Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/23322/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 June 2014	**On 18 July 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN
UPPER TRIBUNAL JUDGE COKER

Between

ENTRY CLEARANCE OFFICER - ISTANBUL

Appellant

and

H A
(Anonymity Direction Made)

Respondent

Representation
For the Appellant: Ms P Hastings a Senior Home Office Presenting Officer
For the Respondent: The sponsor. The Respondent was not legally represented

DETERMINATION AND REASONS

1. The appellant is the Entry Clearance Officer in Istanbul ("the ECO"). The respondent is a citizen of Turkey who was born on 3 April 1988 ("the claimant"). On 4 March 2014 we heard the ECO's appeal against the decision of First-Tier Tribunal Judge Finch ("the FTTJ") to allow, on Article 8 human rights grounds, the claimant's appeal against the ECO's decision of 10 October 2012 to refuse him entry clearance to the UK for settlement with his wife and sponsor, S A ("the sponsor").

2. We concluded that the FTTJ had erred in law and set aside her decision for the reasons set out in the Error of Law Decision and Directions contained in the Appendix to this determination. We preserved specified findings of fact made by the FTTJ and gave directions.

3. The claimant was legally represented at the hearing before the FTTJ. He was not represented at the hearing before us on 4 March 2014 although the sponsor attended. On that occasion she explained that she and the claimant could no longer afford to pay the solicitors who had been acting for them and did not think that it would be possible to obtain legal aid. The sponsor now tells us that whilst she has been to see solicitors legal assistance is still unaffordable and she has received what we regard as questionable advice that the claimant does not need legal representation if she attends the hearing on his behalf.

4. On the morning of the hearing the sponsor gave us copies of correspondence passing between her and her MP, Harriet Harman MP, a letter to Harriet Harman MP from the Department for Work and Pensions, a notice of appointment in connection with her application for Personal Independence Payment and a hospital appointment letter to her from Kings College Hospital NHS Foundation Trust. Although these had been submitted late, Ms Hastings did not object and we admitted them.

5. We explained the procedure to the sponsor and invited her to give evidence. She showed considerable spirit in giving evidence and making points on behalf of the claimant despite the fact that, whilst we did our best to put her at ease, she still found the proceedings intimidating. It soon became clear that if we were to draw out her evidence it would be necessary to ask her relevant questions. This we did. She was cross examined by Ms Hastings and we gave her the opportunity to add whatever she wished. Her evidence is set out in our record of proceedings.

6. The sponsor had come to the Tribunal with a friend who, at the sponsor's request, remained outside the hearing room. We asked the sponsor whether she wanted the friend to give evidence. The sponsor was uncertain and told us that the friend's first language was Turkish and her English was not good. The friend was invited into the hearing room and we spoke to her. It became clear that her English would not be good enough for her to give evidence without an interpreter. No interpreter had been requested in advance. We asked the sponsor what her friend might be able to say and it was apparent that she would be able to add little to the sponsor's evidence from her personal knowledge. The sponsor agreed that her friend should not be called to give evidence.

7. Ms Hastings relied on the refusal decision and the evidence before us. She noted the findings of fact preserved from the determination of the FTTJ. She argued that notwithstanding the positive credibility finding the claimant faced difficulties with his application. However, she accepted that the sponsor had done her best without legal representation. She argued that this was not a case where it was necessary to go beyond the Article 8 provisions in the Immigration Rules. There

were no "arguably good grounds" for taking this step. The claimant and the sponsor had not seen each other for a long time, including a period of two years before the decision. It appeared that he was likely to be called up for Turkish military service. She accepted that the relevant authority was Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640. There was no evidence from the claimant as to what he could contribute to family life with the sponsor and her two children. On the sponsor's evidence he had not had much time to engage with the children. There was an information vacuum. The evidence did not show that family life was engaged. It would not be disproportionate to keep the claimant apart from the sponsor and the children. In reply to our question, Ms Hastings said that the sponsor's credibility was not disputed.

8. The sponsor explained her earlier statement that the claimant was inarticulate. It was not that he could not express himself, more that he did not talk a lot. Social Services were only involved in helping her and the children because of problems which would be much reduced if the claimant was able to join her and help with the children. She was in no doubt that the situation would be much improved if the claimant was allowed to join her and the children. She had seen what his help could achieve during the four months they had lived with him in Turkey. She had been diagnosed as suffering from epilepsy only between 12 and 18 months ago. She had agreed with the claimant that they did not want any more children. She was devoted to the claimant and were it not for the children would go to live with him in Turkey. However, the children had settled lives here. We were asked to allow the appeal.

9. We reserved our determination.

10. We preserved the findings made by the FTTJ in paragraphs 10 and 16 to 21 of her determination. She said;

> "10. The sponsor accepted in her oral evidence that she was not working at the date of the decision and was not working now and that she continues to be in receipt of welfare benefits. In addition, her benefits were not those referred to in paragraph E-ECP. 3.3 of Appendix FM and at the time of the decision her support worker had not applied for Personal Independence Payment and carer's allowance. (Even now she was not in receipt of these benefits and is waiting for an interview to see whether she qualifies for them.) Taking this and the totality of the evidence into account and applying a balance of probabilities I find that the Appellant was not entitled to entry clearance as the partner of a British citizen under the Immigration Rules.
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> 16. When considering proportionality I have taken into account the fact that I found the sponsor to be an honest witness and, therefore, I accept that she is emotionally dependent upon the Appellant and also believes that he will be able to support her in her care of her son, if he is permitted to join her in the United Kingdom.

17. I also accept on the basis of her own evidence that she is very socially isolated and that her own family are not offering her any support in caring for her children or ensuring that she can cope with her own medical conditions. At most, she appears to have one friend who lives locally. She attended court with the sponsor and is said to offer her some emotional support. However, because of her own family responsibilities she is not able to offer her practical support.

18. Instead, the sponsor is dependent upon one support worker who helps her telephone those in authority and make any necessary appointments and another who runs a poverty focus group. But they only see the sponsor once a week.

19. The rest of the time, she has to cope on her own even when she has seizures at night. The medical evidence also indicates that there have been ongoing concerns about her mental health. One Support, the group who have been supporting the sponsor, partly attribute her present difficulties to the absence of the Appellant. There was also evidence to confirm that prior to the refusal the sponsor was being provided with counselling at the Dun Cow Surgery and had also been referred to the Neuroradiology Department at Kings College Hospital. In her oral evidence the sponsor also explained how she suffered from depression and panic attacks. This was confirmed in a letter from the Aylesbury Partnership which said that she had suffered from depression and anxiety for a number of years and that she may also suffer from fibromyalgia.

20. The letter from Lister Primary Care Centre indicates that J's school was concerned about his behaviour in 2011 – 2012 and that he had been referred to the Centre. The letter indicates that J was very anxious about the sponsor's physical health. They are was also a Southwark Common Assessment, dated 19th of January 2012, which noted that CAMHS had been involved with both children in the past and that, in particular, the sponsor was struggling to deal with J's challenging and disruptive behaviour.

21. I have also taken into account that the sponsor said that the Appellant was in regular basis (sic) as a builder in Cyprus and that her brother-in-law would employ him if he was granted entry clearance."

11. We also find the sponsor to be a credible witness. Ms Hastings did not dispute her credibility. We accept the truth of her evidence in relation to relevant matters either not covered by the findings of the FTTJ or not covered by the findings which we have specifically preserved. These findings relate to circumstances appertaining at the time of the ECO's decision (DR (ECO: post decision evidence) Morocco [2005] UKAIT 00038). The claimant is Turkish and his first language is Turkish. However, he has passed the City and Guilds Entry Level I Certificate in ESOL International (reading writing and listening) English. The sponsor describes his English as "quite good". Whilst the sponsor has lived in the UK all her life she also speaks Turkish. Both her parents were of Turkish Cypriot origin. Her son J

does not know his father and has never seen him. Her daughter S did not see her father for about four years and now sees him only intermittently and reluctantly. The sponsor and the claimant have agreed that they will not have any more children and the claimant wishes to adopt J who, despite the distance and length of separation, adores him. Both children got on very well with the claimant during the four-month period they spent with his family in Turkey, particularly J, and the sponsor believes that the claimant is the role model J is looking for and needs. At some point it is likely that the claimant will have to do his compulsory one year military service in Turkey. The sponsor's epilepsy is nocturnal but largely controlled by medication. The claimant is aware of this; the sponsor had a seizure whilst she was living with his family in Turkey.

12. The sponsor would like to work as a teaching assistant and believes that she may be able to do so with the help and support of the claimant. The job offer made to the claimant referred to at the hearing before the FTTJ was from the sponsor's brother-in-law. The offer is still open and the sponsor has had other job offers for him from other members of the Turkish speaking community.

13. It is common ground that the claimant is not entitled to entry clearance as the partner of a British citizen under Appendix FM of the Immigration Rules.

14. The summary of the effect of Gulshan prepared by the author of that determination states;

> *"On the current state of the authorities:*
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> *(a) the maintenance requirements of E-LTRP.3.1-3.2 stand although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;*
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> *(b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);*
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> *(c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is*

necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

The Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Thus the judge should have considered the Secretary of State's conclusion under EX.1 that there were no insurmountable obstacles preventing the continuation of the family life outside the UK. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

15. We find that there are arguably good grounds for granting the claimant leave to enter and settle outside the provisions of the Immigration Rules and that it is necessary for us to go on to consider whether there are compelling circumstances not sufficiently recognised under the Immigration Rules. Although this is not a case where Section EX of Appendix FM can be applied it is relevant to our consideration of the Article 8 grounds outside the Immigration Rules. It was not addressed in terms by the ECO although the Entry Clearance Manager did say that the refusal of the application would not prevent the claimant and the sponsor being able to continue to see each other or to reside with each other in the third country.

16. Ms Hastings did not challenge the credibility of the sponsor's account or evidence, relying upon what she described as an "evidential vacuum". Although we recognise that there is little documentary evidence supporting the application by the claimant, we have taken very careful note of the sponsor's evidence. This was not merely evidence as to her "belief" in their relationship but was evidence as to the concrete nature of their relationship, his relationship with the children and with her, her relationship with his family and the time they had spent together. There was no challenge to this evidence by Ms Hastings; it was not put to the sponsor that this was no more than misguided belief or that her views could not be relied upon as to his intentions. We found no reason to doubt the sponsor's assessment of their personal relationship and their family relationship. We find that the claimant and the sponsor are in a genuine and subsisting relationship. The sponsor is a British citizen settled in the UK. Whilst the sponsor would be prepared to go and live with the claimant in Turkey she is not prepared to take her children with her or leave them behind and it would not be reasonable to expect her to do so. They are British citizens who have lived here all their lives. Their friends, relatives and connections are here. The sponsor's daughter was born in July 1998 and her son in July 2004. They have been educated here, speak only little Turkish and are being provided with appropriate help for the difficulties they face. We find that there are insurmountable obstacles to family life continuing outside the UK.

17. This finding is relevant both to the preliminary question of whether we need to consider direct Article 8 grounds "outside" the Immigration Rules and, having answered that question in the affirmative, whether there are compelling circumstances not sufficiently recognised under the Immigration Rules.

18. In her letter to her MP the sponsor has raised concerns that the Tribunal might have drawn stereotypical and discriminatory conclusions from the difference in ages between her and the claimant (he was born in 1988 and she was born in 1966) and that he was using her to come to the UK and obtain British citizenship. It is an accusation about which she is understandably sensitive and she may have misunderstood the reasoning behind questions which needed to be asked. We have come to no such conclusions. On the contrary we find that there are strong indications which have led us to the conclusion that they are in a continuing, genuine and subsisting marriage and relationship. Both of them speak the same language and have the same Turkish heritage. The sponsor and her children lived with the claimant and his family in Turkey for some four months. Their relationship continues notwithstanding the long separation and the delays of the application and appeals process.

19. We find it probable that if the claimant obtains entry clearance and is able to settle here there will be wider benefits going beyond enabling him and the sponsor to live together. He was working at the date of the decision and is working now, as a builder. He has a genuine offer of work here and even if that were not to materialise we accept the sponsor's evidence that work can be found for him within the Turkish speaking community. Paid employment for the claimant should reduce the sponsor's need to rely on benefits. The relationship he has built up with J in Turkey and over the telephone should provide J with a father figure and assist him with his difficulties. Whilst the claimant and S are not as close their relationship is a good one.

20. On all the evidence, including our findings and those of the FTTJ, which we have set out, we find that the first four of the five Razgar (R v SSHD ex parte Razgar [2004] UKHL 27) tests are answered in the affirmative and that this appeal turns on the last, proportionality. We of course take into account that the sponsor is currently in receipt of public funds and that we are to attach considerable weight to the requirements of the Immigration Rules. We find that to the standard of the balance of probabilities the claimant has established that it would be a disproportionate interference with his right to respect for family life including the family lives of the sponsor and the two children not to grant him leave to settle with them in the UK. By the same token we find that there are compelling circumstances not sufficiently recognised under the Immigration Rules which would result in the denial of entry clearance infringing the Article 8 human rights of the claimant, the sponsor and the children. In reaching this conclusion we reflect the fact that the interests of the children are a primary, but not paramount, consideration.

21. The FTTJ made an anonymity direction. That direction continues in force in order to protect the interests of the children. 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 claimant, the sponsor or any members of their families.

22. Having set aside the decision of the FTTJ we remake that decision and allow the claimant's appeal on Article 8 human rights grounds

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Signed Date 19 June 2014

Upper Tribunal Judge Moulden

APPENDIX

ERROR OF LAW DECISION AND DIRECTIONS

1. The appellant (hereafter the ECO) appeals a decision of the First-tier Tribunal which allowed an appeal on human rights grounds by the respondent (hereafter the claimant) against a decision of an Entry Clearance Officer to refuse entry clearance as the spouse of a British Citizen present and settled in the UK.

2. Permission to appeal had been granted on the basis it was arguable that the First-tier Tribunal judge fail to identify the priority given to compliance with the requirements of the Immigration Rules so far as Article 8 is concerned and did not demonstrate the approach as set out in Nagre [2013] EWHC 720 (Admin).

3. The claimant was not legally represented before us; his wife appeared and was accompanied by her daughter and son. His solicitors submitted a Rule 24 response to the grant of permission to appeal and stated that they would not be appearing.

4. The First-tier Tribunal dismissed the appeal under Appendix FM on the grounds that the claimant did not meet the criteria for maintenance – the claimant's spouse was publicly funded. The claimant, in the Rule 24 response, does not dispute that finding.

5. Having found that the claimant did not meet the maintenance requirements of the Rules the First-tier Tribunal judge then considered the appeal on Article 8 grounds. Unfortunately, although allowing the appeal there was a lack of adequate reasoning in her findings: she has speculated as to the possibility of future development of the relationship between the claimant and the sponsor's children and has given no reasons for finding that the children will benefit from being brought up by their mother and the claimant other than a generalised comment that children benefit from being brought up by both parents; she makes no findings as to the intentions or views of the claimant and has failed to balance the lack of compliance with the Immigration Rules and the public interest.

6. For these reasons we are satisfied there is an error of law in the determination such that the decision is set aside to be remade.

DIRECTIONS

1. The claimant has leave to file such further evidence as considered relevant, such evidence to be filed and served 7 days prior to the resumed hearing.

2. Resumed hearing to be listed first available date after 4th June 2014.

3. The findings in paragraphs 10, 16 to 21 inclusive stand.

Date 11th March 2014
Judge of the Upper Tribunal Coker