Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00260/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 26 February 2016

Decision and Reasons Promulgated
On 1 March 2016

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

METIN POLAT

Claimant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Lingam promulgated on 17 June 2015 in which she allowed the appeal of Mr Metin Polat (to whom I refer as the claimant) against the decision of the Secretary of State made on 28 January 2014 to make a deportation order against him.

2. This appeal was considered by the First-tier Tribunal on 12 August 2014 and was allowed on the basis that the Secretary of State had failed to consider the application properly in line with Section 19 of the Immigration Act 2014. Upon appeal by the Secretary of State the appeal then came before the President of the Tribunal sitting with Upper Tribunal Judge Reeds. That panel found that the decision of the First-tier Tribunal involved the making of an error of law and the matter was then remitted to the First-tier for it to re-determine the appeal on all issues.

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3. It is important to note that, unusually in such an appeal, the claimant is a citizen of Turkey who has lived in the United Kingdom for a considerable period of time. He entered the United Kingdom in 1976 at the age of 3½ and was granted indefinite leave to remain in 1979, He has therefore been at the very least lawfully resident in the United Kingdom for approximately 40 years. He is married and he has two children who are both British citizens. It is his case that his removal would not be in accordance with the Immigration Rules given the effect on his wife and children.

4. In determining the appeal, the judge considered the Immigration Rules and also Section 117C of the 2002 Act as amended. This is set out in some significant detail between paragraphs [31] to [47] of her decision. The judge concluded that paragraph 399A of the Immigration Rules was not met but did, however find at paragraph [76] that it had been accepted by the Secretary of State that it would be unduly harsh to return the children to Turkey with their father.

5. The Judge concluded that it would be unduly harsh to expect the claimant's children to return to live in Turkey [84] and also at [88] that it would be unduly harsh for the wife to go to live in Turkey. The judge was therefore satisfied that the claimant fell within Exceptions 1 and 2 set out within Section 117C of the 2002 Act. The appeal was allowed under the Immigration Rules on that basis.

6. The Secretary of State appealed on two principal grounds:

    i. That the judge materially misdirected herself in law in that she had failed properly to apply paragraph 399 of the Immigration Rules as currently constituted; and,

    ii. that the judge had failed to give reasons or adequate reasons for findings on a material matter, that is she had failed to explain why it was that the children could not cope with the education system in Turkey, why the effect of deportation on the children would be unduly harsh and why it would be unduly harsh on the wife for her to have to live in Turkey.

7. Permission on all grounds was granted by First-tier Tribunal Judge Simpson.

8. When the matter came before me the claimant, Mr Polat, was not represented. It is clear from the file that he was previously represented by Kilic & Kilic Solicitors but on 5 January 2016 they wrote to the Tribunal indicating that they wished to withdraw from the proceedings as they had no further instructions from their client in respect of the hearing.

9. It is evident from the court file and from that letter that notice of the hearing was served on the claimant's solicitors as they then were and it is also clear that notice was served on the claimant at the address given by him and which has remained constant throughout. There is no indication of any change of address.

10. In the circumstances I am satisfied that there has been proper service of the due time, date and venue of the hearing and that the claimant has failed to attend the hearing without giving any reason whatsoever. I am satisfied that it would be in all the

circumstances appropriate bearing in mind the overriding objective to proceed to hear the appeal.

11. I heard submissions from Mr Duffy, who submitted that it was clear from the judge's decision, in particular at paragraphs [67] and [76], that she had misdirected herself in law and that the findings she had made that it would be unduly harsh are not properly reasoned, that is to say there is no basis for her coming to that conclusion it being unclear what hardships she concluded that the children would face. Whilst the evidence was set out no reasoning has been put forward for the conclusions.

12. I consider that it is clear that the judge has not properly applied the correct version of the Immigration Rules. Paragraphs 399(a) and 399 (b) of the Immigration Rules as now constituted are significantly different from the predecessor provisions of the Rules. While those were in force at the time the decision letter was written, it is clear from YM (Uganda) that it is the newer rules which must be considered.

13. It is unnecessary to set out the new rules in detail. It is sufficient to note that where there is, as here, a child who is a British citizen and a subsisting relationship with a partner in the UK the threshold to be overcome in order to come within the Immigration Rules is whether it would be "unduly harsh" for a child to live in the country it is to be deported or for a child to remain without the person who is to be deported. Similarly, the threshold in respect of a relationship is whether it would be unduly harsh for the partner to live in the country to which the person is to be deported. Further, there must be compelling circumstances over and above those described in paragraph EX.2. Appendix FM as to why it would be unduly harsh for the partner to live in this case in Turkey.

14. It is sufficiently clear from the decision that the judge did not have regard to the current version of the Immigration Rules although it is clear that she had consideration of Section 117A to D of the 2002 Act which was brought into effect at the same time as the revised immigration Rules. The decision is somewhat muddled in this respect in that the judge appears to flit between the two without sufficiently identifying what was under consideration.

15. A second limb of the first ground of appeal is that the judge had incorrectly stated that there had been a concession on the part of the Secretary of State that it would be unduly harsh for the child or the wife to go to live in Turkey. This appears to be because it is conceded in the initial refusal letter that, under the previous incarnation of the Immigration Rules and in particular paragraph 399A it would be unreasonable to expect either child to leave the United Kingdom.

16. It appears from the determination and in particular at paragraphs [67] and [76] that the judge had read that over those concessions to mean that there was a concession that the requirement for the children to leave the United Kingdom would be unduly harsh. There is no proper basis for reading the one over to the other. It is clear that the test as to what is unduly harsh is significantly different and higher than unreasonable.

17. Accordingly, for these reasons I am satisfied that the determination of First-tier Tribunal Judge Lingam did involve the making of an error of law in that she clearly misdirected herself as to which Immigration Rules were to be applied. She also appears to have misdirected herself in assuming that her concession that what would be reasonable is equivalent to a concession of undue harshness. I consider that the latter in particular has coloured her assessment of Section 117C of the 2002 Act rendering it unsafe.

18. Whilst the errors identified might not have been material and the reasoning on whether requiring the claimant to return to Turkey without his children or for his children and wife to return with him there had been found unduly harsh there is, as Mr Duffy submits, no proper analysis of what unduly harsh means. Further, it is not entirely clear what it is that the judge finds would be unduly harsh in that it is difficult to discern from what the judge says, in particular at [83] and[87] to [90], what it is that would be harsh about the separation involved.

19. Bearing in mind the misdirection that the judge had made first as to the content of the relevant Immigration Rules and as to what had been conceded by the Secretary of State, I am not satisfied that her reasoning with regard to undue harshness is sustainable. I am satisfied that it could easily be the case that had the judge properly directed herself as to the law and addressed the issue of undue harshness, which is a significantly higher threshold than unreasonable, she could easily have come to a different decision, and accordingly for these reasons I am satisfied that the error of law in this case was material. Accordingly I set aside the decision of the First-tier Tribunal.

20. In considering how best to proceed in this matter, having found that the decision involved an error of law, I note that there is the potential for a number of new findings to be made and that additional findings of fact would in this case be necessary. I am mindful also that this is an unusual case in that the appellant, having succeeded in the First-tier Tribunal and having lived in the United Kingdom in excess of 40 years, has not presented himself here today.

21. I therefore adjourned the matter for a further hearing at which the decision was to be remade in the Upper Tribunal in accordance with the following directions:-

    (a) The appeal will be listed for hearing with a time estimate of 3 hours.

    (b) **The claimant, Mr Polat, must within seven days of promulgation of this decision give written notice to the Tribunal that he wishes to continue with this matter. If he does not do so, the Upper Tribunal will assume that he no longer seeks to pursue this appeal and accordingly it will be deemed to have been withdrawn by Mr Polat and his appeal will be dismissed**.

22. The Claimant has not contacted the Upper Tribunal either to explain his absence at the earlier hearing to confirm that he wishes to continue his appeals. Accordingly, I consider that I am entitled to conclude that he has nothing more to say and no longer contests the appeal.

23. Consent of the Upper Tribunal is required for a party to withdraw its case. Having carefully considered the facts of this appeal as a whole, and observing that Mr Polat was the successful party before the First-tier Tribunal, but that that decision has been set aside, I give such consent for the case to be withdrawn. I also formally record that the appeal has been dismissed, as the claimant no longer maintains that the Secretary of State's decision to deport him was incorrect on the basis of any of the available grounds of appeal.

<u>SUMMARY OF CONCLUSIONS</u>

1. The decision of the First-tier Tribunal did involve the making of an error of law, and I set it aside.

2. I remake the appeal by dismissing it on all grounds.

Signed Date: 25 February 2016

Upper Tribunal Judge Rintoul