Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/10796/2016**

HU/10799/2016

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision and Reasons Promulgated**
On 12 March 2018	**On 13 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ARZU KANALP
ILKE KUTLUAY
[NO ANONYMITY DIRECTION MADE]

Claimants

Representation:

For the Appellant: Mr C Bates, Senior Home Office Presenting Officer
For the Claimants: Mrs L Barton, instructed by Ashton Ross Law

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Jones promulgated 4.7.17, allowing on human rights grounds the claimants' linked appeals against the decision of the Secretary of State, dated 6.8.16, to refuse their applications for ILR on the basis of their relationship with the sponsoring husband/father with ILR status in the UK.

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2. First-tier Tribunal Judge Woodcraft granted permission to appeal on 22.12.17. Thus, the matter came before me on 12.3.18 as an appeal in the Upper Tribunal.

Error of Law

3. For the reasons summarised below, I found such errors of law in the making of the decision of the First-tier Tribunal as to require it to be set aside and remade.

4. In essence, the grounds submit that the judge's reasoning was inadequate. It is suggested that the appeal was allowed for one reason only, namely the view of the Judge that it would be unreasonable for the appellants to return to Turkey and seek entry clearance from there. It is argued that the decision fails to engage with s117B of the 2002 Act and failed to adopt the balance sheet approach established in AM (Pakistan) [2017] EWCA Civ 180, thus failing to properly take into account the public interest in the proportionality assessment.

5. The grounds also alleged errors in reliance on Chikwamba principles without consideration of Chen and the need to demonstrate that there would be a breach of article 8 if required to make an entry clearance application from outside the UK, which may amount only to a temporary separation. It was also submitted that the nature of the family life in the UK was limited in that the husband works away in London and only sees his wife and child on some weekends and vacations. It is also submitted that the judge failed to take into account the precarious immigration status of the family. Finally, it is submitted that the 'best interests' assessment of the child should have been weighed in the balance with the competing factors in favour of removal. The judge has in effect elevated the child's best interests to the sole consideration.

6. In granting permission to appeal, Judge Woodcraft observed that arguably, the reasoning comprises but one sentence and did not engage with the 2002 Act. "Further, the judge arguably erred in rejecting the point that the appellant should return to Turkey to apply for entry clearance from there. Having found that the appellant could not meet the Rules it was arguably an error to conclude that the case law precluded a return to Turkey to apply for entry clearance."

7. Having considered the submissions of both Mr Bates and Ms Barton, I found the decision in error of law in a number of respects. In short, I agree with Judge Woodcraft that the reasoning for allowing the appeal was entirely inadequate, contained within a single sentence at the very end of the decision: "What I do find I have heard is credible evidence from the appellant, it is said that otherwise suitability requirements are met, and for these reasons, I find the submission essentially she and her child should be seen to return to make an application is disproportionate and not in the child's best interests."

8. The phrasing of the sentence makes the sense difficult to follow, but the judge appears to have allowed the appeal on the basis that as the suitability requirements of Appendix FM were met, and the sponsor has ILR, it would be disproportionate to expect the wife and child to make entry clearance from the UK. The ILR status of the sponsoring husband/father is not determinative of the issue. Such reasoning would make the Rules redundant. Whilst the appellants could not benefit from EX1, as none of the family has settled status, the question of insurmountable obstacles set out in the Rules, which are the Secretary of State's response to private and family life claims under article 8 ECHR, was a relevant consideration and should have been made or taken into account in one form or another. The tribunal found at [14] that the appellants could not meet the requirements of the Rules. However, in the subsequent article 8 assessment, the judge omitted to take this weighty consideration into account in the proportionality assessment.

9. Further, it appears that in the last sentence of [20] the judge has conflated a best interests assessment with the article proportionality exercise. Just because it may be in the best interests of a child who has been in the UK with his mother and father since 2014, despite four years in Turkey whilst his father was in the UK, does not make the expectation of making an entry clearance application from outside the UK disproportionate.

10. The 'best interests' assessment should be made independently of the proportionality assessment but is to be brought into account alongside the countervailing public interest factors, pursuant to MA (Pakistan) [2016] EWCA Civ 705. Evidently, this was not the approach of the First-tier Tribunal. The decision appears to accord no weight to the public interest in maintaining immigration control and there is no reference to s117B of the 2002 having been taken into account, including that in the article 8 assessment immigration control is in the public interest, (perhaps as well as that the sponsor does not speak English well-enough not to need an interpreter). Further and more significantly, the immigration status of the appellants was always precarious. S117B(6) does not apply because the child has not been in the UK for 7 years and the reasonableness assessment would in any event have to take into account the wider public interest considerations. Neither appellant nor the sponsor are British citizens, so that there is no right for the family to settle in the UK. The judge appears to have treated this case as akin to a case of a British citizen with family life with third-country family members.

11. In Chen, considering the Chikwamba principles, it was held that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the UK. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. However, in all cases it will be for the individual to place before the Secretary of State evidence that such temporary separation will

interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba. Further, on the facts of the present case there was no guarantee that an application for entry clearance would be granted, as the appellants have yet to demonstrate that they can meet the requirements of the Rules, including the specified documentary evidence under Appendix FM-SE. In the circumstances, reliance on Chikwamba was misplaced.

12. Taking the decision as a whole, I find that the reasoning was insufficient if not flawed, and the proportionality assessment entirely inadequate. These errors of law are sufficiently material to the outcome of the appeal, so that the decision cannot stand and must be set aside and remade.

Remittal

13. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal vitiate findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

14. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh, with no findings of fact preserved.

Conclusion & Decision

15. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal.

Signed

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. Given the circumstances, I make no anonymity order.

Fee Award ***Note: this is not part of the determination.***

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

Signed

Deputy Upper Tribunal Judge Pickup