Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01000/2010

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 January 2014	**On 31st January 2014**

Before

THE HON MR JUSTICE FOSKETT
UPPER TRIBUNAL JUDGE MOULDEN

Between

MR A M
(Anonymity Direction Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Saeed a Solicitor from Aman Solicitors
For the Respondent: Mr S Walker a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the determination of the Upper Tribunal.

2. The appellant is a citizen of Turkey who was born on 16 May 1969. This appeal comes back to the Upper Tribunal from the Court of Appeal following the judgement of Ward, Elias and Pitchford LLJ dated

12 December 2012 (AM v Secretary of State for the Home Department [2012] EWCA Civ 1634).

3. The background to the case, and the basis upon which it is now before the Upper Tribunal, is set out fully in the judgment of Pitchford LJ. Having referred to the decision of the Secretary of State made on 18 November 2010 to deport the appellant on the grounds that he was a "foreign criminal" within the meaning of section 32 of the UK Borders Act 2007 and to the relevant statutory provisions, he set out the background as follows:

> **“Background**
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> 3. I take the factual background from the decision of the First Tier Tribunal ("FTT") promulgated on 9 May 2011. The appellant was born on 16 May 1969 and is now aged 43 years. He arrived in the United Kingdom from Turkey via Cyprus in December 1993 and claimed asylum, relying on his Kurdish background and alleged association with the PKK. That application was refused and the appeal was dismissed in 1995. In 1994 the appellant met his wife at a Kurdish community centre in London and they married on 26 May 1995. They have two sons born on 10 July 1999 and 24 February 2004, now aged 13 and 8 years respectively. On 5 April 2001 the appellant made further representations to the Secretary of State which were treated as a human rights application. The application was refused on 30 July 2001 but an appeal to the second adjudicator was allowed on 18 July 2003. On 15 October 2003 the appellant was granted discretionary leave to remain which expired on 15 October 2006. Thereafter the appellant enjoyed indefinite leave to remain.
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> 4. On 25 February 2005, following a trial at Southwark Crown Court, the appellant was convicted with others of a drug trafficking offence. The circumstances, which I take from an OASyS report referred to in more detail at paragraphs 35 and 36 below, were that in August 2004 the appellant was employed as a mini-cab driver in London. He was offered work by an associate driving a Dutch national for three days. On the third day the appellant was requested to drive to an address in Bournemouth. When they arrived at their destination they were arrested and his passenger was found by the police to be in possession of 9.37 kilograms of heroin of high purity which he had collected from the address visited. The appellant was convicted of being knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing a class A drug. On 23 February 2005 the appellant was sentenced to 15 years imprisonment, later reduced on appeal to 12 years. In or about August 2008 the appellant was transferred to open conditions. On 6 August 2010 the custodial part of the appellant's sentence expired, but he was detained pending deportation until 19 August when he was released on bail.
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> **The decision letter**
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> 5. On 23 November 2010 UK Border Agency notified the appellant that he was subject to automatic deportation as a foreign criminal

pursuant to the terms of section 32 UK Borders Act 2007, because he had been sentenced to a period of imprisonment of not less than 12 months, unless he fell within one of the exceptions set out in section 33 of the Act. The Secretary of State accepted that the appellant had established a family life in the United Kingdom but concluded that his wife and two sons could reasonably accompany him to Turkey. The Secretary of State acknowledged her duty to recognise the interests of the appellant's children as a primary consideration but concluded that other factors outweighed those considerations. The letter informed the appellant that the decision to remove was in accordance with section 32(5) of the 2007 Act and the Agency's published policy in pursuit of the permissible aim "of the prevention of disorder and crime and the protection of health and morals and the protection of the rights and freedom of others". The Secretary of State took into account the personal and family circumstances of the appellant but resolved the issue of proportionality in favour of deportation since, she concluded, the appellant had spent his youth and formative years in Turkey and "it is not considered unreasonable to expect you to be able to readjust to life in Turkey". There was no reason why the appellant's spouse and children could not be expected to return to Turkey since "your concern for your own children did not deter you from committing the serious crime for which you received a long sentence of 12 years imprisonment".

The hearing before the FTT

6. The appellant relied before the FTT on witness statements from himself, his wife and two friends. The appellant and his wife were cross-examined on behalf of the Secretary of State. In its important respects that evidence was accepted [13]. Mrs M arrived in the United Kingdom to join her father in April 1992 as his dependent. Her father claimed asylum and the application was granted. In time, Mrs M became a British citizen and the two children who were born in the United Kingdom were also British citizens. From time to time Mrs M made visits to Turkey, for example for family funerals, and occasionally the two boys accompanied her. On one occasion she had, on account of her ethnic origin, been assaulted in the presence of the boys at the airport on arrival in Turkey. The tribunal found that the ties of both mother and children were, at the time of the hearing, predominantly with the United Kingdom and not with Turkey [3].

7. The appellant had been an industrious prisoner. He received no significant disciplinary adjudications. He undertook educational and other courses, and produced confirmatory certificates. Mrs M had qualified in the late 1990s as a pharmaceutical technician and worked in that capacity until, in about 2009, she developed chronic back pain and panic attacks. Regular contact was maintained between the family and the appellant while he was in prison. He was released on an electronic tag for periods of home leave. The older boy's school performance deteriorated but, once he was reunited with his father, it picked up again. Both children were doing well at school. The appellant was undertaking the bulk of household duties because his wife was not fit enough for heavier work. However, she provided some care for her own mother. The existence, duration and

depth of family life were confirmed by a report from an expert independent social worker, Christine Brown, which was accepted by the tribunal. At paragraphs 6.6 and 6.7 of her conclusions Ms Brown said:

"6.6 ... I have no doubt that both [children] are significantly and closely bonded to their father and that the impact of removal will be devastating for them. It is the children who will in essence be "punished" for their father's lack of status with enormous and enduring implications for all three family members but, most significantly and importantly the children who are not responsible for the situation that they unwillingly find themselves [in] at this time.

6.7 In this instance [the children's] needs are being met by their mother and father although this has been a precarious journey for this family. To remove [AM] would undermine this and place these children in a position which is the antithesis of good social work practice and what the Children Act 1989 sought to enshrine as essential elements required for positive child development and, what was the initial foundation for child care practices since this time, informing subsequent determinations including those of Lord Lamming's findings into the Climbie enquiry and more recently that of Baby Peter."

Notwithstanding these bonds of affection and dependence, the Tribunal was satisfied that, if the appellant was deported, neither his wife nor his sons would accompany him. They would remain in the United Kingdom ([4], [7], [9], [13] – [16]).

8. The FTT correctly instructed itself as to the considerations relevant to the issue which arose under Article 8(2), namely whether expulsion was necessary in a democratic society and proportionate to the legitimate aim pursued, citing *Boultif v* Switzerland [2002] 33 EHRR 1179 and Uner v Netherlands [2007] INLR 273. In *Uner v Netherlands*, at paragraphs 57 and 58, the Grand Chamber listed the relevant factors:

"57. Even if Article 8 of the Convention does not therefore contained an absolute right for any category of alien not to be expelled, the Court's case law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision ... in the case of Boultif the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria ... are the following:

The nature and seriousness of the offence committed by the applicant;

The length of the applicant's stay in the country from which she or he is to be expelled;

The time elapsed since the offence was committed and the applicant's conduct during that period;

The nationalities of the various persons concerned;

The applicant's family situation, such as the length of the marriage and other factors expressing the effectiveness of a couple's family life;

Whether the spouse knew about the offence at the time when he or she entered into a family relationship;

Whether there are children of the marriage and, if so, their age; and

The seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:

The best interests and wellbeing of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

The solidity of social, cultural and family ties with the host country and with the country of destination."

Furthermore, the FTT applied the five stage test which the House of Lords approved in *R (Razgar) v SSHD* [2004] 2 AC 368 and confirmed in *EB (Kosovo) v SSHD* [2009] 1 AC 1159.

9. The FTT proceeded to examine the legitimate aim pursued, in particular the seriousness of the offence that the appellant had committed. It noted the sentencing judge's remarks as to the seriousness of the offence, which I shall quote in full:

"[You] have been convicted by the jury of being knowingly concerned in dealing in a substantial quantity of heroin ... with the intention of evading the prohibition on its importation. This offence is regarded by Parliament as so serious that the maximum sentence after conviction is life imprisonment and the particular level of sentence for this kind of offence set by the Court of Appeal is very high to reflect that position. The seriousness of trafficking in heroin cannot be understated. It is a drug that is highly addictive and for those who take it and become addicted so often leads to personal degradation, squalor and premature death. So powerful is the addiction that huge numbers of addicts are led to commit a whole range of serious offences, including burglary and robbery, in order to obtain the money to feed the drug and feed their addiction."

The Tribunal noted the appellant's poor immigration history. He was unlawfully in the United Kingdom from 1995 to 1998 when he was arrested for a road traffic offence. Having obtained indefinite leave to remain in 2006, he committed a serious criminal offence. The

Tribunal acknowledged that the appellant retained links with Turkey. His parents, brother and sister still lived there. Nonetheless the Tribunal found it would be disproportionate to deport him.

10. The FTT relied on the following matters:

(1) Notwithstanding a period of unlawful presence in the United Kingdom the appellant had been resident in the United Kingdom for 17 years;

(2) The probation officer who carried out an OASyS assessment of the risk posed by the appellant concluded that his risk for re-offending was low. The appellant had one previous conviction for a road traffic offence. He was not a habitual criminal and he had learned his lesson.

(3) The Tribunal found that the appellant had acquired an "especially strong family life under Article 8". In 2003 the second adjudicator had been satisfied that the appellant had enjoyed a strong family life which was sufficient to outweigh the Secretary of State's interest in pursuit of the legitimate aim of the prevention of disorder and crime by the commission of further offences such as road traffic offences.

The FTT continued:

"By the date of the hearing before us and taking into account the additional evidence, largely comprising the further reinforcement of that family life which the second adjudicator had recognised, the argument in favour of a finding that the appellant's family life is an especially strong one became difficult to resist. It became difficult to resist in particular in the light of two developing features. They comprised the ill-health over the period of the last 3 years of Mrs [M] and the continued development in the way that children indigenous to the United Kingdom often do develop … in terms of their education and, it was to be inferred, their continuing establishment of community ties with the United Kingdom, the country in which they were born and of which they are nationals. A strong private life was also established by the appellant and his family members. …"

(4) It would not be reasonable to expect other members of the family to follow the appellant to Turkey. The effect on the children would be particularly harsh. Mrs M and the children had few, if any, ties with Turkey. The children did not speak Turkish. It was in the children's best interests that they remain in the United Kingdom.

11. The Tribunal concluded with these words:

"Again, the consequence of the respondent's decision to make a deportation order would be to separate and indeed break up a family. For that reason her decision is unlawful. The appellant established that Exception 1 contained in section 33(2) of the Act

was established and that accordingly section 32(4) and (5) is disapplied. The appeal on human rights grounds is allowed."

Applications by the Secretary of State for permission to appeal

12. In her application for permission to appeal to the Upper Tribunal, Immigration and Asylum Chamber ("UT"), it was asserted on behalf of the Secretary of State that "whilst it is accepted that the panel do refer to the offence and its seriousness it is submitted that the consideration was flawed as a matter of law by the failure of the panel to properly consider the public interest in deportation in this case". Further, it was argued that the FTT placed too much weight upon its finding that there was a low risk of re-offending. On 3 June 2011 permission to appeal was refused by FTT because the grounds amounted to "little more than" an argument as to the merits.

13. The Secretary of State renewed her application for permission to appeal to the UT relying upon the grounds already advanced and she enlarged upon the submission that the identification by the FTT of a low risk was a wrong conclusion. On 30 June 2011 Senior Immigration Judge Gill gave permission to appeal on two grounds, first that it was arguable that, in reaching a conclusion that the appellant was a low risk for re-offending, the panel had overlooked the appellant's evidence that he was not guilty of any offence and, second, that the panel had failed to identify the strength of the State's interest in deportation in concluding that, without more, deportation which resulted in the break-up of a family resulted in a breach of Article 8. I do not accept the appellant's submission that the Secretary of State's public interest argument was not properly before the UT for decision.

Hearing before the UT

14. The UT acknowledged that the FTT had cited both European and domestic authority which established the principles upon which the deportation decision should be judged. However, the FTT had made no reference to important domestic decisions identifying the public interest against which the proportionality of deportation was to be measured. In particular, at paragraph 22 the UT said:

    "22. It is quite clear to us, that when considering whether or not in this case it would be proportionate to order the deportation of this claimant, the panel failed to have regard to the principles enunciated in the Court of Appeal authorities set out above. Nowhere is there any reference to the legitimate need to deter non-British citizens by ensuring that they clearly understand that one of the consequences of serious crime may well be deportation. Nor is there any consideration of the role of a deportation order as an expression of society's revolution (sic) at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes."

    The UT noted that the words with which paragraph 27 of the FTT's determination concluded (at paragraph 11 above) were simply wrong in law.

15. Secondly, the UT concluded that the FTT's finding as to low risk was perverse. It reasoned its decision as follows:

> "13. Having considered the submissions carefully we are satisfied that there were material errors of law in the Panel's determination. We note first of all the last sentence of paragraph 23 of the Determination where it is stated on behalf of the Panel that "we accord some weight to [the claimant's] protestation that he has learnt his lesson". In light of the claimant's continued denial that he committed the offence of which he was convicted, he cannot have demonstrated that he has learnt any lesson at all, in any meaningful sense. In our judgment, the consequential finding that the claimant presents low risk of re-offending is simply not tenable."

16. Having set aside the decision of the FTT for errors of law, the UT proceeded to remake the proportionality decision. For this purpose the UT accepted the findings made by the panel with regard to the appellant's family life and, in particular, to the devastating effect which the removal of the appellant would have on his family. The UT accepted that for perfectly legitimate reasons neither the appellant's wife nor his children would follow him to Turkey but would remain in the United Kingdom. It was accepted that it would be in the best interests of the children that the appellant was not deported.

17. Mr Aslam, the solicitor representing the appellant before the UT, tendered the appellant for cross-examination. In its determination the UT observed:

> "29. In the light of our acceptance of the evidential findings made by the First Tier Tribunal, Mr Aslam relied upon the evidential findings already made, but tendered the claimant for cross-examination. In answer to the question which was put to him as to what he accepted he had done wrong, the claimant said that "my biggest mistake was I trusted those people who put me in that situation"."

18. The UT recognised that there were present "obviously important compassionate factors". Nevertheless, there were circumstances in which the best interests of the children would not necessarily be determinative. As to the appellant's evidence in cross-examination about his "biggest mistake" the UT said:

> "42. With regard to the claimant's continued protestation of innocence, there are two possibilities. The first is that both the judge and the jury, who were both satisfied beyond reasonable doubt of the claimant's guilt, were wrong; the other possibility is that the claimant is lying when he says he was not guilty. We cannot go behind the verdict of the jury, and so are forced to the conclusion that the claimant was lying when he told us that he was not guilty, and that the extent of his wrongdoing had been to trust his co-defendants. We cannot therefore accord any weight to the claimant's "protestation that he has learnt his lesson" as found by the First Tier Tribunal Panel and to that

extent we do not accept its findings. Nor, in the light of our finding (which is inevitable in the light of the jury's verdict) that the claimant has lied to us with regard to the offence which he committed, can we accept that he presents only a low risk of re-offending."

19. The UT, as did the FTT, took full cognisance of the seriousness of the offence committed by the appellant. It continued:

"44. We must take into account that for an offence of this seriousness, there is a clear public need to deter foreign criminals, so that they understand that a likely consequence of committing offences of this seriousness is that they will be deported, even if there are compassionate circumstances in their case."

20. In striking the balance between competing interests the UT noted that although the appellant had been in the United Kingdom for 17 years he had status for only two years before the commission of an extremely serious offence. It continued:

"45 ....we also take note of the fact that if he were to be deported, it would be to a country where he speaks the language and would be able to make a life for himself, albeit without his family."

21. In conclusion, the UT accepted that deportation would have the effect of breaking up the family. That would necessarily interfere with the appellant's and his family's family life such that his Article 8 rights were engaged. However, that interference would be lawful, necessary and proportionate to the legitimate purpose of the protection of society against serious crime. Thus, the decision of the FTT was reversed."

4. In his conclusion at paragraph 39 Pitchford LJ said;

"In my judgment the FTT erred in law in failing adequately to identify or to apply the relevant public interest component in the legitimate aim; accordingly, the UT was entitled to make its own decision. However, I also conclude that the UT made an error of law in its failure to accept the factual decision of FTT that the appellant presented a low risk for offending. As I read the UT's refusal to accept that the appellant represented a low risk of re-offending, it may have regarded that finding as a significant component in the balancing exercise. I do not think that the UT's conclusion can stand. The proper forum for decision remains, in my view, the specialist tribunal. I would quash the decision of the Upper Tribunal and remit the matter for further consideration by a differently constituted panel of the Upper Tribunal in the light both of our judgments and the findings of fact made by the FTT."

5. Elias and Ward LJJ, whilst adding observations of their own, agreed with the reasoning and disposal of the case suggested by Pitchford LJ.

<u>The hearing before us</u>

6. The appellant attended the hearing, together with his brother who is a UK citizen, and was assisted by a Kurdish Kurmanji speaking interpreter. He gave evidence, was cross-examined and re-examined. We asked some questions for the purpose of clarification. We were supplied with what we are told were the documents submitted at earlier hearings together with a supplementary witness statement from the appellant dated 20 December 2013 and a letter from the appellant Offender Manager at the London Probation Trust dated 15 January 2014. No authorities other than SS (Nigeria) v The Secretary of State for the Home Department [2013] EWCA Civ 550 were put before us by Mr Walker.

Changes in circumstances and a further Welfare Officer's report

7. It was clear from the appellant's recent witness statement that the family circumstances had changed somewhat since the hearing before the FTT. The appellant had separated from his wife in around June 2013, the two sons remaining with her in London. The appellant had moved in about October 2013 to live with his brother in Northampton. The appellant said that he saw his sons at least every other weekend and spoke to them on the telephone several times each week. We have no reason to doubt that evidence.

8. Bearing in mind our duty to have regard to the best interests of the children as a primary consideration we asked Mr Saeed whether the appellant had considered obtaining an up-to-date welfare officer's report. We adjourned to enable him to take instructions. He told us that the appellant wished to proceed without an adjournment to obtain a report. We returned to the point suggesting that, depending on the circumstances, we might consider it necessary to order that a welfare officer's report be obtained. After another short adjournment we were told that whilst the appellant was legally aided up to some point in the proceedings before the Court of Appeal, he was no longer legally aided and his representatives had advised him that it would not be possible to obtain further legal aid. They were appearing for him *pro bono* and the reality was that he could not raise the funds to pay for a welfare officer's report. His instructions remained the same. In the circumstances we concluded that, whilst a further welfare officer's report would have been highly desirable, neither an adjournment nor an order would be likely to produce one. We have considered it right to make assumptions generally favourable to the appellant in respect of his relationship with his sons and indeed his wife.

Respondent's submissions

9. Mr Walker submitted that the appeal turned on Article 8 considerations. The appellant had been separated from his wife and sons since June 2013. It was respondent's case that if the appellant went to Turkey his wife would remain the primary carer for their sons, that contact between the appellant and his sons would be reduced,

but could continue through visits during school holidays and on the telephone. There had been a lengthy period of separation in the past whilst the appellant was in prison. The appellant had a large family in Turkey and in Cyprus and his sons had visited Turkey.

10. Mr Walker accepted that the FTT's findings as to the risk of re-offending stood and that there was an up-to-date letter from the Probation Service. However, he submitted that the risk of re-offending was not the most important factor. The appellant had been convicted of a very serious offence for which the maximum sentence was life imprisonment. He referred to the remarks of the sentencing judge and submitted by reference to paragraphs 52 to 54 of SS Nigeria that the public interest and the seriousness of the crime outweighed the considerations of family life. He accepted that the date of the decision was such that we should consider the Article 8 jurisprudence outside the later codification of this in the Immigration Rules.

Appellant's submissions

11. Mr Saeed submitted that the factual starting point was the determination of the FTT. Despite the appellant's separation from his wife and his sons the family life, whilst different, was still as strong as it was when they were all living together. His role in his sons' lives had not diminished. Indeed where there was a separation the role of the father was arguably more important. His sons needed him. They were the formative ages of 9 and 14 and he and his wife were co-operating amicably about contact arrangements. Contact from abroad through visits and by telephone or other electronic means would not be enough.

12. Mr Saeed submitted that it would be a disproportionate interference with family life of the appellant and his sons for the appellant to be deported. It was accepted that his offence was a serious one, but he had not re-offended and he was at low risk of re-offending, something confirmed by the latest report from the Probation service.

13. He submitted that SS Nigeria depended on its own particular facts and in that case the appellant continued to present a real risk of re-offending. In this case the appellant had shown remorse and, he contended, there was no public interest in removing a man who was no longer a real risk. He could not change what he had done in the past but the focus should be on what had happened since the commission of the offence. Whilst Mr Saeed accepted that the deterrence of others was a relevant factor, he asked us to bear in mind that the appellant had been here since 1993 and the children had lived here all their lives. He asked us to have regard to the full terms of the welfare report before the FTT. It would be in his sons' best interests for the appellant to remain in the UK and their best interests were a primary consideration. We should give this great

weight. We were asked to allow the appeal and to anonymise our determination.

14. We reserved our determination.

Findings of fact

15. As we have indicated, the Court of Appeal did not disturb the findings of fact made by the FTT. There is a section in the determination of the FTT headed "Findings of Fact" covering paragraph 13 to 16 which (suitably anonymised) read as follows:

> "13. We should arrive at findings of fact necessary to decide the appeal. An overt issue as to the capacity of the appellant, Mrs M, Mr T and Mr U to tell the truth did not easily arise. The appellant was not interviewed by an immigration officer before the respondent made the decision to make a deportation order. At the hearing Mr Morley cross-examined the appellant and the supporting witnesses in a lengthy, probing but sensitive, cross-examination. Discrepancies and inconsistencies were not identified by Mr Morley when making submissions. A careful consideration of the evidence has led us to the conclusion that discrepancies and inconsistencies were not present.
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> 14. It was perhaps unremarkable that persons married to each other such as the appellant and Mrs M and blessed with two children might enjoy family life in the general sense of the expression. The appellant and Mrs M in particular were entitled to contend that they had been cross-examined by a well-prepared Presenting Officer and that discrepancies and inconsistencies in their evidence had not arisen. An overt issue as to the strength of the family's ties and connections with the United Kingdom did not arise. A distinct measure of support for the explicit contention of the appellant that his family are inextricably linked with the United Kingdom was to be found in the documentary evidence which confirmed Mrs M's British nationality (her passport, page 34 of the appellant's bundle) the place of birth of the children as the United Kingdom (birth certificates of both, pages 28 and 29 of the appellant's bundle) and their continuing education in the United Kingdom at the date of the hearing (letters from an Academy and a school (pages 41-43 inclusive of the appellant's bundle).
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> 15. A distinctive feature of the documentary evidence lay in the report of Christine Brown. Christine Brown, an independent social worker, was qualified to consider the circumstances of the appellant's family by reason of her academic and professional qualifications. Her report was to be found at page 48 of the appellant's bundle. That exceptionally detained (sic) account of family life which Christine Brown mentioned in her lengthy report provided very strong support for the paramount proposition contended by the appellant and Mrs M, namely, that over the years and notwithstanding the appellant's incarceration for the period of six years, they have enjoyed family life with each other and more recently their sons. It would not be out of place at this point to refer to the determination of the second adjudicator whose findings we should uphold. As long ago as 18 July 2003, on which date the second adjudicator's determination was promulgated, the right of the appellant to respect for family life – that same family life of which the more

recent evidence introduced a logical and understandable extension – outweighed the legitimate aim of the prevention of disorder or crime (paragraph 26 of the second adjudicator's determination). That the second adjudicator made that finding at that date provided yet further support for the paramount proposition which underlay the witness statement and oral evidence which we read and hear.

16. We make findings of fact in line with that extensive summary of the appellant's contentions to which we referred earlier in this determination, the contents of the witness statements, the oral evidence and the documentary evidence as including the report prepared by Christine Brown. Against such a backcloth of findings we now proceed to consider whether the appellant established that Exception 1 defined in Section 33(2) of the 2007 Act was established so as to disapply Sections 32(4) and (5) of the 2007 Act.

16. As is apparent from paragraph 16 these findings were not intended to be the FTT's full findings of fact as matters dealt with earlier in the determination are incorporated by reference. We adopt and follow these which, if fuller details are required, can be found in that determination. They are summarised in the judgement of the Court of Appeal which we have set out.

17. The FTT heard the appeal on 7 April 2011. The FTT decision was based on the facts at that date. The FTT heard evidence from the appellant, his wife, and two friends. They were found to be credible witnesses. We have indicated the nature of the evidence we have heard from the appellant. Mr Walker did not suggest that the appellant's evidence should not be believed and we accept the evidence he gave us.

18. Although it is not clear exactly what stage the proceedings have reached, the appellant and his wife have agreed that they will divorce. The appellant said that he has signed divorce papers. They have also agreed that she is to have custody of their sons and that they will live with her, but the appellant will have access to them at weekends and during school holidays. The appellant said that his wife had a university education and spoke good English. His view was that their sons would benefit from living with her. They did not have any difficulty in communicating with each about arrangements for their sons. His wife was better able to help and advise them with their schoolwork. However, he helped them with their music: one played the guitar in the other the violin. They had relatives with children of similar ages in the UK. The appellant said that if his sons needed him he was no more than an hour away. He believed that it would be a tragedy if they were not able to see each other on a regular basis. His sons had, however, visited Turkey, with their mother.

19. When he sees the boys he picks them up from home, spends four or five hours with them and then returns them the same day. He speaks to them on the telephone four or five times during the week. Usually he calls them but sometimes they call him. Both boys are at school; the younger at a primary school in year five. The appellant says that he is doing well. The elder is studying at a Community Academy. The

appellant has not spoken to his sons about the possibility of his having to return to Turkey although he indicated they were aware that he was attending a hearing before the Tribunal. He believes that he is building up a strong relationship with his sons and that it would have a big impact on them if he could not see them.

20. The appellant sees his Offender Manager every eight weeks. His licence period will finish in 2016. In the letter of 15 January 2014 to which we have referred the Offender Manager confirms that the appellant was released from custody on 6 August 2010 and has attended all his probation appointments. He has not received any warnings or breached the conditions of his licence. He presents as well mannered and engages well with supervision. The view is that he has maintained a good relationship with his family and has made such good progress that he is considered suitable for attendance on a two monthly basis. Whilst the letter states that the appellant has gained employment his evidence to us was that he was not presently employed. He believed that he was permitted to work but it was not practicable for him to do so because he needed to sign on twice a week in London as part of his bail conditions. Since he moved to Northampton he has been trying to change this to somewhere closer. We were told that there have been difficulties but that this should be achieved soon.

21. The appellant has a mother, seven brothers and seven sisters. He is in touch with all of them. His mother, two brothers and four sisters live in Turkey. His other siblings are either in Cyprus or the UK.

Discussion

22. The issue we have to consider is whether his otherwise automatic deportation would breach his Convention rights or the Convention rights of other members of his family, in particular those of his two sons. The only relevant Convention rights are those under Article 8.

23. In paragraph 17 of Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] UKHL 27 (17 June 2004) Lord Bingham said;

> "17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:
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> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

24. Following this step by step approach, it is plain that the Article 8 rights of the appellant and his two sons will be interfered with by his deportation and, of course, would be in accordance with the law.

25. Turning to steps (4) and (5), the relevant factors are contained in paragraph 8 of the judgement of Pitchford LJ set out above. The observations of the Court of Appeal in N (Kenya) v SSHD [2004] EWCA Civ 1094 at paragraphs 64, 65 and 83 (set out in paragraph 24 of Pitchford LJ's judgment) are particularly material to this part of the analysis. Pitchford LJ summarised the effect of these observations as follows:

> "Deportation in pursuit of the legitimate aim of preventing crime and disorder is not, therefore, to be seen as one-dimensional in its effect. It has the effect not only of removing the risk of reoffending by the deportee himself, but also deterring other foreign nationals in a similar position. Furthermore, the deportation of foreign criminals preserves public confidence in the system of control whose loss would itself tend towards crime and disorder."

26. It is step (5) in the process that is crucial in this context.

27. The best interests of the appellant's sons must be treated as a primary consideration. We have referred to the assessment of the independent Social Worker, Christine Brown, as in March 2011 above. The views quoted by Pitchford LJ should be read in the context of paragraph 6.5 in which she says "I would argue that in this instance that their welfare needs are met by their parents in an established, loving family home ... (the children) represent the good aspects and outcome of positive parenting."

28. The position has, of course, changed since then. However, on the evidence we have received, we are satisfied that there is still a strong bond between the boys and their father. We have little doubt that the boys will be just as devastated now as they would have been 3 years ago if their father is deported. Whilst we have no expert evidence with which to judge the position, all we would observe is that the boys are now of an age where they might understand the position when it is explained to them a little better than they might have understood a

few years ago and are of an age where travel to and from Turkey to see their father is more easily arranged. Whilst we recognise that nothing really replaces the advantage of child and parent having direct physical contact, various forms of electronic communication (for example, Skype) do exist whereby closer contact can be maintained than once was possible.

29. There is little evidence on which we can make findings as to the current effect of the appellant's removal on his wife, though we would accept that anything that upsets the boys will have at least an indirect on her enjoyment of her family life.

30. There is little evidence that the appellant has a family life in the UK of any great consequence with anyone other than his wife and his children. Whilst he is living with his brother and there are other members of his family in this country there is little evidence of the nature and extent of his relationship with any of them. There are a number of members of his family in Turkey and Cyprus. He is in touch with them. We have little evidence as to his private life in this country although we accept that he must have one. He was born in May 1969. He has been in this country for more than 20 years, since December 1993. He made an asylum claim which failed. By September 1995 his appeal rights were exhausted. He remained in this country illegally and was arrested for a road traffic offence in August 1998. He made a human rights application which was allowed on appeal in 2003 after which he was granted discretionary leave until October 2006. He made an application for British citizenship in March 2004 which was refused in February 2008, after his conviction in February 2005. The FTT described his immigration history as poor and that assessment must be correct.

31. The essential question, therefore, is whether the public interest in the need to reflect the public condemnation of serious criminality and to deter other foreign nationals from coming to the UK and committing serious crimes outweighs the strong Article 8 claims of, in particular, the appellant’s two sons.

32. In SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550 (22 May 2013) Laws LJ said in paragraphs 53 to 55;

> "53. The importance of the moral and political character of the policy shows that the two drivers of the decision-maker's margin of discretion – the policy's nature and its source – operate in tandem. An Act of Parliament is anyway to be specially respected; but all the more so when it declares policy of this kind. In this case, the policy is general and overarching. It is circumscribed only by five carefully drawn exceptions, of which the first is violation of a person's Convention/Refugee Convention rights. (The others concern minors, EU cases, extradition cases and cases involving persons subject to orders under mental health legislation.) Clearly, Parliament in the 2007 Act has attached very great weight to the policy as a well justified imperative for the protection of the public and to reflect the public's

proper condemnation of serious wrongdoers. Sedley LJ was with respect right to state that "[in the case of a 'foreign criminal' the Act places in the proportionality scales a markedly greater weight than in other cases".

54. I would draw particular attention to the provision contained in s.33(7): "section 32(4) applies despite the application of Exception 1...", that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed.

SUMMARY

None of this, I apprehend, is inconsistent with established principle, and the approach I have outlined is well supported by the authorities concerning the decision-maker's margin of discretion. The leading Supreme Court cases, ZH and H(H), demonstrate that the interests of a child affected by a removal decision are a matter of substantial importance, and that the court must proceed on a proper understanding of the facts which illuminate those interests (though upon the latter point I would not with respect accept that the decision in Tinizaray should be regarded as establishing anything in the nature of general principle). At the same time H(H) shows the impact of a powerful public interest (in that case extradition) on what needs to be demonstrated for an Article 8 claim to prevail over it. Proportionality, the absence of an "exceptionality" rule, and the meaning of "a primary consideration" are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision-maker's margin of discretion: the policy's source and the policy's nature, and in particular to the great weight which the 2007 Act attributes to the deportation of foreign criminals."

33. Whilst each case depends on its own facts, it is clear from that case that a “very strong” Article 8 claim is required to displace the normal consequence of deportation for criminal offending.

Decision and reasons

34. We are prepared to accept that the Article 8 considerations concerning the boys are as strong now as they were three years ago, only observing that maintaining contact from a distance might be more easily achieved now than it would have been then. However, when balanced against the extremely serious criminality of which the appellant was convicted, reflected in an eventual sentence of 12

years imprisonment, we are of the view that the public interest element to which we have referred decidedly outweighs those considerations and any Article 8 considerations affecting the appellant personally or his wife.

35. Accordingly, in our judgment, it would be a proportionate interference with the Article 8 rights of the appellant, his wife and children to remove him from this country. The respondent's decision to do so is, accordingly, lawful and the exception in s 33(2) of the UK Borders Act 2007 does not apply.

Anonymisation

36. We consider that it is necessary to anonymise this determination in order to protect the interests of the appellant's wife and sons.

37. We make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant or any member of his family.

Outcome

38. For the reasons we have given, we dismiss the appellant’s appeal.

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Signed Date 27 January 2014
Upper Tribunal Judge Moulden