IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003063
FtT No: HU/59575/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 October 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

NB (ALGERIA)
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Pullinger, Counsel instructed by Direct Access
For the Respondent: Ms R Arif, Senior Presenting Officer

Heard at Field House on 25 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant and the name or address of his family members, likely to lead members of the public to identify the appellant.

A failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant appeals a decision of First-tier Tribunal Judge French ("the Judge") dismissing his human rights (article 8 ECHR) appeal. The Judge's decision was sent to the parties on 20 May 2024.

Anonymity Order

2. The Judge issued an anonymity order. Neither party requested that the order be set aside.

3. The appellant has an outstanding asylum application. Consequently, at the present time I consider that his article 8 rights outweigh the right of the public to know the identity of all parties to these proceedings, as protected by article 10 ECHR. It is appropriate that the order continue.

4. The anonymity order is detailed above.

Brief Facts

5. The appellant is an Algerian national who is presently aged 39. He entered the United Kingdom on 18 October 2011 as a Tier 4 (General) Student with valid leave until 6 March 2012. He subsequently overstayed. Later he applied for leave to remain as a student in 2016. This application was voided by the respondent on 23 November 2016.

6. He met his now wife, a citizen of Czechia, in December 2019. They commenced residing with each other in February 2020 and were married on 4 May 2021.

7. The applicant made two applications for settlement as a family member of a European Union citizen under the EUSS. The applications were refused by decisions dated 26 January 2022 and 11 August 2022 respectively. In respect of the second refusal a post-decision administrative review upholding the decision was completed by the respondent on 16 November 2022.

8. On 22 March 2023, the appellant submitted a human rights application seeking leave to remain on family life grounds as the spouse of his wife. Whilst this application was outstanding the appellant claimed asylum on 15 June 2023. A decision on that application is presently outstanding.

9. The respondent refused the human rights application by a decision dated 25 July 2023. In respect of paragraph EX.1(b) of Appendix FM, the respondent observed that she had not seen any evidence that there were insurmountable obstacles to family life if the couple relocated to Czechia. It was further considered that there were no exceptional circumstances preventing travel to Czechia.

10. On 10 May 2024, the appeal came before the Judge sitting in Birmingham. The appellant was represented and both he and his wife gave evidence. Reliance was placed upon several supporting statements including one from his wife's daughter, who explained the personal connection that the appellant has with her wider family in the United Kingdom including her own daughter.

11. The Judge's findings of fact are located at [16] of the decision. His conclusion is detailed at [17]:

> "17. Conclusions-
>
> I have endeavoured to keep this judgment as succinct as possible. The key issues is whether or not the Appellant and [the Appellant's wife] could relocate to live together outside the UK. In my view the Appellant could integrate in Algeria. He is familiar with the language and customs of that country, where he lived for the first 27 years of his life. He claims that he has no family or friends there, but I consider that is unlikely. He has qualifications, which in my view would enable to be gain employment. It may be a challenge for [the Appellant's wife] to integrate in Algeria, but she has shown an ability to adjust given that she moved for [sic] Czechia to the UK. In addition she claims to have an interest in learning new languages. I agree with the assessment of the Home Office that although Article 8 ECHR gives an entitlement to a family and private life, it does not give a person the right to stipulate where that right will be exercised. In my opinion the Appellant's application must be refused and he should return to Algeria, where [the Appellant's wife] can choose to join him. There are no insurmountable obstacles to such arrangement. [The Appellant's wife] can visit her family and keep in touch through media. If she and the Appellant chose to make their new home in Czechia that is a matter for them and would be subject to a separate application by the Appellant. [The Appellant's wife] retains her Czech nationality. In all the circumstances as I have explained above, I conclude that there is no merit in this appeal and that the Home Office was justified in refusing the Appellant's application for asylum. Accordingly I dismiss the appeal."

Grounds of Appeal

12. The appellant relies upon grounds of appeal prepared by Mr Pullinger who did not represent him before the Judge.

13. Two grounds of challenge are advanced. The first addresses the failure of the Judge to consider the "unjustifiably harsh consequences" test established under GEN.3.2 of Appendix FM in respect of the appellant, his wife or his wife's family. Additionally, it was contended that there was no adequate consideration of article 8 outside of the Rules.

14. Ground 1 further contends that the decision is deficient for a lack of adequate reasoning in respect of whether the appellant nor his wife have significant health concerns. This contention was advanced as follows:

> "14. Finally, the Appellant instructs that the sponsor clarified during the hearing that although she used to do physically demanding work that this had ceased owing to her medical conditions. The Appellant instructs that she informed the Tribunal in the hearing that she had been moved onto light duties. This would significantly undermine the FTJ's findings at 16(f) and should have been taken into account and/or addressed by the FTJ. The Appellant will seek a transcript of the hearing."

15. I note Mr Pullinger's acceptance before me that the assertion advanced by means of the grounds of appeal was not corroborated by witness statement evidence. He acknowledged that as Counsel attending this hearing it was not proper for him to give evidence. In any event, he has no personal knowledge as to what occurred at before the Judge when he himself did not attend that hearing. This paragraph of the grounds of appeal was withdrawn.

16. The second ground contends that the Judge erred in concluding that the appellant's wife could relocate to Algeria in the absence of consideration of various submissions made at the hearing, such as the difficulties she would be subjected to consequent to her being a Christian woman. Reference was made to [25] of the appellant's skeleton argument before the First-tier Tribunal, dated 23 January 2024, where several references were directed to relevant objective evidence contained within the Home Office's CPIN "*Algeria: Internal Relocation and Background Information*" version 1.0 (September 2020).

17. First-tier Tribunal Judge Fisher granted the appellant permission to appeal by a decision dated 24 June 2024 reasoning, *inter alia*:

> "3. It is arguable that the Judge has only considered the appeal under Section EX of the Immigration Rules, and that he has failed to consider whether there could be unjustifiably harsh consequences outside the Rules. In that regard, the issues raised in Ground 2 would be relevant. There is nothing more than a passing reference to Article 8 of the ECHR in paragraph 17 of the decision. The decision itself was not helped by the penultimate sentence which indicates that the Home Office was 'justified in refusing the Appellant's application for asylum', when this was a human rights claim."

18. It is appropriate to observe that in addition to Judge Fisher's observation as to the error made by the Judge that there was an asylum appeal before him, the Judge further erred at [4] of his decision in referencing that the appellant's skeleton argument addressed the "current appeal under EU Exit Settlement Scheme". Paragraph 2 of the skeleton argument is clear as to the appellant's human rights appeal being founded upon article 8.

Discussion

19. Despite the clear and helpful submissions advanced by Ms Arif, I am satisfied that the Judge made a material error of law in failing to address GEN.3.2. of the Rules. The submissions under this Rule were clearly advanced before him in closing argument as recorded at [15] of the decision and should properly have been considered.

20. I am also satisfied that the Judge failed to adequately consider article 8 outside of the Rules. Ms Arif relied upon a reference in [17] to the Judge agreeing "with the assessment of the Home Office that although Article 8 ECHR gives an entitlement to a family and private life, it does not give a person the right to stipulate where that right will be exercised". I am satisfied the word "that" must be given its ordinary and usual meaning. It is clear when considering the sentence, the Judge was acknowledging the respondent's reference to a well-known principle of law, and not seeking to consider the entirety of the appellant's article 8 case outside of the Rules.

21. Ms Arif further submitted that it was possible to conclude on a fair reading of [17], when considered in its entirety, that the Judge had addressed EX.1, GEN.3.2 of the Rules and article 8 outside of the Rules without conflation. Whilst it may be possible for a judge to deal with all three issues, applying the correct tests, within one paragraph, it is very difficult, if not impossible, to identify this occurring in this matter. Ms Arif's submission is not aided by the Judge commencing his consideration by stating that it would be a "challenge" for the appellant's wife to integrate in Algeria, a conclusion that on its face fails to satisfy any of the three tests he was required to consider.

22. In the circumstances I am satisfied that ground 1 is made out and consequently the Judge materially erred in law.

23. Turning to ground 2, I am mindful that EX.1.(b) requires the appellant to establish that there are insurmountable obstacles to family life with their partner continuing outside the United Kingdom. EX.2 defines insurmountable obstacles as meaning "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which would not be overcome or would entail very serious hardship for the applicant or their partner."

24. I am satisfied that the Judge failed to engage with the submissions made on behalf of the applicant's wife as to the difficulty she may encounter living in Algeria, both as a Christian woman and in terms of employment. I also consider that the consideration of the couple relocating to Czechia is cursory at best. At its core it said that this would be subject to a separate application by the appellant, but this process is simply not explained.

25. I conclude that ground 2 establishes a material error of law.

26. In the circumstances, the proper course is to set aside the decision of the First-tier Tribunal, though certain findings of fact were not challenged by the appellant and can properly be preserved.

27. The findings properly to be preserved are located at [16]: (a), (b), (c), (d), (f) and (g). I observe that whilst (f) should properly be preserved as a finding of fact, there is a rule 15(2A) application before me concerned with medical issues. This evidence can properly be considered at the resumed hearing. Therefore, whilst subparagraph (f) is preserved, it cannot, for the purposes of the appellant's human rights appeal, be considered determinative as to the issue of health. The health of both the appellant and his wife should properly be considered at the date of the next hearing.

28. I consider the finding at (e) to lack any adequate reasoning. It is entirely unclear from the decision as to whether any of these concerns were put to the appellant.

Resumed Hearing

29. The representatives requested that the matter be remitted back to the First-tier Tribunal. I observe the guidance in *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC).

30. It is a rare occurrence where I consider it appropriate to remit an appeal where there are preserved findings of fact. However, consequent to discussion with the representatives, I am satisfied that this is one of those rare occasions. The preserved findings of fact are, in the main, peripheral to this appeal. There are likely to be at least two witnesses attending the remaking hearing; the appellant and his wife. There is an expectation that the wife's daughter will also attend. Mr Pullinger indicated that there may be further documents filed addressing the strength of the couple's links with family members in this country, including grandchildren, as well as further evidence in respect of the couple's health.

31. In the circumstances, because of the significant nature of the fact-finding exercise likely to be required, I consider it appropriate to remit the matter to the First-tier Tribunal.

Notice of Decision

32. The decision of the First-tier Tribunal sent to the parties on 20 May 2024 is set aside for material error of law, save for the preservation of findings of fact at [16](a), (b), (c), (d), (f) and (g).

33. The appeal is remitted to the First-tier Tribunal sitting in Birmingham to be heard by any Judge other than First-tier Tribunal Judge French.

34. An anonymity order is confirmed.

D O'Callaghan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 October 2024