



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: IA/16498/2014**

Appeal

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 19th January 2016

Promulgated

On 16th February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

H I A

(ANONYMITY DIRECTED)

Respondent

Representation:

For the Appellant: Ms Fijiwala, Home Office Presenting Officer

For the Respondent: Mr Ahmed, Counsel for 12 Bridge Solicitors, Hounslow

DECISION AND REASONS

1. The Appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The Appellant is a citizen of Turkey born on 21st September 1992. He appealed against the Respondent's decision of 20th March 2014 refusing him entry clearance to the United Kingdom based on fourteen years' residence and on human rights grounds. His appeal was heard by Judge of the First-tier Tribunal Thanki on 8th June 2015. He allowed the appeal under the Immigration Rules and under Article 8 of ECHR in a decision promulgated on 18th June 2015.
3. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal J M Holmes on 17th August 2015. The permission states that it is well arguable that the Appellant could not

succeed under Appendix FM of the Immigration Rules either as a parent or as a partner and that the judge's approach to paragraph EX1 was flawed. The permission goes on to state that it is also well arguable that the judge's whole approach to the Article 8 appeal was flawed and that he either misunderstood or misapplied both paragraph 276ADE sections 117A to D and the guidance to be found in **SS (Congo) and Others [2015] EWCA Civ 387** and **EV (Philippines) and Others [2014] EWCA Civ 874**. The permission states that arguably his decision is also not consistent with **AM (Section 117B) Malawi [2015] UKUT 260**. This is a family who could live together in safety in Turkey and even those members who are British citizens also appear to be Turkish citizens.

4. There is no Rule 24 response.
5. The Presenting Officer made her submissions relying on the grounds of application. She referred to paragraph 65 of the First-tier Judge's decision submitting that this must be incorrect. The judge refers to Appendix FM and the partner route but having done this goes straight to EX1 which he is unable to do as he has not approached EX1 by the correct route.
6. The Presenting Officer also submitted that the Appellant is married Islamically and this is not recognised in United Kingdom law.
7. The Presenting Officer then referred to paragraph 67 and the parent route. The judge states that the Appellant qualifies but he makes no finding on sole responsibility and it is clear that the Appellant does not have sole responsibility as his child lives with him and the Appellant's partner, the child's mother.
8. The Presenting Officer went on to deal with the judge's approach to the claim outside the Immigration Rules. She referred to paragraph 69 of the decision, in which the judge states that the Appellant is entitled to be considered under Article 8 ECHR. He makes no finding about compelling circumstances and gives no good reason for considering the matter outside the Immigration Rules. I was referred to the said case of **SS (Congo) and Others** and paragraph 33 thereof. This makes it clear that for a case to be considered outside the Immigration Rules there have to be very compelling reasons but the judge has not referred to any compelling reasons. At paragraph 44 of the said case of **SS (Congo) and others** there is narrated the correct approach. If a judge is going to deal with a claim outside the Immigration Rules he has to identify the Rule and the substantive content thereof to see if an application for leave to remain or leave to enter satisfies the conditions laid down in those Rules and he has to assess the force of the public interest given expression in these Rules. She submitted that the judge has done none of this.
9. The Presenting Officer then went on to deal with Section 117B of Part 5A of the Nationality, Immigration & Asylum Act 2002 and the balancing exercise which the judge should have entered into when assessing proportionality. She submitted that the judge refers to this at paragraph 68 of his decision. He refers to Section 117B before considering whether

the case should be looked at outside the Rules. The Presenting Officer submitted that that is not the correct way to consider Section 117B and I was referred to the case of **Bossade [2015] UKUT 415 (IAC)** at paragraph 34 which states that Sections 117A to D are concerned only with proportionality and justification. There has to have been an interference with the right to respect for private and family life and then it has to be decided whether such interference is proportionate. This paragraph states that Part 5A considerations are not and do not purport to be a complete code for the conduct of the proportionality assessment required by **Razgar [2004] UKHL 27**.

10. The Presenting Officer submitted that children cannot be treated as a trump card. She submitted that no consideration has been given as to whether it would be reasonable for the children in this case to go to Turkey with their parents. At paragraph 68 of the decision the First-tier Judge states "I find that it would be unreasonable to expect these British children to go and live in Turkey and in the circumstances I have applied the requirements of Section 117B accordingly." The Presenting Officer submitted that this is a bare assertion with no explanation. The circumstances of this case have not been considered and reasonableness has not been considered. She submitted that the judge has failed to consider the said case of **EV (Philippines and others [2014] EWCA Civ 874)** which narrates what should be taken into account relating to children and their best interests and the case of **AM (Malawi) [2015] UKUT 206 (IAC)** has not been considered. This deals with people who have a precarious immigration status in the United Kingdom, (the Appellant in this case.) At paragraph 39 of that case it is stated there is no reason to infer that any interruption of the education of the elder child upon removal to Malawi would be any more significant than that faced by any child forced to move from one country to another by virtue of the careers of their parents. The Presenting Officer submitted that this has to be factored into the decision as has public interest and this has not been done.
11. The Presenting Officer then referred me to the case of **Forman [2015] UKUT 412 (IAC)** at paragraph 17 which gives an explanation of the correct analysis of Sections 117A and B. I was also referred to the case of **Deelah [2015] UKUT 515 (IAC)** at paragraph 20 and the six considerations under Section 117B. This case states that the characteristic which links the considerations listed in Section 117B(1), (2), (3) and (6) is that of public interest. Public interest is multi-layered. Public interest has to be taken into account in all cases and Section 117B(6) does not prevail over the other sections of Section 117B. She submitted that the judge has not taken any of the relevant cases into account. She submitted that all these factors should have been taken into account and as that has not been done the decision has to be set aside.
12. Counsel for the Appellant referred me to the case of **Treebhawon [2015] UKUT 674 (IAC)** and submitted that there may be an error of law in the decision but it is not material. He submitted that at paragraph 68 of the decision Section 117B(6) is referred to and the judge states that this provides that 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 UK.

He submitted that the judge found the Appellant has a significant relationship with his partner's children and also finds it would be unreasonable to expect these British children to go and live in Turkey. Counsel submitted that in the circumstances the judge applied the requirements of Section 117B correctly. At paragraph 23 of the case of **Treebhawon** it states:

“Ordinarily, a court or Tribunal will first consider an Appellant's Article 8 claim by reference to the Immigration Rules, the purpose of this exercise being to decide whether the relevant qualifying conditions are satisfied by the person concerned. This exercise is performed without reference to Part 5A. The latter regime is engaged directly only where the decision making process reaches the stage of concluding that the person does not satisfy the requirements of the Rules. Thereafter, in any consideration of the case outwith the framework of the Rules and subject to the application of the **Razgar** test, Part 5A will fall to be applied in the decision maker's determination of the proportionality question. It follows that in any case where the parent concerned is unable to satisfy the requirements of the Rules Section 117B(6) may conceivably apply. The outcome will depend on the facts as found by the tribunal.”

Counsel submitted that when this is followed the judge in our case has made no error and the requirements of Section 117B(6) apply accordingly. I was referred to the said case of **Forman** at paragraph 17 and Counsel submitted that at paragraph 18 of **Forman** it is made clear that the judge has to have regard to all the elements of Section 117B and in this case paragraph 117B(6) has been satisfied so the rest of the public interest issues do not require to be considered and the Appellant's appeal must succeed. He submitted that this Appellant is not being deported, his child is British and the two other children of his partner are British and it would not be reasonable for these children to leave the United Kingdom. He submitted that the judge gives weight to the Appellant's wife's daughter's evidence and the fact that she is sitting her GCSEs. I was asked to find that this argument is sustainable and there is no material error of law in the judge's decision. Counsel submitted that it must be disproportionate to separate the Appellant from the three children and his wife. Counsel asked me to make my decision based on this submission only, submitting that it must succeed on this basis. I stated that I would not be doing that. I asked for further submissions.

13. Counsel submitted that the judge has noted that the Appellant was in the United Kingdom precariously when his relationship started and when he had his child but he then considered the terms of the case of **Razgar** and at paragraphs 70 and 71 of the decision found that the Appellant has significant family and private life in the United Kingdom. The judge refers

to the significant impact on the children if he has to move from the United Kingdom. At paragraph 72 the judge refers to the Appellant being illegally in the United Kingdom until 2013. He submitted that the judge has taken everything into account and has found it would not be reasonable for this family to go to Turkey. The Appellant's wife has her own ties in the United Kingdom and the Appellant has cousins and family members in the United Kingdom. The judge took into account the letters of support on file and Counsel submitted that his overall decision was made by looking at the facts in the round and he arrived at a decision open to him.

14. Counsel then referred to the said case of **SS (Congo)** and submitted that the judge had the Immigration Rules in mind when he considered Article 8. At paragraph 68 he considers paragraph 276ADE but the Appellant has not been in the United Kingdom for twenty years. The judge then proceeds with the Article 8 consideration considering how difficult it would be for the appellant to integrate into life in Turkey when his family and children are in the United Kingdom. Counsel submitted that the judge was entitled to do this.
15. I was referred to paragraphs 3 and 4 of the said case of **SS (Congo)** and the minimum income requirements for the terms of the Rules to be satisfied. He submitted that the Home Office have a wide discretion to grant leave to remain or leave to enter outside the Rules. Even if the Rules cannot be satisfied an applicant may have a good claim and may be entitled to enter the United Kingdom and may be entitled to remain here. This entitlement would be based on their Convention rights, Article 3 and Article 8. He submitted that the Secretary of State has to act in a manner compatible with an individual's Convention rights.
16. I was referred to paragraphs 29 and 30 of the said case of **SS (Congo)** which state that leave to remain or leave to enter outside the Immigration Rules should only be granted in exceptional cases. Reference is made to family life established in the United Kingdom at the time when the presence of one or other of the partners was known to be precarious. Counsel submitted that in this case it would be disproportionate not to allow the appeal. At paragraph 31 of **SS (Congo)** it states it cannot simply be assumed that a strict legal test of exceptional circumstances will be applicable when examining the application of Article 8 outside the Immigration Rules. The relevant general balance of public interest considerations and an individual's interests will vary between different parts of the Rules. It is only if the normal balance of interest relevant to the general area in question is such as to require particularly great weight to be given to the public interest, as compared with the individual interests at stake that a strict test of exceptionality will apply. He submitted therefore that the Appellants in this case can succeed under Article 8 even though the requirements of the Rules cannot be satisfied. He submitted that there is no error of law in the judge's decision or if there is it is not a material error of law. He submitted that the judge's findings of fact have not been challenged by the Respondent. He submitted that the judge deals with paragraph 276ADE and then considers Article 8.

17. With regard to the Immigration Rules and the partner route he submitted that although the Appellant does not meet the requirements of the Rules suitability is not a problem in this case. With regard to Appendix FM he submitted that the financial requirements have not been satisfied but the judge can still allow the claim under the partner Rule as this is an exception.
18. He submitted that the judge has stated that it would be difficult for all the family to return to Turkey and settle and he is aware of the finances. He submitted that this is not an error of law. With regard to the judge failing to look at sole responsibility and the parent route he submitted again that there is no problem with suitability and again the exceptions can be considered.
19. Counsel submitted that it would not be reasonable for the Appellant to go back to Turkey with the rest of his family. The judge has found this and given proper reasons for his findings. He submitted that the judge dealt with the matter properly and found that the Appellant meets the suitability criteria for both partner and parent.
20. I was asked to consider the said case of **EV (Philippines)** and the fact that in this case there are three British children. He submitted that the best interests of the children have been properly considered by the judge and this appeal by the Secretary of State should be dismissed. He submitted that there is no material error of law in the judge's decision.
21. The Presenting Officer submitted that she accepts that suitability and eligibility are satisfactory but EX1 does not apply because the financial requirements cannot be satisfied. She submitted that EX1 is parasitic to the Rules and if the terms of the Rules cannot be satisfied EX1 cannot apply. She submitted that there is no mention by the judge about the English language test. She went on to state that the judge has not considered sole responsibility and the Appellant does not have sole responsibility for the children. She submitted that this is a mandatory requirement.
22. She submitted that the judge therefore has to find compelling reasons for allowing the appeal outside the Rules. I was referred to the said case of **SS (Congo)** at paragraph 32. This states that the Rules provide significant guidance about the relevant public interest considerations which should be taken into account when a court or Tribunal seeks to strike a proper balance of interest under Article 8 when making its own decision. She submitted that in this case the Rules are a complete code. She submitted that this claim should not have been considered under Article 8 of ECHR. I was referred to paragraph 43 of **SS (Congo)** which refers to this issue. Paragraph 44 states that the way forward should always be to identify first, the substantive content of the relevant Immigration Rules and to assess the force of the public interest given expression in these Rules. Secondly if an applicant does not satisfy the requirements in the substantive part of the Rules then he may seek to maintain a claim for a grant outside the substantive provisions of the

Rules pursuant to Article 8 but only if there is a good arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules. She submitted that in this case there is no good arguable case under Article 8 which could not have been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules. She submitted that the Rules are a complete code. The Appellant is relying on family life and this has to be considered under Appendix FM. To consider private life outside the Rules there have to be compelling circumstances and she submitted there are no compelling circumstances in this case and the judge did not do this when dealing with the case outside the Rules.

23. The Presenting Officer submitted that if there are compelling circumstances, that is when Section 117B has to be taken into account.
24. The Presenting Officer submitted that if Counsel is correct and Section 117B(6) applies, reasonableness has to be considered. She submitted that the judge has not considered whether the Appellant and his family can go to Turkey and whether the children can be educated there. At paragraph 68 of the decision the judge refers to the significant relationship of the Appellant with his partner's children but no reasons have been given for them not being able to go to live in Turkey. At paragraph 68 little weight is given to the Appellant's private life as the judge states that the Appellant's private life was formed when he was in the United Kingdom illegally since 1996. At paragraph 70 of the decision the judge refers to Article 8 and at paragraph 72 he goes on to state that the Appellant has established a strong family and private life in the United Kingdom. She submitted that it is clear that what the judge has done is consider Section 117B(6) separately and not as part of the proportionality exercise.
25. The Presenting Officer submitted that there is an English language certificate on file although this has not been referred to by the judge.
26. I was asked to find that there is a material error of law in the judge's decision and to set the decision of the First-tier Tribunal aside.

Decision and Reasons

27. The permission in this case is clear and I quote "It is well arguable that the appellant could not succeed in his application under Appendix FM either as a parent or as a partner and that the judge's approach to paragraph EX1 is flawed." The financial terms of the Rules cannot be satisfied and the appellant does not have sole responsibility for the child. These are substantive elements of the Rules so the judge has not approach Appendix FM by the correct route. EX1 is not free standing.
28. The judge misapplied paragraph 276ADE before stating at paragraph 68 that the appellant's claim does not meet its requirements.
29. The judge at paragraph 69 states that the appellant is entitled to have his claim considered under Article 8 outside the Rules. He makes no mention

of the said case of **SS Congo and Another** and gives no reasons for considering the claim outside the Rules. He does not refer to any "compelling reasons".

30. It is clear that the judge has not properly considered the relevant case law, in particular **SS Congo and Others, EV Philippines and AM Malawi**. The judge should have identified the substantive content of the Rules and then assessed the force of the public interest given expression in those Rules. In this case the appellant does not satisfy the requirements of substantive parts of the Rules and it is only if there is a good arguable case which has not been sufficiently dealt with under the Rules that Article 8 can be considered outside the Rules, and then the appellant's and his family's rights can be balanced against public interest and Part 5A can be taken into account.
31. The judge should have considered the claim which he has considered outside the Rules, within the Rules.
32. If it was appropriate for the judge to consider the claim outside the Rules, which I do not accept is the case here, the judge would require to consider all the public interest considerations within section 117B. The judge has not carried out a proper balancing exercise. He has not properly considered effective immigration control and he has given considerable weight to the appellant's relationship which was established when he was in the United Kingdom unlawfully. Little weight should have been given to this appellant's private life.
33. The judge also considered the appellant's child as a trump card. He states that it would not be reasonable for the child to join the appellant in Turkey but he has not adequately reasoned this finding and has not given adequate reasons for the other family members being unable to go to live in Turkey.
34. Counsel for the appellant submitted that the appeal should succeed based on section 117B(6) and that nothing else needs to be considered but section 117B(6) does not prevail over the other sections of section 117B. Section 117B(6)(b) has not, in any case, been properly reasoned by the judge. The decision does not explain why it would not be reasonable to expect the Appellant's child and his partner's children to leave the United Kingdom. The circumstances in Turkey re schooling etcetera have not been considered. Section 117B(6) cannot be satisfied without there being clear reasons why it would not be reasonable to expect the children to leave the United Kingdom.

Notice of Decision

There are material errors of law in the First-tier Tribunal's decision promulgated on 18 June 2015. It must be set aside.

No findings of the First-tier Tribunal can stand. Under s.12 (2) (b) (i) of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact finding

necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal. The member(s) of the First-tier Tribunal chosen to reconsider the case are not to include Judge Thanki.

Anonymity has been directed.

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

Deputy Upper Tribunal Judge I A M Murray