Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37448/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 5 March 2014	**On: 12 March 2014**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

L'HOCINE KACI AISSA

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms V Laughton, instructed by Wilson Solicitors LLP

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Aissa's appeal against a decision to remove him from the United Kingdom following the refusal of his application for indefinite leave to remain on the grounds of long residence. For the purposes of this decision, I shall refer

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to the Secretary of State as the respondent and Mr Aissa as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of Algeria, born on 4 November 1965. He arrived in the United Kingdom on 1 July 1998 on a visitor visa valid for six months. On 17 May 2001 he was granted a right of residence as the family member of an EEA national until 14 May 2006. On 7 September 2010 he applied for permanent residence as a family member of an EEA national. His application was refused on 19 January 2011. On 17 July 2012 he made an application for settlement on the basis of 14 years long residence in the United Kingdom.

3. The appellant's application was refused on 19 August 2013. The respondent, in refusing the application, noted that he had married his EEA national spouse on 17 July 2000 but had divorced on 27 October 2005 on the grounds that they had lived apart for a continuous period of at least two years immediately preceding the presentation of the divorce petition. It was noted that he had failed to notify the Secretary of State of the change in his circumstances. With regard to paragraph 276B of the immigration rules, he had not completed 10 years of continuous lawful residence. Although the application had been made on the basis of 14 years long residence, the provision to grant indefinite leave to remain on that basis had been removed from the immigration rules on 9 July 2012, prior to the date of his application. The respondent went on to consider Article 8 of the ECHR. Since the appellant did not have a partner or child in the United Kingdom, he did not meet the requirements in Appendix FM of the immigration rules. With regard to paragraph 276ADE the respondent noted that the appellant had not lived in the United Kingdom for at least 20 years and considered that he would have retained ties to Algeria. There were no compelling or compassionate circumstances to justify allowing him to remain in the United Kingdom on an exceptional basis and accordingly his application was refused.

4. The appellant's grounds of appeal before the First-tier Tribunal were based upon his private life under Article 8 of the ECHR.

5. The appellant's appeal was heard in the First-tier Tribunal Judge before First-tier Tribunal Judge Gillespie. The judge recorded the appellant's evidence. He noted his claim to have experienced discrimination in Algeria on the basis of his Berber ethnic origin. He had travelled to France as a student in September 1997 and had remained there for a year until June 1998 when he entered the United Kingdom on a visitor visa. He met his former spouse, a German national, in January 1999 and married her in July 2000. In late February or early March 2002 he travelled to Algeria for two weeks to visit his family and had not returned to the country since then. He and his wife separated in 2004 and divorced in 2005. His parents and some siblings remained in Algeria but he had not seen them since 2002. He had been continuously employed in the United Kingdom since 2002, working as a chef. He had also undertaken studies in IT and computing and in September 2007 commenced a degree course in food technology but discontinued his studies when required to pay the full fee as a foreign student. He had been self-supporting and had paid tax and national insurance contributions.

6. The judge considered the immigration rules relating to private life, but concluded that the appellant could not meet the requirements of paragraph 276ADE as he had been resident in the United Kingdom for less than 20 years and had retained ties to Algeria. However he considered that the rules did not adequately address all relevant factors appropriate to the appellant's circumstances since they did not provide for consideration of the nature and strength of his existing ties or for consideration of a situation where there were only very tenuous ties to the country of removal. He found that the appellant therefore had good grounds for seeking protection outside the rules and he went on to consider Article 8 in the wider context. He considered that the appellant had established a private life in the United Kingdom over a period of 15 years and concluded that the cumulative effect of his circumstances, namely his length of residence, his tenuous ties to Algeria, his continuous employment and tax record and the absence of enforcement action or intent at evasion or deception, was such that the respondent had failed to show that his removal was justified in terms of Article 8(2) of the ECHR. He accordingly allowed the appeal on Article 8 human rights grounds.

7. The respondent sought permission to appeal that decision to the Upper Tribunal on the grounds that the judge had failed to identify compelling circumstances not recognised by the immigration rules and had failed to follow the approach in Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720, MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 and Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640. It was asserted further that the judge had failed to provide adequate reasons why the appellant had no ties to Algeria.

8. Permission to appeal was granted on 31 January 2014.

Appeal before the Upper Tribunal

9. The appeal came before me on 5 March 2014. I heard submissions on the error of law.

10. Ms Isherwood expanded upon the grounds of appeal, submitting that the judge had failed to provide adequate reasons for concluding that there were arguably good grounds for looking beyond the immigration rules and for concluding that the appellant's circumstances were compelling. There had been inadequate consideration of the Secretary of State's position.

11. Ms Laughton relied upon her response to the grounds of appeal and submitted that the grounds were simply an attempt to appeal the decision on the facts and did not demonstrate any legal errors on the part of the judge. The judge had correctly directed himself on the law and the findings of fact he had made were accordingly open to him. He had directed himself to the relevant case law and to the appropriate principles in Nagre, Gulshan and Shahzad (Art 8: legitimate aim) Pakistan [2014] UKUT 85. He had found arguably good grounds for looking outside the rules and had identified compelling circumstances in the appellant's case. There was no need for him to go on to consider

exceptionality as that was not the appropriate test. The respondent was not alleging perversity.

12. I enquired of the parties if there was further evidence relied upon in the event that an error of law was found and the decision set aside and re-made. Ms Laughton advised me that there was no further evidence and that she would rely on the submissions set out in her rule 24 response. Ms Isherwood made further brief submissions and Ms Laughton responded. They were both content for the decision to be re-made on the basis of those submissions, in the event of the decision being set aside. It was agreed that the judge's findings of fact were not challenged.

Consideration and Findings

13. There can be little dispute that the judge's decision was a generous one. However the relevant issue is whether or not he erred in law in making his decision and whether the grounds in fact amount simply to a disagreement with his generous findings. It is indeed the case that the judge carefully set out the relevant case law and the principles set out in the leading cases of Nagre, MF (Nigeria) and Gulshan. At paragraphs 12 to 14 he considered the immigration rules and the approach of the courts to those rules, identifying at paragraph 12 that it was not appropriate to "embark upon a free-wheeling article 8 analysis unencumbered by the rules". He properly identified and followed the approach endorsed in Shazad at paragraph 31:

> "Where an area of the rules does not have such an express mechanism, the approach in *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin) ([29]-[31] in particular and *Gulshan (Article 8 - new Rules - correct approach)* [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."

14. In line with that approach, the judge found, at paragraph 13, that there were arguably good grounds for seeking protection beyond the rules and, at paragraph 14, that there were compelling circumstances not sufficiently recognised under the rules. However, it seems to me that, in so doing, he fell into legal error by failing to give adequate reasons for finding that those arguably good grounds and compelling circumstances existed.

15. The reason given by the judge, at paragraph 13, for concluding that arguably good grounds existed for seeking protection outside the rules, was that the rules did not provide for consideration of circumstances where there remained only tenuous ties to the country of removal. I find such reasoning to be unsustainable for the following reasons. Firstly, the finding itself that the appellant's ties to Algeria were tenuous was plainly inadequately reasoned, given that the appellant's evidence was that he had spent the first 32 years of his life in that country and that his parents and siblings still lived there. Whilst it was his accepted evidence that he had not returned there since a two week visit in 2002 and had not seen his family since then, the evidence as recorded at paragraph 6 and in his

statement did not suggest that he had had no contact with them since that time and was that he was aware that they still remained there. Secondly, and even if the judge was entitled to consider such ties to be tenuous, the immigration rules, when taken with the further clarification in Ogundimu (Article 8 - new rules) Nigeria [2013] UKUT 60 clearly did provide for circumstances of tenuous ties.

16. Ms Laughton relied upon the Administrative Court's comments at paragraph 33 of its judgment in Nagre in submitting that the judge was justified in considering that the rules did not cover the appellant's circumstances:

> "The Secretary of State does not contend that the new rules completely cover every conceivable case in which a foreign national may have a good claim for leave to remain under Article 8. In relation to both Section EX.1 (family life) and paragraph 276ADE (private life) it is possible to envisage cases where they would not:
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> …ii) In relation to paragraph 276ADE, for example, there may be individual cases of adults who have lived in the United Kingdom for less than 20 years and who do retain *some* ties to their country of origin, but in relation to whom the ties they have developed and the roots they have put down in the United Kingdom manifestly and strongly outweigh those ties, so that it would be disproportionate to remove them.."

17. However, as Ms Isherwood pointed out, the evidence before the judge did not indicate a situation where the ties developed by the appellant and the roots he had put down in the United Kingdom "manifestly and strongly outweighed" the limited ties to Algeria. The appellant had no family ties to the United Kingdom and the only ties identified by the judge were his length of residence and his continuous employment.

18. In the circumstances it seems to me that the judge was simply wrong to conclude that the appellant's circumstances were not adequately covered by the rules. He was not entitled, on the basis of the inadequate reasoning given, to conclude that there were arguably good grounds for granting leave to remain outside the rules. As such, he was not entitled to go any further in considering Article 8.

19. However, even if the judge was justified in considering Article 8 in its wider context outside the rules, his reasoning with respect to the existence of compelling circumstances not sufficiently recognised under the rules was plainly inadequate. No adequate or proper reasons were given by him for concluding that a person who had no family ties to the United Kingdom, whose ties to the United Kingdom consisted of little more than a good employment record and an absence of recourse to public funds and whose period of residence in the United Kingdom had been largely unlawful, had established that his circumstances were compelling. The appellant's length of residence was clearly a matter covered by the immigration rules. The fact that he may have succeeded under the 14 years long residence rules had he submitted his application two weeks earlier was not a matter of significant weight given that the applicable rules were those when he made his application and that any such argument was tantamount to the "near-miss" argument rejected by the Court of Appeal in Miah & Ors v Secretary of State for the Home Department [2012] EWCA Civ 261. The fact that the appellant, as a Berber, had

experienced some problems in Algeria was not a matter of weight and the judge found, at paragraph, 18, that he would not be at risk on that basis.

20. The judge, at paragraph 16, appears to have lightly dismissed the appellant's periods of unlawful residence on the basis that he later sought to regularise his position and that there was no intention to deceive. However in so doing he did not take account of the fact that the appellant had continued to enjoy the benefits of his EEA residence at a time when he was no longer entitled to it following his divorce and had failed to inform the Secretary of State of his change in circumstances; that he had since that time (in addition to the period from January 1999 to July 2000) been living in the United Kingdom without any lawful residence; and that he had been working since then without any entitlement to do so. The judge placed significant weight upon the appellant's employment and payment of taxes but, as Ms Isherwood submitted, he had not established himself in a permanent job but was undertaking periods of agency work and, as already stated, was not entitled to work after 2005. The fact that he had not had recourse to public funds and was of good character was confirmed by the Upper Tribunal in Nasim and others (Article 8) Pakistan [2014] UKUT 25 as not being a matter to be taken as enhancing a person's human rights.

21. In all of the circumstances I find that the judge failed to give adequate reasons for concluding that the appellant's circumstances were compelling and were such that they were not provided for adequately by the immigration rules. His findings in that respect are unsustainable and his decision accordingly has to be set aside.

22. As stated above, both parties agreed that the decision could be re-made on the evidence already available together with the submissions made in the appellant's rule 24 response and before me. For the reasons given above, I consider that the appellant's appeal has to fail. It is not disputed that he cannot meet the requirements of Appendix FM and paragraph 276ADE of the immigration rules. In terms of the principles in Nagre, Gulshan and Shahzad, there are no arguably good grounds for granting leave to remain outside the rules and thus it is not necessary to go on to consider Article 8 in any wider context. However, and in any event, the appellant has failed to establish that there are any compelling circumstances in his case. His removal from the United Kingdom would not be disproportionate to the legitimate aim of maintaining an effective immigration control and would not be in breach of Article 8 of the ECHR.

DECISION

23. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Mr Aissa's appeal on all grounds.

Signed
Upper Tribunal Judge Kebede