



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/01645/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 23 October 2015**

**Decision & Reasons Promulgated
On 29 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**EY
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr E. Fripp, Counsel instructed by Alaga & Co.

For the Respondent: Mr S. Staunton, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. The appellant is a citizen of Turkey, born on 23 January 1970. He entered the UK unlawfully in May 1996 and applied unsuccessfully for asylum. He appealed but the appeal was abandoned in April 1998. In October 2010 the appellant applied to remain in the UK on the basis of long residence and under Article 8. The application was refused on 30 September 2014 and the appellant appealed. His appeal was heard by the First-tier Tribunal on 18 December 2014 and allowed to the limited extent that the respondent's decision was not in accordance with the law such that his application remained outstanding with the respondent. Thereafter, on 20 January 2015, the respondent made a further decision refusing leave to remain. Directions were given for the removal of the appellant to Turkey.
3. The respondent's reasons for refusal letter of 20 January 2015 states that the appellant had applied for asylum and because human rights had been raised in the original claim prior to the Human Rights Act 1998 his application generated a fresh right of appeal. The letter repeated reasons for refusal given in 1996 and concluded that the appellant did not qualify for asylum. The refusal letter then considered, and rejected, the appellant's claim that removing him from the UK would be contrary to Article 8 ECHR.

Decision of the First tier Tribunal

4. The appellant appealed and his appeal was heard by First tier Tribunal ("FtT") Judge Kelly who, in a decision promulgated on 16 June 2015, dismissed the appeal.
5. The FtT did not adjudicate the appellant's asylum claim. At the outset of the hearing the judge determined that there was not a basis to hear the asylum appeal. The decision records that this was common ground between the representatives of the parties although Counsel for the appellant "was instructed to pursue the asylum claim even though she accepted there was no legal basis for doing so."
6. The FtT then proceeded to consider the appellant's Article 8 claim. The judge firstly considered whether the appellant satisfied Appendix FM or Rule 276ADE of the Immigration Rules. Having found that he did not, the judge then assessed Article 8 outside the Rules following the five stage approach set out in Razgar.
7. The judge was not satisfied that the appellant was in a genuine and subsisting relationship with his purported partner or that he intended to reside with her permanently. The judge found that although the appellant had been in the UK for 19 years he maintained connections to Turkey having worked and been educated there. His sister stated in oral evidence that she would support him financially in Turkey. The judge found the appellant was familiar with the culture and traditions of Turkey. In respect of the appellant's siblings in the UK, the judge found that the relationships did not go beyond the normal attachments between adult relatives.

8. In considering proportionality, the judge took into account Section 117B of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”), noting in particular that Section 117B(4) requires that little weight should be given to a private life established when a person is in the UK unlawfully and that the appellant had not demonstrated any significant ability to speak English (117B(2)) or financial independence (117B(3)).
9. The grounds of appeal submit that (a) the failure to adjudicate the appellant’s asylum claim was misconceived; and (b) the FtT erred in its approach to the treatment of proportionality outwith the Immigration Rules.

Submissions

10. With regard to the asylum claim, Mr Staunton conceded that there had been a material error of law in failing to consider the claim and it was common ground between the parties that this issue should be remitted to the First-tier Tribunal.
11. With regard to the claim under Article 8, Mr Fripp made clear that he was not challenging the judge’s findings of fact. Nor was he contending that the component findings of the judge were not sustainable. Rather, his argument was that the ultimate question of whether Article 8 applies should be left open for rehearing even if all the factual findings made by the FtT are preserved. He contended that there were issues in relation to the asylum claim that have a bearing on the Article 8 claim and the FtT had not considered these. Mr Staunton’s response was that the appellant’s grounds in relation to Article 8 are no more than a disagreement with the judge’s findings. The judge had applied Article 8 properly, carrying out the required balancing act in assessing proportionality and taking into account the relevant factors under the 2002 Act including in particular that the appellant’s private life had been established whilst in the UK unlawfully.

Findings

12. The FtT made a material error of law by failing to adjudicate the appellant’s asylum claim. The respondent’s decision to remove him to Turkey was appealable under Section 82 of the 2002 Act on the grounds stipulated in Section 84 of the 2002 Act which include that removal would result in a breach of the UK’s obligations under the 1951 Refugee Convention. This was stated clearly in the removal directions served on the appellant on 23 January 2015. As conceded at the hearing by Mr Staunton, it was not open to the FtT to decide not to hear the asylum appeal.
13. However, the FtT’s decision with respect to the appellant’s Article 8 claim does not contain an error of law. On the contrary, it is a carefully considered decision where a finding is reached that was clearly open to the judge.

14. The FtT correctly identified and applied the relevant Rules and having found that the appellant could not satisfy them (a finding that has not been challenged) considered the appellant's position outside the Rules. In considering proportionality, the FtT recognised the length of time the appellant had been in the UK but weighed against this that he:
 - a. did not meet the requirements of Immigration Rules;
 - b. had entered and remained in the country unlawfully;
 - c. had absconded from the immigration authorities and failed to maintain contact with the respondent;
 - d. had not demonstrated any significant ability to speak English;
 - e. was not financially independent;
 - f. speaks Turkish fluently;
 - g. has relatives who could assist him if he were returned to Turkey;
and
 - h. remained familiar with the customs and traditions of Turkey.
15. In assessing proportionality the FtT cited and considered the relevant provisions of Section 117B of the 2002 Act, noting in particular subparagraph (4) (concerning the weight to be given to private life established by a person in the UK unlawfully); subparagraph (2) (concerning the ability to speak English); and subparagraph (3) (concerning financial independence).
16. Having considered and weighed the evidence, and taken into account the relevant statutory provisions, it was undoubtedly open to the judge to dismiss the appeal under Article 8 and find that any interference to the appellant's private life is outweighed by the respondent's interest in maintaining effective immigration control.
17. Having regard to section 12(2) of the Tribunals Courts and Enforcement Act 2007 and the President's Practice Statement 7.2(a), given that the effect of the error of law in relation to adjudicating the appellant's asylum claim has been to deprive him of a fair hearing before the FtT, the appellant's asylum claim is remitted to the FtT for hearing afresh.

Decision

18. The decision of the First-tier Tribunal contains a material error of law in respect of the appellant's claim for asylum and is set aside.
19. The appeal is remitted to the First-tier Tribunal to be heard before a judge other than First tier Tribunal Judge Kelly.
20. An anonymity order is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 26 October 2015