Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU030652015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 May 2017	**On 9 June 2017**

Before

UPPER TRIBUNAL JUDGE MCGEACHY
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MISS SERAP OZKAYA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hawkins, Counsel, instructed by Kinas Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. We shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more the Respondent, and Miss Ozkaya is the Appellant.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge R G Walters (the judge), promulgated on 31 October 2016, in which he purported to allow the Appellant's appeal under the Immigration Rules.

3. The Appellant's appeal to the First-tier Tribunal had been against the Respondent's decision of 8 July 2015, refusing her application for leave to remain with reference to paragraph 298 of the Rules. The Appellant had entered the United Kingdom on 17 February 2013 with leave to enter until 29 April 2015. She sought an extension of that leave by an in-time application made on 28 April 2015. The Respondent's decision referred to the fact that whilst the Appellant's father was settled in the United Kingdom, her mother only had limited leave to remain here: thus, paragraph 298(i) was not satisfied and the application fell to be refused. Article 8 was considered outside the context of the Rules. In light of the fact that the Appellant was by that time an adult, it was deemed that removal would not breach any protected rights.

The judge's decision

4. The judge commented that in his view it was unclear on what basis the Appellant had entered the United Kingdom in 2013. He concluded that it was likely that the relevant provision upon which she had been granted entry clearance was paragraph 302 of the Rules, not paragraph 297. The judge then makes reference to the provisions of paragraph 301, and finds that the Appellant's father was indeed present and settled in the United Kingdom, and that the Appellant's mother had limited leave to enter with a view to settlement (see paragraph 23). In light of this and the fact that there was no dispute as to the satisfaction of the other provisions of the relevant Rule, the judge concluded that the Appellant met the relevant provisions of paragraph 298(ii). On this basis he allowed the appeal, as he put it, under the Immigration Rules.

The grounds of appeal and grant of permission

5. The Respondent's grounds of appeal assert that the judge misdirected himself by failing to have any regard to paragraph 298(i) of the Rules. It is said that the judge simply failed to consider this particular provision.

6. Permission on this basis was granted by First-tier Tribunal Judge Grant-Hutchinson on 11 April 2017.

The hearing before us

7. Mr Whitwell relied on the grounds and submitted that the judge had erred in consideration of the issues as they were put before him, both in respect of the application made by the Appellant and submissions made at the hearing. It was speculative as to whether or not the judge could have arrived at the same conclusion if he had pursued an alternative route in respect of the applicable Rule. Mr Whitwell also pointed out that it was a human rights only appeal and therefore the judge was wrong to have purportedly allowed it under the Rules.

8. Mr Hawkins helpfully clarified a couple of factual matters for us in respect of when the entry clearance application was made. He then submitted that the judge was correct to have concluded that entry clearance was issued on the basis of paragraph 302 of the Rules given her parents' immigration status at the relevant time.

Decision on error of law

9. We conclude that there is a material error of law in the judge's decision.

10. The judge may have been entitled to conclude that entry clearance was indeed issued under paragraph 302 of the Rules, and he clearly had in mind the relevant status of the Appellant's parents at the time the application was made in 2015. However, the problem arises when he concludes at paragraph 26 that all of the relevant requirements of paragraph 298(ii) were satisfied, and that this effectively led to the outcome of the appeal being allowed. Unfortunately, the judge failed to have any regard to the requirements of paragraph 298(i), which is a substantive and conjunctive provision of that particular Rule. However the Appellant's case may or may not have been put to him at the hearing, in respect of this element of the Rules the judge simply fails to engage with it in any way. In our view this omission must be material.

11. We would also note that the judge was wrong to have purportedly allowed the appeal under the Rules given that this appeal was governed by the amended provisions of the Nationality, Immigration and Asylum Act 2002 Act, and that therefore the only ground of appeal available to the Appellant was in relation to Article 8.

12. In light of the above we set aside the judge's decision.

Remaking the decision

13. In remaking the decision we have had regard to the evidence contained in the Respondent's bundle, the Appellant's bundle, indexed and paginated 1-68, and the submissions made to us at the hearing.

14. Mr Hawkins submitted that the Appellant's case fell within the ambit of paragraph 298(i)(d) of the Rules, namely that there were "serious and compelling family circumstances" pertaining to the Appellant's situation in the United Kingdom. These circumstances were, in effect, that whilst her father was settled here and that her mother and sister had limited leave to remain with a view to settlement, the Appellant was faced with the prospect of being removed from her family unit and sent back to Turkey. It was submitted that the mother and sister would in all likelihood be making applications for settlement in the near future. In respect of the situation in Turkey, Mr Hawkins accepted that the grandmother and her older sister still resided there but this was not fatal to his argument. He accepted that paragraph 301(ii) could not apply to the Appellant because of her age. It was submitted that if we were not satisfied that the Appellant's case fell within the provisions of the Rules we should nonetheless consider the Article 8 claim at large.

15. Mr Whitwell submitted there were no serious and compelling family circumstances in this case. The Appellant was an adult, she was working in this country, and could return to live with other family members in Turkey. There was nothing stopping any of her family members in the United Kingdom from visiting her.

Our findings

16. There has never been any credibility challenge to any of the evidence in this case. We have no reason to doubt the reliability of any of the evidence before us. We therefore find that the Appellant and her father are credible and that all of the documentary evidence is reliable.

17. We find that the Appellant applied to enter the United Kingdom when she was still a minor and had to wait a considerable period of time before a decision was made on that application. She entered the United Kingdom on 17 February 2013 along with her mother and younger sister. At all material times the Appellant's father has been present and settled in the United Kingdom. We find that prior to the arrival in the United Kingdom the Appellant was living with her mother and younger sister in Turkey. She was clearly part and parcel of the family unit at that time. We find that the Appellant came to this country along with her other family members with the express intention of settling here in a reunified family unit (her father of course already being resident in this country).

18. We agree with the finding of the judge as regards the specific basis upon which the Appellant was granted entry clearance, namely paragraph 302, with reference to paragraph 301. In our view, that is the only logical conclusion.

19. The evidence satisfies us that the Appellant has been living in the family home in the United Kingdom from the point of her arrival here, to date. We accept that the Appellant has been working, although we find that she is not wholly financially independent. She clearly relies at least on accommodation provided to her by her parents. We find that the Appellant's mother and younger sister were granted limited leave to remain in the United Kingdom at the same time as the Appellant was refused indefinite leave to remain. For some reason which remains unclear, the Appellant's application was made on an erroneous basis, namely for indefinite leave to remain, when it was quite apparent that her mother only had limited leave to remain and therefore paragraph 298(i) of the Rules could not be satisfied. If at that time the Appellant had applied for limited leave to remain she would very probably not be in the situation she how finds herself.

20. Whilst we acknowledge that the Appellant's mother and sister have not yet made applications for settlement, it is clear that they will do so in the near future. The reality is that such applications would be likely to succeed.

21. We find that the Appellant has a grandmother and an older married sister living in Turkey. There is very little evidence about their particular circumstances. There is no indication that the Appellant had lived with either of these family members by herself at any time in the past.

Our conclusions

22. This is a human rights only appeal, and therefore our consideration of the issues must involve an overall assessment under Article 8.

23. We conclude that there is in fact family life as between the Appellant and the rest of her immediate family residing in the United Kingdom. In so concluding we have regard to a series of cases considering the effect of the well-known principles relating to adult children and family life set out in Kugathas [2003] EWCA Civ 31. In particular we direct ourselves to the cases of Rai [2017] EWCA Civ 320, Butt [2017] EWCA Civ 184, and Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC), the overall effect of which is that where family life is enjoyed prior to the attainment of majority, such life will not automatically cease when a child becomes an adult. Every case is highly fact-sensitive.

24. In this case we have found that the Appellant lived with her family members whilst in Turkey and that her and her mother and her sister came to the United Kingdom together with the express intention of continuing to reside together after arrival. This they have done. The Appellant has not, in our view, formed an independent life. She may be working but she is not financially independent and is still significantly emotionally attached to her parents. She remains a young adult and, in the context of the cases already referred to, we find that on balance sufficient connections continue so as to justify a finding that family life is engaged.

25. The Appellant's removal would clearly constitute a sufficiently serious interference with that family life.

26. The Respondent's decision is in accordance with the law and pursues a legitimate aim, namely the need to maintain effective immigration control.

27. We turn to the issue of proportionality. In so doing we address initially the provisions of paragraph 298(i)(d). In our view (by a narrow margin) it cannot be said there are "serious and compelling family circumstances" (underlining added) in this case. We interpret the phrase as including two elements, both of which must be present in order for the sub-paragraph to be met. If it were otherwise, either the term "serious" or "compelling" would be superfluous.

28. Here, whilst we are clear that compelling circumstances exist (as will be set out below), there is not the added element of serious factors such as ill-health, a particularly difficult or traumatic history, or the prospect of dire living conditions should the Appellant return to Turkey. In light of this, the Appellant does not satisfy paragraph 298(i)(d) of the Rules.

29. The satisfaction or otherwise of the Rules represents an important, but not of course determinative, aspect of the overall proportionality assessment.

30. Our conclusion that there are compelling family circumstances in this case is based upon the following matters. The Appellant was always a part of the family unit whilst they resided in Turkey. There was a perfectly legitimate attempt at migration to the United Kingdom in order to join the father who was already here on a settled basis. At the time the application for entry clearance was made the Appellant was of course still a child. The significant delay by the Respondent in making the decision on the application did nothing to help matters.

31. Eventually, the Appellant arrived in this country together with her other family members and family life continued as before. Applications for leave to be extended were made by the Appellant, her mother and younger sister. In respect of the Appellant the application was refused, whereas in respect of the other two family members leave to remain was granted, as we have stated already. It seems unfortunate that the Appellant's own application was put on what seems to have been an erroneous basis given her mother's status at all material times. However, that is in our view no fault of the Appellant.

32. It is highly unlikely in our view that she would be able to live with the older sister who is herself married and has no doubt her own family unit to consider. In theory it might be possible for the Appellant to return to Turkey and live with the grandmother. That possibility in our view does not undermine the existence of compelling family circumstances.

33. In essence, these circumstances consist of the following matters: a strong pre-existing family unit that has pursued lawful means of entry to the United Kingdom with a view to settle here, will be split by the Appellant (and only the Appellant) having to leave. The underlying basis for that state of affairs is the fact that her extension application was made on an incorrect basis (namely for indefinite leave under paragraph 298 rather than for further limited leave). Given that no other issues in relation to accommodation, maintenance and such like have ever been raised, it is in our view highly likely that if the application in 2015 had been put on a correct basis, the Appellant would have been granted further leave to remain in line with her mother and sister and she would not be in the position in which she now finds herself. Rather, the Appellant would have been in the same position as her mother and sister, namely close to the end of the path towards settlement.

34. We have full regard to all the mandatory factors under section 117B of the 2002 Act. The public interest is clearly an important factor and we place significant weight upon it, including the fact that the Appellant could not satisfy paragraph 298 in its entirety. The Appellant is, on the face of it, partially financially independent. She is working and earning money. At most this factor would count against her only to a limited extent. As to her level of English, we note the letter from her employers (TFC). It appears from this that she has a role dealing with customers and, taking everything into account we are satisfied that her standard of English is sufficient as to render the relevant factor of neutral effect. The Appellant's status is, and always has been precarious, and to that extent the weight placed upon both her family life must be reduced. However, we place that in the context of the history of that family life as set out previously. We take into account the fact that the Appellant could potentially return to Turkey without facing particularly dire consequences.

35. On the Appellant's side of the scales is the very significant context of her migration into the United Kingdom and family situation thereafter, as described previously. As we have already stated, those circumstances in this particular case, are compelling. Weighing all relevant matters up we would conclude that the balance falls in favour of the Appellant and thus the appeal is allowed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law.

We set aside that decision.

We remake the decision on the Appellant's appeal, allowing it on the basis that the Respondent's decision breaches the Appellant's Article 8 rights and is therefore unlawful under section 6 of the Human Rights Act 1998.

No anonymity direction is made.

Signed Date: 5 June 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make a whole fee award of £140.00. The Appellant has succeeded in her appeal, based upon factors that were known, or should have been known, to the Respondent prior to our decision on this appeal.

Signed Date: 5 June 2017

Deputy Upper Tribunal Judge Norton-Taylor