Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04727/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 December 2018	**On 28 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MRS UMMUGULSUM OZDEMIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Dakin, Counsel, Kinas Solicitors
For the Respondent: Mr S Kotas, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Bartlett promulgated on 21st May 2018 dismissing her appeal on the basis of her human rights. The decision of Judge Bartlett was appealed against and permission was granted by Designated Judge Shaerf in the following terms:

> "1. The Appellant, a Turk, appealed against the Respondent's decision to refuse her further leave to remain on the basis of her private and family life in the United Kingdom. Her husband who had indefinite leave dies in 2010. Their four daughters are

married and there is one son who is unmarried. All the children are British citizens except for one who has indefinite leave.

2. It is arguable the Judge has erred in law in her assessment of the Appellant's Article 8 claim in not adequately taking into account the background that the Appellant's husband was recognised as a Convention refugee and the matter referred to in paragraph 18 of her decision. She has focused on the connection with Turkey of her son-in-law's family rather than whether there are very significant obstacles to the Appellant's re-integration into life in Turkey, given her particular circumstances: see *AK (Kosovo) v SSHD [2018] EWCA Civ.2038* where the point is made in a deportation appeal and a fortiori will have application to a removal appeal."

2. I was not provided with a Rule 24 reply by the Secretary of State but was given the indication that the appeal was resisted.

Error of Law

3. At the close of the hearing I indicated I would reserve my decision, which I shall now give. I find that there is a material error of law in the decision, such that it should be set aside. My reason for so finding are as follows.

4. In respect of the Grounds of Appeal as they are pleaded, it is fair to note that they are somewhat confusing and what may be politely described as sporadic at best. In fairness Ms Daykin did not seek to rely upon them beyond embellishing on the point upon which permission had been given by Designated Judge Shaerf in terms of the First-tier Tribunal's assessment of whether historic injustice had been suffered by the Appellant and if so the effect that would have upon the proportionality assessment under Article 8 ECHR.

5. For the sake of completeness Ms Daykin did not seek to rely upon the decision of *AK (Kosovo)* [2018] EWCA Civ 2038 which she kindly provided a copy of to the Upper Tribunal (as it is only available on Westlaw at present). Ms Daykin's position was that this decision was of general assistance in that it established that an assessment must be made of all the factors at stake but that was a matter that was trite and did require any authority to establish this principle.

6. In terms of the historic injustice as characterised by Ms Daykin she directed my attention to the Appellant's bundle before the First-tier Tribunal which arrived under cover of letter dated 25th April 2018 and which numbered some 152 pages. Within that bundle Ms Daykin first directed my attention to pages 28 to 33 of the Appellant's bundle before the First-tier Tribunal which contained a determination promulgated on 19th February 2003 from Adjudicator Harrison sitting in the Immigration Appellate Authority. That decision as reflected at paragraph 10 concerned the Appellant's claim that her family life would be disproportionately interfered with were she to be required to leave the United Kingdom and seek entry clearance from Turkey. In the course of reaching her findings

Judge Harrison at paragraph 20 first noted that the Appellant's husband was a recognised refugee and then went on to note at paragraph 23 as follows:

> "If, as I find it to be, the Respondent has given his assurance that entry clearance would be granted to the Appellant were she to return to Turkey and apply there, the only remaining issue for me to consider is whether it will be disproportionate in the circumstances to require her to do so."

7. This finding was made in light of the Presenting Officer's position before the Immigration Appellate Authority which was reflected at paragraph 15 of the determination under the heading Respondent's case and which reads as follows:

> "Mrs Chapman assured me that if the Appellant were to return to Turkey to apply for entry clearance she would have no problem in being granted it. Her husband has refugee status, and the couple are now legally married. If I were to decide that she should not return and claim entry clearance, a great deal of public money would have been wasted. This she said was a relevant consideration for me to take into account in my consideration of proportionality."

8. Ultimately Adjudicator Harrison decided that there were no exceptionally compelling circumstances that would render the Appellant's return to Turkey to apply for entry clearance as disproportionate. And that the judge further found that the Presenting Officer's submission was correct that the Appellant should not be entitled to "circumvent the Immigration Rules". In that light the judge went on to find as follows at paragraph 27 of the determination which reads as follows:

> "I have recorded above my understanding that the Respondent has agreed that entry clearance will be issued when the Appellant makes her application. Were I to have reason to think that entry clearance would not be granted, I would have very grave reservations about dismissing this appeal."

9. Thus as a consequence of those findings made by the Immigration Appellate Authority, the Respondent had given, as Ms Daykin puts it a clear unequivocal assurance that entry clearance would be granted without any conditions thereupon or any stipulations as to the time frame which the entry clearance application should be made.

10. I further note that there is also Ms Daykin's point that this decision was promulgated in 2003 and consequently the only reason that the Respondent's decision was considered proportionate was that there were no "exceptionally compelling circumstances" why the Appellant should not return to Turkey to apply for entry clearance and not be entitled to circumvent the Immigration Rules. That bureaucracy and rhetoric has, of course, been disapproved by Lord Brown in the House of Lords decision in *Chikwamba* where the concept of queue jumping was considered to be "Kafka-esque" and did not automatically render such decision making proportionate. I also note the use by the Immigration Appellate Authority

of the parameter of "exceptionally compelling circumstances" which is again quite different to the present approach that the First-tier Tribunal now undertakes of applying a fair balance and gauging the proportionality of an appealed decision. The importance of this position in light of *Chikwamba* is that one can glean from this determination that the Respondent's reasoning for refusing to grant status to the Appellant in 2003 is now at least arguably incorrect in light of *Chikwamba*, and most important of all, the Respondent has made an unequivocal assurance as also found by the Adjudicator, that entry clearance would be granted to the Appellant were she to simply return to Turkey and apply from there.

11. Turning to the First-tier Tribunal's assessment of these matters Mr Kotas prays in aid reliance upon paragraphs 36 to 38 of the First-tier Tribunal's decision where in his submission the judge has considered the Appellant's immigration history including at paragraph 37.5 that the Adjudicator made a direction based on a concession at the hearing by the Respondent and that as the First-tier Tribunal put it the Appellant had "an expectation" following the decision in 2003 that she will receive entry clearance.

12. In my view there is a disparity between an unequivocal assurance given to the Appellant as opposed to a mere expectation. The assurance given by the Respondent was recorded in writing by the Adjudicator in 2003 and was also independently the subject of a finding that entry clearance should be granted were she simply to return and apply from Turkey. As a consequence the fact of the six month delay in making the application on return to Turkey is neither here nor there given that the assurance made by the Respondent was 'unequivocal' and importantly no expiration date, reasonable or otherwise, was given in relation to the assurance that entry clearance would be granted. It is regrettable that the Appellant did not submit the application for six months after her return to Turkey, but an application was made nonetheless. It is further regrettable that a bombing occurred at the consulate which further delayed the application however the First-tier Tribunal's assessment was made on the understanding that there was a mere 'expectation', as opposed to an 'unequivocal assurance', and that there was a change in the circumstances that could affect the assurance given, were matters that did not demonstrate an accurate balancing of the historic injustice suffered by the Appellant in this matter.

13. As noted by the judge at paragraphs 27 to 28 previously, at paragraph 18 the Respondent ought to have considered whether the terms of the Adjudicator's decision in 2003 and what happened or did not happen as a result could amount to an unrepaired historical wrong in the context of *Ghising* [2013] UKUT 567 and a basis upon which the claim the Appellant's appeal might succeed under Article 8. Thus, without fully and fairly weighing the historical wrong suffered by the Appellant I find that the proportionality assessment that has been carried out by the First-tier Tribunal takes the historic wrong at an incorrect face value of an expectation, rather than an unequivocal assurance, made by a Presenting Officer and pays insufficient heed to the fact that this assurance was also the subject of a finding of fact by the Immigration Appellate Authority in

2003, and importantly, it was only due to this assurance that the Adjudicator was prepared to accept that the decision was proportionate in 2003 to the much higher threshold identified under the re-entry policy that is no longer proportionate post-*Chikwamba*.

14. Mr Kotas further prayed in aid the fact that the First-tier Tribunal had found that there was no family life, however even if that were so, the Appellant could still rely upon the fact of the historic injustice as affecting the weight to be given to the public interest in the proportionality assessment when answering the fourth and fifth *Razgar* questions under Article 8 ECHR and it is not inconceivable that the Appellant's appeal could succeed on the basis of her private life, even if the First-tier Tribunal were to find that there was no family life in existence.

15. Given my findings in relation to the proportionality assessment I set aside the decision of the First-tier Tribunal in its entirety given that the remainder of the decision is interspersed with errors such that the totality of the decision is infected by error.

16. In light of the above findings I set aside the decision of the First-tier Tribunal in its entirety.

Notice of Decision

17. The appeal to the Upper Tribunal is allowed.

18. The decision of the First-tier Tribunal is set aside in its entirety and this matter is to be remitted to be heard by a differently constituted bench.

Directions

19. The appeal is to be remitted to IAC Taylor House.

20. A Turkish interpreter is required.

21. Several witnesses are anticipated to be called as occurred at the last hearing before the First-tier Tribunal. Consequently the time estimate for this appeal is three hours.

22. No special directions have been sought and none are required in my view.

23. No anonymity direction is made.

Signed Date 14 January 2019

Deputy Upper Tribunal Judge Saini