IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07575/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th April 2015	**On 28th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR RASHID ZEGRAB
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B E Jones of Counsel
For the Respondent: Mr S. Whitwell, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Algeria born on 9th April 1976. He appealed against the decisions of the Respondent dated 10th September 2014 in which she had refused to grant him asylum under paragraph 336 of the Immigration Rules and decided to remove him to Algeria. The Appellant argued that he was at risk of ill-treatment

contrary to both Article 3 of the European Convention on Human Rights and the Refugee or Person in Need of International Protection (Qualification) Regulations of 2006. At first instance his appeal was dismissed on asylum and humanitarian protection grounds and under Article 3 of the European Convention on Human Rights but was allowed by the First-tier Tribunal under Article 8 (right to respect for private and family life). The Respondent appealed against that part of the decision and there was no cross-appeal against the dismissal of the asylum claim. For the reasons which I have set out in some detail below I have set aside the decision of the First-tier to allow the Appellant's appeal under Article 8 and have remade the decision on the appeal in this case. For the sake of convenience therefore I continue to refer to the parties as they were known at first instance notwithstanding that the appeal initially comes before me as the Respondent's appeal.

The Proceedings at First Instance

2. The Appellant's asylum case was that he had a well-founded fear of persecution from Islamic extremists in Algeria. He ran a snooker table on the roadside and he was singled out by a group who harassed him. The group were not happy with his use of the snooker table at the roadside because it was said to distract people from their religion. Graffiti had been written about the Appellant on walls and he had been sworn at. His snooker table had been damaged with a blade and the hostile group had threatened to set fire to it. This particular extremist group had killed a police officer because the policeman had watched people playing snooker at the table.

3. The Appellant conceded that his case did not attract the protection of the Refugee Convention (on the basis of the matters put before him it would appear that his fear was of non-state actors). He did however claim to qualify for humanitarian protection because of the indiscriminate violence in Algeria. The Respondent did not accept the Appellant's credibility and refused the claim. In his determination the Judge found there were no grounds for believing that the Appellant would face any threat on return. The Appellant's account was not credible. Once the table had been destroyed the Appellant would have been of no further interest to any extremist group. Given the length of time which had passed since the claimed incident (in 1997) any such group would no longer have an interest in the Appellant. If the group had killed a policeman as the Appellant claimed the police would most certainly be interested in such a group. The Appellant merely thought it would be difficult for him to return to Algeria as he had been away for so long and he had no home or work there. His mother, aunt and uncle were still living in Algeria. The Appellant's father had remarried and shared his time between Algeria and France. The Appellant had a half brother and sister living in Algeria. The Appellant had not shown substantial grounds for believing he would face a real risk of serious harm in Algeria.

4. The Judge considered whether under the Respondent's enforcement instructions guidance regarding legacy cases some form of leave should have been granted by the

Respondent to the Appellant. The Appellant had entered the United Kingdom on 26th October 2006 and had claimed asylum on 30th October 2006. An asylum interview had been arranged for 23rd April 2007 but the Appellant had not attended it and the Respondent had therefore decided the Appellant's asylum claim in his absence refusing it. On 17th November 2010 the Appellant wrote to the Respondent asking for an update on his case sending further submissions which were ultimately rejected by the Respondent on 14th July 2011. In June 2013 the Appellant attended an appointment with the Respondent to make further submissions and on 15th November 2013 he was invited to attend an asylum interview which he did attend. On 10th September 2014 the Respondent refused the application.

5. The Respondent referred the Appellant to the Upper Tribunal decision in **AZ [2013] UKUT 00270** which held that there was no obligation either on the Respondent to delay consideration of an asylum claim or on a Tribunal to adjourn an asylum appeal where the issue had been raised that the case should be considered as a legacy case. Judge Blake found that the Appellant's case had not been severely mishandled between 2010 and the eventual date of decision. It had been subject to delay as a result of a backlog of cases but time had only run from 2010 when the Appellant had made himself known to the Respondent after having wilfully absented himself. The Appellant did not enjoy a legitimate expectation that any relevant policies would be exercised in his favour. The cases were fact sensitive and even if the policy had been applied there was no certainty that the Appellant would have been granted indefinite leave. In fact the Judge found it was more probable the Appellant would not have been granted leave.

6. That left only the issue of Article 8 to be resolved. The Judge accepted that the Appellant's claim could not succeed under the Immigration Rules but considered that there were exceptional circumstances that needed to be taken into account in the Appellant's case. He had been in the United Kingdom for some eight years and had sought to regularise his stay in the United Kingdom from 2010 onwards. He enjoyed a close relationship with his brother and had behaved lawfully and not been a burden on the state. He had laid deep roots and ties during the passage of time which had not properly been taken into account by the Respondent. If the Respondent had taken these matters into account the result would not inevitably have been the same, that is rejection of the Article 8 claim. The Respondent failed to properly engage in a fair and proper balancing exercise and therefore her decision was not in accordance with the law. However rather than decide that because the decision of the Respondent was not in accordance with the law it remained outstanding before the Respondent to take a lawful decision, the Judge went on to allow the appeal under Article 8 outright.

The Onward Appeal

7. The Respondent appealed against that decision arguing that the Judge had failed to identify why: (i) the Appellant's relationship with his brother and (ii) that the Appellant had been in the United Kingdom for eight years were exceptional factors

such that the appeal should be allowed outside the Rules. The Judge had also failed to apply Section 117A to D of the Nationality, Immigration and Asylum Act 2002. Section 117A(2) mandated the First-tier Tribunal to have regard to the factors set out in Section 117B when deciding a case under Article 8, this the Judge had failed to do. In particular the Judge had failed to consider that little weight should be given to a private life established by a person at a time when the person's immigration status was precarious. Had the Judge carried out the proportionality assessment correctly the result might very well have been different.

8. The application for permission to appeal came on the papers before First-tier Tribunal Judge Holmes on 3rd February 2015. In granting permission to appeal he wrote:

> "It is arguable that the Tribunal fell into error in the consideration of the Article 8 appeal because no reference is made to Section 117A or 117B of the 2002 Act and arguably paragraphs 103 to 123 of the decision cannot properly be read as making any implicit reference thereto. Thus the Article 8 appeal was arguably not considered in its proper context.
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> The Appellant was always present in the UK unlawfully. Arguably very little weight should properly have been given to the "private life" he claimed to have established during the period he was evading the Respondent. In any event little weight could have been given to anything established in the period since 2010 when he had resurfaced and sought to renew his asylum claim. Arguably his friendship with his brother (whose immigration status in the UK the Judge fails to comment upon) - a friendship that the Judge had earlier characterised as normal relationship between adult siblings (paragraph 58) - was not a proper basis for allowing the Article 8 appeal. Absent that reason the Judge arguably gave no reasons for doing so.
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> Indeed arguably the decision is written as if the Judge were conducting a review of the legitimacy of the decision making process rather than conducting the proportionality balancing exercise demanded of him."

9. Following the grant of permission directions were issued by the Principal Resident Judge to the effect that the parties should prepare for the forthcoming hearing on the basis that it was confined to whether the determination of the First-tier Tribunal should be set aside for legal error, and if so whether the decision in the appeal could be remade without having to hear oral evidence in which eventuality the Tribunal was likely to proceed immediately with a view to remaking the decision."

The Error of Law Stage

10. At the outset Counsel for the Appellant sought to raise an issue regarding the Appellant's claim that he should have been granted some form of leave under the legacy arrangements. I pointed out that there had been no formal application to cross-appeal the Judge's dismissal of the legacy argument or any form of Rule 24 response to the grant of permission in this case. I was not therefore prepared to permit the Appellant at this late stage to raise any fresh issues arising out of the determination. In fact the Judge had considered the legacy issue at some length and had decided that it did not apply to the Appellant. I have seen nothing as to why

that was wrong. Indeed the Judge at first instance could have referred to SH Iran [2014] EWCA Civ 1469. In that case the Court of Appeal said (at paragraph 36) that "mere delay in dealing with a case falling within the legacy programme cannot of itself give rise to any expectation or entitlement that relief should be granted as though the case had been dealt with what is asserted to be reasonable expedition". The matter therefore proceeded with the error of law stage.

11. In oral submissions the Presenting Officer indicated that had the matter come before the First-tier Tribunal as a judicial review things might have been different but that was not the case, it was a straightforward statutory appeal. There were multiple errors of law in the determination. The first was that there was no structured consideration of Article 8. There had been no finding of family life between the Appellant and his brother. At paragraph 58 the Judge had stated that the Appellant had a "normal relationship" with his brother as was to be expected between adult siblings. That finding at paragraph 58 sat ill with the finding at paragraph 118 that the Appellant enjoyed a "close relationship" with his brother.

12. In reply it was argued that the Respondent was merely disagreeing with the result of the decision. Whilst the Judge could have made matters more explicit the complaints were one of form not substance. The Judge was right to cite **Ganesabalan** that there was no threshold test that had to be crossed before Article 8 had to be considered. The Judge did not need to mention specifically the case of **Razgar [2004] UKHL 27**. The Judge was aware of the unlawfulness of the Appellant's overstaying and did not need to mention 117B in terms. The Judge had not found in the Appellant's favour solely on the basis of his relationship with his brother but also the fact that the Appellant had been in the United Kingdom for eight years.

13. Between 2010 and 2014 the Appellant had been asking for a decision to be made on his case and yet the Respondent had done nothing about that. The Respondent's delay led to this case being similar to **EB Kosovo** and the Appellant's private life would have deepened and strengthened. In finding that the Respondent had failed to properly engage in a fair and proper balancing exercise the Judge was merely saying that the decision was disproportionate. It was disproportionate to remove the Appellant after a period of nine years.

14. At the conclusion of the submissions I indicated that there were material errors of law in the determination. One particular point of importance was that there had been no consideration by the Judge of the statutory provisions contained at Section 117A to D of the 2002 Act and his findings on Article 8 such as the Appellant's relationship with his brother had been unexplained. As the Upper Tribunal explained in **Dube [2015] UKUT 00090**: "judges are required statutorily to take into account a number of enumerated considerations. Sections 117A-117D are not, therefore, an a la carte menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty-bound to "have regard" to the specified considerations. In accordance with the directions given by the Upper Tribunal (see paragraph 9 above) I enquired whether it was intended to call any further oral evidence. Counsel indicated that there was no further oral evidence that the Appellant wished to give. I indicated that

I would proceed to rehear the appeal and the matter therefore proceeded by way of submissions.

The Substantive Hearing

15. For the Respondent it was argued that the Appellant was only putting forward two matters, his relationship with his brother and length of residence. It had to be taken into account in assessing proportionality that the Appellant had only put his head "above the parapet" from 2010 onwards. The Appellant had no family life in the United Kingdom and the length of residence and the issue of delay would not unduly tilt the scales in the Appellant's favour.

16. For the Appellant Counsel relied on the findings of the First-tier Tribunal that there was a close relationship between the Appellant and family members. There had been no contrary findings made against the Appellant that he genuinely did not know his asylum claim had been refused in 2007. This was not a case of non-compliance. At its highest it absolved the Appellant of delay. There were elements of emotional dependency between the Appellant and his brother. They lived in the same household. At page 27 of the Appellant's bundle paragraph 29 of the Appellant's statement of 18th November 2014 the Appellant said he considered the UK to be his home. He had his brother, cousin and friends living in the UK and had a good relationship with his friends in the UK who offered him some financial support. There had been delay on the part of the Respondent and the legacy matter needed to be considered in the context of Article 8.

Findings

17. The Appellant seeks to remain in the United Kingdom under the provisions of Article 8 of the European Convention on Human Rights outside the Immigration Rules. The Appellant has never had any leave to remain in this country. He made a claim for asylum in 2006 a few days after entering the country illegally. The Respondent arranged an interview for him but he did not attend. His argument was that he did not know the interview had been arranged as he did not receive a letter inviting him to attend. At paragraph 90 of the determination Judge Blake found that the Appellant had failed to attend the interview in 2007 without good reason. Thereafter the Appellant appears to have "gone to ground" only resurfacing in 2010 to ask what was happening about his case.

18. There was no obligation on the Respondent to treat the Appellant's case as a legacy case. What the Respondent did do was to give the Appellant a further opportunity to be interviewed about an asylum appeal which resulted in the refusal of the claim for asylum and the consequent proceedings. The Appellant sought to put up something of a smokescreen in this case claiming that the Respondent had mishandled his case or that there had been delay but the Appellant had disappeared for three years between 2007 and 2010. His case never engaged the Refugee Convention and, as the Judge found, it did not entitle him to humanitarian protection

either. The position was that the Appellant was remaining unlawfully in this country despite having no good reason why he should be here. As Judge Blake correctly pointed out the Appellant could have no legitimate expectation in those circumstances that his case would receive a favourable response from the Respondent. All the Appellant had to argue in his favour under Article 8 to be allowed to remain outside the Immigration Rules was that he had been here for eight years and he had a brother.

19. As I have indicated the Judge's findings on the relationship between the Appellant and his brother were contradictory. However even taking the Appellant's case at its highest and referring to the Appellant's own witness statement the Appellant was merely receiving some financial support from his brother because the Appellant was unable to work due to his unlawful status. He was also socialising with his friends. This would not in my view amount to more than normal emotional ties between two adult siblings even allowing for the concept that the brothers were close. Indeed in a normal relationship between adult siblings they would be close without going beyond normal emotional ties without more. In this case there is no more. It is difficult to see how this relationship of brothers could constitute family life even given the relatively low threshold which needs to be crossed before Article 8 is engaged in a family life case. As Judge Blake indicated the Appellant has a number of family members remaining in Algeria and if returned to Algeria he could resume his family life with them.

20. The Appellant principally puts his case under Article 8 private life. It is difficult to see that there are any compelling and/or compassionate circumstances in this case such that this appeal should be allowed outside the Immigration Rules. Firstly, the Appellant's private life that he has established in this country during his unlawful residence is limited. It has consisted of him evading the attention of the authorities for several years and then pursuing a hopeless asylum appeal. During that time he has not worked because he has not been able to. The Appellant's presence has been here unlawfully throughout and in those circumstances little weight is to be given to it in the proportionality exercise by reason of Section 117B.

21. Applying the Razgar one can say that the Appellant's private life will be interfered with by requiring him to return to Algeria but that interference will be pursuant to the legitimate aim of immigration control since the Appellant entered the country illegally and made a hopeless claim for asylum. The question is whether the interference is proportionate. I find that it is since there is little on the Appellant's side of the equation given the unlawful nature of his stay in this country but considerable weight to be given on the other side of the equation to the legitimate aim pursued. The Appellant cannot bring himself within the Immigration Rules, he has not resided here for at least twenty years. He has not severed all social, cultural and family ties to Algeria. There is no reason why he cannot return to Algeria and re-establish his life there, a country where he has lived the majority of his life before coming to this country. I therefore dismiss the appeal under Article 8 of the Human Rights Convention. I make no anonymity direction as there is no public policy reason for so doing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

I have remade the decision by dismissing the appeal under Article 8 of the European Convention on Human Rights.

Appellant's appeal dismissed.

Signed this 27th day of April 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

No fee was payable and there can be no fee award.

Signed this 27th day of April 2015

…….
Deputy Upper Tribunal Judge Woodcraft