



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/03352/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Glasgow
On 14 August 2017**

**Decision & Reasons
Promulgated
On 29 August 2017**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**MR SERKAN KARA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Winter, instructed by Maguire Solicitors
For the Respondent: Mr Mathews, Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission against the decision of First-tier Tribunal Judge Kempton promulgated on 5 April 2016, dismissing his appeal against the decision of the respondent made on 15 July 2015 to refuse extensive leave and to refuse a human rights claim.
2. The appellant is a citizen of Turkey. He is married to a British national and their relationship has been subsisting for nearly seven years. They met in 2010 when his wife was on holiday and they were subsequently married. Their first child was born on 31 January 2014 in the United Kingdom, Mrs Kara having travelled back to the United Kingdom as her mother was

unwell. The family have tried living together in Turkey but this did not prove possible and eventually, the appellant entered the United Kingdom on 8 December 2014 with a visit visa valid until 11 May 2015. He then applied for leave to remain on the basis of his family life.

3. The respondent refused the application on the basis that as the appellant had entered the United Kingdom he was unable to meet the requirements of paragraph E-LTRP.2.1. of Appendix FM and there were no exceptional circumstances, having had regard to Article 8 of the Human Rights Convention and Section 55 of the UK Borders Act 2009, such that she should be entitled to leave the United Kingdom.
4. The judge noted [24] that it was agreed that the appellant could not meet the requirements of the Immigration Rules. Whilst misdirecting herself [25] as EX.1. was not met as the child was not at least 7 years old, that error was not material given that EX.1. could not have been met in any event because of the failure to meet E-LTRP.3.1.
5. Similarly, the appellant could not meet the requirements of paragraph 276ADE.

Procedural History

6. The appellant sought, but was refused permission to appeal to the Upper Tribunal both by the First-tier Tribunal and upon renewal to the Upper Tribunal. He then pursued an application by way of judicial review to the Court of Session. Subsequent to the grant of permission by an interlocutor dated 16 March 2007, the matter was resolved by consent, the decision of the refusal of permission by the Upper Tribunal being reduced for a fresh consideration of whether to grant permission to appeal to the Upper Tribunal. It was also noted that the Upper Tribunal must have regard to Section 117B(6) of the 2002 Act.
7. Following that, on 6 June 2017 the Vice President of the Upper Tribunal granted permission.
8. There is no indication in the decision that the judge took into account Section 117B (6) of the 2002 Act. On the contrary, the indications are, given her misreading of EX.1. as requiring a British citizen child to have lived in the United Kingdom for at least seven years preceding the date of application to qualify, that she had assumed that a British Citizen child who had not lived her seven years was not a "qualified child" as defined in section 117D of the 2002 Act. The definition of qualified child in Section 117D being to all intents and purposes the same as that applied in EX.1. Though, to have spent seven years applies only to those who are not in the United Kingdom, only it applies to those who are not British citizens.
9. As was noted in MA (Pakistan) v SSHD [2016] EWCA Civ 705 at [49]:

the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's

best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.

10. This applies equally to the situation where there is a British Citizen child. Accordingly, it was incumbent on the judge to consider Section 117B(6) and to indicate what weight she attached to the best interests of the child and also what weight is to be attached on the public interest bearing in mind what was said in MA (Pakistan)
11. It would appear from what the judge records at [29] that she did consider that there was a significant weight to be attached to proper immigration control but no indication as to how this was balanced against the best interests.
12. Whilst I note Mr Mathews' submission that the child would not be expected to leave the United Kingdom, it is not clear that the judge properly addressed this issue. Further there is no indication at [33] the judge had considered what weight to attach to the interference with family life. The issue is not whether family life exists or not, or whether it could be conducted with the family living in different countries, but whether the interference with family life which would necessarily flow from this is proportionate. Certainly, at paragraph [36] the judge appears to have considered that it would be reasonable to expect the child to leave the United Kingdom; the case relied upon, Azimi-Moayed [2013] UKUT 00197 is not on point. Again the judge appears not to have taken into account the fact that the child in question is a British citizen.
13. Accordingly, for these reasons, I am satisfied the decision of the First-tier Tribunal did involve the making of an error of law. Given the length of time that has elapsed since the findings and the absence of proper findings of fact I am satisfied that in all the circumstances of this case it is appropriate to remit it to the First-tier Tribunal for a fresh decision on all issues.

Notice of Decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
- (2) I remit the decision to the First-tier Tribunal for a fresh decision on all issues.

Signed

Date: 25 August 2017



Upper Tribunal Judge Rintoul