IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01482/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 14th July 2015	**On 23rd July 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

ERCAN OZER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Hussain of Counsel instructed by Ahmed Rahman Carr Solicitors
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Myers made following a hearing at Bradford on 29th October 2014.

Background

2. The appellant is a citizen of Turkey born on 14th December 1975. He came to the UK on 8th January 2001 with his wife and daughter and was granted temporary admission. He failed to report and was treated as an absconder.

3. On 26th March 2001 he made an application for asylum using a false name which was refused and he eventually became appeal rights exhausted by 30th July 2004. He was subsequently granted indefinite leave to remain on 31st August 2007 in his false identity.

4. In 2011 his wife and children acquired British citizenship.

5. The appellant applied for naturalisation, again in his false identity, on 3rd June 2011 and was refused. Following that refusal he voluntarily confessed to the police that he had used it to obtain indefinite leave to remain. He was charged with a number of immigration offences and, on 22nd June 2012 was sentenced to a total of fifteen months' imprisonment.

6. On 11th July 2014 a decision was made to deport him under Section 32(5) of the UK Borders Act 2007.

7. The judge recorded the appellant's evidence, which was that his two younger children were both born in the United Kingdom, doing well at school and wanted to remain here. He voluntarily went to the police because he felt unable to continue living a lie. He had only used the false name to claim asylum because he realised that he had missed the date for reporting to the authorities and wished to avoid being arrested as an absconder.

8. His parents and two of his siblings live in Turkey and he is on good terms with them but they have their own commitments. His wife's family are also there and she has been back to Turkey on three occasions, the last for seven weeks over the summer.

9. There was contradictory evidence about his relationship with his wife. The appellant said that he was temporarily separated from her at the time of his conviction and they had lived apart for a total of eighteen months. His wife and children visited him in prison two or three times and they reconciled when he was released. His wife said that the appellant had left home when they first came to the UK for almost a year.

10. The judge recorded that the evidence on the relationship was evasive and inconsistent, his wife initially stating that there had only been one period when they lived apart, but then saying that she had forgotten about the earlier period when it was put to her that she had said that they were separated in her asylum interview. The appellant's evidence was initially that they had lived apart for one and a half years before his prison sentence but he changed his evidence to say that it was a total of one and a half years including the period of imprisonment.

11. The judge concluded that the appellant had spent significant periods living apart from his wife and children and the picture presented of a close-knit happy family was removed from the truth or at best only of recent provenance.

12. She took a serious view of the offence. The appellant had claimed a considerable amount of money in state benefits by use of his false identity, and if he had reported to the authorities as he was required to do when he originally gained entry to the UK, he may not have had the opportunity to live here for ten years making use of the benefits system. The appellant had frustrated immigration control for a considerable period of time and the fact that he voluntarily gave himself into the authorities did not outweigh the public interest in deporting him.

13. She recorded that although his spoken English was good, the appellant had not perfected his English even though he had lived here for thirteen years. There was no evidence that he was economically independent and skills gained here could be utilised in Turkey. He had close family ties there and his private and family life in the UK had been established at a time when his immigration status was precarious. She accepted that the wife and children would choose to remain in the UK and it would be unreasonable to expect the two older children to leave. However they had recently returned from Turkey after a seven week visit and if they wished to accompany the application there it would not be unduly harsh for them to do so.

The grounds of application

14. The appellant sought permission to appeal on the grounds that the judge had failed to take into account all of the relevant factors, including that there had been a single conviction which had come about solely because of the appellant's voluntarily approaching the authorities.

15. Second, the judge had made incomplete findings in relation to the closeness of the family. It was incumbent on her to make a clear finding as to the present family bond.

16. Third, the Tribunal had erred in its approach in considering whether there were exceptional circumstances in this case.

17. Although permission to appeal was initially refused in the First-tier, on 1st June 2015 Deputy Upper Tribunal Judge Archer gave permission to appeal on the grounds that the judge had cited the wrong version of paragraph 399 of the Immigration Rules and arguably erred in law in not referring to the correct test and considering the facts of the case within the context of that test.

Submissions

18. Mr Hussain argued that the judge had plainly applied the wrong test under the Rules, and in considering whether there were exceptional circumstances, which had to be material.

19. Otherwise he relied on the grounds. Since there were children involved in the appeal the Tribunal had to ensure that there was no deficiency in the determination which could adversely impact upon their best interests. Whilst it was accepted that there had been past volatility in the relationship, the couple had been living together again for a number of months and the children would be facing an impossible choice, namely to live with their father or to remain in the country of their nationality.

20. Mr Diwnycz defended the determination and submitted that on the judge's findings it would not be unduly harsh for the children to either remain in the UK or to return with him to Turkey where they have recently returned from a seven week holiday.

Findings and conclusions

21. It is not disputed that the judge cited an out of date version of the Immigration Rules. However the correct test was referred to under Section 117C. Moreover, it is abundantly clear from the Immigration Judge's findings that, had she applied her mind to the test under the Rules as well as under the 2002 Act, her decision would have been the same.

22. The version of paragraph 399(a) to which she referred requires an assessment of whether it would be reasonable to expect the child to leave the UK and whether there is another family member who is able to care for the child in the UK.

23. The correct version is as follows:

> "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."

24. She correctly cited the relevant provisions of Section 117C of the 2002 Act which states:

"(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh"

25. To the extent that the judge considered whether the children would have a parent in the UK to look after them if the appellant was deported, she took into account an irrelevant consideration, but it is not material.

26. The judge's broad statement that the appellant was sentenced to a period of imprisonment of fifteen months and therefore it is only in exceptional circumstances that his family or private life will outweigh the public interest in deportation, is neither inconsistent with the Immigration Rules nor with Section 117C.

27. The judge was not, at paragraph 13 of the determination considering exceptional circumstances within the Rules but whether there were exceptional circumstances outside them. She cited MF (Nigeria) [2013] EWCA 1192 which held that the new Immigration Rules are a complete code. She also said, unremarkably, that the consideration of exceptional circumstances involved the application of a proportionality test. There is no error in paragraph 13.

28. The judge was clearly of the view that she had not been told the truth about the periods of separation between the appellant and his wife and children. She identified clear inconsistencies in their evidence. It was accepted that the couple were living apart at the time of the asylum interview and that they were also apart in the period before the appellant was imprisoned. She was unpersuaded that there would be a significant detrimental effect on the children were their father to be deported. She said that she placed weight on the fact that the children had already spent significant periods when he was absent.

29. This is a family which clearly maintains close links to Turkey. It is not said that the children cannot speak Turkish, which is clearly the main language of their parents. They have extended family there, including

grandparents, and they had recently returned from spending the whole summer there.

30. The judge accepted, correctly, that as British citizens the children could not be required to leave and indeed that it would be unreasonable to expect them to do so. The mother's evidence was that she would stay in the UK. However given her findings that the appellant had already spent significant periods away from them, the judge would inevitably have found that it would not be unduly harsh for them to remain and for the appellant to leave.

31. Section 117C(v) refers to the consideration of whether the effect of the claimant's deportation on the partner or child would be unduly harsh. No challenge to the judge's assessment under the Act has been made, either in the grounds or in the submissions. It therefore cannot properly be argued that the result of an accurate consideration of Rule 399(a) would not have been exactly the same.

32. So far as the other challenges to the determination are concerned, they have no substance. The judge plainly took into account the fact that there had only been a single conviction which had come about because of the appellant's voluntary confession, which she considered in some depth at paragraph 17. It took place after the appellant had been living illegally in the UK for ten years, claiming benefits in a false name, and only shortly after he had been refused British citizenship. The judge was entitled to place little weight on the appellant's eventual candour.

33. The judge plainly had at the forefront of her mind, what the impact on the children would be if the appellant were deported to Turkey. She assessed the nature of the family relationships and accepted that it was not in their best interests for the family to be split up. It was not an error of law for her to conclude that the public interest in deportation outweighed them.

Notice of Decision

34. The original judge did not materially err in law and the decision stands.

35. No anonymity direction is made.

Signed

Upper Tribunal Judge Taylor Date