Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09363/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2017	**On 9 October 2017**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR VOLKAN BICAKCI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Z Ahmad, Home Office Presenting Officer
For the Respondent: Mr M Murphy, Counsel instructed by Ashton Ross Law

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal. He is a citizen of Turkey and his date of birth is 13 March 1987. On 15 November 2010 he was granted leave to enter the UK until 15 May 2011 as a visitor. On 1 April 2011 he made an application for leave to remain in the UK in order to establish himself in business under the European Community Association Agreement (ECAA) and this was granted until 7 April 2012. On 20 March 2012 he made an application for further leave to remain in the UK and this was granted until

7 April 2015. On 27 March 2015 he applied for indefinite leave to remain under HC 510 and the Immigration Rules in force in 1973 by virtue of the terms of ECAA and his application was refused by the Secretary of State on 9 October 2015. The Appellant appealed and his appeal was allowed by Judge of the First-tier Tribunal Maxwell who decided that the decision of the Secretary of State was unlawful, following a hearing on 27 October 2016 (in a decision dated 9 November 2016).

2. Permission was granted by Upper Tribunal Judge Frances on 8 August 2017. Judge Frances concluded that it was arguable that the standstill clause did not apply with reference to R (on the application of Aydogdu) v Secretary of State for the Home Department (Ankara Agreement – family members – settlement) [2017] UKUT 167 where McCloskey J held:

> "The settlement of migrant Turkish nationals and their family members does not fall within the scope of the 'standstill clause' in Article 41(1) of the Ankara Agreement (ECAA) additional protocol as it was not necessary for the exercise of freedom of establishment under Article 13. Thus the status of settlement in the UK for such Turkish nationals and their family members cannot derive in any way from the ECAA or its additional protocol."

3. In the Reasons for Refusal Letter the Secretary of State considered the application under the ECAA with reference to HC 510 which reads as follows:

> "In deciding these matters account is to be taken of all the relevant facts; the fact that the applicant satisfies the formal requirements of these rules for stay, or further stay, in the proposed capacity is not conclusive in his favour. It will, for example, be relevant whether the person has observed the time limit and conditions subject to which he was admitted; whether in the light of his character, conduct or associations it is undesirable to permit him to remain; whether he represents a danger to national security; or whether, if allowed to remain for the period for which he wishes to stay, he might not be returnable to another country."

4. The Secretary of State concluded that it would be undesirable to permit the Appellant to remain in the UK in light of his past criminality with reference to a conviction on 29 November 2014 for sexual activity with a female child under the age of 16 for which the Appellant was sentenced to 26 weeks' imprisonment and ordered to pay a victim surcharge of £80 and £500 compensation. He was ordered to pay costs of £620 and put on the Sex Offenders Register for a period of seven years. The decision-maker made reference to new sentencing thresholds which have replaced the assessment of criminality under the Rehabilitation of Offenders Act 1974 and specifically to pages 110 and 11 of the "Business Applications under the Turkish EC Association Agreement Guidance" which relates to applications made on or after 13 December 2012 which reads as follows:

"In line with the current sentencing thresholds you must refuse an applicant who is applying for leave or indefinite leave to remain on or after 13 December 2012, if they, 'were convicted of an offence and sentenced to imprisonment for less than twelve months, and seven years has not passed since the end of the sentence'."

5. The Secretary of State stated that having taken into account all of the circumstances of the Appellant's case, she was not prepared to exercise discretion in the Appellant's favour, in the light of his criminality. She concluded that the application was refused under paragraph 4 of HC 510 because it would be undesirable to permit the Appellant to remain in the UK in the light of his character, conduct and associations. The Secretary of State did not consider the Appellant's rights under Article 8 in the absence of an application having been made on that basis.

6. The salient findings of the judge can be found at paragraphs 4, 5, 6 and 7 of the determination:

"4. In considering the seriousness of the offending behaviour I am mindful of the Sentencing Guidelines in relation to this offence. It is unfortunate that the Respondent has not furnished the Tribunal with an outline of the facts of the allegation. What may be said however is that the Court must have been of the view that the offending behaviour was sufficiently serious as to pass the custody threshold and that there were no factors that might make the suspension of the custodial sentence appropriate. It is clear that the victim was working for the Appellant as an intern and therefore the offending behaviour would appear to entail a degree of breach of trust and there is a significant age difference as between the Appellant and the victim.

5. The Appellant claims to be an innocent man falsely accused by an infatuated teenager who made the allegation so as to destroy the Appellant's relationship with his girlfriend (now wife) so as to make him start a relationship with her. That claim was tested and the Appellant was convicted after trial therefore the allegation has been proved to the criminal standard so that I am satisfied so that I am sure of his guilt. His continuing denial can only serve to further undermine his case. Undoubtedly a conviction of this nature, quite properly gives rise to great public concern however I am driven to the view that the Respondent has approached this decision in an inappropriate manner.

6. Further, in refusing the application, the Respondent having identified the fact that the Appellant did have a right of appeal purported to limit this to the extent that he could only rely on Article 8 grounds if he made a fresh application on this basis. None of the Appellant's circumstances have been taken into account. Given the date of the application predates the changes in legislation, the Respondent was wrong to dismiss any

interference with Article 8 rights at that stage without consideration of the factual matrix.

7. It is apparent the Respondent did not take account of any factors whatever other than the guidance as set out above. In doing so, I find she has fettered her discretion as paragraph 4 clearly requires a balancing exercise to be undertaken and no such exercise has been undertaken."

To summarise the judge concluded that the decision was unlawful because the decision-maker fettered discretion because the Secretary of State did not take into account any factors other than the guidance and that the decision-maker did not conduct a balancing exercise. The judge concluded that the approach was not in accordance with paragraph 4 of HC 510.

7. The grounds of appeal argue that there was nothing unlawful about the decision-maker applying the modern guidance to decisions where the standstill clause in HC 510 applies and that the crucial question is whether the Appellant has been subject to less favourable restrictions than those in place in 1973 and it is argued that the Appellant in this case was not.

8. The grant of permission drew the parties' attention to the case of Aydogdu and indeed both representatives at the hearing before me agreed that the standstill clause does not apply to applications of this nature in the light of the decision and to this extent the judge materially erred. I accept that the appeal was heard prior to the case of Aydogdu and no criticism can be levied at the judge in this respect. The judge found that the Secretary of State was wrong to "dismiss any interference with Article 8 rights," but did not go on to consider the appeal under Article 8. In the light of the misapplication of the HC 510, the judge erred because the appeal should have been determined under Article 8. There is a failure by the judge to identify any power available to him to allow the appeal on the basis he did. Neither party at the hearing before me was able to identify any relevant power. The judge materially erred in allowing the appeal. I set aside the decision to allow the appeal.

Notice of Decision

9. I set aside the decision, having concluded that the judge materially erred. Having heard submissions on the issue of venue, the appeal is remitted to the First-tier Tribunal subject to the following directions:

Directions

1. It may be that the Secretary of State decides to make a further decision in the light of this decision. I cannot make an order that she does, but it would be a sensible way forward.

2. Both parties are to serve skeleton arguments setting out the issues no later than 21 days before the substantive appeal.

2. The findings of the judge at [4] and [5] of the decision have not been challenged and at this stage I do not see any good reason for going behind those findings in respect of the Appellant's criminality. However, I do not seek to tie the hands of the First-tier Tribunal Judge determining the matter.

No anonymity direction is made.

Signed *Joanna McWilliam* Date 6 October 2017

Upper Tribunal Judge McWilliam