Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06412/2013

THE IMMIGRATION ACTS

Heard at Field House **Determination Sent**
On 18th March 2014

Before

UPPER TRIBUNAL JUDGE POOLE

Between

BG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins, Counsel
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a male citizen of Turkey born 27 October 1990. He originally appealed against the decision of the respondent dated 13 October 2010 (with an extension of time for the filing of his appeal having been granted) to refuse to grant him asylum, humanitarian protection or leave to remain under Article 8 ECHR.

2. The appellant's appeal came before Judge of the First-Tier Tribunal Jackson sitting at Hatton Cross on 19 November 2013. The appellant attended and gave

evidence. Both parties were represented. In the appellants case he was again represented by Mr Collins.

3. In a Determination dated 2 December 2013 Judge Jackson dismissed the appellant's appeal on all grounds finding that the appellant would not be at risk upon return in respect of anything covered by Refugee Convention. In respect of the Article 8 appeal the Judge noted the appellants marriage but concluded that as his wife was of Turkish origin and the marriage took place at a time when both he and his wife knew his status was precarious would not be unreasonable to expect the appellant's wife to either accompany him back to Turkey or support him in an application to re-enter for settlement.

4. The appellant sought leave to appeal via grounds settled by Mr Collins. Paragraph 4 of the grounds make it perfectly clear that leave was not sought in respect of Asylum/Article 3 ECHR/Humanitarian Protection. Leave was sought in respect of Article 8 alone and paragraphs 5 through to 14 set out the basis of the request.

5. It was suggested that the judges findings that the appellant's wife could "relocate if she so chose" was irrational bearing in mind that she is a British citizen, has her own business and is pregnant. It is suggested that the judge failed to come to a balanced judgment in the light of "all the material facts" pursuant to the guidance set out buy the Court of Appeal in **VW & AB v The Secretary of State for the Home Department [2009] EWCA Civ 9**.

6. Paragraph 9 of the grounds states "the Determination (paragraph 49) as recording that the appellant's wife did not think she could readjust to living in Turkey which made it "plainly wrong and irrational" for the judge to then find that there were no reasons why the appellant's wife could not re-establish herself in Turkey.

7. The appellant's application for leave then came before another Judge of the First-Tier Tribunal who, on 30 January 2014, granted leave and in his reasons stated the following:

> "3. The grounds assert that the judge erred in law and in fact in reaching the decision that he did in relation to Article 8 ECHR. The judge found that it would be reasonable for the appellant's wife to relocate to Turkey if she so chose but she is a British citizen (although born in Turkey) who has lived in the UK since the age of 7 so that the notion of her relocating is irrational. All the appellant's wife's immediate family are in the UK; she has returned to Turkey on only some three or four occasions. She is an established self-employed hairdresser and she is pregnant. It is a material error for the judge to properly take into account all those factors.
>
> 4. In an otherwise careful and well-reasoned determination it is arguable that the judge's approach to Article 8 and the appellant's British citizen wife amounts to an error of law. Additionally, it is arguable that the failed to properly rake into account the reasonable foreseeability of the birth of the child who will also be a British citizen. It is arguable, following the case of **Sanade [2011] UKUT 00048**, that it would be unreasonable to expect the appellant's wife as a British citizen and the

yet to be born but reasonably foreseeable child who will be a British citizen to leave the UK for a life in a different country.

5. As this arguable error of law has been identified all the issues in the grounds are arguable".

8. Hence the matter comes before me in the Upper Tribunal.

9. Mr Whitwell indicated that there was no Rule 24 response from the respondent save for a very brief "holding" letter dated 11 February 2014.

10. Mr Collins relied upon his grounds seeking leave. The appellant's wife is now 7 months pregnant. There is challenge to the judge's conclusions in respect of Article 8 on the particular facts of the case, being that the wife is a UK citizen with an expected delivery date of 1 May 2014. The correct analysis should not be on the question of relocation. There are ramifications to the appellant's wife moving to Turkey. It has been accepted by the judge that the appellant is a draft evader and at paragraph 91 noted that the parties would be apart for "several years". Mr Collins submitted that paragraph 91 of the Determination evidenced a wrong approach by the judge.

11. Mr Whitwell in response submitted that the judge had correctly directed himself. The judge was looking at a family of two people as is the situation as at the date of the Upper Tribunal hearing. Paragraphs 89, 90 and 91 show that the judge properly considered **VW (Uganda)**. The appellant's wife spoke Turkish and had been to that country on visits, and they had married not caring about the appellant's status. They had had a family life despite the appellant not having leave to remain. There is no error of law. It was accepted there would be disruption but the appellant could make a "spouse application" after he had served any sentence of imprisonment in Turkey.

12. Mr Collins in reply accepted on behalf of the appellant that the appellant's wife was British but of Turkish heritage. He accepted also that the appellant and his wife formed a relationship and married during a time when the appellant's position was precarious. It is accepted that the appellant is a draft evader who faces imprisonment. That could well therefore be years of separation between the appellant and his wife (and child). This was an extremely intrusive situation from the point of view of assessing proportionality.

13. At this stage I indicated I was planning to reserve my determination. I canvassed views on the question of how the matter would proceed should I find an error of law to the extent that the Determination of Judge Jackson should be set aside. Mr Whitwell chose to make no comment, whereas Mr Collins indicated that his preferred outcome would be for me to remit the case back to the First-Tier to examine the facts relating to the Article 8 claim.

14. I have spent a considerable amount of time considering the issues before me. I have noted in great detail the contents of Judge Jackson's Determination, the grounds seeking leave, the submissions made at the hearing and to the authorities presented to me especially that of **VW**. In addition I have noted the reasons given by the judge in granting leave to appeal.

15. The Determination Judge Jackson is challenged solely on the question of Article 8 ECHR. His findings and conclusion in respect of the asylum appeal are not challenged.

16. I am of the view that Judge Jackson's Determination is indeed a careful and well reasoned judgment. I do feel that his conclusions as to the outcome of the Article 8 appeal are based more on the Turkish heritage of the appellant's wife and the precarious position of the appellant at the time of their relationship than on the specific circumstances of the case.

17. In addition and perhaps the deciding factor is the pregnancy of the appellant's wife. I do not consider that Judge Jackson properly took into account the pregnancy. In reaching this conclusion I note Mr Whitwell's comments regarding the family of two but I consider the reasonable foreseeability of a family of three must not be ignored. To quote from **VF** "it is a balanced judgment of what can reasonably be expected in the light of all the material facts". I find that not all material facts were adequately covered and for that reason an error of law occurred in Judge Jackson's Determination.

18. I consider this to be a material error to the extent that the determination with regard to Article 8 ECHR must be set aside. All other aspects of that determination (including the dismissal of the asylum and humanitarian protection appeals) are preserved including the fact that the appellant is a draft evader and potentially faces imprisonment upon return to Turkey.

19. I must now turn my mind to how to dispose of the outstanding Article 8 appeal. I have reached a conclusion that a degree of fact finding is appropriate and that the nature of such judicial fact finding which is necessary in order for the decision to be remade is such that it is appropriate to remit the case to the First-Tier Tribunal to be heard by a judge other than Judge Jackson.

Signed Date

Upper Tribunal Judge Poole