



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

Appeal Number: HU/04850/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 23 September 2020**

**Decision & Reasons
Promulgated
On 1 July 2021**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

**SD
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Robert Parkin, Counsel instructed by Synthesis Chambers Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant's son, herein called "DD". Breach of this order can be punished as a contempt of court. I make this order because the child has personal educational and health needs and I see no legitimate public interest in his identity being in the public domain.
2. This is an appeal against a decision of the First-tier Tribunal dismissing the appeal of the appellant, a citizen of Turkey, against a decision of the Secretary of State to refuse him leave to remain on human rights grounds. The appellant

is a national of Turkey. He entered the United Kingdom in August 2004 and eventually leave was extended until 7 January 2018.

3. On 18 January 2018 he was sent to prison for eighteen months for an offence involving the misuse of a trademark. He was helping to supply "fake good".
4. In summary, it was the appellant's case that he ought not to be deported because he had a genuine and subsisting relationship with his wife and their son. The son was born in 2006 so is now about 14 years old and has significant learning difficulties.
5. The main reason for granting permission is that it was considered arguable that the Tribunal did not consider if there were any "very compelling circumstances" under paragraph 398 of HC 395 over and above those identified in paragraph 399 and 399A.
6. I begin by considering just what the First-tier Tribunal decided. In submissions made directly to the Secretary of State it was the appellant's case that he should not be deported because he had a genuine and subsisting relationship with his wife and son who was born in 2006. The son's circumstances were made more difficult because he had learning problems and went to a special school. The Secretary of State acknowledged that the best interests of the child were a primary consideration. The appellant's son, identified as "DD", was not a British citizen and had not lived in the United Kingdom for at least seven years. The child entered the United Kingdom in November 2014. He had been back to Turkey for a visit and it was not accepted that it was unduly harsh for DD to return to Turkey or to remain in the United Kingdom without his father. His mother was the primary carer as had been demonstrated when the appellant was in prison.
7. It was accepted the appellant had a genuine and subsisting relationship with his wife but not that it would be unduly harsh for his wife to return to Turkey where she was a national and had spent her formative years and it was not accepted it was unduly harsh for her to remain in the United Kingdom without her husband.
8. The Secretary of State did not accept that the appellant was socially and culturally integrated into the United Kingdom. That was evidenced by his criminality. Further, it was not accepted there were very significant obstacles to his reintegration into Turkey where his mother and other family members lived. There were no very compelling circumstances.
9. The appellant gave evidence to the First-tier Tribunal with the aid of an interpreter.
10. He said that he had been in the United Kingdom since 2004. It has been his intention to live in the United Kingdom to learn to speak English and then return to Turkey but he adopted to the British way of life. He met his wife. They married in April 2006. His wife had been in the United Kingdom since about 2003.
11. He was embarrassed at having been sent to prison and embarrassed at the effect it had on his family. He accepted responsibility for what he had done and did not try and justify his criminal behaviour.

12. He said his son did not know he was in prison. They had lied to the boy and told him that his father was working in Legoland outside London. They kept in touch by his mother including contributions from the child in e-mail messages she sent to the appellant.
13. It was said that the son had “learning difficulties and mild autism”.
14. The appellant said that his son discovered the possibility of his being removed because he had seen a letter marked “Deportation” and that started a conversation. He told his son that they would not be separated again.
15. The appellant said he had been in the United Kingdom for sixteen years and related to British culture and democracy. He could not support his wife in his circumstances. She was running the family business but he helped with his son’s studies and took him from and to school and took him out at the weekends.
16. The First-tier Tribunal made findings about the appellant’s criminal behaviour but I do not find them particularly important. For the purposes of an article 8 balancing exercise the severity of the crime reflected by the sentence is the important factor.
17. The appellant confirmed that his son was aged 8 when he came to the United Kingdom and that he attended school in Turkey because he had special needs (paragraph 35 of the Decision and Reasons).
18. The appellant’s wife had struggled in his absence. This business was not doing well and the school had raised concerns about the child.
19. His son would be supported by SENDCO (Special Educational Needs Coordinator) until he was 25 years old.
20. He said it was not possible for his wife and son to go with him to Turkey. He explained that the son was receiving treatment in the United Kingdom and making good progress. They had looked for alternatives in Turkey and had found somewhere in Ankara but it did not seem to be able to help much. He thought it would be damaging psychologically for his son to stay in the United Kingdom away from his father. He talked about his son’s arrival in the United Kingdom. His son came first when he was aged about 1 and went back after three months. They were beginning to recognise signs of autism and it was not thought beneficial to go to the United Kingdom. He said that his son had made good progress and spoke fluently. His wife did not bring their son to the United Kingdom because he went to see him in Turkey from time to time.
21. His son had a close relationship with his grandmother who seemed to understand him very well.
22. Nevertheless he brought the child to the United Kingdom in 2014. The doctors were satisfied with his ability to speak Turkish and thought him ready to integrate into a different culture. The appellant said that his wife had worked hard to provide their son with speech classes in the United Kingdom.
23. The judge heard supporting evidence from the appellant’s wife. She said how their son had missed the appellant when he was in prison and her own emotions were “frozen”. She had no family members in the United Kingdom but received psychological support through the NHS.

24. When her husband returned from prison he resumed his place in the family home taking care of the son, taking him to school for example, and giving the extra care and support that his learning difficulties required. She did not want to face again managing him on her own. She was very grateful to the son's school and teachers for the support they gave. She wanted to remain in the United Kingdom with her husband and child. She had applied for British nationality because that was in her mind where their life was to be lived.
25. In cross-examination she confirmed that she and her husband and their son were all Turkish nationals and the son came to the United Kingdom in 2014. In Turkey they had lived with her son's grandmother and his learning difficulties were recognised in Turkey and there was special treatment available. He received support in the United Kingdom from teachers who spoke Turkish as well as English because he did not speak English when he arrived.
26. She claimed not to have discussed going to Turkey as a family unit because they had established a new life in the United Kingdom. She did not agree that they could re-establish their life in Turkey.
27. Although she continued to talk to her son in Turkish he always responded in English and had adapted to the British lifestyle, as indeed had the appellant and her. She did not feel she could remain in the United Kingdom with her son without her husband because she was so lonely when he was in prison. She explained that she started to see problems as the child started to develop and went to doctors in different cities and approached various specialists.
28. Her son's grandmother was particularly useful at supporting him.
29. One of the reasons she came to the United Kingdom is she was encouraged to come by one of her son's doctors who thought that the family being reunited would be beneficial all round. However, she did not bring him to the United Kingdom in 2007 because he was getting treatment and she wanted that to continue. She found leaving him for a time necessary and in his best interests. They were living in a "decent home".
30. He was 13 years old and needed support particularly with his language. He had no friends that visited him.
31. In reaching her conclusions the judge recorded that the Secretary of State had accepted that the appellant had a genuine and subsisting relationship with his wife and his son and the judge found that there was established family life between them all in the United Kingdom as well as a "substantial degree of private life" since the appellant arrived in 2004.
32. Unremarkably, the judge found that the decision was an interference with the family life of the appellant, his wife and their son. Again unremarkably, she found the decision lawful and then asked herself if it was proportionate.
33. The child is not a British citizen and had not lived in the United Kingdom for more than seven years preceding the application and so could not come within paragraph 399 of HC 395. Similarly, the child was not a "qualifying child" for the purposes of the Nationality, Immigration and Asylum Act 2002 for the same reasons. He was not a British national and had not lived long enough in the United Kingdom at the time of the application to qualify.

34. The judge then directed her attention to Section 117C of the 2002 Act. She found, correctly, that Exception 1 did not apply if for no other reason than that he was not lawfully resident in the United Kingdom for most of his life.
35. The judge found that Exception 2 could apply. It applies in the case of deportation of foreign criminals where the person has a genuine and subsisting relationship with a qualifying partner or parental relationship with a qualifying child and the effect of deportation on the partner or child would be unduly harsh. The child is not a qualifying child for these purposes but the appellant's wife is a qualifying partner because she is settled in the United Kingdom. The judge found that the effect on the appellant's wife would not be unduly harsh. The judge noted that the appellant's wife has some mental health problems which are treated in the United Kingdom but nothing that would stand in the way of her managing without her husband in the United Kingdom or returning to Turkey.
36. The judge then recognised that the appellant's main point lay in the effect of deportation on his son. The son has severe learning difficulties and was improving in the United Kingdom. The judge noted a psychotherapist's report and quoted extracts from it. The judge accepted evidence of the "negative effects" of the appellant's absence. The judge found that it was in the child's best interests to live with both of his parents and separation would be upsetting but not that it would be unduly harsh if that were the test.
37. The judge accepted that the best interests would be to grow up with both parents but it was not established that should be in the United Kingdom but in any event the judge reminded herself that the best interests were a primary but not decisive consideration. There was provision for the child in Turkey where he had spent his early years. The family had contacts with Turkey because they made frequent family visits.
38. As I have indicated the main reason for giving permission was the failure to consider properly if there were "very compelling circumstances" under paragraph 398 of HC 395. Paragraph 398 provides that the public interest is in deportation and that public interest "will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraph 399 and 399A".
39. The grounds for permission to appeal says the consideration is inadequate and referred to the decision of the Supreme Court in **Kiarie and Byndloss v SSHD [2017] UKSC 42** at paragraph 55 which listed "non-exhausted points" that might be taken into account. These are listed in the grounds and particularly refer to the impact of deportation and the need to safeguard and promote the welfare of a child. The grounds are clear and although not drawn by Mr Parkin were, appropriately, adopted by him in his submissions.
40. The difficulty that Mr Parkin faces is that although he can point to factors in the circumstances of the child and the child's relationship with the father which might, possibly, have persuaded a judge to amount to very compelling circumstances he is not able to point to anything that should have been considered that has not been considered or has been considered irrationally.

41. I hope my brief summary of his submissions does not indicate that his submissions were ineffective or that I have considered them in only a cursory way. I have got the point. I am very aware that this is a decision that will have a big impact on the life of an autistic child who is taking advantage of the opportunities of living in the United Kingdom. The child is clearly innocent of any deficiencies on the part of his father and is not to be criticised in any way for benefiting from educational opportunities in the United Kingdom that flowed from his law entrance.
42. Further, separation from the father has been significantly unsettling and is something that needs to be thought about.
43. I have thought about it.
44. Mr Clarke's line was predictable and none the worse for that. He reminded me, rightly, that this is a question of seeking an error of law. He said that exceptions are provided and there was no argument to be made that the exceptions were not considered, either the exceptions under the Rules or the exceptions set out in the Act and the plain fact is the appellant does not qualify. Either the necessary ingredients are not met or, alternatively where there is an element of discretion, the matters have been considered. The child should not be elevated to the status of a qualifying child because he is not but the decision clearly showed concern for the child and the child's circumstances. There are quotations from the reports that were provided to the judge and a clear finding that the child's best interests were to grow up with both parents although not necessarily in the United Kingdom.
45. The judge found that the appellant could resume business activities in Turkey. The child had obtained treatment in Turkey. It is not a case where there is proper reason to fear that the appellant and his family would be returned to penury or that specialist medical treatment would not be available. All this was considered and explained.
46. The appellant himself had not made a good impression. The judge had not believed him in parts and found he had tried to minimise his involvement. These are trading standard offences of some significance as reflected by the sentence and are not to be trivialised.
47. The judge also found that the harm done to the appellant's son had been exaggerated. That perhaps is understandable by a woman who was anxious to do the best that she could for her child but the judge concluded at paragraph 117 that she found "the appellant has not demonstrated that there is any compelling reason why she should not be deported to Turkey".
48. Mr Parkin reminded me that Article 8 is wider than the Rules and that is a point properly made. What he could not do is identify any public law error. This is an argument about weight and that is largely a matter for the judge unless perversity is established and it has not been established.
49. Putting all these things together and having reflected on it for rather longer than I should have done, I find that the appellant has not established any error of law in the decision and I dismiss this appeal.

Notice of Decision

50. This appeal is dismissed.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 1 July 2021