a functional component and that she had been engaging with the psychology team.

13. The appellant was put forward for and undertook a Stress Control Course during the early part of 2017; he has no current depressive or anxiety issues.

Remaking the decision

14. Ms Isherwood put the various reports and evidence from the children to the appellant and questioned why, given that his evidence was that he played a full and important part in the life of the two younger children, he was not referred to as undertaking this role. His unshaken evidence, supported and confirmed by his sister and brother-in-law was that he played a full role taking the daughter to school, collecting her, cleaning the house, gardening, minor household repairs, cooking, ensuring the younger boy was able to participate in various outdoor games and assisting in the household generally overall. The appellant's brother-in-law was an impressive and highly credible witness. Although clearly in great distress because of his diagnosis, his positive attitude and desire for his family to be protected as much as possible was highly evident. He gave detailed evidence of the decision taken not to tell his younger children of his diagnosis and the discussions held with his daughter's psychologist.

15. I have no doubt, having read the reports and witness statements with great care and having heard the oral evidence of the appellant, his sister and his brother in law (given in the absence of each other) that the appellant is a necessary and critical part of this family. The ill-health, not only of the brother-in-law but also the appellant's sister and their daughter, has meant that the burden of day-to-day caring for the children as well as the physical aspects of the home have fallen to the appellant. I found all three witnesses credible. I am satisfied that during the daughter's lengthy stay in hospital not only did he care for the younger child, but he assisted the family to ensure that the daughter could be visited, the physical aspects of the household continued to run smoothly, and the family was able to function as a family.

16. I have no doubt at all but that the appellant is a critical member of the family at this very sad time and has been so since his brother-in-law's diagnosis. His removal from the family unit could have considerable consequences on the family. I find that Article 8 is engaged.

17. This appeal is not following a deportation decision, but the appellant has been convicted of criminal offences for which he received suspended sentences. He does not fall within the definition of foreign criminal in paragraph s117D (2) Nationality, Immigration and Asylum Act 2002 but I have nevertheless taken the factors in s117C into account in reaching my decision as well as those set out in s117B. The public interest in the removal of the appellant as a person who has breached immigration controls as well as because he is a criminal weigh heavily in the balance in assessing the proportionality of his removal.

18. That the appellant speaks good English is a neutral factor in this consideration, but I must, and do, also weigh into my consideration the fact that he came as a visitor and overstayed. I have also borne in mind and placed weight upon the fact that his criminal offending occurred very close to his brother-in-law's diagnosis. It was some two years from his entry as a visitor, having therefore overstayed for some 18 months, before the serious

medical problems arose. It was only when those medical problems surfaced that his involvement with the family could be said to change from being an uncle to that of being a critical member of the family. Although he plays a significant and critical role within the family he does not have parental responsibility for the younger children and he does not stand in the shoes of either parent. It cannot be said that he has a parental relationship with the two younger children; he has a close, caring and personal bond with them because he is their uncle and plays an important role in their life and the life of the family generally. There is no question, reasonably, that it would even be considered by any of the family members that the children would or could go to Algeria if he were removed.

19. I note that the appellant underwent stress counselling. Although this is to his credit, given the responsibility he feels, but I have placed little weight on this given the public interest in his removal both as a criminal and as someone who has breached immigration control.

20. The appellant has not been resident in the UK for most of his life and nor are there very significant obstacles to his reintegration in Algeria. He has been in the UK since December 2013, a matter of only five years and 4 ½ of those unlawfully. He has worked (unlawfully). His integration in UK society has arisen because of the relationship he has with the family; the problems faced by the family have necessitated his involvement with the children's lives at school and with society generally in as much as the family are all British and have been here for so many years. Nevertheless, I have placed little or no weight on this.

21. Mr Aitken and Ms Isherwood both said that the fact that the appellant is supported by his sister and brother in law is a factor against him. Since the date of the hearing, *Rhuppiah* [2018] UKSC 58 has said that this is not a factor adverse to an applicant, but it remains only a factor I have considered. It is not a matter upon which I have placed much weight other than to recognise that he is, because of the financial support provided financially independent.

22. The critical and overwhelming issue in this appeal is the relationship this appellant has with the family. Their physical dependence could, I do not doubt, be replaced, albeit at some considerable cost. Some of what he does may be provided by social services, but the full extent of his physical assistance would not be provided on the essentially full-time basis that he currently undertakes. What cannot be replaced is the emotional dependency in the broadest and most intimate sense between the appellant and the members of the family both individually and as a family. The devastation that would befall the two younger children cannot be exaggerated. The daughter is already suffering from considerable anxiety both because of her own health issues but also because of her awareness of her father being seriously ill – even though she does not know the full extent of that illness and its impending consequence. The appellant's brother-in-law relies for emotional support on the appellant, as well as on his wife. The appellant's sister relies upon the appellant to facilitate the

smooth running of the household not only to enable her to care for her husband but also to care for herself. To remove the appellant at this time in these highly emotional and stressful times, when the stresses on the family are increasing and will continue to increase given what the brother-in-law has been told, is, quite simply, disproportionate.

23. It is the cumulative aspects of the whole family that renders the decision to remove disproportionate. By themselves, if just one individual were affected, the appellant's removal would be proportionate. But this tragic and highly unusual set of circumstances is such that this is one of the almost unique cases where the public interest does not lie in the appellant's removal.

24. I allow the appeal on Article 8 human rights grounds.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision in so far as it relates to Article 8.

I re-make the decision in the appeal by allowing it on human rights grounds – Article 8. The appeal against the protection decision remains as reached by the First-tier Tribunal.

Date 3rd December 2018

Upper Tribunal Judge Coker