Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00829/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 November 2015	**On 25 November 2015**

Before
MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUSTAFA YASAR

Respondent

Representation:
For the Appellant: Ms A. Fijiwala, Presenting Officer
For the Respondent: Mr. B Bundock, counsel instructed by Wilson and Co

DECISION AND REASONS

1. This is the Secretary of State's appeal from a decision of FtT Judge Finch (as she then was) allowing the respondent's appeal against a decision to deport him by reason of his criminal conduct.

2. The respondent is a Turkish national born in May 1957 and thus now 58 years old. He is of Kurdish ethnicity. He applied for asylum in the UK in February 1989. He was refused refugee status but granted ELR in October 1991 and subsequent extensions of stay.

3. The respondent married in Turkey in 1973. His wife was born in January 1956 and is 59 years old. There are three surviving children of the marriage born in June 1976, October 1976, and July 1981. His wife and

children arrived in the UK in April 1989 and were also granted extensions of stay. In March 2000 all the family were granted indefinite leave to remain. In November 2000 the respondent his wife and son applied for naturalisation. His wife and son were granted British citizenship in 2005 but the respondent's application was refused as by then he was not of good character. Each of the respondent's three children are married or in a permanent relationship with partners in the United Kingdom; between them there are four grandchildren. Mrs Yasar has four brothers in the UK with whom she has close relations. She has suffered from depression for the previous ten years; arthritis in her shoulder, and high blood pressure. She receives disability allowance as a result of her mobility problems.

4. The respondent was arrested for conspiracy to supply a controlled Class A drug, heroin, on 23 March 2001. He was tried and was convicted at Harrow Crown Court on 20 December 2001. He was sentenced to a term of five years imprisonment in February 2002. He appealed his conviction with leave of the single judge. On 30 June 2003 his conviction was quashed and a retrial was directed. He was released from prison on 14 July 2003. On 7 April 2006 he was once again found guilty and was sentenced to 3 years 11 months imprisonment. He did not serve this lesser term as he had already completed the five year sentence. There is no information in the papers as to why it took nearly three years for the re-trial to take place.

5. Although, given the passage of time, none of the papers relating to trial conviction and sentence are available, the eventual level of sentence following a trial tends to indicate that at re-trial the sentencing judge assessed that the respondent played a lesser role in the offence or had mitigation that led him to be treated as such. His offending behaviour thus took place 14 years ago. There is no evidence of any previous convictions before the events of 2001 or any further offending after completion of his sentence in 2003.

6. In 2012 he applied to the Home Office for his ILR to be transferred to his current passport. This seems to have led to an inquiry that resulted in a decision to deport him being made in April 2014. There is again no information on the papers why it was only eight years after his reconviction that this decision was taken other than that the presenting officer at the hearing before Judge Finch described it as 'unfortunate'. Given the impact of the delay on the family and their reasonable expectations of continued cohabitation, as well as the significant changes in law and practice in such cases since 2006, that is something of an understatement.

7. The appeal came on for hearing before Judge Finch in November 2014. The judge heard oral evidence from the appellant, his wife and three children supplementing their witness statements. There was a written report of an independent social worker, detailing the interdependent family relations that he had observed in a domestic visit and commenting on the wife's mental and physical health and the impact of deportation on her.

8. She heard submissions on the application of paragraphs 399 (a) and (b) of the Immigration Rules to the facts of the case and took account of the guidance as to assess an Article 8 human rights in the light of the rules designed to provide a code for such assessments since 2012. The judge also directed herself, as to the relevant considerations that she was required to take into account by the terms of s. 117 B and C inserted by Nationality Immigration and Asylum Act 2014. She noted the very serious nature of the offence, the fact that the more serious the offence is the greater the public interest in deportation, and the legitimate inferences to be drawn from the length of the sentence as to his level of participation in it. She noted that as the respondent received a sentence of less than four years the public interest that required the respondent's deportation was subject to Exception 2 that applied where the offender had a genuine and subsisting relationship or child and the effect on the partner or child would be unduly harsh.

9. Having properly directed herself as to the requirements of statute and the approach to human rights claims directed by the Immigration Rules, the judge applied her findings of fact to the relevant tests and in particular whether the respondent's deportation would be unduly harsh on his family members.

10. The judge then recited the uncontroversial facts that:

    i. The marriage had lasted some 42 years from 1973, was genuine and subsisting and had not been entered into at a time when the respondent's status was precarious.

    ii. The wife had lived in the UK for 26 years at the time of the hearing and each of the children had lived here for the greater part of their lives.

    iii. The wife receives help and social support from her brothers in the United Kingdom where her husband, who is not in the best of health himself, cannot help. She is in receipt of higher level of disability allowance

    iv. She relies on her husband for daily personal care in getting out of bed, dressed, washed, and sanitary functions. She is not well versed in English and relies on her husband for shopping, travel and emotional support.

11. Before his conviction Mr Yasar had been working in various capacities and supporting his family. Since his release from prison, he had been in ill health and spent his time with his wife, children and grandchildren; one of his sons in law had suffered injuries in a car accident that restricted his ability to care for his children. There were concerns expressed by his wife and the independent social worker as to how the appellant would survive by himself.

12. The judge then indicated at [23] and [25] of the decision that taking all the evidence before her into account that it would be unduly harsh to expect the wife either to return to Turkey with her husband or remain in the United Kingdom without him.

13. The Secretary of State lodged grounds of appeal contending that the judge failed adequately to explain her findings on unduly harsh because:

    i. in respect of a possible return to Turkey, the judge did not mention the Secretary of State's decision letter to the effect that there were medical facilities in Turkey and that the wife was of Turkish origin and must have retained ties there.

    ii. in respect of a possible separation of the spouses, why the wife's brothers could not substitute for the personal care that the husband received.

14. Permission to appeal was refused by the FtT on the basis that the grounds in reality amounted to no more than assessments reached by the judge without misdirection. Permission was granted by UT Judge Kekic.

15. Ms Fijiwala developed her grounds of appeal with vigour, but as she developed her points the more we were persuaded that the response of the FtT to the application for permission to appeal was correct and this appeal was a sophisticated attempt to endeavour to substitute the Secretary of State's views for the careful assessment reached by the judge without misdirection.

16. In MAB (para 399; unduly harsh) USA [2015] UKUT 000435 a constitution of this Tribunal observed that unduly harsh was something more severe than uncomfortable, inconvenient and unwelcome and something of the flavour of inordinately severe and bleak was required. They are ordinary words that require no precise definition in their application but this seems to capture the flavour of the requirement in both the Rules and the Act. An overall assessment is required.

17. It seems to us unsurprising to reach the conclusion that it would be unduly harsh or inordinately bleak to expect a woman nearly 60 to either live part from her husband of 42 years, with whom she had been consistently cohabiting for the last 26 years with the exception of the 30 month period when he was serving his sentence, and on whom she now depends for intimate care and support, or abandon her home, siblings, children and grandchildren and the domestic arrangements developed in the UK over the past 26 years in the country of her present nationality. Huang [2007] 2 AC 167 AC is a case whose principles still resonate in this jurisdiction despite the numerous legislative and case law developments since it was decided. As Lord Bingham put it at [18]:

> 'Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant.'

18. Of course there is a strong public interest in deporting those who deal in class A drugs, but the sentence was under four years and the statutory scheme contemplated that the public interest could be outweighed by the respect to be given to family life, where the consequences of deportation would be unduly harsh. Further, for this consequence to result from offending behaviour prosecuted 14 years ago and where no deportation action had been taken for eight years is itself a weighty consideration in the proportionality exercise.

19. In our judgment, there was no error of self-direction made by the judge; all the evidence was considered and a holistic assessment made. The judge did not base her decision on an absence of medical facilities in Turkey, or the absence of linguistic ties with her country of origin. She did not need to spell out these considerations in order to sufficiently explain her decision, although they formed part of the overall picture in the case, to which she indicated that she had regard.

20. We add, for completeness, that in the light of the references to the respondent's employment prior to his sentence, we raised with Ms Fijiwala whether this was a case to which the Secretary of State should have applied the EU law principle of public policy by reason of the Ankara Agreement and its implementing measures, and the case law of the Court of Justice. This explains that Turkish workers who are duly integrated into the labour force of the host state by achieving the unconditional right to take employment after four years economic activity may only be expelled where their presence represents a sufficiently serious present threat to one of the fundamental interests of society: see in particular Case 383/03 Dogan [2005] ECR where the principles were applied to a Turkish worker who received a three year sentence for class A drug dealing.

21. In the end we accepted her submission that there was insufficient information on the evidence as to the nature and duration of the employment activity to have required either the Secretary of State or the judge to consider the issue. We stress that in this kind of case, it will be important for their legal representatives to properly explore the employment history in the light of the EU case law, and where an offender is unrepresented for a judge to raise the issue if there is reason to believe it is applicable.

22. Finally, Mr Bundock invited us to continue the anonymity order made below. We understand why, out of an abundance of caution, it was made below, pending the determination of this appeal, but we do not consider that a sufficient case has been made to depart from the principle of open justice. We will revoke the order and refuse anonymity.

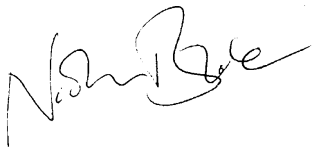
Notice of Decision

The appeal is dismissed

No anonymity direction is made.

No fee is paid or payable and therefore there can be no fee award.

Signed



THE HON MR JUSTICE BLAKE Date 20 November 2015