



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/22461/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 6 June 2018

Decision & Reasons Promulgated  
On 26 July 2018

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KUTAN KISA OGLU  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Ms G Peterson, Counsel, instructed by Oakfield Solicitors

**DECISION AND REASONS**

1. This is an appeal against the decision issued on 4 January 2018 of First-tier Tribunal Judge Griffith which allowed the appeal of Mr Kisaoglu brought on Article 8 ECHR grounds.
2. Mr Kisaoglu was born on 16 July 1978 and is a citizen of Turkey (Turkish Republic of Northern Cyprus) (TRNC)).

3. It is accepted that Mr Kisaoglu is in a genuine and subsisting relationship with Ms Patricia Harris, a British citizen. The materials before me do not show clearly when they met but they appear to have been together for approximately 9 years. It is not disputed that between approximately 2010 and 2013 the couple lived together in Northern Cyprus. Mr Kisaoglu came to the UK with leave to join Ms Harris on 11 July 2013 and was granted leave to remain until 16 February 2016.
4. On 22 February 2016 Mr Kisaoglu attempted to extend his leave but he encountered difficulties in making a valid application, of which more below. It is not disputed that a valid application was not made until 3 May 2016.
5. The respondent refused that application in a decision dated 13 September 2016. It was accepted that Mr Kisaoglu met the suitability requirements but not that he met the eligibility requirements as the application of 3 May 2016 was made over 28 days after the expiry of his leave on 16 February 2016. The respondent therefore went on to consider paragraph EX.1.1. of the Immigration Rules, finding that there were no insurmountable obstacles to Ms Harris joining the applicant in Northern Cyprus and the couple exercising their family life together there. The respondent also considered whether there were exceptional circumstances showing that it would be disproportionate to refuse leave but found that there were not.
6. The appeal against that refusal of leave came before First-tier Tribunal Judge Griffith on 11 December 2017. After hearing evidence from Mr Kisaoglu and Ms Harris and submissions from the legal representatives, Judge Griffith found as follows in paragraphs 48–58:

“48. I found the appellant and Ms Harris to be credible witnesses. I accept their evidence that they did not take legal advice in connection with the appellant's application for further leave and sought assistance instead from the Home Office and followed, to the best of their ability what they had been told. The appellant's leave expired on 16 February 2016 and according to the appellant's representatives (I have not seen a copy of the initial application form), an application was made on 22 February 2016, within the 28 day window which would have prevented the appellant from being regarded as an overstayer. I do not know what the gap was between being informed that the first application was invalid and the submission of the second, which was done on advice from the Home Office. I find the appellant took steps in time to comply with the Rules and I do not find the delay was excessive as the second completed form was received on 3 May 2016.

49. The respondent, being satisfied that the appellant could not meet the Rules, went on to consider the exceptions in Section EX but was not satisfied that there were insurmountable obstacles to family life with Ms Harris continuing outside the UK. Ms Peterson did not seek to argue that there were insurmountable obstacles as defined in EX.2. In that paragraph insurmountable obstacles are defined as:

‘The very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner’.

It was submitted in this case that outside the Rules the decision was disproportionate, having regard to the deteriorating medical condition of Ms Harris.

50. Some better medical evidence would have been helpful, in that there was no up-to-date comprehensive report from Ms Harris' GP. There were some documents that appear to have been sent with the grounds of appeal dated 2016, consisting of a letter from Homerton Hospital setting out a list of various conditions from which Ms Harris was suffering (also referred to in a letter dated 7 September 2016 from her GP). There was a list setting out the dates on which her various conditions had been diagnosed and some information about her medication. A letter from the DWP confirmed that she was in receipt of disability living allowance from April 1997. The appellant's bundle contained some letters dated August and September 2017 concerning hospital appointments.
51. It is plain, however, from the medical evidence that is available, that Ms Harris suffers from a number of conditions, some of which are chronic such as diabetes and osteoarthritis, and some more recent, from 2016, affecting her digestive system and spine. I accept her evidence that she is prone to hyperglycaemic episodes and needs to take strong painkillers as part of a pain management scheme for some of her other conditions as no alternatives are available. It is not known whether the medication she currently takes is available in Northern Cyprus or what it would cost; evidence on that issue would have been helpful. Between 2010 and 2013, when the appellant was in work in Northern Cyprus and when they were being funded by the London Borough of Haringey to look after a foster child, she would return to the UK at regular intervals and I accept that that was partly driven by financial reasons in order to collect medication for which she did not have to pay.
52. Since 2013 the evidence points to a significant deterioration in Ms Harris' health, with it a heavier reliance on more medication. The appellant admitted that he had not investigated what his employment prospects would be in Northern Cyprus but assumed that he would be unable to obtain work. He submitted no medical evidence to show that he was not unable to undertake physical work of the type he had undertaken between 2010 and 2013 I do not accept his evidence that he would be unable to get a job, although it is likely that any employment would not be as well paid as his current employment, which would have an impact on living standards and his ability to pay for medication were Ms Harris to accompany him.
53. Her evidence is that she would not go to Northern Cyprus. She said, 'if I could go I would but I have my children and there is nothing I can do about it'. It is clear that Ms Harris is not fit to work and, furthermore, she does not speak Turkish. I accept her evidence that in the UK she is heavily dependent on the appellant for financial, practical and emotional support. If the appellant were removed, she would lose that support and I do not consider it reasonable or practicable, given her state of health and her age, for Ms Harris to be expected to uproot herself and move to Northern Cyprus. It is also unlikely that she would be able to support an entry clearance application in light of her financial circumstances.
54. Addressing the questions posed in **Razgar**, family life is not in dispute and the decision of the respondent in removing the appellant amounts to an interference sufficient to engage Article 8. The decision was lawful because the appellant was

unable to meet the Rules and for a legitimate purpose, namely maintaining immigration control.

55. I do not, however, find that the decision of the respondent is proportionate. The appellant and Ms Harris made every effort to comply with the Rules by putting in an application before the expiry of his leave and it is unfortunate that because they did not seek legal advice, errors were made. They were not told until after the expiry of the 28 day period that it would be necessary to complete a further application and the delay in applying appears to have been the sole reason relied on for refusing the application under the eligibility criteria in [the] Rules. I consider that that amounts to a compelling circumstance to which I can attach considerable weight.
56. The refusal letter made no reference to the earlier application and the history of what occurred. It also appears that when considering insurmountable obstacles and the application of paragraph EX.1, there was no consideration of Ms Harris' medical condition. I note, however that it does not appear that this was raised either in section 8B of the application form, which invited the appellant to set out any other reasons for wishing to stay in the UK, or in a covering letter. It is possible that had the appellant and Ms Harris had the benefit of legal advice, such omission would have been remedied and the medical evidence could have led to a different outcome based on the respondent's exercise of discretion.
57. I have had regard to Section 117B. The appellant speaks English and is financially independent. He was in the UK lawfully, having satisfied the Immigration Rules to be granted a visa as an unmarried partner, although I accept that as his leave was temporary, his immigration status remained precarious.
58. Taking into account all the circumstances, I find that the public interest considerations that call for the appellant's removal are outweighed for all the reasons set out above. I am satisfied that this is a case where the public interest does not require the appellant's removal".

7. The respondent raised a number of challenges to the decision of the First-tier Tribunal.
8. In ground 3, the respondent maintained that the reference in paragraph 53 to Ms Harris not being able to support an entry clearance application from abroad was wrong in law where Appendix FM Section E-ECP.3.1.(c) and E-ECP.3.3. made provision for someone on Disability Living Allowance to act as a sponsor notwithstanding their potentially limited finances. It was not seriously disputed before me that this ground had merit.
9. fails to take into account that Ms Harris chose to live in Cyprus with Mr Kisaoglu for three years. This ground also argues that the First-Tier Tribunal failed to consider that during that time she was able to manage her medication by returning to the UK to obtain it free of charge and had continued to receive her DLA payments whilst in Cyprus. Further, ground 4 points out that there was no medical evidence to show that the sponsor could not be expected to live in Cyprus, how adversely Ms Harris would be affected if she did so, that any medication she needed would be unavailable or would be too costly. The decision was also in error in failing to take account properly,

as regards obtaining medication in Northern Cyprus or returning to the UK to get it, that it was found that Mr Kisaoglu could find work there.

10. It is my view that grounds 3 and 4 of the respondent's challenge have merit. The decision at paragraphs 50, 51 and 52 indicates that there was limited evidence on Ms Harris' medical conditions, how serious they were, what medication was needed and whether she could obtain adequate treatment at a reasonable cost in Northern Cyprus. The burden was on the appellant to show that her ill-health was so serious and treatment in Cyprus limited or unavailable. The decision conceded that there was no evidence on those matters.
11. Further, the proportionality assessment does not address the potentially material evidence of Ms Harris choosing to live in Northern Cyprus for three years and whilst doing so managing to obtain medication for her ill-health by arranging to come back to the UK from time to time to obtain free medication and also continuing to claim DLA.
12. The First-Tier Tribunal also found that the appellant could obtain work in Northern Cyprus but there is no consideration of whether this would assist in Ms Harris returning to live there and obtain appropriate medication without having to return to the UK.
13. If the evidence about Ms Harris having lived for 3 years without significant difficulty in Northern Cyprus and the appellant obtaining work there had been weighed and the mistake of fact on the DLA/entry clearance point not been made, the outcome of the appeal might have been different. I therefore find that material errors of law arise such that the proportionality assessment must be set aside to be re-made.
14. For completeness sake I should indicate that it also did not appear to me that the First-Tier Tribunal was correct to state in paragraph 55 that the failure to make a valid in-time application was a "compelling circumstance" because the couple had made "every effort" and it was only the application being made late that had led to the Immigration Rules not being met. The same paragraph concedes that the couple were responsible for the defects in the application. I found merit in the respondent's argument in ground 2 that where the applicant and the sponsor were responsible for the late and invalid application and thus for the situation at the date of the decision that the appellant could not meet the eligibility requirements, being without leave, the First-Tier Tribunal took an irrational approach in finding this was a "a compelling circumstance" to which "considerable weight" was placed in their favour.
15. This appeal has been heard twice by the First-tier Tribunal and it appeared to me that where the default position is that appeals should be re-made in the Upper Tribunal, there was a compelling case for that to be so here. I therefore indicated to the parties that I intended to re-make the decision in the Upper Tribunal.
16. Ms Peterson made an application for an adjournment for further evidence to be provided. I refused that application having referred to the overriding objective and considering whether the matter could be determined fairly and justly without an

adjournment. The decision of the First-Tier Tribunal commented on the limited evidence provided and the applicant and his legal advisers have been on notice of that view since then. The direction given to the parties with the decision dated 9 February 2018 granting permission to appeal to the Upper Tribunal indicated that:

“4. There is a presumption that, in the event of the Tribunal deciding that the decision of the FtT is to be set aside is erroneous in law, the re-making of the decision will take place at the same hearing. The fresh decision will normally be based on the evidence before the FtT and any further evidence admitted ... together with the parties’ arguments. The parties must be prepared accordingly in every case

5. The Tribunal is empowered to admit new or further evidence to be admitted in the re-making of a decision. In any case where this facility is sought the parties must comply with Rule 15(2A) ...

A failure to comply with Rule 15(2A) will be regarded as a serious matter and may result in fresh or further evidence not being considered by the Tribunal.”

17. Ms Peterson had not been given any instructions as to why there had been no application under Rule 15(2A) or, indeed, why the additional materials for which an adjournment was sought had not been before the First-Tier Tribunal.
18. It was my conclusion that these matters and the requirement in the overriding objective to avoid undue delay and cost showed that it was not in the interests of justice to adjourn for further evidence and that the appeal could be fairly and justly determined without it.
19. Ms Peterson also sought to adduce further oral evidence from the appellant and Ms Harris. As above, the parties had been directed that there is a presumption that in the event of an error of law the fresh decision would normally be based on the evidence before the First-Tier Tribunal “and any further evidence admitted”. As above, there was no Rule 15(2A) application for further evidence to be admitted and no explanation for why that was so. It was not argued that the further evidence was so compelling that good reason arose such that it should be admitted. Nothing explained why it had not been before the First-Tier Tribunal. The respondent would be prejudiced by having no notice of the further oral evidence that Ms Peterson sought to admit, whatever its nature. In all the circumstances, I did not find that it was appropriate to hear further oral evidence.
20. The key issues in the re-making of this appeal should be reasonably clear from the matters set out above. It is not disputed that the Immigration Rules cannot be met as the appellant did not have leave when he made his application for further leave. It was conceded on his behalf that there were no insurmountable obstacles to the couple exercising their family life in Northern Cyprus; see paragraphs 47 and 49 of the First-tier Tribunal decision.
21. The appellant maintains that the decision is disproportionate and breaches Article 8 ECHR, relying on the factors of Ms Harris’ health, medical facilities in Northern Cyprus, her own family being in the UK, his difficulty in obtaining work in Northern

Cyprus and the couple having made the late and invalid applications for leave in good faith.

22. I am content to take the view of the First-Tier Tribunal on Ms Harris' medical condition at its highest, that is that she has chronic conditions including diabetes and osteoarthritis and problems with her spine and digestive system. She is prone to hypoglycaemic episodes and needs strong pain killers.
23. As noted by the First-Tier Tribunal, however, there is no evidence suggesting that Ms Harris cannot obtain her medication in Northern Cyprus. As before, the appellant can be expected to work. Ms Harris was able to claim DLA whilst in Northern Cyprus for 3 years and nothing indicates that she would not be able to do so now. The evidence does not support a claim that the appropriate medication is not available or that it would not be affordable.
24. The couple have lived in Cyprus before so both have some knowledge of the country albeit Ms Harris does not speak Turkish. Ms Harris maintains that she cannot live there as her children are all in the UK. That factor cannot attract significant weight where her children are adults, do not live with her, according to the appellant's evidence "have their own lives" and it is the appellant who lives with her and supports her.
25. My conclusion is that this evidence showed that it was proportionate for the couple to be expected to exercise their family life in Cyprus.
26. Weighing in favour of the appellant is the genuine and subsisting nature of his relationship with Ms Harris. I accept that they have been in a relationship for nine years. In addition, the appellant has been in the UK lawfully as Ms Harris' partner and it is only the difficulties with the procedures and form for extending leave that led to his being without leave. The appellant has supported himself, working as a duty manager in a leisure centre and being employed by the Local Authority to look after autistic children. He also does voluntary work with autistic children.
27. The parties were of assistance at the hearing in clarifying what happened when the appellant applied for further leave in 2016 and in setting out their positions on whether this was a factor capable of assisting them in the proportionality assessment.
28. The appellant and Ms Harris maintain that they applied for an extension of his leave in time. It became clear that what they meant by that was within 28 days of the expiry of Mr Kisaoglu's leave on 16 February 2018 such that the period of overstaying would have been overlooked by the respondent had a valid application been made on 23 February 2018. Prior to the expiry of leave they had sought advice from the Home Office and Mr Kisaoglu was told to take an English language test which he did. Ms Harris accepted that they had not known about the Immigration Health surcharge.
29. The Home Office records provided by Mr Clarke indicated that an application to extend leave was made on 23 February 2016. Mr Clarke provided a letter dated 6 April 2016 informing Mr Kisaoglu that he had not submitted a valid immigration application because the immigration health surcharge (IHS) had not been paid and because the

application form was incomplete as mandatory sections had not been completed. The letter advised the appellant within 10 days to pay the IHS online and complete the form, returning it to the respondent. He should do so as even if he had enrolled his biometrics, he would become an overstayer after the 10 day period and the application would be rejected as invalid.

30. The GCID database indicated that this letter was sent out on the same day as a letter dated 6 April 2016 indicating to Mr Kisaoglu that he needed to register his biometric information. It is undisputed that Mr Kisaoglu did receive that letter and registered his biometrics at the appropriate time.
31. Mr Kisaoglu and Ms Harris maintain they did not receive the first letter dated 6 April 2016, however, advising them of the shortcomings in the application. The Home Office GCID records indicates that both letters dated 6 April 2016 were sent out so it is odd that one arrived and one did not. The evidence of the appellant and Ms Harris on the difficulties they had in making the application for further leave was consistent between each other and over time, however. I accept that they did not receive the 6 April 2016 letter advising that the 23 February 2016 was incomplete and that the HIS had not been paid.
32. The couple do not dispute that they received a letter of 26 April 2018 advising that the application had been rejected for failure to pay the IHS. They then sought legal advice and made a further application on 3 May 2016. But for Mr Kisaoglu no longer having leave, that application would appear to have shown that he met the Immigration Rules.
33. How should those matters weigh in the proportionality assessment? The appellant and Ms Harris acted in good faith but not in line with the legal requirements. Their application of 23 February 2016 was defective and that was their responsibility. In essence they seek to rely on Article 8 ECHR as a remedy for the mistakes they made which led to Mr Kisaoglu being unable to meet the Immigration Rules. I did not find that to be a sustainable argument when they could be expected to have complied with the requirements and provided a valid application. They also submit that they were disadvantaged by the respondent rejecting the application only after the 28 period had passed. But the respondent acted so as to assist Mr Kisaoglu in that regard by sending the 6 April 2016 letter which gave him 10 more days to remedy the defects and be treated as someone still with leave. The submissions is also, therefore, it is unfair that Mr Kisaoglu lost his leave because the letter of 6 April advising of the defects in the application was not received. Again, that argument can only go so far where it was the failure of the appellant to make a valid application, albeit innocently, that lay at the heart of the application being rejected and his leave lapsing.
34. It is therefore my conclusion that these were not matters that could assist the appellant materially in showing that the respondent's decision was disproportionate. He can be expected to return to Cyprus either with Ms Harris or to seek entry clearance. The appellant's case was not argued on the basis of Chikwamba v SSHD [2008] UKHL 40. I could not discern from the materials here why this would be one of the rare cases



that could succeed in showing that the temporary separation arising from the appellant seeking entry clearance would be disproportionate where Ms Harris could go to Cyprus with the appellant as she has in the past, taking with her any medication she needs.

35. For all of these reasons I did not find that the decision showed that the respondent's refusal of leave was a disproportionate interference with Mr Kisaoglu and Ms Harris' family life. It was not seriously argued that Mr Kisaoglu's private life could bring anything material to the proportionality assessment notwithstanding his commendable work in public service with vulnerable children.
36. It should be clear from the above, however, that, as did the First-Tier Tribunal, I found Mr Kisaoglu and Ms Harris to be credible, reliable witnesses and people of good character who have acted in good faith in this matter. Mr Kisaoglu meets the Immigration Rules other than having leave. These will no doubt be factors that a decision-maker on any future application for entry clearance or leave will wish to take into account.
37. For these reasons the appeal is re-made as refused.

#### **Notice of Decision**

38. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be re-made.
39. The appeal is re-made as refused under Article 8 ECHR.

Signed:   
Upper Tribunal Judge Pitt

Date: 19 July 2018