Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41632/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 16th June 2014	**on 19th June 2014**
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Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

KAMAL LARDJANI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Livingstone Brown, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1. The Appellant is a citizen of Algeria, born 2nd December 1967. He says that he entered the UK unlawfully on 25th December 1999. He first came to the attention of

the immigration authorities when encountered working illegally on 11th July 2008. His wife is a UK citizen, born on 2nd March 1961. They married on 15th February 2012. Through his solicitors, he sought leave to remain in the UK on the basis of his marriage. The Respondent refused that for reasons explained in a letter dated 25th September 2013. The Appellant did not meet the requirements of Appendix FM of the Immigration Rules for leave to remain as a spouse, and with regard to paragraph EX.1.1(b) had "failed to demonstrate ... insurmountable obstacles to family life with your wife continuing outside the UK" (paragraph 13). The letter went on to private life considerations, and then said at paragraph 19:

> Only in exceptional circumstances will a decision made in accordance with the Rules lead to a breach of Article 8. However, as you have not raised any exceptional circumstances it is not considered that your removal would have unjustifiably harsh consequences for you or that removal of your application is disproportionate.

2. The letter at paragraph 24 again accepted that the Appellant had established family life with his British wife, and that removal would interfere with private and family life in a manner sufficiently serious to engage Article 8(1), but considered that removal would be in accordance with the law, would pursue a legitimate aim of maintaining immigration control, and removal would not be disproportionate, under reference to the established case law.

3. Judge Quigley dismissed the Appellant's appeal to the First-tier Tribunal by determination promulgated on 27th February 2014.

4. The Appellant appeals to the Upper Tribunal on grounds which (shorn of supporting case references) are in summary:

   (i) The criterion of "insurmountable obstacles" has to be read in a manner compatible with Article 8 ECHR, and is a criterion disavowed in the case law. Although the Tribunal referred to the criterion of reasonability in the following sentence at paragraph 30, it was unclear whether the Tribunal properly understood the criterion and that "insurmountable obstacles" is not to be interpreted literally.

   (ii) The Tribunal failed to take account of weighty factors relevant to whether the Appellant and his wife should relocate to Algeria, such as:

      (a) spouse's nationality; integration of the Appellant within the UK; spouse's lack of connection with Algeria; the reasonability of expecting her to relocate there as the price of keeping her marriage intact; the situation of the Appellant's wife who has lived all her life in the UK as a citizen with an inalienable right of abode; detailed and anxious consideration necessary before finding no insurmountable obstacles to her emigrating and finding accommodation and work in a foreign country to keep her marriage intact;

      (b) the fact that the Appellant's wife cannot speak Arabic, has no ties with Algeria apart from the Appellant and has lived all her life in the UK.

   (iii) Error in the alternative finding that the Appellant could return to apply for entry clearance – failure to ask whether there was a sensible reason for requiring such return. *Esto* that is wrong, failing to apply relevant factors to whether it was sensible for the Appellant to return, including prospective length and degree of disruption and whether other family members are in the UK. It should have been found that the Appellant's spouse is in the UK and is British. The

separation is likely to be longer than six months because six months' wage slips are required, plus further time needed for entry clearance application to be decided such a time limit a factor in making return to apply for entry clearance disproportionate – such factors demonstrative of exceptional circumstances and unjustifiably harsh consequences in terms of the length and degree of separation between Appellant and spouse.

(i) If it is said that the judge did take account of these factors, the judge erred by failing to explain how these factors have been assessed in reaching the decision both in respect of relocation to Algeria and in respect of the finding that the Appellant could return to apply for entry clearance. If it is said that the judge has given adequate explanation, the judge erred by reaching an irrational decision.

5. (I observe in passing that there is no apparent requirement for 6 months wage slips to post-date an applicant's departure from the UK, and that it must be doubtful whether there could be adequate reasons for an irrational decision.)

6. Mr Winter said that the main issues raised in the grounds were (i) whether an incorrect test of insurmountable obstacles was applied, and (ii - iii) whether there was failure to take any real account of the relevant factors in reaching the proportionality assessment. He submitted further as follows. The judge was wrong in considering that EX.1 did not apply in a case of this nature, a point accepted by the Respondent in the refusal letter. Although the judge went on to consider the case in the alternative (¶20-29) she repeated the incorrect phrase in reaching her conclusion (¶30). The determination did narrate (¶22-24 in particular) why the Appellant's spouse was unwilling to relocate to Algeria, but her only link there was her husband. She has spent all her life in the UK and her family, job, house and all other connections are here. These are material considerations not factored into the proportionality conclusion. Although the judge after repeating the error of referring to insurmountable obstacles as a decisive test at ¶30 went on to state her conclusions in terms of reasonability of relocation, that was an insufficient rectification. It remained in doubt whether the correct test had been applied. The factors previously mentioned in the determination had not been factored in when that conclusion was reached. On ground (iii), whether it was reasonable to expect an application to be made from Algeria, the reality was that this is not a case raising the "*Chikwamba*" issue, because the financial position of the Appellant's spouse is such that there is no real prospect of meeting the financial requirements for his return to the UK. Mr Winter took me through the case law vouching the various propositions on which he relied. He submitted that there were unjustifiably harsh consequences of removal in this case and to expect the Appellant's spouse to relocate was so unreasonable that a decision should be substituted allowing the appeal outright.

7. Mr Mullen submitted that the grounds were essentially only disagreement with the judge's assessment of the practicalities of the Appellant's wife relocating to Algeria. The issue whether it was proportionate for him to make an application from Algeria was only an alternative matter and not of essential importance, because it did not appear that he had provided evidence that he was likely to succeed in any application made from Algeria. Even if the judge had gone wrong in thinking that there was a "*Chikwamba*" issue, the outcome of the case would have been the same. The judge found that the Appellant had not succeeded in showing a right to remain

in the UK notwithstanding the requirements of the Immigration Rules, and there was no reason to interfere with that conclusion. Much was now made of the Sponsor having to give up her employment in the UK, but even if the judge did not specifically mention that, it must have been obvious to her as part of the outcome. There was no reason to think that the Appellant would not be able to work in Algeria and to support them both. The Appellant listed numerous factors which the judge was said to have overlooked, but in fact they were all rehearsed (¶21 to 26) and referred to again in deciding whether there was a case outside the Rules (¶ 33). Reading the determination fairly and as a whole it was plain that the judge in fact applied an overall reasonableness test, not a strict test of "insurmountable obstacles". She also looked to see whether there was any case for success outside the Rules. The Appellant had a long history of evading immigration controls and his lack of status in the UK was always plain to him and to the Sponsor. All the factors enumerated in the case law were properly taken into account on both sides. Nothing in the case references required the outcome to be in favour of the Appellant. It was not an error of law for the judge to come down on the side which she did. The ECHR cases showed that inability to speak the language in a country was a factor, but none of them said that it was determinative. Any complaints made about the determination went only to its form not to its substance and did not amount in the end to more than disagreement. This was a case where there were factors on both sides, as summed up for example in *Izuazu* (Article 8 – new Rules) [2013] Imm AR 3 at ¶69 (one of the passages to which Mr Winter had referred), and there was no error in the judge coming down on the side which she did.

8. Mr Winter in response pointed out that in all those cases in which Appellants had succeeded there was some adverse immigration history, and that *Izuazu* is such an example. Although the Respondent argued that the judge took account of all factors within the determination there was no assessment of the fact that the Appellant's wife has spent all her life in the UK, does not speak Berber or Arabic, has her job, house and family all here and has no ties apart from her husband in Algeria. Failure to take account of these material considerations was such an error of law that the determination ought to be reversed.

9. I reserved my determination.

10. The Appellant's and his wife's side of the case has been pressed before me as strongly as it could be, in terms of all relevant legal principle and all relevant supporting factors. However, I unable to identify any material error of legal approach by the First-tier Tribunal Judge. She may have gone wrong in thinking that EX.1 of the Rules was not a provision by which the Appellant might succeed, but that played no part in the outcome. She went on to consider the question of insurmountable obstacles in terms which plainly did not treat that criterion literally but as a question of what might reasonably be expected of the parties in all the circumstances. The conclusion at the end of ¶30 is this:

> I do not accept the submission that the Appellant's wife could not reasonably be expected to relocate to Algeria and that removal of the Appellant will be a disproportionate breach of their right to family life.

11. That conclusion must have been open to the judge. All the considerations on which the Appellant and his wife relied such as medical difficulties, her lack of family connections in Algeria, her inability to speak the language, her job and home in the UK, are plainly set out. The judge turns to the correct criteria for consideration outside the Rules at ¶33 – "a good arguable case" and "compelling and compassionate circumstances". I find no error of law in how the judge approached the decisive issues, and how she struck the balance.

12. The same answer to the error of law question can be reached by considering ¶69 of *Izuazu*:

> The Strasbourg case law indicates that weighty reasons are needed to justify expulsion of someone who has had long residence as a child or that would risk separating devoted partners in a family relationship. It may, by contrast, require weighty reasons or exceptional factors to outweigh the strong justification for the expulsion of those who entered by deception, remain by fraud, establish their relationship in the host state in precarious circumstances and never had an expectation of being permitted to remain to conduct their family and private life in the host state.

13. Weighty reasons were needed in this case to risk separating the parties; but the judge missed out nothing of what that might involve. On the other hand, strong justification for expulsion was present in the Appellant's history of entering by deception, remaining unlawfully, establishing his relationship while both knew he was here under precarious circumstances, and he had no other expectation of being permitted to remain. It could not realistically be said that the case was capable of lawful resolution only in the Appellant's favour.

14. In my opinion, the Appellant has not identified any error by the judge which requires her determination to be set aside, and the determination shall stand.

Hugh Macleman

19 June 2014
Judge of the Upper Tribunal