Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06412/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th September 2015	**On 1st October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

BAHATTIN GOGREMIS
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins of Counsel instructed by Sentinel Solicitors
For the Respondent: Miss A Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant is a male Turkish citizen born 27th October 1990 who appeals against a decision of Judge of the First-tier Tribunal Charlton-Brown promulgated on 16th December 2014.

2. The Appellant arrived in the United Kingdom on 24th September 2010 and subsequently made an asylum and human rights claim which was refused on 13th October 2010.

3. The Appellant claimed that he had a well-founded fear of persecution if returned to Turkey as he is a Kurd who is supporter of the DTP and BDP political parties. He claimed to have been detained and ill-treated on three occasions, in November 2008, September 2009, and July/August 2010. The Appellant claimed that he is a draft evader who would come to the attention of the Turkish authorities if returned, and that he is suspected of involvement with the PKK.

4. The application was refused and the reasons given for that refusal were set out in a letter dated 13th October 2010. In brief summary the Respondent did not accept the Appellant's claim to be of Kurdish ethnicity, did not accept that he had been engaged in politics which opposed the Turkish Government, and it was not accepted that he had been arrested, detained and ill-treated as claimed. The Respondent accepted that the Appellant was at an age when he would be required to complete military service, and that he may be subject to imprisonment if returned to Turkey, because he had evaded military service, but it was not accepted that this amounted to persecution.

5. The Appellant's appeal was heard by Judge of the First-tier Tribunal Jackson on 19th November 2013 and dismissed on asylum, humanitarian protection and human rights grounds.

6. The Appellant was granted permission to appeal to the Upper Tribunal in relation to the findings made by Judge Jackson on Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

7. The appeal was heard by Upper Tribunal Judge Poole on 18th March 2014 and allowed to the extent that the appeal was remitted to the First-tier Tribunal for fresh consideration of the Appellant's Article 8 claim. There had been no appeal to the Upper Tribunal in relation to asylum, humanitarian protection, or any other Articles of the 1950 Convention. Judge Poole directed that the findings made by Judge Jackson in relation to risk on return be preserved, as was the finding that the Appellant is a draft evader and potentially faces imprisonment upon return to Turkey.

8. The appeal was heard by Judge Charlton-Brown on 1st December 2014. Evidence was given by the Appellant and his wife, and this evidence included the fact that the couple had a British child born in the United Kingdom on 26th April 2014. Judge Charlton-Brown found that the removal of the Appellant to Turkey would not be disproportionate and would not breach Article 8 of the 1950 Convention.

9. The Appellant applied for permission to appeal to the Upper Tribunal contending in summary that the judge had erred by seeking to rely upon findings and analysis made by Judge Jackson in relation to Article 8, when that aspect of his decision had been set aside by the Upper Tribunal.

10. It was further submitted that the judge had erred by not adequately considering the essential question in the appeal, which related to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) whether it would be reasonable to expect the Appellant's British child to leave the United Kingdom. It was further contended that the judge had not adequately addressed the point that if the Appellant was removed from the United Kingdom he would be separated from his British wife and child because of the preserved finding that the Appellant faced imprisonment on return to Turkey for draft evasion, and thereafter would have to undertake military service.

11. Permission to appeal to the Upper Tribunal was granted by Judge of the First-tier Tribunal Shimmin on 12th January 2015.

Error of Law

12. The appeal came before me on 24th July 2015. After hearing submissions from both parties I set aside the decision of the First-tier Tribunal, and set out below my reasons for so doing;

    18. In my view the judge erred in law in making reference to the findings made by Judge Jackson, in paragraphs 22, 23, 24 and 30 of her decision. The decision of Judge Jackson, so far as it related to Article 8, had been set aside by the Upper Tribunal, who specifically found that Judge Jackson had materially erred in his consideration of Article 8. The task of the First-tier Tribunal thereafter was to consider afresh the appeal in relation to Article 8.
    19. I conclude that the judge erred by placing some reliance on findings made by Judge Jackson in relation to Article 8, and did not carry out the task of considering Article 8 de novo.
    20. One of the core issues in the appeal related to the relationship of the Appellant with his British child. It is accepted that the Appellant has a British wife and a genuine and subsisting relationship with his child. I do not find that the judge adequately considered the provisions contained within section 117B(6) of the 2002 Act. There should have been a detailed and comprehensive analysis so that findings could be made as to whether it would be reasonable to expect the child to leave the United Kingdom. The decision of the First-tier Tribunal does not contain such an analysis, and there are no adequate conclusions or findings on this, which is a material issue.
    21. The judge did not make findings on the reasonableness of the child leaving the United Kingdom, taking into account the preserved findings from the previous decision, that the Appellant would be separated from his family if removed to Turkey, by reason of him being likely to receive a sentence of imprisonment for draft evasion, and thereafter having to undertake military service.
    22. As I conclude the judge erred in law, the decision of the First-tier Tribunal is set aside.

13. Having set aside the decision of the First-tier Tribunal and having considered paragraph 7 of the Senior President's Practice Statement dated 25th September 2012, I decided that it was appropriate for the decision to be re-made by the Upper Tribunal at a resumed hearing.

The Resumed Hearing

Preliminary Issues

14. I received from Mr Collins a skeleton argument dated 14th September 2015, a copy of the Immigration Directorate Instruction Family Migration; Appendix FM section 1.OB April 2015 (the IDI), together with an extract from the Country of Origin Information Report on Military Service in Turkey. I received from Miss Brocklesby-Weller YM (Uganda) [2014] EWCA Civ 1292.

15. I was made aware that the representatives had different views as to whether the decision should be re-made, taking into account Appendix FM of the Immigration Rules, which Miss Brocklesby-Weller submitted would be appropriate, or whether there should be no consideration of Appendix FM, and the decision should be re-made with reference to Article 8 outside the rules, taking into account section 117B of the 2002 Act, which Mr Collins submitted was appropriate.

16. In addition I was referred to the IDI which Mr Collins submitted indicated at 11.2.3 that it would be unreasonable in the majority of circumstances, to expect a British child to leave the UK. I was asked whether it may be appropriate for the decision to be sent back to be considered again by the Respondent in the light of the latest IDI.

17. Having reflected upon the submissions I indicated that it was not in my view appropriate to send the decision back to the Secretary of State, and the decision would be re-made by the Upper Tribunal. I would hear submissions from both representatives as to whether or not it was appropriate to consider Appendix FM and make a decision on that in due course.

18. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Evidence

19. I firstly heard evidence from the Appellant. He was asked in English to confirm his proficiency in that language, and he said that he could speak and understand some English although “not really good”.

20. Thereafter the Appellant gave his evidence with the assistance of an interpreter in Turkish. There was no difficulty in communication.

21. The Appellant was questioned by both representatives and I have recorded all questions and answers in my Record of Proceedings and it is not necessary to reiterate them in full here. In very brief summary the Appellant stated that he and his wife cared for and looked after their son and if he was removed to Turkey, his wife would remain in the United Kingdom. He confirmed that his parents live in Turkey, and that his wife

and son had visited Turkey in 2014, but if he was removed from the United Kingdom, his wife and son would not join him.

22. I then heard evidence from the Appellant's wife Hamide Cokgezici who adopted her witness statement dated 14th August 2013. All questions and answers have been recorded in my Record of Proceedings and will not be reiterated in full here. In brief summary Mrs Cokgezici confirmed that she and the Appellant had a traditional marriage on 12th August 2012 and a formal marriage recognised in the UK on 18th February 2013. Both these ceremonies took place in this country.

23. Mrs Cokgezici was born in Turkey and came to the United Kingdom in 1999 when she was 7 years of age as her father's dependant. She confirmed that she had been naturalised as a British citizen and that she and the Appellant have a son who is British, and who was born in this country on 26th April 2014.

Submissions

24. Miss Brocklesby-Weller submitted that the one issue to be decided was whether it would be reasonable to expect the Appellant's British son to leave the United Kingdom. There was no dispute as to the relationship between the Appellant and his son. It was submitted that Appendix FM applied and Miss Brocklesby-Weller relied upon paragraph 39 of YM (Uganda) in support of that submission.

25. I was told that it was accepted that the suitability and eligibility requirements of Appendix FM were satisfied so that it was appropriate to consider EX.1(a). It was understood, and Mr Collins confirmed, that no reliance was placed upon EX.1(b) which relates to a genuine and subsisting relationship with a partner.

26. I was asked to find that British nationality alone did not mean that it was not reasonable to expect a child to leave the United Kingdom. I was reminded that nationality is not a trump card although it was accepted that it is a weighty matter.

27. I was asked to take into account the very young age of the Appellant's son, and that if he returned to Turkey he would have close family members there, and in the circumstances of this case, it would not be unreasonable to expect him to leave the United Kingdom. In relation to the point that the Appellant would have to undertake military service and serve a sentence of imprisonment, I was asked to find that this was as a result of him failing to obey Turkish law.

28. If Article 8 was considered outside the Immigration Rules it was accepted that the same question would be considered, with reference to section 117B(6) of the 2002 Act but I must also take into account the other provisions of section 117B, such as the fact that maintenance of immigration controls is in the public interest, and the Appellant is not financially independent.

29. I then heard submissions from Mr Collins who relied upon his skeleton argument. It was confirmed this appeal was not being pursued on Zambrano principles, and that it was accepted that if the Appellant left this country, his son would not be forced to leave, as he could remain with his mother.

30. Mr Collins submitted that YM (Uganda) related to deportation which was not the case in this appeal. Mr Collins submitted that because the Respondent's decision had been made as long ago as 13th October 2010, prior to the introduction of Appendix FM into the Immigration Rules, it was appropriate to consider this case with reference to Article 8 outside the rules. It was however accepted that if the appeal was considered under EX.1(a) or Article 8 and section 117B(6), the same question had to be considered, whether it was reasonable to expect the child to leave the UK.

31. Mr Collins confirmed that if EX.1 was considered, no reliance was placed upon EX.1(b) which relates to a genuine and subsisting relationship with a partner, and would involve showing insurmountable obstacles to family life with that partner continuing outside the United Kingdom.

32. Mr Collins submitted that the IDI at 11.2.3 confirmed that generally if a parent or primary carer would be required to return to a country outside the EU, it would be unreasonable to expect a British citizen child to leave the EU with that parent or carer, unless the parent or carer was involved in criminality or had a very poor immigration history, neither of which exceptions applied in this case.

33. Mr Collins also relied upon paragraph 5 of the head note to Sanade and Others [2012] UKUT 00048 (IAC) stating that it would not be reasonable to require a British child or spouse to relocate outside the European Union.

34. I was asked to allow the appeal on the basis that it would be unreasonable to expect the Appellant's British child to leave the United Kingdom.

35. At the conclusion of submissions I reserved my decision.

My Conclusions and Reasons

36. I have taken into account all the evidence both oral and documentary placed before me, and taken into account the submissions made by both representatives.

37. I find that the Appellant is a Turkish citizen who entered the United Kingdom on 24th September 2010. I accept that he entered into a traditional marriage with his wife on 12th August 2012, and a formal marriage ceremony took place on 18th February 2013. The couple have a British son born on 26th April 2014.

38. I accept the Appellant's wife was born in Turkey but came to the United Kingdom in 1999 aged 7 and that she is a naturalised British citizen.

39. The findings made by the First-tier Tribunal that the Appellant is not entitled to a grant of asylum, or humanitarian protection, and that his removal would not breach Articles 2 and 3 are preserved. The Appellant's account in relation to the events in Turkey, and risk on return were not accepted by the First-tier Tribunal and the Appellant was not found to be a credible witness on those issues.

40. Findings made by Judge Jackson at paragraphs 78 and 91 of his decision are preserved in that the Appellant would be recorded in Turkey as a draft evader and if returned to Turkey is facing a sentence of imprisonment followed by compulsory military service. Judge Jackson found that whether or not the Appellant's wife relocated to Turkey, the relationship was likely to be one with little face to face contact for several years.

41. I find that the Appellant has close family members in Turkey including his parents, and that his wife also has family members in Turkey, and that she has visited Turkey, the last time being with her son in 2014.

42. I have to decide whether this appeal should be considered with reference to EX.1 of Appendix FM, or whether this should be disregarded, and the appeal should be decided with reference to Article 8 outside the Immigration Rules. Whichever course is taken, I agree with the representatives, that the question to be decided is the same, and that is whether it would be reasonable to expect the child to leave the United Kingdom.

43. In my view it is appropriate to consider Appendix FM, and Miss Brocklesby-Weller was correct to refer to paragraph 39 of YM (Uganda) which in summary confirms that the "new" Immigration Rules are to be applied even if the original decision was made by the Secretary of State prior to the introduction of those rules.

44. As it is common ground that no reliance is placed upon EX.1(b) I set out below EX.1(a):

> EX.1. This paragraph applies if
> (a)(i) the applicant has a genuine and subsisting parental relationship with a child who –
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
> (bb) is in the UK;
> (cc) is a British citizen or has lived in the UK continuously for at least seven years immediately preceding the date of application; and
> (ii) it would not be reasonable to expect the child to leave the UK;

45. It is accepted on behalf of the Respondent that the Appellant has a genuine and subsisting parental relationship with his son, and that his son is in the UK, and is a British citizen. In assessing the issue of reasonableness I take into account that the child is very young with Turkish relatives and that British nationality is not a "trump card".

46. I have considered ZH (Tanzania) [2011] UKSC 4 which gives guidance on the best interests of children. I note paragraph 41 in which it is stated, inter alia,

> The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the fact of doing this is that they would inevitably lose those benefits and advantages for the rest of their childhood.

47. I have also taken into account the principles in Zoumbas [2013] UKSC 74 and in particular paragraph 12 which I set out below in part;

> The benefits of British citizenship are an important factor in assessing whether it is reasonable to expect a child with such citizenship to live in another country. Moreover in H (H) Lord Kerr explained (at paragraph 145) that what he was seeking to say was that no factor should be given greater weight than the interests of a child.

48. I also take into account the principles in Sanade and Others and set out below paragraph 95;

> We shall take this helpful submission into account when we consider the application of Article 8 to each Appellant's case. We agree with it. This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania). If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation.

49. This is not a case where it is suggested that the British child would be forced to leave the United Kingdom. If the Appellant was removed, it would be possible for his son to remain with his mother, the Appellant's wife. But that is not the issue, as the question to be decided is whether it is reasonable to expect the child to leave this country.

50. I have considered the Respondent's IDI and set out below the guidance contained therein at 11.2.3;

> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer.
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with a child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

51. There are two exceptions to the above guidance, where the parent or primary carer has been involved in criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules, or has a very poor immigration history such as repeatedly and deliberately breaching the

Immigration Rules. It was not suggested, and I find, that the Appellant does not fall within these two exceptions.

52. Having applied the facts of this case as I find them, to the case law referred to above, and the guidance in the IDI, I conclude that it would not be reasonable to expect the British citizen child to leave the UK, as this would mean that he would potentially lose the benefits and advantages of British citizenship for the rest of his childhood. If he was removed to Turkey, because the preserved findings that the Appellant would serve a sentence of imprisonment, and have to undertake military service, his British child would in any event be separated from his father for a period of time.

53. I therefore conclude that this appeal succeeds under the Immigration Rules with reference to EX.1 of Appendix FM.

54. If I was wrong to consider EX.1, my decision would have been the same had I considered Article 8 outside the Immigration Rules, with reference to section 117B(6) of the 2002 Act. The question to be considered and answered is the same question in section 117B(6) as in EX.1(a)(ii). If I considered Article 8 outside the rules I would have had to consider the other provisions of section 117B such as the maintenance of effective immigration control being in the public interest, and that it is in the public interest that an individual can speak English and is financially independent. In this case it has not been proved that the Appellant is financially independent, but notwithstanding that, I would have reached the same conclusion, that it would not be reasonable to expect the Appellant's child to leave the United Kingdom.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows.

I dismiss the appeal on asylum grounds.

The Appellant is not entitled to humanitarian protection.

I dismiss the appeal on human rights grounds in relation to Articles 2 and 3.

I allow the appeal under the Immigration Rules with reference to EX.1(a) of Appendix FM.

Anonymity

The First-tier Tribunal made no anonymity direction. Mr Collins confirmed that there was no application for anonymity and the Upper Tribunal makes no anonymity order.

Signed Date: 18th September 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable. There is no fee award.

Signed Date: 18th September 2015

Deputy Upper Tribunal Judge M A Hall