



IAC-AH-DP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/11646/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 4th September 2015**

**Decision & Reasons Promulgated
On 17th September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**T T
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Davis of Counsel instructed by Duncan Lewis Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge of the First-tier Tribunal Youngerwood promulgated on 22nd April 2015.
2. The Appellant is a male Turkish citizen born 20th October 1985 who arrived in the United Kingdom on 11th July 2014 and claimed asylum on 19th July 2014. The claim was based upon the Appellant's Kurdish ethnicity. He claimed to be a member of the Democratic People's Party (DEHAP). He

claimed that he had been detained and tortured by the Turkish authorities on four occasions and accused of membership of the PKK.

3. He was released from his last detention having agreed to work as a police informant against the PKK. He was not given any specific time to report back to the police, and fled Turkey on 5th July 2014.
4. In addition to his asylum claim the Appellant relied upon Articles 2, 3 and 8 of the 1950 European Convention on Human Rights (the 1950 Convention). His Article 8 claim was based upon his family life with his wife who is a British citizen, and his two step-sons who are also British citizens.
5. The application was refused on 24th November 2014, and the Respondent's reasons for refusal are contained in a letter of that date.
6. In brief summary the Respondent accepted the Appellant's nationality and identity but did not accept that he had been a member of Kurdish political parties in Turkey, nor was it accepted that he had been detained and tortured by the Turkish authorities.
7. The Respondent concluded that the Appellant would not be at risk if returned to Turkey and therefore he was not entitled to asylum or humanitarian protection, and his removal from this country would not breach Articles 2 or 3 of the 1950 Convention.
8. In relation to Article 8 it was not accepted that the Appellant's relationship with his wife is genuine and subsisting, therefore the Respondent considered that the requirements of Appendix FM were not satisfied. The Respondent did not accept that the Appellant satisfied the requirements of paragraph 276ADE in relation to his private life.
9. The Appellant's appeal was heard by Judge Youngerwood (the judge) on 1st April 2015. After hearing evidence from the Appellant and his wife, the judge did not accept that the Appellant had made a credible claim, and did not accept that he would be at risk if returned to Turkey. Therefore his appeal was dismissed in relation to asylum, humanitarian protection, and Articles 2 and 3 of the 1950 Convention.
10. The judge decided that he could not consider section EX.1 of Appendix FM, because the Appellant had not made a valid application for leave to remain as required by R-LTRP1.1(b) of Appendix FM.
11. Therefore the judge considered Article 8 outside the Immigration Rules and found that there would be no breach, on the basis that the relationship between the Appellant and his family in the United Kingdom could be maintained by the family visiting him in Turkey. The judge noted that there had been a previous appeal involving the Appellant, following refusal of his application for a visit visa, and that the judge who heard that previous appeal made a finding that the Appellant and his wife were married and in a genuine relationship. This conflicted with the contention in the Respondent's reasons for refusal letter dated 24th November 2014 that there was no genuine relationship, and at the hearing before the

judge the Respondent conceded that following the principles in Devaseelan [2002] UKIAT 00702 the Appellant did have a genuine family life, with his wife and step-children, and the judge made a finding to this effect.

12. The dismissal of the appeal caused the Appellant to apply for permission to appeal to the Upper Tribunal. There was no challenge to findings made by the judge that the Appellant would not be at risk on return nor was there any challenge to the findings made as to Article 8 outside the Immigration Rules.
13. The Appellant challenged the judge's finding that he could not consider EX.1 because the Appellant had not made a valid application for leave to remain. It was accepted that the Appellant had not made such an application, but pointed out that the judge had not taken into account GEN1.9(a)(i) which states that the requirement to make a valid application will not apply when the Article 8 claim is raised as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused.
14. It was contended that the Appellant had made an Article 8 claim as part of his asylum claim and therefore the judge had erred materially.
15. Permission to appeal was granted by Judge of the First-tier Tribunal Astle who found it arguable that the judge had failed to take into account GEN.1.9 of Appendix FM. Following the grant of permission the Respondent issued a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. It was accepted that the judge was correct under the Devaseelan principles to find that there was genuine family life between the Appellant, his wife and step-children. It was accepted that the judge had failed to consider EX.1, but it was contended this was not a material error, as any such application was unmeritorious and bound to have failed, as the Appellant was simply trying to remain in the United Kingdom without having to satisfy the financial requirements of Appendix FM.
16. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside and re-made.

The Upper Tribunal Hearing

Error of Law

17. I firstly heard submissions from Mr Davis who relied upon his skeleton argument dated 3rd September 2015. Mr Davis argued that it was in effect conceded by the Respondent that the judge had erred in law in failing to consider EX.1, and it was clear that the judge had materially erred, by failing to take into account GEN.1.9. Mr Davis submitted that it was clear that this was the only reason that the judge found for not considering EX.1.

18. Mr Melvin submitted written representations dated 4th September 2015 accepting that the judge had erred in not considering EX.1 but contended that the error was not material. In his oral submissions Mr Melvin accepted that the error was material.
19. In my view the judge materially erred as contended on behalf of the Appellant. This was conceded on behalf of the Respondent at the hearing before me.
20. The judge erred by not taking into account GEN.1.9(a). It is accepted that the Appellant did not make a valid application for limited leave to remain as a partner, but the provisions of GEN.1.9(a) state that this requirement will not apply if Article 8 is raised as part of an asylum claim. I find that Article 8 was raised as part of the Appellant's asylum claim, and this was acknowledged by the Respondent in the reasons for refusal letter dated 24th November 2014 at paragraph 17, and the Respondent recorded that the Appellant claimed that removing him to Turkey or requiring him to leave the UK would be a breach of his Article 8 ECHR rights because of his relationship with his wife and her children.
21. It is apparent that it was conceded on behalf of the Respondent before the judge that the Appellant had a genuine family life with his wife and two step-children and the judge would have considered EX.1 had it not been for his error in believing that there needed to be a valid application for leave to remain before he could do so.
22. I set aside the decision of the First-tier Tribunal in relation to EX.1. There had been no challenge to the findings made in relation to risk on return, and therefore the findings that the appeal was dismissed in relation to asylum, humanitarian protection, and Articles 2 and 3 were preserved. There had been no challenge to the findings made in relation to Article 8 outside the rules, and therefore those findings were also preserved.

Re-Making the Decision

23. I indicated that the decision would be re-made by the Upper Tribunal, as in my view this was not an appropriate appeal to remit to the First-tier Tribunal. I observed that although the Appellant was in attendance, there was no interpreter, and therefore if further evidence was to be heard, the hearing would have to be adjourned so that an interpreter could be provided.
24. Mr Melvin submitted that it would be appropriate to adjourn the hearing so that findings of fact could be made in relation to EX.1.
25. Mr Davis indicated that it was not proposed to call further evidence, and the Upper Tribunal had all the information needed in order to re-make the decision. Mr Davis submitted that the decision should be re-made without a further hearing.
26. Mr Davis submitted that it was clear that the suitability and eligibility requirements were met so that EX.1 could be considered, and I was asked to note that the First-tier Tribunal had made full findings in relation to

EX.1, and I was asked to adopt those findings. In making those findings the First-tier Tribunal had heard detailed evidence from both the Appellant and his wife.

27. Mr Davis submitted that if the First-tier Tribunal had not erred by finding that EX.1 could not be considered because a valid application for leave had not been made, then the appeal would have been allowed, based on the findings made in paragraph 55 of the First-tier Tribunal decision.
28. I was asked to find that the conclusions reached by the First-tier Tribunal in relation to EX.1 were not inconsistent with the finding that Article 8 outside the rules would not be breached. The issue of reasonableness was not considered by the First-tier Tribunal when considering Article 8 outside the rules, and the proportionality decision was not related to the issue of whether it was reasonable for the two step-children to leave the United Kingdom. In effect the First-tier Tribunal had found that separation of the family would not be disproportionate.
29. Having heard oral submissions I reserved my decision.

My Conclusions and Reasons

30. I will not set out in full the preserved findings of the First-tier Tribunal. In brief summary the finding in relation to the Appellant's account of events in Turkey, that the Appellant was not a truthful witness is preserved. Findings that the Appellant had not been arrested and detained are preserved, as is the finding that the Appellant would not be at risk if returned to Turkey. Also preserved is the finding that Article 8 outside the rules would not be breached, in that the relationship between the Appellant and his family in the United Kingdom could be maintained by the frequent visits of the Appellant's wife to Turkey for short periods, and modern methods of communication.
31. The issue that I have to decide is whether the Appellant can succeed with reference to section EX.1 of Appendix FM. The burden of proof is on the Appellant, and the standard of proof a balance of probabilities. The Appellant relies upon EX.1(a) which I set out below;

'EX.1 This paragraph applies if

 - (a)(i) the applicant has a genuine and subsisting parental relationship with a child who -
 - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
 - (bb) is in the UK;
 - (cc) is a British citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
 - (ii) it would not be reasonable to expect the child to leave the UK;'
32. For the avoidance of doubt, it was made clear that the Appellant does not rely upon EX.1.(b) which relates to his relationship with his partner, and

would involve proving that there were no insurmountable obstacles to family life with that partner continuing outside the UK.

33. Having reflected upon the submissions made at the hearing, I decided that it is not necessary to have a further hearing or to hear further evidence, and that I can decide this appeal on the basis of the evidence that was given to the First-tier Tribunal.
34. It is appropriate to preserve the finding in paragraph 55 that there is genuine family life between the Appellant, his wife and the Appellant's two step-children. This finding followed a previous appeal, in which a finding was made that there was genuine family life, and the fact that there was genuine family life between the parties, was conceded on behalf of the Respondent before the First-tier Tribunal at the hearing on 1st April 2015.
35. I find that the Appellant and his wife married in Turkey on 22nd December 2010. The Appellant's wife has two sons from a previous relationship, and they were both born in the United Kingdom, the elder having a date of birth of 15th November 1999 making him 15 years of age, and the younger having a date of birth of 14th April 2003 making him 12 years of age.
36. The Appellant's wife has been in the United Kingdom since 1992 and is a naturalised British citizen. Both boys are British citizens.
37. The biological father of the boys died following an accident in 2009.
38. It is not disputed and I find as a fact, that the suitability and eligibility requirements necessary for Article EX.1 to be considered, are satisfied. I find that EX.1(a)(i) is satisfied because the boys are under 18, in the United Kingdom, and are British citizens.
39. The issue that I have to decide is whether it would be reasonable to expect them to leave the UK.
40. I agree with the submissions made by Mr Davis that this is not the same issue that was considered by the First-tier Tribunal when Article 8 was considered outside the rules. I find that the judge in considering that issue, concluded that separation of the family would not be a disproportionate breach of Article 8.
41. In considering whether it would be reasonable to expect the boys to leave the UK, I have considered ZH (Tanzania) [2011] UKSC 4 which gives a guidance on the best interests of children. I note paragraph 41 in which it is stated, inter alia,

“The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood.”
42. I have also taken into account the principles in Zoumbas [2013] UKSC 74 and in particular paragraph 12 which I set out below in part;

“The benefits of British citizenship are an important factor in assessing whether it is reasonable to expect a child with such citizenship to live in another country. Moreover in H (H) Lord Kerr explained (at para 145) that what he was seeking to say was that no factor should be given greater weight than the interests of a child.”

43. I also take into account the principles in Sanade and others (British children - Zambrano - Dereci) [2012] UKUT 00048 (IAC) and set out below paragraph 95;

“95. We shall take this helpful submission into account when we consider the application of Article 8 to each Appellant’s case. We agree with it. This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania). If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation.”

44. I also bear in mind EV (Philippines) [2014] EWCA Civ 874 and in particular paragraph 35 which relates to factors to be taken into account when the best interests of children are considered and those factors are set out below;

- their age;
- the length of time that they have been here;
- how long they have been in education;
- what stage their education has reached;
- to what extent they have become distanced from the country to which it is proposed that they return;
- how renewable their connection with it may be;
- to what extent they will have linguistic medical or other difficulties in adapting to life in that country;
- the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

45. The boys in this appeal are aged 15 and 12. They were born in the United Kingdom and have always lived in this country. They have been educated here and I find have no connection with Turkey, other than they have visited, and their mother and other relatives originate from Turkey. There are no relevant medical issues, and although their first language is English, I accept that if they do not already speak some Turkish, they would not have great difficulty in learning a new language. However I find that their removal would be a very significant interference with their rights as British citizens.

46. I have taken into account the witness statement dated 1st April 2015 made by the Appellant’s wife in which she explains that her younger son is still

receiving counselling following the death of his father. The elder boy was exhibiting behavioural problems at school and now attends a specialised college where he commenced his education at the end of 2014.

47. I accept that both boys have close relatives including their late father's parents, brothers and sister in the UK.
48. I accept that the eldest boy has visited Turkey twice, once he was 2 years of age, and once when he was 11 years of age and that the younger boy has visited three times.
49. Having considered the case law referred to above, and having considered the facts as I find them, I conclude that placing weight upon the British citizenship of the boys, the fact that they were born here and educated here, and that they have close family members here, and although they have visited Turkey they have never lived there for any length of time, that it would not be reasonable to expect them to leave the United Kingdom. Therefore the requirements of EX.1(a) are satisfied and the appeal succeeds for that reason.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows.

I dismiss the appeal on asylum grounds.

The Appellant is not entitled to humanitarian protection.

I allow the appeal under the Immigration Rules with reference to section EX.1(a) of Appendix FM.

I dismiss the appeal on human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The First-tier Tribunal made an anonymity direction. I continue the anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family.

This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings. The order is made because this appeal involved considering the interests of the Appellant's minor step-children.

Signed

Date: 10th September 2015

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

No fee is paid or payable and therefore there is no fee award.

Signed

Date: 10th September 2015

Deputy Upper Tribunal Judge M A Hall