Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/07426/2014
IA/07427/2014
IA/15985/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
24 October 2014	**10 December 2014**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

OMAR TABBI, SUHILA TABBI, KIERRA TABBI
(Anonymity directions not made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Ball, counsel instructed by J McCarthy Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Algeria. The first and second appellants are husband and wife and the third appellant their adult daughter. Their respective dates of birth are 4 October 1951, 16 June 1958 and 17 January 1986. They appeal against decisions of the First-tier Tribunal dismissing

their appeals both under the immigration rules and on human rights grounds against the decisions made on 14 November 2013 refusing their applications for leave to remain on human rights grounds and giving directions for their removal.

Background

2. In brief outline the background to this appeal is as follows. The first appellant was given leave to enter the UK as a diplomat on 8 August 2001 valid until 8 August 2006. His wife and two of their children, the third appellant and her brother Fahd were given co-extensive leave as his dependants. The first appellant left the UK but returned with entry clearance as a visitor on 31 July 2005 valid until 16 November 2005 and the third appellant also left the UK but returned with leave as a visitor valid until 3 March 2009. It is not in issue that on expiry of their respective visas the family overstayed.

3. On 17 May 2010 the first appellant applied for leave to remain on human rights grounds for himself, the second and third appellant and Fahd. Their applications were refused on 21 June 2010 but no directions were given for their removal at that time. A request was made to the respondent for removal decisions so as to generate a right of appeal but no response was received. Judicial review proceedings were issued in September 2013 and this prompted the respondent to review the 2010 decision. Their positions were considered separately with reference to appendix FM and para 276 ADE of HC395. On 21 January 2014 the refusal decisions in relation to the first and second appellants were maintained and by letter dated 20 March 2014 the decision in relation to the third appellant was also maintained. However, on the same day it was accepted that Fahd whose date of birth is 22 October 1989 met the requirements of para 276 ADE (v) having spent half his life in the UK and on 6 June 2014 he was granted leave to remain until 20 September 2016. The appellants appealed against the decisions to remove them. The grounds to the First-tier Tribunal are succinct: they argue that the decisions are incompatible with the appellants' human rights under article 8, is unlawful or otherwise unreasonable. It is further argued that removal is not proportionate to the facts of the case and that the immigration rules are not compatible with article 8 jurisprudence by which the UK is legally bound.

The Hearing before the First-tier Tribunal

4. At the hearing the judge heard evidence from the appellants, Fahd and two witnesses. It was confirmed in submissions [37] that none of the appellants placed reliance upon para 395C of the rules (which had been raised in the skeleton argument) nor was it asserted that the first appellant's medical condition was such as to reach the threshold required to engage article 3.

5. It was accepted by both parties that the public interest considerations set out at s117B of the 2002 Act as amended by the Immigration Act 2004

needed to be considered but it was argued on behalf of the appellants that as the decision on their applications had been made in 2010 their human rights claims should not be considered with reference to appendix FM or para 276 ADE with the deference to the rules thereby entailed. It was argued on behalf of the respondent that the provisions of s19 of the 2014 Act specifically applied to all decisions made after 28 July 2014 and that the implementation provisions for the amended rules applied "to all applications to which paragraph 276 ADE to 276 DH and appendix FM apply (or can be applied) by virtue of the immigration rules and any other ECHR article 8 claims (save for those of a foreign criminal), and which were decided after that date." In consequence it was submitted that the Court of Appeal's judgment in Edgehill [2014] EWCA Civ 402 was no longer of any application and any appeal decided after 28 July 2014 fell to be considered with reference to the immigration rules presently in force.

6. The judge accepted that submission and found that none of the appellants could meet the requirements for leave to remain under appendix FM or of para 276 ADE (vi). He found that although they had all been in the UK for a long time it was clear that they had retained a cultural connection to Algeria. They spoke Arabic at home and the first and second appellants had given evidence in that language. They had another son living in Algeria and their social connections were in the main drawn from the North African community in this country. The judge went on to consider the amended rules finding that the appellants were unable to show there would be very significant obstacles to their integration into life in Algeria and, although the third appellant had only spent about 5 years of her life there, she had always lived with her Algerian family whose antecedents, cultural connections and associations she shared. She would return with her parents who would be on hand to assist her in reintegrating into life in Algeria. He therefore dismissed the appeals under the immigration rules.

7. The judge went onto consider article 8 directing himself in accordance with Haleemudeen v Secretary of State [2014] EWCA Civ 558 that he should first have regard to the requirements of the rules which should be given greater weight than had previously been thought to be the case. He also took into account the determination of the Upper Tribunal in Gulshan (article 8 - new rules - correct approach) [2013] UKUT 00640 where it was said that an appellant needed to show "non standard and particular features demonstrating that removal will be unjustifiably harsh."

8. The judge found that as that the appellants fell to be removed together there would be no interference with their family life inter se except that Fahd had been granted leave to remain and it might reasonably be anticipated that in due course he would acquire indefinite leave to remain but he said that did not seem to him to be an exceptional, compelling matter to be considered so as to justify departure from the immigration rules for the rest of the family and that a line of eligibility had to be drawn somewhere. He noted that the evidence was that Fahd still lived at home with his parents but he was 24 years old, working and in due course it was

to be anticipated that he would embark on an independent life of his own. Whilst he had leave to remain in the UK, there was in reality nothing going beyond choice or convenience preventing him from returning to Algeria with his family or visiting them if he chose to do so.

9. The judge went on to comment in respect of the third appellant that, had he been considering her appeal with reference to European jurisprudence such as Boultif (2001) 33 EHRR 1179 and Maslov [2008] ECHR 546, length of residence would be something that would have weighed heavily in her favour but the legal landscape had changed and he had to have regard to the public interest considerations of para 117B of the 2002 Act which provided that the maintenance of effect of immigration control was in the public interest and that he should give little weight to any private life established by an appellant when in the UK illegally. He commented that little weight was not the same as no weight and he had had regard to the fact that there was no evidence that the first and second appellant spoke English to an acceptable standard or that any of the appellants had passed a life in the UK test. He was satisfied that in the short term their presence in the UK would represent a burden on public funds as it had been the first appellant's evidence that his savings in France had been exhausted. For these reasons the appeal was dismissed on article 8 grounds.

The Grounds of Appeal

10. The grounds of appeal raise four issues. The first focuses on the approach to be taken to appeals in the light of the judgment in Edgehill. The applications in the present case had been made well before the changes to the rules coming into force on 9 July 2012. The initial application was made in May 2010 and refused with no right of appeal in June 2010. Following judicial review proceedings further decisions had eventually been made on 21 January and 20 March 2014 respectively. Mr Ball submitted that it was clear from Edgehill that the provisions of the new rules could not lawfully be taken into account as a material consideration in an article 8 application made before 9 July 2012. The decision therefore should have been made on the basis of how article 8 appeals were assessed before the amendments. He submitted that the judge had erred by finding that the new rules were applicable including the further amendments coming into force on 28 July 2014. I referred the parties to the judgment of the Court of Appeal in YM (Uganda) v Secretary of State [2014] EWCA Civ 1292 but Mr Ball maintained his submission that an article 8 application should be considered without the amended rules being regarded as material.

11. The second ground argues that the judge failed to consider the relationship between all the family members and in particular the fact that Fahd had been granted limited leave to remain. Mr Ball argued that the judge had been wrong to consider whether there were compelling or exceptional circumstances and that contrary to the guidance of the Court of Appeal in MM v Secretary of State [2014] EWCA Civ 985 at [129], an intermediate test had wrongly been applied.

12. The third ground relies on EB (Kosovo) v Secretary of State [2008] UKHL 41. Mr Ball submitted that the judge had failed to make any adequate reference to the delay and the fact that the parties' private life had been built up during that period. This could and should have been taken into account. Finally, in reliance on the fourth ground, he argued that there had been no adequate assessment of the interdependency of the different family members in circumstances where it had been recognised that to remove Fahd would be disproportionate. This was a case where consideration should have been given to the fact that the situation was being reached whereby the parents would be dependent on their children rather than the other way round. Fahd was working and contributing to the family and it would be disproportionate for a brother and sister to be separated in the circumstances of this family. He submitted that there had been no proper consideration of the extent to which they had integrated into life in the UK in circumstances where the third appellant could not read Arabic and had only lived for 5 years in Algeria: it would be unreasonable and disproportionate for her to be expected to return there.

13. Mr Bramble submitted that as the application had been made outside the rules, the principles in Edgehill did not apply. This was a case where the applicants were unable to meet the rules and the judge had been right to take that fact into account. He acknowledged that Gulshan might have fallen by the wayside, as he described it, in the light of the judgment in the Court of Appeal in MM but there was no reason to find that the judge had not taken all the relevant aspects of the evidence into account. The judge had clearly been aware of the length of time the appellants had been in the UK and had specifically considered the impact of the grant of leave to Fahd. By the time of the hearing the most recent rules applied and the statutory guidelines in s117B had to be taken into account. In so far as it might be arguable that the judge had not fully considered the interrelationship between the family members, the fact remained that the three appellants were all overstayers and the judge had taken into account the public interest and given sufficient reasons for his decision. When the determination was looked at as a whole it was, so he submitted, one properly open to the judge.

Assessment of the Issues

14. I will deal firstly with the issue of whether the judge erred by assessing the article 8 appeal in the context of the immigration rules as amended in 2014 and the statutory guidance set out in the 2014 Act . But for the changes in the rules and the coming into force of the 2014 Act Mr Ball's submissions based on Edgehill would have some force. In that case the Court of Appeal was considering an article 8 application and whether and to what extent it should be affected by rules subsequently coming into force on 9 July 2012. Mr Ball argued that it was wrong to take into account the new provisions in the rules as relevant considerations as they were capable of affecting the outcome of the application. It is clear, however,

that YM (Uganda), which considered the issue of which rules should be applied in a deportation appeal where the Tribunal had wrongly failed to apply the 2012 rules and the decision had to be re-made under the 2014 rules, held that the new statutory provisions and the 2014 rules applied. I do not think that the fact that YM (Uganda) applied to deportation cases provides any proper basis for distinguishing it, as the court specifically considered at [39] article 8 claims. For these reasons I am satisfied that the judge did not err in law by applying the 2014 rules and the general principles set out in the 2014 Act.

15. Mr Ball also argued that the judge had failed to take a number of relevant factors into account including the delay and the consequential impact in the nature and extent of the appellant's private life in the UK, the fact that Fahd had been granted limited leave and the extent to which the appellants have integrated into society in the UK.

16. I am not satisfied that there is any substance in these grounds. There is no reason to believe and, indeed it is clear, that the judge was well aware of the periods of time the appellants have spent in the UK and the lack of time the third appellant has spent in Algeria [48]. When considering the length of the residence the judge was entitled to take into account the fact that the appellants had all overstayed after their leave had expired and he was obliged to consider under para 117B the fact that little weight should be given to private life established at a time when a person's immigration status was precarious as has been the status of the appellants after their leave to remain expired. I agree that Gulshan must of course be read in the light of the comments of the Court of Appeal in MM but I am not satisfied that the judge interpreted Gulshan as imposing a threshold test or that he applied one.

17. It is also argued that the judge failed to consider the appeal in accordance with the guidance in Boultif and Maslov but he was entitled to make the point that it was now provided by statute that the maintenance of effective immigration control was in the public interest. He was also aware of and referred to the fact that the reference to "little weight" in statute was not the same as no weight. I am not satisfied that the judge erred by leaving any relevant factors out of account which were capable of affecting the outcome of the appeal.

18. In summary, I am not satisfied that the judge erred in law as set out in the grounds of appeal. His decision was properly open to him for the reasons he gave.

Decision

19. The First-tier Tribunal did not err in law and it follows that its decision stands.

Signed Date 9 December 2014

Upper Tribunal Judge Latter