



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

Appeal Number: IA/23639/2014

THE IMMIGRATION ACTS

Heard at Fieldhouse

On 18th June 2014

Determination

Promulgated

On 30th July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

**MRS NAHLA BEN ABDULLAH EP RAIHI
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Blondell, counsel instructed by Rashid & Rashid

For the Respondent: Mr Kondola, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, Mrs Nahla Ben Abdullah Ep Raihi date of birth 26 December 1978, is a citizen of Tunisia.
2. I have considered whether any of the parties to the present proceedings requires the protection of an anonymity direction. Taking account of all

the circumstances I do not consider it necessary to make an anonymity direction.

3. This is the Appellant's appeal against a determination of First-tier Tribunal Judge Devlin promulgated on 18th December 2013.

4. By a decision taken on 28th April 2014 Upper Tribunal Judge McGeachy granted permission to appeal. The reasons for the decision are:-

(1 The grounds of appeal asserts that the Judge of the First-tier Tribunal erred in his consideration of the Article 8 rights of the appellant and that he should have found that there were exceptional factors which made the decision disproportionate. They also refer to the position of the appellant and the children under EU law.

(2 Particular in with regard to that point and notwithstanding the useful analysis of the relevant law set out in paragraph 42 onwards of the determination and the very detailed findings of fact made by the judge regarding the sponsor's ability to care for himself, I find that the grounds of appeal or arguable.

5. Thus the matter appeared before me on 18 June 2014 to determine in the first instance whether or not there was a material error of law within the determination.

6. Outline of the facts:-

a) As stated the appellant is a national of Tunisia. The sponsor, Mr Mohammed Ben Belgacem Riahi is a British citizen.

b) The sponsor had been in the United Kingdom since 1970. He had had a previous marriage and had five children by that previous marriage. Some years ago he had acquired British citizenship.

c) The sponsor and the appellant married on 20 September 2006 in Tunisia. Some 13 days later the sponsor returned to the United Kingdom.

d) The sponsor visited the appellant in Tunisia in December 2006 and December 2007. In December 2007 the appellant became pregnant. The first child of the marriage was born on 27 August 2008. A further child was born on 12 April 2013. Both the children are British citizens. After 2008 the sponsor did not visit Tunisia but the appellant commenced to visit the United Kingdom, visiting some 2 to 3 times.

e) The appellant came ostensibly as a visitor to the United Kingdom on 19 June 2012. The appellant has remained in the United Kingdom since that date.

f) Between 2008 and 2010 the sponsor began to experience heart problems. He suffered cardiomyopathy and heart failure. On 2

December 2010 he underwent an operation to fit a pacemaker. It is alleged that post the operation his health and memory have deteriorated and he has become baby like. Post the operation the sponsor was placed in "sheltered accommodation". Due to his medical condition the sponsor is unable to take employment and is dependent upon pension tax credit, child tax credit, council tax credit and incapacity benefit. FTTJ Devlin made adverse credibility findings with regard to the claims in respect of the sponsor's medical condition, in that he found that the appellant had sought to overstate the sponsor's medical condition.

- g) That was supported in part by the statement by the sponsor. According to the evidence given in the first-tier the sponsor was able to look after himself. However, it was asserted that the two children of the family would have no one to look after them and would have to leave the United Kingdom with the appellant, if the appellant were removed from the UK.
 - h) The appellant having come to the United Kingdom on 19 June 2012 became pregnant and gave birth to the second child as referred to above on 12 April 2013. The first child of the family is now attending school in the United Kingdom and is allegedly well-settled and making good progress.
 - i) Having regard to the condition of her husband and the position of the two children application was made on the appellant's behalf on 10 October 2012 to remain in the United Kingdom as the spouse of a person present and settled here.
7. It was conceded before me that the appellant could not succeed under the rules and could not meet the requirements of appendix FM or paragraph 276 ADE. The appeal had therefore to be considered under Article 8 outside the rules.
 8. The appellant had entered the United Kingdom on the 19 June 2012 and was making application to remain on 10 October 2012. If for no other reason the appellant could not succeed under the Rules as Appendix FM E-LTRP 2.1 Immigration Status Requirements precludes the appellant applying under appendix FM as a spouse, because at the time of her application she was a visitor and had valid leave granted for a period of less than six months.
 9. Similarly the appellant as a parent could not succeed under Appendix FM E-LTRPT.3.1., because again that precludes a person that is in the United Kingdom as a visitor or with valid leave granted for a period of less than six months from applying.
 10. As part of the submissions made on the appellant's behalf it was asserted that the judge in applying the requirements of the rules had wrongly construed EX.1(a) as requiring not only that the children be British

nationals but also that they were required to have spent seven years immediately preceding the application in the United Kingdom. A clear reading of E-LTRPT.2.2. makes of that the child has either to be a British citizen or to have lived in the UK for 7 years. Certainly in paragraph 32 FTTJ Devlin is mistaken as to the effect of the rules.

11. It was submitted that having approached the requirements of the rules on a false basis that infected the approach taken with regard to Article 8.
12. From paragraph 30 of the determination onwards the judge points out other factors which lead him to the conclusion that the appellant could not meet the requirements of the rules including the fact that the appellant could not meet the financial requirements of paragraph E-LTRP.3.1. nor had the required documentary evidence under Appendix FM-SE been submitted.
13. The appellant's representative sought to argue that consistent with the case of Gulshan 2013 UKUT 640 the starting point for assessment of Article 8 was family life under the rules and having assessed those factors under the rules consideration had to be given as to whether or not there were factors justifying consideration outside the rules. The contention being that as the rules are the starting point and as there had been a failure to look at the rules correctly, there was an error which infected the whole of the assessment.
14. Looking at the judge's assessment of the requirements of the rules, the judge has given valid reasons for finding that the appellant does not meet the requirements of the rules.
15. The judge has made specific findings with regard to material aspects such as the medical condition of the sponsor. Whilst it is asserted that there was medical evidence before the judge, there is no medical opinion indicating that the sponsor was unable to look after himself and the evidence from the sponsor directly contradicted such claim. The judge has specifically found that the condition of the sponsor has been exaggerated by the appellant. That was a finding of fact the judge was entitled to make on the evidence that was before him.
16. The judge has also assessed the nature and extent of the relationship of the sponsor to his children. In respect of all those factors the judge has given valid reasons for coming to the conclusions that he did.
17. The appellant could not meet the financial requirements of the rules or the documentary requirements of the rules as set out.
18. Submissions were made with regard to paragraph EX.1 but as is pointed out in the case of Sabir 2014 UKUT 63(IAC) EX.1 is not a freestanding ground.
19. The judge has therefore made a full assessment of the rules and Appendix FM and given valid reasons for the conclusions that he reached. Those

reasons are not infected by the error set out in paragraph 32 of the determination. Whilst the judge has made an error in that respect that error does not infect the other factual findings made by the judge.

20. The judge has also assessed the private life aspects of paragraph 276 ADE. The judge has again given valid reasons the finding that the appellant does not meet the requirements with regard to private life.
21. The most recent authorities on the issue of the relationship between article 8 and the rules are the cases of Gulshan [2013] UKUT 640, Nagre [2013] EWHC 720 and Haleemudeen [2014] EWCA Civ 558. The cases make the point that the Rules are Article 8 compliant and that it would only be where the facts warrant consideration outside the rules under Article 8 that Article 8 needs to be considered on the basis of Razgar [2004] UKHL 27.
22. In considering the issues raised the judge has specifically looked the best interests of the children as is evident from paragraph 152 onwards. Judge clearly also took into account the effect upon the children if the children were to be removed from the United Kingdom. However the judge has properly assessed all the factors.
23. The judge specifically noted that the appellant had been able to live in Tunisia with the eldest child for four years and three months. There was nothing to suggest that the child and the appellant did not enjoy a satisfactory standard of living. The judge has looked at all the factors including a wider family support the appellant had in Tunisia.
24. In assessing whether or not the factors which justify consideration of article 8 outside the rules the judge has considered with great care the best interests of the children, the medical condition of the sponsor and all other relevant factors.
25. The appellant had entered the United Kingdom as a visitor with no expectation that she would be allowed to remain here. The appellant did not meet the requirements of the rules to be allowed to remain here. In accordance with the case law the judge properly considered whether or not the circumstances were such as to justify consideration of article 8 outside the rules and has given valid reasons for coming to the conclusions that he did. Whilst the judge has made an error such was not material taking into account the other findings made by the judge
26. In the circumstances the judge has assessed all the material factors and was entitled to come to the conclusion that he did on the basis of the evidence presented. For the reasons set out there is no material error of law within the original determination. I uphold the decision to dismiss this appeal on all grounds.

Signed

Date

Deputy Upper Tribunal Judge McClure