EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 65
XA4/18

Lady Paton
Lord Menzies
Lord Glennie

OPINION OF THE COURT

delivered by LORD MENZIES

in the Appeal

under Section 13(4) of the Tribunals Courts and Enforcement Act 2007

by

ORHAN MENDIREZ

Appellant

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: Bovey QC; Drummond Miller LLP (for Damir Duheric Solicitors, Edinburgh)
Respondent: Webster; Office of the Advocate General

2 October 2018

Introduction

[1] The appellant was born on 13 September 1962 and is a national of Turkey. He came to the United Kingdom in 2007 on an "Ankara agreement" visa. In 2009 he met and formed a relationship with a lady who is a UK citizen. They were married on 29 October 2014; they have lived together in Scotland since 2009.

[2] The appellant applied for leave to remain in the United Kingdom as the spouse of his wife Mrs Donna Alice Mendirez, who is his sponsor. The respondent refused this application on 3 February 2015 because she was satisfied that the sponsor did not meet the financial requirements of the Immigration Rules. The appellant appealed against this refusal under section 82(1) of the Nationality Immigration and Asylum Act 2002 to the First-tier Tribunal (FTT). After a hearing on 30 March 2016, by decision promulgated on 6 June 2016 the FTT dismissed the appeal under the Immigration Rules and further dismissed it on human rights grounds.

[3] The appellant appealed against the decision of the FTT to the Upper Tribunal (UT). After a hearing on 20 December 2016, on 21 December 2016 the UT refused the appeal. The appellant sought permission from the UT to appeal to this court, but on 10 February 2017 the UT refused this application. The appellant then applied to this court for permission to appeal, and on 22 December 2017 his application was granted. The appeal is directed against the decision of the FTT, and the decision of the UT to refuse the appeal.

The First-tier Tribunal

[4] The FTT considered documentary material placed before it, and heard oral evidence from the appellant and his wife, as well as having statements from each of them. The appellant stated that his wife was aware at the time of the marriage that there was no certainty that he could stay in the UK; they spoke about it. His wife could not go to Turkey as she had a business in this country. His wife stated that at the time of their marriage there was no certainty that he would remain in the UK but they did not discuss what to do if he had to leave. She supported the appellant, having started her own business. The current profit from this was £12,220. Her accountant had provided a projected profit of £25,000.

[5] The Home Office presenting officer submitted that the parties were agreed that the appellant could not be successful under the Immigration Rules. The appellant did not meet the income requirement. The appellant's wife is self-employed and the SSHD cannot take into account projections. The appellant had not been here for 10 years so under the Immigration Rules he would have had to have shown that there were serious obstacles or serious hardship in his returning, which was not the case. When the appellant came to the UK, he gave up his employment; he could open up a similar business in Turkey if returned there. He is a Turkish citizen; although his wife does not speak Turkish, there are no health issues, and he has family in Turkey. If his wife returned with him there would be no interference with family life. There were no obstacles to having a private life in Turkey. He could support his wife in Turkey for a time. The appellant stated that there were more difficulties in Turkey because it has become more Islamic but there was nothing to show that this was the case. It was proportionate for him to return.

[6] The FTT judge noted the submissions made by the appellant's representative. There is no note that the appellant conceded that he could not be successful under the Immigration Rules. It was submitted that it was proportionate to allow the appeal on article 8 grounds outside the Immigration Rules. If the appellant was removed there would be significant interference with his rights, whether or not the removal was temporary. There would be interference with the private life of both the appellant and his wife. They have close ties to Dumfries. The State must prove proportionality. The FTT would have to find that it was in the public interest that the appellant be removed. He had a good immigration history and had paid his fees for this appeal. Although it was accepted that the appellant did not meet the £18,600 threshold, he was not a burden on public funds. He was economically self-sufficient and his wife's business would support both of them.

[7] The FTT judge held that the appellant did not meet the Immigration Rules in terms of *SSHD* v SS *(Congo)* [2015] EWCA Civ 387. He considered whether there was a "gap" between the Immigration Rules and article 8, and whether there are circumstances in the case under consideration which take it outside the class of case which the Immigration Rules properly provide for. Such circumstances required to be relevant, weighty and not fully provided for within the Immigration Rules. In practice, the FTT judge stated, they are likely to be both compelling and exceptional, but this was not a legal requirement.

[8] The FTT judge narrated the terms of article 8, and the five questions set out in *R (Razgar)* v *SSHD* [2004] UKHL 27. He stated that he took into account the public interest considerations as specified in sections 117A, 117B and 117D of Part 5A of the Nationality Immigration and Asylum Act 2002.

[9] The FTT judge accepted that the consequence of the removal of the appellant to Turkey would potentially engage article 8, and the issue was whether or not the extent of the interference would be proportionate to the legitimate aim of the maintenance of immigration controls and of public confidence in their maintenance. It was for the appellant to show that there would be an interference with article 8, and if this was established, it was then for the respondent to establish that the interference would be justified. The FTT judge went on to consider proportionality in paragraphs 23 and 24 of his decision letter as follows:

> "23. The Appellant's Representative is correct to state that if the Appellant's partner chooses to return with him then this would result in the failure of her new business and a loss to the public purse. However there are many imponderables. She may not return with him – in which case the public interest will not be harmed. The Appellant seems to think that she will not return. It may be the case that even if she stays in the UK with the Appellant that her business will fail, the accountant's projections notwithstanding. This latter option is a possibility which the Immigration Rules are clearly designed to make provision for. The Appellant's partner may decide to return to Turkey with him. If she does so there will only be a little interference with their family and private life. A further possibility is that her business will

> succeed and that the Appellant will accordingly in due course be able to satisfy the financial component of the Immigration Rules. I accept that it may take some time for the business to generate the necessary proof of its success however this will also allow the Appellant time to provide proof or further proof of passing the 'English language test'.
>
> 24. I find that interference by the Respondent is proportionate in this case. I do not find that the Appellant's appeal succeeds outside the Immigration Rules."

The Upper Tribunal

[10] The UT judge summarised the submissions for the parties in his decision letter. We do not consider that it is necessary to set these out in detail here. We observe that an error of fact has crept into the letter; the source of this error is not entirely clear, and it seems unlikely to have played a material part in the decision. It is stated in paragraph 6 of the decision, in the narrative of the submissions for the appellant, that "the immigration history is not seriously adverse, he having overstayed only for about one year prior to making the application leading to these proceedings." In fact, on looking at the sequence of events the appellant was not an overstayer for any period prior to making the application.

[11] The summary of the Home Office presenting officer's submissions at paragraph 7 included the sentence "The appellant had conceded that he could not meet the terms of the Immigration Rules, which include paragraph EX 1". We note, however, that the summary of the submissions for the appellant contains no such concession.

[12] The decision of the UT is contained in paragraph 11 of the decision letter, and is in the following terms:

> "The grounds based on failure to consider relevant factors received a certain boost from the grant of permission, but are inevitably deflated by the concession that the terms of the rules, which include paragraph EX 1, could not be met. Generally, on this issue, I prefer the submissions for the respondent. The grounds and arguments under this heading are no more than reiteration of a case the facts of which were

> plain to the judge. Considerations were not overlooked; they simply did not add up to the outcome the appellant and his partner wished for."

Submissions for the appellant

[13] Senior counsel for the appellant indicated that the appellant's wife was no longer self-employed and running her own business but was now employed. She was still able to support the appellant financially from her earnings. He stated to the court that there was no express concession that the case could not be brought within the rules, and in particular within EX 1. Despite what is stated in the submissions for the respondent at paragraph 10(a) of the FTT decision letter, Mr Bovey understood that any concession before the FTT and the UT was confined to the income requirements and the English language test. There was no express concession regarding the issue of insurmountable obstacles, although he accepted that it had not been argued that there were such obstacles. Before this court he did not concede that the insurmountable obstacle test was not satisfied, and if such a concession had been made in the tribunals below, he withdrew it. It appeared that before the FTT the respondent challenged the evidence of the appellant and his wife regarding the pressure they would face to conform to Islamic norms of dress and behaviour if they were required to live in Turkey. This issue was therefore raised before the FTT, but never resolved by it. It was submitted that since the FTT's decision was promulgated in early June 2016 the process of change in Turkey which was referred to in the evidence of the appellant and his wife had progressed and accelerated, so the issues now are in even sharper focus.

[14] Senior counsel adopted his written note of argument. He made several criticisms of the approach taken by the FTT. First, although reference was made in paragraph 18 to *SSHD* v *SS (Congo)* (supra), the FTT judge did not consider any evidence which might support the insurmountable obstacle argument, nor evidence which might go to

proportionality. In paragraph 21, it was accepted that it was proper for the FTT to have regard to sections 117A, 117B and 117D. However, although the FTT judge stated at paragraph 21 that he took into account these considerations, he did not make factual findings which would entitle him to do so. This renders paragraph 21 problematic. With regard to section 117B, it should be remembered that this case was concerned with subsection (5) and not with subsection (4). It is not clear from the decision letter that the FTT judge recognised this fact, nor even the distinction between the two subsections.

[15] In paragraph 22 the FTT judge identifies the issue, but it is not resolved by him.

[16] Paragraph 23 is unusual. There are no findings of fact, either in this paragraph or elsewhere, as to the nature of the relationship between the appellant and his wife, nor as to the nature of his or her engagement with local friends and family and the business community in Dumfriesshire. Not only does the FTT judge not appear to have considered the effect on the appellant's wife's private life and family life if she went to Turkey with her husband, but the judge does not consider or analyse the difficulties which would face the appellant and his wife if they went to Turkey. The appellant was aged about 53 at the date of the hearing before the FTT, and had not lived nor worked in Turkey since 2007. There was no consideration given to the difficulties that he would inevitably experience in finding a job, given his age and the length of his absence from Turkey. No consideration was given to the difficulties of finding accommodation in Turkey. No consideration was given to the fact that the appellant was a non-practising Muslim with a non-Muslim wife, moving to a country which was adopting increasingly orthodox Muslim norms. No consideration was given to the appellant's wife's reluctance to wear the hijab, or the possible social consequences for her and the appellant if she declined to do so. These are all issues which would fundamentally affect the lives of the appellant and his wife.

[17] Senior counsel submitted that in human rights claims it was necessary "for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account" – *MN (Somalia)* v *SSHD* 2014 SC(UKSC) 183 per Lord Carnwath at paragraph 31. He also referred us to the observations of the Supreme Court in *R* (*on the application of Kiarie and Byndloss*) v *SSHD* [2017] 1 WLR 2380. Although this appeal was directly concerned with the deportation of criminals, observations were made which were relevant to appeals based on human rights grounds – see paragraphs 42/43 and 47-56. The factors listed in paragraph 55 were relevant in the present case, and in particular:

> "(a) The depth of the claimant's integration in United Kingdom society in terms of family, employment and otherwise;
>
> (b) the quality of his relationship with any child, partner or other family member in the United Kingdom;
>
> …
>
> (e) the likely strength of the obstacles to his integration in the society of the country of his nationality."

There was nothing to suggest that the FTT judge had considered any of these matters, and there were no findings in fact relating to any of them.

[18] The relevant principles applicable to an article 8 claim concerning family life were set out in *Jeunesse* v *Netherlands* (2015) 60 EHRR 17 at paragraph 107, in which the court indicated that:

> "factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin ... and whether there are factors of immigration control (for example, a history of breaches of immigration law) ..."

The FTT judge made no finding regarding the appellant's relationship with his wife, nor any finding as to the extent to which family life would effectively be ruptured if he was required to return to Turkey. There was no finding regarding the appellant's immigration status (although before the Upper Tribunal there was an indication that he was an overstayer, which was not correct). There were no findings regarding the appellant's wife's circumstances – her life in Scotland, her family and friends here, her preference as a British citizen to live in the United Kingdom, and possible infringement of her rights as a non-Muslim woman should she move to Turkey. Senior counsel also referred us to *Sahin* v *Turkey* [2007] 44 EHRR 5; *R* (*on the application of Agyarko*) v *SSHD* [2017] UKSC 11; *MM (Lebanon)* v *SSHD* [2017] 1 WLR 771; *Mockutė* v *Lithuania*, 27 February 2018, [2018] ECHR 200 particularly at paragraph 119, and *Clayton and Tomlinson, The Law of Human Rights* (2nd edition) at paragraph 12.288. The FTT required to consider the social pressures on the appellant's wife to wear the hijab if she moved to Turkey, and the issue of freedom to manifest one's religious beliefs, both when considering insurmountable obstacles and when considering proportionality.

[19] The FTT (and, by extension, the UT) also erred in law in its approach to the income available to the appellant and his wife. It is now clear that an assessment required to be made under the rules, and then if an applicant fails to meet the test under the rules the Tribunal must go on to consider under article 8 the issues of proportionality and wider evidence about the risk of the applicant becoming a burden on the State. There is a different test to be applied, not only in relation to sources of funding, but to the whole circumstances of each case – see *MM (Lebanon)* at paragraphs 76 and 98-101, and *Agyarko* at paragraphs 19, 48 and 54-57. The "insurmountable obstacles" test is not the same as the "exceptional circumstances" test. Where an article 8 claim is made, it is not enough for a tribunal to

consider only the "insurmountable obstacles" test; if this is not met, the Tribunal requires to consider proportionality and whether refusal of the application would result in unjustifiably harsh consequences amounting to "exceptional circumstances".

[20] Nothing in section 117B suggests that the same weight is to be attached to a relationship formed with a qualifying partner when the person is in the United Kingdom unlawfully and when the person's immigration status is precarious, nor does *SS (India)* v *SSHD* [2017] CSIH 43 support such a proposition. "Little weight" does not mean uniformity of treatment. The FTT judge did not make any findings in this regard, nor did he state what weight he has attached to this relationship. In the present case, the relationship between the appellant and his wife was formed when the appellant's immigration status was precarious, but not unlawful, so neither section 117B(4) or (5) apply.

[21] There was nothing in the decision of either the FTT or the UT to indicate that anxious scrutiny had been given to these issues, nor did it appear that consideration had been given to each point which might favour the applicant or which raised human rights issues. In all the circumstances senior counsel submitted that the case should be remitted to a differently constituted FTT.

Submissions for the respondent

[22] Counsel for the respondent submitted that the FTT made no material error of law, and in not interfering with its decision the UT had also not made a material error of law. The appeal should accordingly be refused.

[23] The concession on behalf of the appellant that the appellant could not be successful under the Immigration Rules, which was noted by both the FTT and the UT, was important. The proposition that the application could not succeed under the Immigration Rules was

never disputed, and there was never any attempt to present an argument that the rules could be complied with; the appeal was presented throughout on the basis that the rules could not be complied with. Only when the grounds of appeal before this court were lodged was the question of article 8 raised. So, effectively there was a concession before the FTT, if not express then implied. Counsel accepted that this was a question of law, and that such a concession can be withdrawn. However, the withdrawal of the concession before this court did not alter the issue for the court – namely, was the FTT or the UT in error of law.

[24] There was no error in law by either tribunal in proceeding only on the arguments which were advanced. There was no elaboration of particular family interests which the appellant or his wife had in Scotland – eg elderly relatives requiring care. There was no reason to think that the appellant would not be able to start a business in Turkey or to get a job there. The FTT considered the financial evidence and decided that the financial projections were not good enough. In any event, how does this advance the appellant's case? He married a UK national, and it was self-evident that she would have family and social ties in this country. She might wish to accompany the appellant back to Turkey, and she might wish to dress differently from other females there, but she was not required to do so. The appellant could find work and accommodation in Turkey. There were no insurmountable obstacles in the way of the appellant and his wife living in Turkey, nor any exceptional circumstances, and the appellant's family life with his wife was created at a time when both were aware that his immigration status was precarious. The tests set out in *Jeunesse* v *Netherlands* (supra) at paragraphs 107/108 simply were not met. There was no error by the FTT, and even if there was any error, it was not material.

[25] Section EX.1 of appendix FM to the Immigration Rules provides the test of insurmountable obstacles to family life with the applicant's partner who is a British citizen continuing outside the UK.

[26] EX.2 provides the definition of "insurmountable obstacles". That definition was introduced with effect from 28 July 2014, and so was operative when the FTT heard this appeal on 30 March 2016. The proper approach to the "insurmountable obstacles" test and the "exceptional circumstances" test was set out by Lord Reed in the Supreme Court in *Agyarko* (see particularly paragraphs 44, 46-48 and 57).

> "In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."

[27] A very strong or compelling claim had not been made in the present case. The circumstances here would never justify an article 8 grant, so the appropriate disposal should be to refuse the appeal. If the court was of a different view, the matter should be remitted to a differently constituted FTT for reconsideration.

Discussion and decision

[28] It does not appear to us that either the FTT or the UT have approached this matter with the anxious scrutiny required of an appeal such as this. Although he mentioned the issues of insurmountable obstacles, proportionality and exceptional circumstances in the course of his decision letter, the FTT judge has made no findings in fact on which to base any analysis of these issues. He appears to have considered that any concession regarding the appellant's inability to meet the Immigration Rules extended to the test of insurmountable obstacles as stated in EX.1 and defined in EX.2. He has then confined his considerations to whether there is a "gap" between the Immigration Rules and article 8, but he appears to

have carried out no analysis of whether the "insurmountable obstacles" test was satisfied or not.

[29] We consider that the criticisms made by senior counsel for the appellant of the approach taken by the FTT (which are set out at paragraphs [14]-[16] above) are well founded. Such analysis as the FTT has carried out of issues of proportionality – including the effect on the family life of the appellant and his wife if the appellant is required to return to Turkey – is to be found in paragraph 23 of the FTT's decision letter. There are no findings in fact in this paragraph, nor anywhere else in the decision letter, which might underpin this analysis. The appellant's wife was born in Scotland and has lived in Scotland all her life; she has family and friends here. It seems likely that the appellant will have developed a private life in the UK since his arrival in 2007. The relationship between the appellant and the lady who married him in 2014 has subsisted since 2009. The FTT judge makes no findings in fact about that relationship, nor about any private life in Scotland. There are no findings in fact about the effect that moving back to Turkey (with or without his wife) might have on the appellant's private life in Scotland or his relationship with his wife. There are no findings in fact relating to how easy or difficult it would be for the appellant (with or without his wife) to find accommodation and employment in Turkey nor how easy it would be for them to be absorbed into Turkish society, standing the appellant's status as a non-practising Muslim and his wife's status as a non-Muslim who has objections to wearing the hijab.

[30] We do not suggest that these factors will inevitably result in the appeal being allowed on the basis of insurmountable obstacles under the rules, or exceptional circumstances under article 8. However, they are factors which must be taken into account and analysed with anxious scrutiny by any tribunal before it reaches its decision. Such an

analysis requires a factual basis. In the present case it appears to us that the FTT judge has failed to set out in his decision letter the facts which he found to be established, and has also failed to carry out the necessary robust analysis.

[31] The analysis which is required when considering issues of insurmountable obstacles, proportionality and exceptional circumstances is, we consider, one which must inevitably consider the weight to be given to the existing relationship within the UK and the private life within the UK, and any obstacles arising from return to the appellant's home country, and balance these against the considerable weight to be attached to the public interest in a suitably robust immigration policy, as set out in the respondent's immigration rules as approved by Parliament. An exercise considering whether the application of policy is appropriate or proportionate in a particular case requires consideration to be given to all the relevant facts found established in a case.

[32] It does not appear to us that the FTT judge has carried out such an exercise. At paragraph 23 he makes the following assertion:

> "The appellant's partner may decide to return to Turkey with him. If she does so there will only be a little interference with their family and private life."

This assertion is unsupported by any findings in fact. The FTT judge does not engage with what family and private life the appellant and his wife would be leaving behind in Scotland, nor what obstacles may face them in Turkey. There is no basis for the assertion in any findings in fact, and no attempt at reasoned analysis. As Lord Carnwath observed in *MN (Somalia)* v *SSHD* at paragraph 31 when considering the expression "anxious scrutiny",

> "It has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account."

It is not apparent from the FTT's decision letter that every factor which might tell in favour of the present appellant has been properly taken into account.

[33] Although *Kiarie and Byndloss* v *SSHD* was concerned with the deportation of criminals, we accept senior counsel for the appellant's submission that much of the reasoning in that case is relevant to appeals based on human rights grounds, and in particular that the factors relied on for the appellant in paragraph 55 of that case are relevant in the present appeal. The FTT judge does not appear to have considered these factors.

[34] Separately, the FTT judge made passing reference in paragraph 21 of his decision letter to sections 117A, 117B and 117D of Part 5A of the Nationality, Immigration and Asylum Act 2002, and states that he took these into account. However, he does not state how he took them into account, nor how he considered them to be relevant. Section 117B is headed "article 8: public interest considerations applicable in all cases", and subsections (4) and (5) might be thought to have some application in a case such as this. However, two points should be borne in mind when considering these subsections – first, each subsection provides that little weight should be given to specified factors, but they do not state that no weight at all should be given to them; and second there is a distinction between subsection (4), which is concerned with a person who is in the United Kingdom unlawfully, and subsection (5), which is concerned with a person whose immigration status is precarious. Different factors are relevant to each subsection – subsection (4) provides that little weight should be given to (a) a private life, or (b) a relationship formed with a qualifying partner. By contrast, subsection (5) is confined to providing that little weight should be given to a private life – there is no provision limiting the weight which should be given to a relationship formed with a qualifying partner.

[35] In the present case the appellant was never in the United Kingdom unlawfully, so subsection (4) does not apply. Subsection (5) applies to limit the weight which should be given to a private life established when the appellant's immigration status is precarious, but this does not extend to a relationship formed with a qualifying partner. It is not apparent that the FTT judge understood this distinction, nor in what respect he considered that section 117B was applicable in the present case. Moreover, he does not state what weight he attached to any factors in the present case.

[36] We have had regard to all the authorities to which we were referred, and in particular to the observations of the Supreme Court in *MM (Lebanon)* v *SSHD* and *Agyarko* v *SSHD*. It may well be that, on reconsideration, a differently constituted FTT may reach the conclusion that there are neither insurmountable obstacles to the appellant being returned to Turkey nor any exceptional circumstances, and that it would be proportionate to order his return. However, on the basis of the FTT's decision letter now before us, it is not apparent that the FTT judge has carried out the necessary exercise of fact finding and analysis to which we have referred above. We are unable to conclude that he has had regard to all the relevant factors, nor that he has applied anxious scrutiny. Moreover, it is not clear what significance he has attached to section 117B, whether he considered that either subsection (4) or subsection (5) was applicable in this case, and if so, what weight he gave to the factors specified. We consider that the FTT judge was accordingly in error of law. We also consider that the UT was in error of law in refusing the appeal for the reasons outlined in paragraph 11 of its decision letter (quoted at paragraph [12] above).

[37] In the whole circumstances we shall allow the appeal, and remit the case to be determined by a differently constituted First-tier Tribunal.