Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09671/2019

THE IMMIGRATION ACTS

Heard at Field House by video conference on 25 November 2020 (V)	**Decision & Reasons Promulgated on 8 March 2021**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

VAKKAS [A]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr J. Byrne, instructed by Visa Inn Immigration Specialist
For the respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 21 May 2019 to refuse a human rights claim. He applied for leave to remain on the ground that he was the family member of a person who had limited leave to remain with reference to the European Community Association Agreement ("ECAA") also known as the Ankara Agreement.

2. First-tier Tribunal Judge S. J. Walker ("the judge") dismissed the appeal in a decision promulgated on 23 September 2019. The judge outlined the background to the case. He noted that the appellant entered the UK illegally in 2004. He was refused asylum on 04 November 2004. It is unclear whether he appealed the decision. The appellant remained in the UK without leave until 28 November 2018, when he applied for leave to remain with his partner and two children on human rights grounds. His partner, also a Turkish national, ran a business in the UK. The respondent accepted that his partner had limited leave to remain under the Ankara Agreement. The familial relationships are not disputed.

3. The judge noted that the appellant's partner lived in Turkey. She moved to Italy with the oldest child in 2012 and then to the UK in 2014. The youngest child was born in the UK. Neither child was a 'qualifying child' because they had not been resident in the UK for a continuous period of seven years for the purpose of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). There was no evidence of any compelling compassionate circumstances relating to health or to show that the family would face 'very significant obstacles' to integration in Turkey. The judge observed that no information had been provided relating to the conditions the children might face there. The appellant's representative accepted that he did not meet the qualifying requirements of the immigration rules relating to family life because his partner is not settled in the UK.

4. The judge went on to consider whether there were any exceptional circumstances that might justify granting leave to remain with reference to GEN.3.2.(1) of Appendix FM of the immigration rules. He concluded that the best interests of the children were served by remaining with both parents. He found that there was insufficient evidence to show that it would be 'unduly harsh' for the family to return to Turkey. Although he noted what was said about the important stage the oldest child was at in her education, he concluded that 'educational inconvenience' was not a sufficiently strong reason to reach the threshold of 'unjustifiably harsh consequences'.

5. The judge considered the arguments put forward about the proportionality of removal in light of the standstill provisions in the immigration rules relating to the Ankara Agreement. He noted that the 'on-entry' provisions contained in the 1972 immigration rules (HC 509) provided for dependent family members to join a businessperson in the UK. However, the judge also observed that the 'after-entry' provisions of the immigration rules (HC 510) allowed the respondent to take into account relevant facts including whether the person had observed the time limit and conditions of admission and whether in the light of his character, conduct or associations it was undesirable to permit the person to remain. The judge also noted that the respondent's guidance on ECAA applications states that a dependent partner 'must not' fall for refusal under the general grounds for refusal in light of their character, conduct or associations, represent a danger to national security or be an illegal entrant. The judge found that the guidance made it clear that those who remained illegally or overstayed their leave 'should normally be refused' and

that a dependent person who is in the UK illegally cannot switch to an application under the Ankara Agreement. He considered whether the guidance should be disregarded because it was more restrictive than the provisions of the 1972 immigration rules but concluded that the wording of paragraph 4 of HC 510 was similar to the wording of the guidance and 'envisages applications being refused on, for instance, the grounds that the applicant was an illegal entrant' [41]. The judge found that the appellant was unable to show that he would have a strong chance of succeeding in an application for entry clearance and that the *Chikwamba* principle did not apply: see *Chikwamba v SSHD* [2008] 1 WLR 1420. The judge concluded that there was nothing in the evidence to show that removal of the appellant would lead to 'unjustifiably harsh consequences' for him or his family.

6. The appellant appealed the First-tier Tribunal decision on the following grounds:

   (i) The judge failed to consider relevant evidence relating to the difficulties that the family said they would face as Kurds returning to Turkey.

   (ii) The judge failed to consider the more stringent wording of the policy guidance compared with the 1972 immigration rules. The guidance stated that an applicant 'must not' fall for refusal under the general grounds for refusal or be an illegal entrant. In contrast, paragraph 4 of HC 510 did not mandate refusal on that ground, but only provided for those factors to be taken into account. Nor did the 1972 immigration rules prohibit switching to an application for leave to remain under the ECAA (this appears to be an incorrect assertion for the reasons given below). The judge erred in placing weight on the guidance without taking these differences into account.

   (iii) If the judge erred in relation to the previous points, he also erred in assessing the *Chikwamba* principle.

   (iv) It was procedurally unfair for the judge to take into account the appellant's illegal entry as a relevant factor without giving him an opportunity to address the issue when it was not raised by the respondent in the decision letter or put forward in submissions at the hearing.

Decision and reasons

Error of law

7. It is not necessary to make detailed findings because Ms Everett accepted that the First-tier Tribunal decision involved the making of errors of law. She was right to make the concession.

8. First, the judge failed to conduct an evaluative assessment of whether it would be reasonable to expect the family to return to Turkey together. The appellant and his wife both gave reasons why it would be difficult for them to return to Turkey. The background evidence relating to the situation for Kurds was not evaluated. In

referring to whether it was 'unduly harsh' for the children to return to Turkey the judge applied the wrong test, which is applicable to deportation cases but not to non-deportation human rights claims [32].

9. Second, the judge erred in his assessment of the 1972 immigration rules, which in turn impacted on his assessment of the *Chikwamba* principle. The judge failed to appreciate the distinction between the 'on-entry' requirements contained in HC 509 and the 'after-entry' requirements of HC 510 and the distinction between leave to enter and leave to remain.

10. Only the on-entry immigration rules provide for family members to join a businessperson in the UK. Reflecting the time, paragraph 30 of HC 509 provided for 'businessmen' to apply for leave to enter to establish a business in the UK. Paragraph 35 allowed for 'wives and children under 18' of a person admitted as a businessman to be given leave to enter for the period of the businessperson's stay. The on-entry requirements related to applications for leave to enter that would normally be made by way of an entry clearance application from abroad.

11. The after-entry immigration rules applied to in-country applications for leave to remain. Paragraph 21 of HC 510 allowed non-EEC nationals who were admitted as visitors to apply for leave to remain as a 'businessman'. Nothing in HC 510 made provision for a person who was already in the UK to apply to switch to leave to remain as the family member of a non-EEC businessperson. Paragraph 40 stated that a person issued with a residence permit for 5 years should have the time limit on their stay removed after they had remained in the UK for 4 years in business unless there were grounds for not removing the time limit.

12. As noted by the judge, paragraph 4 of the after-entry immigration rules allowed the Secretary of State to 'take into account' public interest considerations relating to a person's history of compliance with immigration control when deciding in-country applications for leave to remain. The wording was not mandatory and allowed for discretion.

13. There is some force in the argument that the mandatory wording in the respondent's recent guidance is more restrictive than the wording of paragraph 4 of HC 510 and therefore impermissible with reference to the standstill clause. However, in light of the legal framework set out above, and for different reasons to the ones given by the judge, his finding that a partner who was remaining in the UK without leave could not switch to an application for leave to remain as the family member of a person who has been granted leave to remain as an Ankara Agreement businessperson was correct.

14. The 1972 immigration rules required family members of a businessperson to apply for leave to enter. Although a person could switch from being a visitor to a businessperson, the 1972 immigration rules made no provision for after entry applications from family members. In my assessment, the judge went wrong when he applied the provisions of paragraph 4 of HC 510 to a theoretical application for

entry clearance, when that provision only applied to after entry applications. When considering whether the *Chikwamba* principles applied, in fact, the appellant would only have to show that he is the spouse/partner of a person who has leave to remain as an Ankara Agreement businessperson for the purpose of paragraph 35 of HC 509 (assuming that the 1972 rules would be interpreted in the expanded way that the current rules do for Article 8 family member applications). The fact that the appellant has been the partner of his ex-wife in a relationship akin to marriage for a period of more than two years since they resumed their relationship in 2014 is not disputed.

15. For these reasons, I conclude that the First-tier Tribunal decision involved the making of errors of law. The decision is set aside. The usual course of action is for the Upper Tribunal to remake the decision.

Remaking

Best interests of the children

16. In assessing the best interests of the children, I have considered the broad principles outlined in cases such as *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of children are a primary consideration although they are not the only consideration.

17. The respondent must have regard to the need to safeguard the welfare of children who are "in the United Kingdom". I take into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55 of the Borders, Citizenship and Immigration Act 2009 ("BCIA 2009"). In the guidance, the respondent acknowledges the importance of international human rights instruments including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies." The UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.

18. The appellant and his wife have two daughters. The first, 'A', was born in Turkey. She was 16 years old at the date of the hearing and is 17 years old at the date of this decision. The appellant left Turkey a few months after her birth with the intention of claiming asylum. He hoped that his family could join him at a later date. A was raised by her mother in Turkey. A's mother says that life was tough. She survived by doing farm work. A says that her father also sent some money. The appellant says that he kept in touch with his wife and child by telephone but by 2008 the

lengthy separation led to marriage breakdown and they decided to divorce. The appellant maintained contact with his daughter.

19. In 2012 A and her mother went to stay with her maternal uncle in Italy. Her mother was issued with a work permit. A says that it was a difficult time for her because her mother worked during the day and at night. She found it difficult because she did not speak the language at first. The children at school bullied her and teased her for not having a father. She wanted her father in her life rather than just on the phone or Skype. A asked if she could visit her father in the UK. After an initial refusal they were issued with a visit visa. They arrived in the UK in July 2014. This was the first time A had seen her father since she was very young. The family spent time together in the UK and her parents reconciled. A's mother agreed to start a business in the UK, as she had done in Italy, so that she could spend more time with her father.

20. In December 2014 A's mother discovered that she was pregnant with a second child. 'B' was born in the UK in 2015. She was five years old at the date of the hearing. She has known no other life than the UK and has no experience of living in Turkey. She is of an age where she is beginning to enter reception classes at school and is beginning to develop connections outside the family home.

21. There is no evidence to suggest that either child has any serious health problems, disabilities or that there are other compassionate issues.

22. A says that life in the UK is so much better than in Turkey or Italy. Here she is able to live in the family unit with both parents. She has lived in the UK for six and a half years and is likely to have completed the GCSE courses she was studying at the date when she made her statement. She says that if she had to return to Turkey it would destroy the educational progress she has made since arriving in the UK. The education system in Turkey is nothing like the UK and she would find it difficult to adapt once again to a new school system. She has future prospects here, which would not be available to her in Turkey. Her mother was granted leave to remain under the ECAA Agreement in 2018, which was extended. The children also have leave to remain on human rights grounds and are on a route to settlement.

23. In assessing the best interests of the children, and where a fair balance may lie in relation to Article 8, both parties agreed that I should look at the more up to date Country Policy and Information Note (CPIN) on 'Turkey: Kurds' (Version 3.0 – February 2020). An estimated 15 million Kurds live in Turkey where they form 10-20% of the population [2.4.1]. The clash of interests between the Turkish government and calls for cultural and political freedom of Kurdish people has led to discrimination against Kurds and periods of violence. The conflict in the south east led to large scale displacement and has resulted in 40,000 deaths. It is still ongoing although at a reduced level compared to previous years [2.4.2]. Although a Kurdish middle class is growing in urban areas, Kurds in the less-developed conflict affected areas in the south east of the country have reduced access to government services and fewer opportunities [2.4.3]. The requirement to speak

Turkish in schools puts Kurdish pupils who may not speak Turkish at a disadvantage [2.4.6]. The CPIN appears to accept that Kurds face significant discrimination in Turkey, but does not accept that this in itself is sufficient to give rise to a real risk for the purpose of a protection claim in the absence of other factors [2.4.12].

24. Kurds may participate in all areas of public life, but they tend to be under-represented in senior roles and may be reluctant to reveal their Kurdish ethnicity in case it proves a hindrance. Opportunities to access better paid work are often denied to Kurds. A Kurdish name or accent may make it harder to gain employment. Kurds who had gained senior positions did not emphasise their Kurdish identity [2.4.15].

25. Women are generally treated less favourably than men in Turkish society. Kurdish women may be less educated than ethnically Turkish women [2.4.16]. There is evidence of societal discrimination against Kurds. Some Kurds in western Turkey may be fearful about disclosing their Kurdish identity or speaking Kurdish in public [2.4.17]. Citizens are free to move throughout the country although it is mandatory to have a NUFUS identity card in order to work, register at school, and to access a wide range of services [2.6.2].

26. Information gained from the European Commission during a Home Office Fact-finding Mission in 2019 recognised that the legal framework in Turkey provided general guarantees for fundamental rights but there had been 'serious backsliding' in the areas of freedom of expression, assembly and association. The rights of minorities were of particular concern. Discrimination, hate speech, and hate crime against minorities were of serious concern [3.1.7].

27. Education is possible for Kurdish people, but classes are in Turkish. It becomes an issue for poor people from the south east who do not know Turkish or speak Kurdish as their first language [5.2.2]. The quality of education in the south east compared to western areas has also been an issue. There is a 'general patriarchal issue and urbanisation issue'. Some parents might not want to send their children, particularly girls, to school [5.3.1].

28. One source told the Fact-finding Mission that those who have previously lived in the east of Turkey may experience some discrimination with regard to education, employment and maybe also accommodation in Ankara [5.8.2]. National fervour is simmering as the country pursues a military offensive against Kurdish militias in northern Syria. Some say that this is behind a rise in discrimination against Kurds [5.8.5]. Another report from October 2018 stated that international and domestic observers had reported that the government's response to the resumption of conflict in the south-east, and to the 2016 attempted coup, have significantly affected the rights and freedoms of Kurds. In particular, security operations since 2015 have resulted in significant hardship for local residents in the south-east [6.8.5].

29. Although none of the witness statements go into any detail about their life in Turkey before they came to the UK, several documents indicate that the family come from a town called Pazarcik, which publicly available maps indicate is a small town just north of Gaziantep in south-east Turkey. The passports of the appellant's wife and child both indicate that they were born in Pazarcik. The divorce certificate also indicates that their divorce was granted by a court in Pazarcik. The appellant's witness statement indicates that he used to run a barber shop. The account of A's mother surviving through basic farm work is consistent with rural life in south-east Turkey. It seems that by 2011 the appellant's partner was struggling to bring up her daughter on her own, which may have prompted her to move to Italy where she could benefit from family support.

30. It is in the best interests of the children to remain in the family unit with both parents. It is particularly important for A, who spent the early years of her childhood without the physical presence of her father. B has had the benefit of the support of both parents since birth. In practical terms, it might be possible for the family to return to Turkey where their parents might be able to find some form of work to support themselves. However, the background evidence shows that the family would face discrimination as Kurds in a wide range of areas, including employment. They would be disadvantaged in the type of employment they might be able to obtain. They are more likely to be in less well-paid employment. The background evidence shows that A and B are likely to be discriminated against as girls. As Kurdish girls, they will be further disadvantaged. The background evidence also shows that the situation for Kurds has deteriorated again in Turkey in recent years, as has the security situation in south-east Turkey. The evidence shows that the family comes from south-east Turkey. There is no evidence to suggest that they have any connections to larger cities in the west of the country. In any event, the background evidence indicates that they are likely to face hurdles to relocating to a big city because they would be disadvantaged and discriminated against as Kurds from the south-east.

31. In contrast, the girls are well settled in the UK. Their 'real world' situation is that they have leave to remain in line with their mother. They are on a route to settlement. In the UK they are likely to have better access to and quality of education. They are likely to have better access to healthcare. They are likely to have better opportunities for long term development. They are less likely to face discrimination on grounds of their gender or ethnicity. The girls are more likely to be safe. They will not have to face insecurity arising from armed conflict. For these reasons I conclude that it is in the best interests of the children to remain in the UK with both parents.

Article 8(1)

32. The appellant has lived in the UK for 16 years. His witness statement provides no detail about the nature of any private life he might have established in the UK. It is reasonable to assume that he is likely to have established friendships and other ties. Since 2014 he has also re-established his family life in the UK. Removal would

separate him from his partner and children. I am satisfied that his removal in consequence of the decision would affect his right to private and family life in a sufficiently grave way as to engage the operation of Article 8(1) of the European Convention.

Article 8(2)

33. Article 8 of the European Convention protects the right to private and family life. However, it is not an absolute right and can be interfered with by the state in certain circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.

34. Part 5A NIAA 2002 applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 of the European Convention. The 'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

35. The 1972 immigration rules made no provision for a spouse or partner to apply for leave to remain in the UK. The only provisions were the on-entry provisions by way of an application for entry clearance. The appellant does not meet the family life requirements of the current immigration rules because his partner is not settled in the UK and neither of the children are 'qualifying children' who have lived in the UK for a continuous period of seven years at the date of the hearing in order for the appellant to come within the exceptions to the eligibility requirements for paragraph EX.1 to apply.

36. Section 117B(1) of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') states that the maintenance of immigration control is in the public interest. The appellant does not meet the strict requirements of the standstill provisions of the 1972 immigration rules nor the current immigration rules. The appellant's level of English is unclear from the evidence before me. His wife has permission to run her own business and works to support the family. The appellant is not likely to be a burden on taxpayers. He previously ran a barber shop and there is nothing to suggest that he is unable to work should he have permission to do so. At best, that is a neutral factor. Little weight should be given to his private life in the UK, which was established while the appellant had no leave to remain.

37. Although section 117B(4) states that little weight should be placed on a relationship 'formed' at a time when the appellant was remaining in the UK unlawfully, the circumstances of this case are different to those envisaged by the statutory provisions. The appellant and his partner were married before he came to the UK. They did not begin a relationship in the UK in the knowledge that the appellant's

status was unlawful but were reconciled when his partner visited with their daughter. The appellant re-established a pre-existing family life with his partner and daughter. Their family life was strengthened by the birth of their second child. I find that some weight can be given to the appellant's relationship with a person who has leave to remain under the Ankara Agreement.

38. At the date of the hearing neither child was a 'qualifying child' for the purpose of section 117B(6). It is important to remember that the provisions of Part 5 NIAA 2002 are intended to be consistent with Article 8 of the European Convention. The threshold of seven years continuous residence recognises that after such time a child is likely to have established significant ties to the UK but that is not to say that the circumstances of children who have been resident for less than seven years should not be properly evaluated and weighed in the balance.

39. At the date of the hearing A had been continuously resident in the UK for a period of six years and four months. When A's history is placed in context, it becomes clear from her evidence that the time she has spent living in the UK has been important. Her father was absent in the early years of her life. Her mother faced hardship bringing up a child on her own. A faced upheaval when her mother moved to Italy, where she struggled to learn the language and to integrate. Only two years later she faced further upheaval when she came to the UK, where she had to start again at a different school and learn another language. For the first time she benefited from being brought up by both parents. She has lived in the UK for a large proportion of her young life. A entered the UK when she was 10 years old. She has developed ties to the UK at an important time of her life when a child begins to develop more connections outside the family home as they enter adolescence. B has lived in the UK all her life and knows no other life but is unlikely to have developed particularly strong ties given her young age.

40. The 'real world' situation of the children is that they have leave to remain in the UK in line with their mother and are on a route to settlement. The only obstacle to their father being able to remain in the UK with them is the fact that the 1972 immigration rules did not make provision for family members of a businessperson to apply for leave to remain in-country. I take into account the fact that was not an obstacle to the children being granted leave to remain with their mother on human rights grounds. The only requirement the appellant would have to meet to satisfy the on-entry requirements of the 1972 immigration rules as preserved by the standstill clause is to show that he is the partner of a person who has been granted leave to remain under the Ankara Agreement. There is no dispute that the couple have been married, and despite their divorce, have resumed their relationship in a way that is akin to marriage for the last six years.

41. Although I do not think the Covid-19 pandemic can be given anything like the weight Mr Byrne sought to place on it, it does form part of the overall picture at the date of the hearing. Unnecessary travel is being discouraged by governments around the world. Entry clearance posts are likely to be centred in big cities in

Turkey, where the appellant is unlikely to have any connections to assist him with support while he makes an application. Whilst the appellant has not produced any evidence to indicate how long an entry clearance application might take, it is reasonable to infer that a period of separation might not be insignificant while an application is prepared and processed. A is most likely to be affected by a period of uncertainty given that she has already experienced a long period of separation from her father in the past.

42. I bear in mind that the appellant's immigration history is a relevant factor. He has remained in the UK for a considerable period of time without leave. Paragraph 4 of the 1972 after-entry immigration rules allowed the respondent to take into account a person's immigration history when deciding whether to grant leave to remain but did not mandate refusal solely on the ground that a person was remaining without leave. The fact that the appellant has never had leave to remain is a matter that must be given weight, but there is no evidence of abuse of the immigration system at the more serious end of the scale e.g. fraud or deception that might add additional weight to the public interest considerations.

43. In *Chikwamba* Lord Brown was not setting down a legal test when he found that "only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate…. for the appellant to apply for leave from abroad". But his observation recognised the essence of the right that Article 8 is intended to protect if, all other things being equal, requiring a person to return to their country of origin for the sole purpose of completing an administrative procedure would lead to the separation of a family with children for an uncertain period of time.

44. Having considered the particular circumstances of this case I conclude that it would not be reasonable to expect the children to return to Turkey with their parents. Removal of the appellant would separate him from his partner and children for an uncertain period of time and would interfere with his right to family life in a sufficiently grave way to engage the operation of Article 8. Having weighed the appellant's circumstances against the factors relating to the public interest in maintaining an effective system of immigration control, I conclude that removal would not strike a fair balance and would be disproportionate in this case.

45. I conclude that the removal of the appellant in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The appeal is ALLOWED on human rights grounds

Signed M. Canavan Date 02 March 2021
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email