



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27890/2013

THE IMMIGRATION ACTS

Heard at Field House
On 7 May 2014

Determination Promulgated
On 2nd June 2014

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR I D
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Miss Vidhyadharan
For the Respondent: Mr A Gilbert

DETERMINATION AND REASONS

1. The appellant (the Secretary of State for the Home Department) appeals the decision of First-tier Tribunal Judge Finch. In a determination promulgated on 28 January 2014 the judge allowed the respondent's appeal under Article 8 ECHR.

2. The appellant sought permission to appeal that decision and made various submissions that the appeal should only have been allowed under Article 8 ECHR where the circumstances are exceptional in some way. "Exceptional" means circumstances in which although the requirements of the Rules have not been met, refusal would result in an unjustifiably harsh outcome.
3. The submissions are made that the judge failed to establish that there are insurmountable obstacles to the respondent and his wife continuing their family life in Turkey and also that "insurmountable obstacles" constitute serious difficulties which the respondent and his partner would face in continuing their family life outside the UK. This would entail something that could not be overcome even with a degree of hardship for one or more of the individuals concerned. It is not something that is merely unreasonable or undesirable. Although the judge concluded that the respondent's wife would not work in Turkey due to her income being derived from being a sign language interpreter the determination does not indicate that any evidence has been submitted in support of this finding. Furthermore it is said to be unclear why the judge concludes that the respondent's partner would be completely unable to seek any employment in Turkey on this basis and that whilst the respondent has two daughters in the UK he is not their sole care giver. He can maintain his relationship with his children through visits and modern communicational means. Whilst the judge notes that the respondent's partner offers support to her parents, it is also noted that the parents receive relevant benefits and enjoy the support of the NHS. This does not present an insurmountable obstacle to the respondent's partner relocating and she can continue her relationship with her parents through visits.
4. Permission to appeal was granted stating that guidance upon the correct approach in such circumstances has now been provided in **Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC)**. It was found arguable that the judge had failed to identify adequately what compelling circumstances were not recognised by the Rules and what unjustifiably harsh results would flow from this if the respondent were to be removed.

My Decision

5. The First-tier Tribunal Judge read the statements of and heard evidence from the respondent and his fiancée. The judge found them to be honest witnesses who did their best to assist the Tribunal. The judge found also that the respondent was not entitled to leave to remain under the Immigration Rules but then went on to consider Article 8 ECHR. The respondent has two British citizen daughters. They live in the UK with their mother. He provides them with financial support and has direct contact with them. He is in the process of divorcing his wife and is engaged to a British citizen. The judge found that family life exists between the respondent and his daughters and also with his fiancée.
6. The judge reminded herself that the appellant is able to take into account that the respondent is a foreign national who is subject to immigration control. He is not

entitled to leave to remain in order to protect his family and private life under the Immigration Rules. The judge took into account the fact that the UK can balance the public interest in maintaining strict immigration controls against the respondent's individual rights. The judge refers to the European Court of Human Rights jurisprudence indicating that it is necessary to balance the public interest against the individual's rights in order to prevent public disorder and protect the economic wellbeing of the country.

7. The judge also took into account the Article 8 rights of the respondent's daughters and fiancée as well as those of the respondent himself. Thereafter the judge sets out the facts as found by her. She concludes that the respondent has a close, genuine, and ongoing relationship with his two daughters and has offered them both emotional and financial support. This relationship would be diminished if he was not permitted to remain in the United Kingdom. The judge accepts also that the respondent is engaged to be married and his fiancée is now pregnant and the baby was due to be born shortly after the hearing before me. The respondent's fiancée provides accommodation and earns a good salary and if the respondent is allowed to remain there is a job offer open for him, a fact that the judge accepted also. The judge gave reasons why the respondent's fiancée would not be able to derive income from being a sign language interpreter in Turkey and although the suggestion appears to be that this is an irrational finding, it was perfectly open to the judge to conclude as she did on the point. Although the judge was silent as to whether the respondent's fiancée would be able to obtain employment in a different field, the point is made that she would be unable to work in her chosen field. She would also be in Turkey with a very young child and that would be likely to cause difficulties for earning a living, certainly for the immediate future.
8. The judge has not referred to any of the burgeoning number of cases that have arisen as a result of the changes to the Immigration Rules and the relationship of those Rules to Article 8 ECHR. For some reason the judge has also referred in paragraph 25 to applying the requisite "lower standard of proof" but this appears to be a simple error as elsewhere at paragraph 7 she refers to the standard of proof being that of the balance of probabilities.
9. As to the point about not referring explicitly to recent case law the jurisprudence makes clear that the Immigration Rules do not cover every conceivable situation where a foreign national may have a good claim to remain under Article 8 ECHR. A proportionality exercise is still required. The judge carried out such a proportionality exercise in this appeal and concluded, although not using the words, that this is one of those exceptional cases where it would be disproportionate to require that the respondent be removed to Turkey. Referring specifically to particular cases would, it seems to me, have elicited no different principles to those set out in the determination and to which the judge directed herself.
10. The decision is not perverse or irrational and the reasoning is sufficient to justify the finding of disproportionately on the particular facts.

11. In those circumstances, and as I announced at the hearing, the decision of the First-tier Tribunal Judge is upheld.
12. An anonymity direction was made in the First-tier and to protect the interests of the children involved in this case I maintain that direction.

Signed

Date

Upper Tribunal Judge Pinkerton