



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA 01098 2012

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 3 June 2013**

**Determination**

**Promulgated**

**On 24 June 2013**

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**A-U-L**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Rudd, Counsel, instructed by Howe & Co Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

I direct that the appellant be identified only by initials in connection with these proceedings.

1. The appellant is a citizen of Algeria who is now about 32 years old. He appeals a decision of the respondent on 22 November 2012 to refuse to revoke a deportation order made against him.
2. The appellant is a married man and his wife's personal circumstances, including details of her fertility, are a significant part of the evidence that was before the Tribunal. Whilst the nature of that evidence and its relevance to my decision are a proper matter for public concern, I see no reason whatsoever for the appellant's wife to be identified and so I have made an anonymity order in this case.
3. The appeal was dismissed by the First-tier Tribunal (First-tier Tribunal Judge Milligan-Baldwin and Dr J O De Barros, non legal member) in a determination promulgated on 7 March 2013. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Garratt.

4. I have no hesitation in finding that the First-tier Tribunal erred in law because it conspicuously failed to consider the human rights of the appellant's wife when making its decision. It is trite law that in cases such as this the human rights of the family members directly affected by removal are an important consideration.
5. I am also satisfied that the First-tier Tribunal erred in law by not making any findings in the balancing exercise about the gravity of the offence that precipitated the decision to deport the appellant and made no rational findings on the availability of fertility treatment for the appellant's wife in the event of her choosing to live in Algeria.
6. Correcting any of these errors could lead to a different outcome. It follows that I set aside the decision of the First-tier Tribunal and remake the decision. It is for the appellant to prove on the balance of probabilities that he satisfies the requirements of the rules or, to the extent that a standard of proof is meaningful in an appeal on human rights grounds, that there is a real risk of his rights being breached in the event of his return. If he shows that his removal would engage article 8 of the European Convention on Human Rights then the respondent must show that his removal is justified.
7. The appellant entered the United Kingdom irregularly having travelled on the back of a lorry on 20 May 2003. He obtained work as a cleaner. He was employed by an independent contractor but worked for the London Borough of Waltham Forest. With other men in very similar circumstances he worked long and unsociable hours for modest reward. He paid the tax and national insurance due from a person earning as he did. Some time in 2007 the council decided to employ its street cleaners directly and the appellant had so conducted himself that the council wanted to employ him. He was asked to produce identity documents and he proffered a forged French passport in an effort to secure employment with the council. He was caught and pleaded guilty to an offence of possessing a false identity document with the intention of using it to establish registrable facts about himself contrary to Section 25(1) of the Identity Cards Act 2006. For this offence he was sentenced to twelve months' imprisonment on 12 September 2007.
8. On 9 October 2007 he claimed asylum which application was refused and he appealed. At some time he indicated an intention of applying for leave to remain on the basis of his relationship with a British citizen. On 13 December 2007 he was served with a decision to make a deportation order.
9. On 7 January 2008 he went through an Islamic marriage ceremony whilst in immigration detention.
10. By letter dated 22 June 2010 the Immigration Advisory Service (a highly respected organisation committed to the representation of immigrants and asylum seekers) stated in an open letter that it had acted for the appellant but had been instructed on 20 March 2008 that the appellant was preparing to leave the United Kingdom and the IAS was asked to inform the

Tribunal accordingly. By letter the IAS informed the Tribunal “that our client had left UK and returned to his home country”.

11. On 11 April 2008 the appellant’s appeal against a decision to make him the subject of a deportation order was heard by Immigration Judge B W Dawson (as he then was) with Mr C Thursby, non-legal member. The Tribunal appellant did not appear. The Tribunal appears not to have seen the letter claiming that the appellant had left the United Kingdom because it considered the case on its merits and dismissed the appeal.
12. The appellant next came to the attention of the authorities on 16 September 2012 when he was arrested on suspicion of theft by the Cambridge police.
13. On 22 September 2011 the appellant married according to the rites of the Church of England. This marriage is recognised in English law. However I note that the appellant was married by licence so that publishing banns of marriage was not required. The wedding ceremony may have been arranged at short notice but the evidence that the appellant and his wife have been committed to each other for some time is compelling.
14. A deportation order was signed on 17 November 2011.
15. The appellant applied to revoke the deportation order on 7 November 2012 and that application was refused on 22 November 2012.
16. A letter from the solicitors representing him in that matter confirms that he was acquitted after a trial at Cambridge Magistrates’ Court on 11 January 2013.
17. The reasons for refusal to revoke the deportation order are set out at length in a letter dated 22 November 2012. The substantial points are that the Rules prescribe that a deportation order will not normally be revoked in less than 10 years after it was made and that removing the appellant would be in accordance with the Immigration Rules dealing with the United Kingdom’s obligations under Article 8 of the European Convention on Human Rights.
18. The appellant gave evidence before me and adopted his statement dated 20 December 2012.
19. There he said that he was born in Algeria in July 1981 and lived there with his mother and two sisters. He had problems beginning in 2003.
20. His father was separated from his mother and the appellant did not live with his father. He claimed he left Algeria for France, travelling on his own passport. He lost his passport and obtained a false French passport with the assistance of a distant relative. He entered the United Kingdom in April 2003 having travelled on Eurostar and went to Walthamstow where he had friends.
21. He used his assumed false French identity to obtain a national insurance number and he worked as a street cleaner for Waltham Forest Borough. He did not effect to his intention of approaching the authorities immediately on arriving because he had been advised he would have been removed.

22. He met the woman who is now his wife in February 2005 at a nightclub in London. By August 2006 they were very much in love and he proposed marriage. They began to live together at the end of 2006. She was not aware of his irregular presence in the United Kingdom until about March 2007 when he had to explain why he could not accompany her on a family holiday to Dubai. She disapproved of his status and encouraged him to contact the authorities.
23. In June 2007 he was arrested at work by the police and was soon in custody for using false documents.
24. His wife visited him regularly in prison and whilst he was in immigration detention.
25. He claimed asylum whilst he was in detention but withdrew the asylum claim.
26. On 7 January 2008 he and his wife went through an Islamic marriage ceremony at the detention centre that was witnessed by a small number of her friends and detainees. It was never his wife's intention to practice the Islamic faith but she wanted some ceremony to bind them. At that time his wife was a Sikh.
27. The appellant was released from detention subject to a reporting condition which he ignored after a time. He said his wife was suffering from depression and he feared he would be removed and that would upset his wife.
28. He insisted that he stopped reporting because he was afraid of the consequences and not because he was disrespectful of the United Kingdom law and authorities. I do not accept that there is a significant difference between these positions. The fact is that he stopped reporting so that the respondent would find it harder to remove him.
29. The appellant and his wife decided that rather than engaging with the appeal process it would be better to return voluntarily to Algeria and apply to return as the husband of a British national. He said he gave appropriate instructions to his legal representatives and assumed they would be carried out.
30. Nevertheless he did not leave the United Kingdom. He said that this was because he did not want to leave his wife by herself.
31. In 2010 his wife wanted to start a family. They could not conceive naturally and his wife started to have treatment including IVF treatment.
32. He said his wife was becoming more interested in the Christian faith where she found solace. She had attended church with her neighbours since she was a young child. She was baptised as a Christian on 28 August 2011.
33. After her conversion the appellant's wife wanted them to be married and they were married on 22 September 2011. He said that as time passed it became harder for him to contemplate approaching the authorities to regularise his position.

34. In September 2012 he was arrested by the police. He was suspected of being involved in theft. He denied that he had any criminal intent and was acquitted.
35. He said that he was shocked to know that a deportation order was recorded as being served against him. He had not seen one.
36. He took legal advice and was told that he would be able to argue that removing him would be contrary to the United Kingdom's obligations under Article 8 of the European Convention on Human Rights.
37. He helped his solicitors present such a claim.
38. He said that his wife and he had been in a "genuine and subsisting relationship since 2005" and he believed it would be impossible for his wife to return to Algeria with him.
39. He explained that his wife is a British citizen who was born and brought upon the United Kingdom and had strong family ties in the United Kingdom.
40. Additionally he had promised that any children of the marriage would be raised in the Christian faith. His mother was aware that he had married and his mother and sister said they would not accept his wife because she was not a Muslim. He said that the fact she is Christian and he is Muslim would stand out and make difficulties. The difficulties would be enhanced by the fact that she is "of Indian origin" and would be noticeably not Algerian.
41. She did not speak French or Arabic and so communication would be difficult. She did not expect to obtain work.
42. He said that he regarded himself as very much part of his wife's family.
43. In answer to additional questions he said that he had not told his wife that he did not have permission to be in the United Kingdom until she went to Dubai for a holiday in 2007.
44. He did not appeal the deportation notice because he was going home but his wife was too depressed for him to leave her.
45. His family would disown him if he returned with a Christian wife. His wife had strong family links with the United Kingdom.
46. In cross-examination he confirmed that his wife had tablets for depression. His wife's family would pay for IVF treatment just as they had helped support him in custody. He insisted that he had had no work since leaving prison.
47. His wife was a customer service worker for orange telephones.
48. The appellant's wife gave evidence before me. She adopted her statement of 20 December 2012.
49. She confirmed that she had met the appellant in February 2005 at a club in Leicester Square. He proposed marriage on her birthday in 2006 and she made plans for them to share a life and have children.

50. She thought he was French because he speaks French so well but she had never asked him about his immigration status. She was “shocked” when she discovered that he was unable to travel with her to Dubai for a holiday.
51. He was arrested on 12 June 2007. She had to ring every police station in London to find him. She visited him at Wormwood Scrubs three times a week for three months and altered her shifts at work so that she could visit him as well as do her job. They spoke every day that he was in prison. She visited him while he was in detention.
52. They took part in an Islamic marriage ceremony in January 2008. She had hoped that he would be released in time for the marriage ceremony to be out of custody but that did not happen. She talked about the time he was taken into prison and said:

“I was crying all the time and I felt depressed and alone. I felt like my world had ended; it was horrible. I now feel the same way again as I fear that he will be taken away from me and returned to Algeria.”
53. She could not contemplate living in Algeria. Her whole family was in the United Kingdom and they were very close. Her father was not a well man and she wanted to be reasonably near to him. She spoke Punjabi and English. She needed to speak French or Arabic to live in Algeria. She was used to being an independent woman but could not do that if she was unemployable in Algeria. She could not see how she could adjust to a society that had different expectations about the role of a woman and she was concerned about how she would dress and how she would be treated.
54. She described herself as a “practicing Christian” and did not think that a mixed marriage would be acceptable in Algeria.
55. It was a condition of the marriage in the Church of England in September 2011 that the appellant would allow any children to be raised as Christians. The appellant could not keep this promise in Algeria.
56. She could not conceive naturally. She hoped to benefit from an egg donation so that she could experience pregnancy and deliver a child.
57. She confirmed in answer to additional questions that she suffered from depression and could not contemplate coping without her husband after he had been released from detention.
58. She said that she had been born in the United Kingdom and her family never had any problems with immigration matters and it was a strange world for her to find that the appellant was not lawfully in the country and had to go to prison. She coped.
59. She spoke frankly and movingly about her desire to have children and her frustrations at not being able to conceive.
60. She also talked of her close family ties with the United Kingdom. She was asked what she would do if her husband was deported. She said it was too much to cope with. She wanted to stay in the United Kingdom and have a child.
61. She was cross-examined.

62. She said that her family were not strongly religious although one of her sisters went to church sometimes. She turned to religion for comfort.
63. The appellant's wife is rather older than the appellant. She was born in 1967 and told me on more than one occasion in her evidence that she was aware of her biological clock ticking.
64. Neither witness was re-examined.
65. There is evidence confirming that the appellant's wife has been treated for depression for significant periods in 2010, 2011 and 2012.
66. Mr Walker began by describing the evidence from the appellant and his wife about their relationship and circumstances as "credible". Of course that is a matter for me not a matter for Mr Walker but he was not being disrespectful. He was being realistic. I am quite satisfied on the evidence that I have heard that the appellant and his wife are fond of each other. I am satisfied that at least one of his reasons for not leaving the United Kingdom when he should have done was to support his wife who was suffering from depression. I am satisfied they are committed to each other. I am satisfied that she would find it very difficult in Algeria.
67. I accept as well that it would not be possible for the appellant to conceive a child by IVF treatment in Algeria. I have the benefit of a report from Emile George Howard Joffé. Dr Joffé is a well-known commentator in the Middle East. He says in a report dated 12 May 2013 that although in vitro fertilisation treatment is available in Algeria, at significant cost, third party donation is just not available and neither is it available in neighbouring Muslim states.
68. I am also satisfied that this is an appeal that cannot succeed under the Rules.
69. However I do not accept that a person's Article 8 rights are considered adequately simply by applying the Immigration Rules. I rely on the decision of the Tribunal in **MF (Article 8 - new Rules) Nigeria [2012] UKUT 00393 (IAC)** and **Izauazu (Article 8 - new Rules) [2013] UKUT 45 (IAC)** where the effect of the new Rules has been considered at length, and unless I am told by a higher court or act of Parliament that the approach in those cases is wrong then I cannot limit consideration of Article 8 issues to an application of the Rules.
70. Mr Rudd has prepared a realistic and helpful skeleton argument which is laden with authority.
71. He particularly draws to my attention the decision of the European Court of Human Rights in **Maslov v Austria** which identifies points of particular relevance.
72. Clearly the offence for which the appellant has been sent to prison is not the most serious in the criminal calendar. Nevertheless, he has been convicted of an offence that strikes at the core of immigration control. The public generally have an interest in removing from the United Kingdom people who have no business to be in the United Kingdom and that interest is enhanced when the person has used dishonest means to enter or

lengthen his stay. Whilst the removal of the appellant might not be as necessary as, for example, removing a person with several convictions for the most unspeakable offences against children and an inclination to continue them, I am also satisfied that it is in the public interest that he be removed.

73. He has been in the United Kingdom for about 10 years. However, until he was 22 he lived in the country of which he is a national and he still has connections with that country because he talks about fairly recent contact with his wife and sister. If he were to be removed to Algeria he would not be removed to a country where he has lived as an adult and where he would know how to conduct himself.
74. The offence that led to his deportation was committed nearly six years ago and he has not been convicted of anything since as far as I am aware. The Secretary of State is probably in a better position than anyone in the United Kingdom to know about a person's criminal records and can be relied upon to have told me if he had been in further trouble.
75. However, I cannot look at the appellant's circumstances and conclude that he is a man who is sorry for his criminal activities or who has learned by his experiences in custody. He allowed his solicitors to indicate that he had left the United Kingdom. He admitted he had the intention of leaving but instead of doing that he remained and no doubt would have remained living irregularly unless he had been detected.
76. Whilst I cannot know that he actually received a copy of the deportation order I conclude from his decision, taken at a time when he was represented properly, to walk away from an appeal against a decision to make him the subject of such an order that he must have known that it was at least highly likely that such an order would have been made. I find this very significant. The whole regime of immigration control depends on people who do not want to be in the United Kingdom being removed. Whilst the need to remove somebody may well be diminished by the passage of time so that even people convicted of quite serious offences do not necessarily have to be removed when all the circumstances are considered, I find that there is need to remove a person who has defied the system by entering illegally and who has remained knowing that he had no business being in the United Kingdom and after having indicated an intention to leave weight heavily in the balance when article 8 is evaluated.
77. If the appellant was the only person to be considered then, like the First-tier Tribunal, I would have no hesitation whatsoever in concluding that his removal would have been wholly proportionate.
78. As is so often the case in deportation appeals the difficult parts of the case concern not the human rights of the appellant but of those who would be affected deeply by his removal.
79. As is explained above, the appellant's wife is an impressive lady in many respects. She is deeply loyal to the appellant. Having reflected carefully on her story I believe that she did not realise he was not entitled to be in the United Kingdom until after their relationship had become rather serious



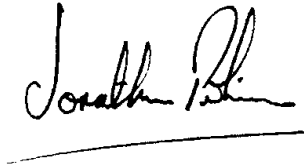
when he could not go on holiday with her to Dubai. I accept that she is not a person experienced with people who have irregular immigration status and I accept that it was inherently believable that the appellant was a French citizen and therefore entitled to be in the United Kingdom. The appellant's wife did not allow the relationship to become serious in defiance of immigration control.

80. Nevertheless, she knew for some years that he had no business in the United Kingdom. I am quite confident about that. She presented as an intelligent woman well able to use the internet to research such matters and able to take the initiative in, for example, trying to arrange for the appellant's marriage.
81. I accept that she was suffering from depression and I make it plain for the avoidance of doubt that I recognise that depression is a serious mental illness. Nevertheless, she has helped him remain in the United Kingdom when she should have known, and did know, that he should not have been there. Although the appellant's wife would benefit from his presence when she was ill she has a strong supportive family in the United Kingdom. He could have left her being supported by them. She did not and does not need his presence in the United Kingdom to cope with her illness although I do not doubt that she would be aided by it.
82. I accept that the appellant's wife longs to be a mother. I do not know if she will ever be able to achieve that. There is no reason to assume that the kind of fertility treatment contemplated would actually work, but I understand that she wants the chance. It has not been explained to me that arrangements could not be made for the treatment to be carried out in the United Kingdom in the absence of the appellant and that is, I find, a surprising omission from the story. Without in any way trivialising the pain a woman must feel when she cannot conceive, I cannot determine this appeal as if she would become a mother unless the appellant was removed. His removal will make it harder to achieve something that may not happen anyway.
83. I do not think she can reasonably be expected to live in Algeria. She is used to earning her own living and I accept that it would be difficult for her to find a job without first learning a language which she clearly could not do in the immediate future. I also accept that there would be significant societal prejudice against her because of her appearance and religion. This is not a case where the appellant's wife has presented herself as a person of great piety who would be deeply frustrated at being unable to associate with other Christians or worship in a Protestant church. She has not put the case that way and that is to her credit, but her religious instincts are those of a Christian, and she will find it hard to give expression to that in Algeria. I do not consider it reasonable to expect her to embrace the big change that would be consequent on her removing to Algeria.
84. I am quite confident that if I dismiss this appeal I will make a decision that will hurt her very deeply. I must now ask myself if that kind of disturbance to her private and family life is proportionate to the proper purpose of

enforcing immigration control. After much hesitation I have come to the conclusion that it is. The problem is not the severity of the appellant's offence but the complete disregard that it shows for immigration control in the United Kingdom.

85. Although I set aside the decision of the First-tier Tribunal because it was wrong in a very important way, having heard all the evidence I come to the same conclusion which is to dismiss the appeal.

Signed  
Jonathan Perkins  
Judge of the Upper Tribunal

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', written over a horizontal line.

Dated 20 June 2013