Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09686/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 July 2015	**On 14 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY
DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR BILAL NEOZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Young of counsel
For the Respondent: Mr Tarlow, a Home Office Presenting Officer

DECISION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

Introduction

1. This is an appeal by the appellant. The appellant is a citizen of Turkey and his date of birth is 20 April 1984. He is married to Elif Has (aka Kilinc)

who is a British and Turkish citizen. Her date of birth is 14 August 1980. They married on 24 February 2012. Has had two children by a former marriage, Dilan and Damla who were 10 and 15 years of age at the date of the First-tier Tribunal hearing

Immigration History

2. The appellant arrived in the United Kingdom in November 2009. He was cautioned and given form IS151A in October 2010. He applied for leave to remain on the basis of private/family life but this was rejected by the respondent on 18 February 2014. On 30 June 2014 he made a claim for International Protection (asylum) on the basis of a fear of persecution in Turkey and leave to remain on the basis that removal would breach his Article 8 rights. The respondent rejected that claim on 29 October 2014, refusing to grant asylum under paragraph 336 of the Immigration Rules (HC395) (as amended) ('the Immigration Rules') or leave to remain under Article 8. The appellant appealed against this decision to the First-tier Tribunal.

The First-tier Tribunal Judge's Decision

3. The First-tier Tribunal, Judge Robinson ('the judge'), dismissed the appellant's appeal on the asylum, Article 3 and Article 8 grounds. The judge found that the appellant had not demonstrated a well-founded fear of persecution or that there was a reasonable likelihood that he was at risk of ill treatment if he were to be returned to Turkey. With regard to Article 8, the judge considered the case under the Immigration Rules but records that it was not argued that the appellant met the requirements of those rules. The judge therefore considered his claim under the European Convention on Human Rights outside of the Immigration Rules. He found that the respondent's right to enforce immigration control outweighed the appellant's right to family life with his wife and her children.

Permission to Appeal

4. The appellant applied to the First-tier Tribunal for permission to appeal on both asylum and article 8 grounds. Limited permission to appeal was granted by First-tier Tribunal Judge Osborne solely on article 8 grounds. Judge Osborne was satisfied that the findings of the First-tier Tribunal in relation to the appellant's asylum claim were sustainable on the evidence before the judge and that the grounds seeking permission to appeal were no more than a disagreement with judge's findings. In relation to the Article 8 claim the judge granted permission to appeal on the basis that it was arguable that the judge had made an error of law in failing to make a reasoned decision in relation to the best interests of the children and in failing to consider s117 of the Nationality, Immigration and Asylum Act 2002.

Discussion

5. At the hearing we heard submissions from Mr Young on behalf of the Appellant and Mr Tarlow on behalf of the respondent. Mr Young submitted that the judge had erred by failing to take account the case of ZH (Tanzania) v SSHD [2011] UKSC 4 and the correct approach to decision making when considering the best interests of children. He argued that the judge had not addressed the best interests of the children and concentrated only on the appellant and his wife. Mr Young submitted that the matter should be adjourned if an error of law was found so that the Tribunal could be updated on the current position, and they needed time to explore evidence from, for example, a social worker. He did not have further evidence at the hearing and the appellant was not in attendance.

6. Mr Tarlow relied on the Rule 24 response. He accepted that there was no reference to ZH (Tanzania) v SSHD [2011] UKSC 4 in the reasons and decision but that taken as a whole the decision was a balanced determination and weighed the interests of the wife and children but took into account the appellant's poor immigration history and the need for effective immigration control. However,

the judge had found that the children's and wife's interests were outweighed by those factors. With regard to re-making the decision, if a material error of law was found, he submitted that there was nothing before the Tribunal to suggest that the facts had materially changed.

7. Both representatives were asked to make submissions on section 117B (6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), in particular the meaning of 'parental relationship'. Without quoting any authority, Mr Young invited the Tribunal to consider that parental relationship can extend to a step-parent. He referred us to paragraphs 6 and 7 of the appellant's wife's witness statement and submitted that parental relationship extends to a person who was a father figure to the two children.

Legal Framework

8. As a result of the amendments which came into force on 28 July 2014, inserted by section 19 of the Immigration Act 2014, the 2002 Act now requires the Tribunal to take certain factors into account when determining whether a decision made under the Immigration Acts breaches respect for private and family life. The decision in the instant case is a decision made under the Immigration Acts. The relevant provisions provide:

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

…

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

…

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully.

…

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

9. Article 8 of the ECHR states:

(i) Everyone has the right to respect for his private and family life, his home and his correspondence.

(ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is 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.

Error of Law

10. The jurisdiction of this tribunal on an appeal from the First-tier Tribunal is limited to points of law (s 11 of the Tribunals, Courts and Enforcement Act 2007). Generally the Upper Tribunal will not interfere with the decision of the First-tier Tribunal, if an error of law is found, unless that decision is material to the outcome of the appeal.

11. Having considered the grounds of appeal and the submissions of the parties we find that the judge has made a material error of law.

12. The judge failed to take into consideration section 117 of the 2002 Act which is an error of law. We do not consider, however, that on its own this would necessarily have been a material error of law.

13. The judge failed to consider sufficiently the best interests of the children. The judge adopted the correct approach, as enunciated by the House of Lords in **Razgar [2004] UKHL 27**, when determining Article 8 outside of the Immigration Rules.

14. However, at paragraph 62(2), when considering whether the interference would have consequences of such gravity as potentially to engage Article 8, (although finding that Article 8 was engaged) it is clear that the judge considered this only with regard to the appellant and his spouse. The judge accepted '*that the consequences of removal would be significant for the appellant and his spouse. I therefore answer this question in the affirmative.*' Having reached the conclusion that Article 8 was engaged this would not itself be a material error of law but demonstrates that the judge was considering primarily the effect of removal on the appellant and his wife.

15. At paragraph 72 the judge found '…*The children may have grown fond of the appellant but it is clear that their own father is involved with their care and upbringing*

and even if the appellant were required to leave the United Kingdom the children would remain in the shared care of their birth parents. In my view this would be in their best interests'. This is the only analysis in the decision of the interests of the children. It is evident from the comments in paragraph 75 that in weighing the factors the judge did not treat the interest of the children as a primary consideration and paid insufficient regard to their best interests ' *…It is important to note that the family and private life enjoyed by the appellant and his wife has developed during the period when he had no leave to remain. I take the view that little weight should be placed on family and community ties in these circumstances'.*

16. The judge was referred to the case of ZH (Tanzania) v SSHD [2011] UKSC 4 by the Appellant's representative. No reference[1] is made to that case or to the duty under s55 of the Borders, Citizenship and Immigration Act 2009 to consider the best interests of the children. There is no evidence in the decision that when the judge undertook consideration of the effect of the appellant's removal on the children their best interests were treated as a primary consideration.

17. Accordingly, the decision of the First-tier Tribunal contained a material error of law and is set aside but the findings of fact made by the judge stand for the reasons given below.

18. Mr Young invited us to adjourn for a re-hearing for further evidence to be obtained and adduced, in the event that we decided that there was a material error of law. He submitted that the Tribunal needed to be updated and they needed time to explore evidence from, for example, a social worker. The appellant had not made a proper application pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, and the defendant had given no prior indication that this was his intention, Mr Young did not indicate the relevance of any such evidence and no indication was given that there had been a material change in the circumstances that were before the First-tier Tribunal

[1] Failure to cite the case or s55 is of course not an error

judge. We therefore refused to admit new evidence and decided to make a fresh decision preserving the findings of the judge.

Decision

19. The First-tier tribunal had to decide the best interests of the appellant's wife's children as part of the balancing exercise required under Article 8. In particular he had to decide whether removal of the appellant would be proportionate having regard to the Respondent's obligations towards Dilan and Damla.

Preserved Findings

20. The findings of the judge in paragraphs 61 – 65 (the first of the 4 questions posed in Razgar) are preserved. The findings of the judge on the proportionality of the appellant's removal in respect of his and his wife's Article 8 rights are preserved. In this regard the judge made the following findings:

> 67 I consider the family life in the context of his age, health and personal circumstances, his immigration status and immigration history. I also take account of the length of his stay in the United Kingdom, his links with the community insofar as they are known and the nature of his relationship with others.
>
> 68 For the whole period of his stay in the UK the appellant has lived here unlawfully, i.e. without any valid leave. This is a very strong argument in favour of the respondent who has a duty to implement and enforce immigration laws.
>
> 69 The appellant has submitted no letters of support from family members or friends in the UK. This is an important omission because he claims to have several family members in the UK including 3 siblings. He claims his wife would not be able to accompany him to Turkey because her children are UK nationals and have regular staying contact with their father (his spouse's former partner).

70 The appellant's health condition is not supported by any medical evidence, the appellant has received treatment privately in the UK and there is no reason to suppose that appropriate medical treatment is not available in Turkey.

71. It is claimed that the appellant's wife would be unable to join her husband in Turkey for several reasons. She has a home and employment in the UK, her children are UK nationals and are in full time education here, the children stay with their father at weekends and he would not permit them to be taken out of the UK.

72. I accept that it would be unreasonable to expect the appellant's wife to live in Turkey for reasons given by her. However it is apparent from the facts of this case that the appellant has never had leave to enter or remain in the UK and the couple were aware of his circumstances when they entered into their relationship. The children may have grown fond of the appellant but it is clear that their own father is involved with their care and upbringing and even if the appellant were required to leave the United Kingdom the children would remain in the shred care of their birth parents. In my view this would be I their best interests.

73 The appellant is an adult male who is now 30 years old who came to the UK when he was 25. He has spent the majority of his life in Turkey and his parents live there. His main language is Turkish and he speaks Kurdish. I take the view that he would be able to access appropriate medical treatment and medication for his condition in Turkey. He appears to be fit to travel. He has not acquired nay property or assets in the UK.

74 The appellant's wife may be able to visit the appellant in Turkey if her former husband agrees to look after the children for longer than he does at present. It is not clear what the contact arrangements are in the school holidays. She speaks Turkish and Kurdish and should have no practical difficulties travelling to Turkey.

75, I have taken all known factors into account and have weighed these against the respondent's duty to maintain an effective and fair system of immigration control. It is important to note that the family and private life enjoyed by the appellant and his wife has developed during the period when he had no leave to remain. I take the view that little weight should be placed on family and community ties in these circumstances.

76. I have carefully considered the appellant's strong connections with his country of origin. It appears to me that it would not be unreasonable to expect the appellant to return to Turkey where he has family connections and he is familiar with the language, culture, and environment. Objective evidence shows that the appellant would be able to access appropriate medical in any of the major cities.

78 The appellant's poor immigration history is a strong argument in the respondent's favour. It is apparent that he was willing to enter into marriage with a second cousin in order to obtain status here. It is of concern that social services had to intervene to protect the young woman who was being offered for marriage.

79 In summary I find that the respondent's right to regulate immigration to the United Kingdom and her responsibility to enforce immigration laws fairly and effectively outweigh the appellant's righty to family life with his wife and her children here. I find that the decisions were lawful under the immigration rules and that due regard was taken of all the circumstances known at the time of the decision. I have undertaken the balancing exercise under Article 8(2) on the basis of the circumstances known at the appeal hearing.

21. The findings and decision set out in the above passages are well reasoned and the decision is one that a reasonable Tribunal judge could come to. We endorse those findings and the adopt the decision adding, in addition, that the judge not only was entitled to *'take the view that little weight should be placed on family and community ties in these circumstances'* but was in fact required to do so by virtue of s117B of the 2002 Act which **requires** that little weight should be placed upon a relationship formed with a qualifying partner that is established while the applicant is unlawfully in the UK. In R (on the application of Mahmood) v Secretary of State for the Home Department [2001] the court held, '*The state has a right under international law to control the entry of non-nationals into its territory subject always to its treaty obligations. Article 8 does not impose on the state any general obligation to respect the choice of residence of a married couple'*.

The best interests of the children

22. We commence by considering s117B (6) of the 2002 Act which provides:

> In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

23. If this provision applies the public interest in effective immigration control would not require the appellant's removal. The appellant is not liable to deportation. It was accepted by the judge that the children would not be able, and therefore it would not be reasonable to expect them, to leave the United Kingdom. On that basis the second limb of the provision is met. As set out above we invited submissions on the meaning of 'parental relationship'. Mr Young invited us to consider that this included a step-parent or a person treated as a father figure. The children have two natural parents both of whom are involved in their upbringing. The appellant has not adopted the children.

24. There is no definition in the 2002 Act or in the Interpretation Act 1978. Applying the literal rule of statutory interpretation to the words, the natural or ordinary meaning of parental relationship is, in our view, a person who has the rights, duties, powers, and responsibilities that a parent of a child has. The appellant does not have any parental rights or duties in respect of the children.

25. We have considered, but have not gained much assistance from, the Immigration Bill: European Convention on Human Rights: Memorandum by the Home Office (October 2013) which set out in relation to s117B(6) at para 74. *'This is self-explanatory and is intended to broadly reflect case law. It provides that certain countervailing factors will not justify removal in an immigration case (it does not apply to criminals or other non-conducive deportations)'*

26. We have also considered paragraph 6 (Interpretation) of the Immigration Rules which provides:

    'a parent' includes

    (a) The stepfather of a child whose father is dead…

27. We consider that the definition in the Immigration Rules supports the interpretation derived from applying the natural and ordinary meaning of the words. We do not consider that s117B(6) applies to the appellant as he does not have a parental relationship with the children within the meaning of the 2002 Act in the strict sense referred to above.

28. We turn to consider the best interests of the children applying the relevant principles. In ZH (Tanzania) v SSHD *[2011] UKSC 4* the Supreme Court noted that s 55 of the Borders, Citizenship and Immigration Act 2009 was enacted to incorporate the UK's obligation under article 3(1) United Nations Convention on the Rights of the Child that, *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'*

29. The court held:

    26 'This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first…'

    33. 'We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's

appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that.'

30. In JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC) the Upper Tribunal reviewed the relevant principles and correct approach. The Tribunal set out ta paragraph 9:

'More detailed prescription of the correct approach to section 55 and its interaction with Article 8 ECHR has followed. In Zoumbas v Secretary of State for the Home Department [2013] 1 WLR 3690, the Supreme Court recently considered the interplay between the best interests of the child and Article 8 ECHR, rehearsing what might be termed a code devised by Lord Hodge comprising seven principles:

(1) The best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR;

(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.'

31. Applying the approach set out above we take into consideration the findings of the judge, the appellant's and his wife's witness statement and the grounds for permission to appeal. There are two children, Dilan and Damal aged 15 and 10, who are from the appellant's wife's former marriage. They are both British Nationals. The appellant started living with the children as a family when he married their mother, Elif Has, on February 2012 nearly 3 ½ years ago (para 13 of the decision). The children's father is involved with the care of the children. He has them at weekends picking them up on Fridays and returning them on Sundays (para 15). The appellant's wife's evidence, as set out in her witness statements (para 6) is that the children love the appellant and treat him as a second father, he does lots of things with them and is involved in everything in their lives. The judge found that it would be unreasonable to expect the children to accompany their mother and step father to Turkey (para 65). There was some discrepancy in the evidence with regard to the extent of appellant's involvement. At para 8 the judge records his oral evidence as *'he takes them to school and picks them up'*. At paragraph 13 the judge records that the appellant's wife said in evidence in chief that the appellant takes them to school whereas at paragraph 15 the appellant's wife said, in response to questions from the Tribunal, that she usually took them to school and that the appellant sometimes picks them up. It is likely that this discrepancy led to the judge noting, in paragraph 44, that the appellant *'appeared to overstate the tasks he performed for them'*. Notwithstanding any discrepancies we accept that the appellant is involved in the children's lives and that they have formed an emotional bond with him.

32. In terms of the best interests of the children this involves safeguarding and promoting the welfare of the children including preventing impairment of their health or development. In this case the appellant has been involved in the children's lives for a relatively short period of time. He is not a primary carer and does not have parental responsibility. The children are not dependent on the appellant. They spend weekends with their father. If the appellant were removed the children would still have both of their parents involved in their care and

upbringing. What effect would removal of the appellant have on the children? The effect of removal on the children was stated to be that:

- *'they would be very upset if he had to leave'* (para 6 WS appellant's wife)
- *'It would be unreasonable and disproportionate to separate [the appellant] from his wife and children who had become used to him'* (para 23 of the First-tier Tribunal decision)
- *'the departing even if it is for a short period the wife and children's life would be disrupted. The children would clearly be upset by this change'* (grounds for permission to appeal).
- *If the appellant was forced to return to Turkey it would destroy family life* (appellant's WS para 3j)

33. We have considered section 117 of the 2002 Act. Although the public interest is statutorily enshrined in s117B these factors are not the only factors to be considered but they form a bedrock for consideration. Sufficient weight must be accorded to the public need for maintenance of effective immigration.

34. In MH (Pakistan) [2011] CSOH 143 it was held that the respondent's entitlement to take into account an appellant's poor immigration history, the precariousness of the position when a relationship was entered into and the need to maintain immigration control were all confirmed in ZH (Tanzania).

35. Weighing in favour of removal we consider that the appellant has a very poor immigration history. He entered the UK illegally in 2009 and has remained unlawfully since. He attempted to 'sort out his status' (appellant's WS para 3g) by marrying his second cousin. That failed when Social Services intervened to prevent the marriage. He applied for leave to remain on the basis of private/family life but this was rejected by the respondent on 18 February 2014. In a further attempt to remain in the UK he made an unmeritorious claim for asylum in June 2014 some 5 ½ years after entering the UK.

36. He entered in to a relationship with his wife at a time that they both must have known that he was in the UK unlawfully. Little weight is to be accorded to the relationship with his wife given the circumstances it was formed in. However, this cannot be held against the children in assessing their interests as they have no knowledge of his immigration status.

37. In weighing those factors we do not weigh lightly the emotional upset that would be caused to the children by the appellant's removal. However, we do not consider that this will have a long term effect on their welfare. Their best interests will continue to be met through their relationships with their natural parents. Some contact can be maintained if the appellant were removed through letters, electronic communications, visits etc.

38. Having weighed all the factors set out above the cumulative effect of the factors in favour of removal and the public interest in maintenance of effective immigration controls outweighs the interests of the children. We find that the interference with the children's Article 8 rights is proportionate to that legitimate aim. We find that the interference with the appellant's and his wife's Article 8 rights is proportionate to that aim for the reasons set out above. We find that his removal would not be disproportionate.

Conclusions

39. There was a material error of law such that the decision of the First-tier Tribunal is set aside.

40. We have decided to re-make the decision with the preserved findings. We dismiss the appeal against the respondent's decision to refuse to give the appellant leave to remain on the grounds that his rights under article 8 would be infringed.

41. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all

the circumstances and evidence we do not consider it necessary to make an anonymity direction.

Notice of Decision

The First-tier Tribunal erred in law such that the decision in respect of the Article 8 claim is set aside to be remade.

We re-make the decision.

The appeal against the decision to refuse the appellant's claim for leave under Article 8 is dismissed.

Signed

Deputy Upper Tribunal Judge Ramshaw Date 6 August 2015