IAC-AH-LEM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01026/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 18 February 2015	**On 26 February 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr Bradshaw instructed by Hasan, Solicitors

DECISION AND REASONS

1. The respondent, HA, is a citizen of Turkey who was born in 1961. I shall hereafter refer to the appellant as the respondent and to the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). In 2008, the appellant was convicted of making dishonest representations to obtain welfare benefit and sentenced in 2009 to a period of eighteen months' imprisonment. The decision to make a deportation order under the UK Borders Act 2007 was taken on 13 May 2014 and the appellant appealed against that decision to the First-tier

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Tribunal (Judge Shimmin) which, in a determination promulgated on 30 October 2014, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The appellant has a son, TA, who is a British citizen and is aged 16 years. The appellant's wife has medical problems which cause her pain and limit her mobility. Judge Shimmin found as a fact [66] that the wife is disabled. The appeal turned on the application of paragraph 399 of the Immigration Rules. In essence, the judge found that deportation of the appellant would have unduly harsh consequences for the child TA in particular; at [80], the judge noted "giving weight as detailed above to the public interest in deporting foreign criminals I found it would be unduly harsh on TA to deport the appellant."

3. Matters are complicated by the change in the Immigration Rules which took place between the date of the Secretary of State's decision letter and the hearing before Judge Shimmin. Applying the previous text of paragraph 399, the Secretary of State accepted [31] that TA is in the United Kingdom and is a British citizen and also that it would be unreasonable to expect TA to leave the United Kingdom. However, the Secretary of State considered there was another family member (the appellant's wife / TA's mother) who would be able to care for TA in the United Kingdom. By the time the appeal came before Judge Shimmin, paragraph 399(a) appeared in the following form:

> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported…

4. I accept that the judge was told by Mr Bradshaw (who appeared before the First-tier Tribunal also) and the Presenting Officer that the judge should have considered the "new" form of paragraph 399(a) but the judge appears to have applied a combination of the old and new text of the Rules. As I explained in court, this "belt and braces" approach does not itself render the determination wrong in law; indeed, it is better that the Tribunal applies tests which may not be relevant than that it should fail to apply a relevant test. Judge Shimmin found that TA would "spend the rest of his childhood and into his young adult life held back and burdened by the care of his [disabled] mother." [77]. He considered that the child would have to take "over his father's role" and that this would "adversely affect his education and development". The judge then found [78]

(unnecessarily, in the light of the change in the Rules) that there would, in effect, be "no other family member who is able to care for" TA because the mother could not do so because of her disability. Whether that judgment was right or wrong is irrelevant since the judge was applying the former text of the rule. Further, confusion arose as to the "reasonableness" of TA returning with his father to Turkey and whether or not it would be "unduly harsh". The proper test, under the new form of the Rule, was that of "unduly harsh". That was not a matter considered in the refusal letter which was written at a time when the Rules provided for the reasonableness of the child leaving the United Kingdom to be considered.

5. As Mr Bradshaw pointed out, having previously said that it would be unreasonable for TA to travel to Turkey to live, the Secretary of State is now suggesting that it was "anything but unreasonable" for him to do so. The grounds of appeal submit that there was no good evidence to show that the appellant (who speaks Turkish and has been shown to have run a business in the United Kingdom previously) will be unable to obtain employment in Turkey. In the circumstances, it is submitted that it is wrong for the Tribunal to conclude that the appellant's likely lack of employment would mean that it was unduly harsh for TA to join him in Turkey.

6. At [44] Judge Shimmin noted

> I accept the appellant's argument that at his age he would have difficulty in obtaining a job in Turkey and any job would be unlikely to be well paid. He claims this would make it difficult to obtain health treatment for his wife and education in English for his son.

I see no difficulty in Judge Shimmin accepting the appellant's evidence on that point. The fact that the appellant may have been found guilty of a dishonesty offence does not mean that every statement that he may subsequently utter will be unreliable, as the grounds appear to suggest. Furthermore, Judge Shimmin does not go beyond accepting that the appellant might find it difficult to find a job in Turkey; the remainder of the passage which I have quoted above is no more than the judge recording what the appellant said in evidence *("he claims …").* Much more emphasis (entirely reasonably, in my view) is given in the judge's reasoning to the illness and disability of the appellant's wife and the practical difficulty which TA (a teenager just beginning his GCSE year at school) would face, in the absence of his father, in having to look after his disabled mother. Moreover, in the light of the text of the "new" paragraph 399, I find it was open to the judge to conclude, having regard to all the circumstances, that it would be unduly harsh to expect TA to live in a country which he had only visited on three occasions and where he had never lived and where he would be unable to enjoy his own rights as a British citizen. Although it may be arguable, notwithstanding her disabilities, that the appellant's wife would (in terms of the "old" form of the rule) have been able to "care for" TA, it was open to the judge to conclude that the same factual matrix

would render it unduly harsh for TA to remain in the United Kingdom without the appellant (paragraph 399).

7. As both parties accepted at the Upper Tribunal hearing, there is nothing in the particular facts of this appeal which would compel any particular outcome of the appeal. It follows, therefore, that it was open to Judge Shimmin to allow the appeal, whilst any confusion on his part as to the correct text of the Immigration Rule is not material. The question remaining is whether the judge achieved that outcome by a proper analysis of the relevant evidence and by supporting his decision with cogent reasoning. I find that he did do so. In effect, the judge has given reasons for allowing the appeal under both the old and new form of paragraph 399. Another Tribunal may have reached a different outcome but that is not the point. Accordingly, the appeal is dismissed.

NOTICE OF DECISION

The appeal is dismissed.

Direction Regarding Anonymity – 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 their 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.

Signed Date 24 February 2015

Upper Tribunal Judge Clive Lane