Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21826/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 7 May 2015	**On 14 May 2015**

Before

The Hon Mrs JUSTICE McGOWAN
DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MERCAN YILDIRIM

Respondent

Representation:
For the Appellant: Mr A Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr D Sellwood of counsel instructed by Castle Park Solicitors

DECISION AND REASONS

1. For the reasons set out below we find that there was such an error of law in the making of the decision of the First tier Tribunal that it should be set aside.

2. Mrs Mercan Yildirim is a national of Turkey, born on 1 January 19944. Her appeal to the First tier Tribunal was allowed on human rights grounds and the Secretary of State now appeals that decision.

BACKGROUND

3. Mercan Yildirim originally applied for a visa to enter the UK to visit her son, Ruhi Yildirim, who is now her sponsor. That application was refused on 24 October 2011 on the basis that she did not intend to return to Turkey. Her appeal against that refusal was allowed and she entered the UK on 12 June 2012 with 6 months leave to remain. She has over stayed that leave and has been liable to administrative removal since December 2012.

4. On 31 January 2014 she applied for indefinite leave to remain, outside the Immigration Rules, on compassionate grounds. On 25 April 2014 the SSHD refused that application in a detailed letter considering the evidence in support of the application on compassionate grounds outside the rules. Much of that evidence set out the various medical conditions from which she suffers, in particular vascular dementia.

5. Her appeal from that refusal was heard on 16 December 2014 and that appeal was allowed by a decision given on 2 January 2015. The appeal was refused under the Immigration Rules but allowed on humanitarian grounds. The SSHD now appeals that decision on the ground that there were material errors of law, in that the Judge failed;

    a. To give adequate consideration to the SSHD's policy on adult dependent relatives, even though the Appellant was in the UK at the time of her application,

    b. To provide adequate reasoning for the findings relating to the engagement of family life between the Appellant and her sponsor,

    c. To provide adequate reasoning for the finding that family life was engaged between the Appellant and her grandchildren,

    d. To give sufficient weight to any countervailing factors, whether under s. 117B or not and

    e. By attaching too much weight to those findings upon which the appeal was allowed.

SUBMISSIONS

6. The SSHD submits that even though the First tier Tribunal went outside the rules general consideration should have been given to the policy and that the fact that such high standards are required to satisfy the rules should influence consideration of those factors even outside the rules.

7. She further submits that inadequate weight was given to the public interest factors in s. 117B Nationality, Immigration and Asylum Act 2002. In particular she argued;

a. on the issue of immigration control that the Appellant does not meet the rules and is in the UK as an overstayer,

b. that in considering the question of her inability to speak English, finding that the fact she is aged 71 and therefore the requirement did not bite meant that primary legislation was being relied upon at times in the reasoning and disregarded at others,

c. that the financial burden upon the tax payer, through her dependence on the NHS, was a significant factor and should have been given considerable weight.

8. The SSHD further argued that there were errors in the reasoning on the issue of family and private life because any relationship contracted on the basis of care provided had been contracted during the period in which the Appellant had been here as an overstayer and therefore on a very precarious basis.

9. The SSHD argued that the final balancing exercise which the Judge carried out did not give any or sufficient weight to the findings of fact made. In particular, having found that the appellant did still have close family in Turkey, that fact was not put into the balance in deciding the difficulties facing the appellant if obliged to return to Turkey.

10. The Response made under Rule 24 sets out the competing contentions. It is said that the SSHD had never previously raised the point that the policy in respect of adult dependent relatives should be considered for those outside the rules as well as those within. In any event, it is argued, that it would be wrong to require such a consideration in this case when the appellant could not have met the requirements even if she had applied from outside the UK under the rules.

11. In response on the family life point it was submitted that the reasoning was more than adequate and that the Judge was right to find that the appellant was more then unusually dependent upon her son. Further it was said that the reasoning given in relation to the family ties between the appellant and her grandchildren was more than sufficient.

12. It is further submitted that there was no error in that all the points raised by the SSHD under s. 177 were addressed and given appropriate weight. It is not for this tribunal to substitute its own assessment.

DISCUSSION

13. This elderly lady clearly does suffer from a number of degenerative complaints, most serious of which is her dementia. Nobody could be anything other than sympathetic towards her situation and to admire her son and his family for the care they give her. Those factors do not determine the outcome of the application of the process in her case.

14. She is in the UK unlawfully and it is accepted that she came to the UK in order to obtain free medical treatment, rather than to be re-united with her son. The First tier Tribunal found that she still had ties in Turkey and did not accept the sponsor's evidence that his brothers had disappeared.

15. This lady cannot satisfy the requirements of the Immigration Rules and the Tribunal found, "that there are such circumstances for me to assess the matter outside of the Immigration Rules because of the medical condition of the Appellant and the position of the sponsor as a refugee". The case of **Nagre v SSHD [2013] EWHC 720 (Admin)** brings together the jurisprudence on the position of an individual who falls outside the rules, "*where family life is established when the immigration status of the claimant is precarious, removal will be disproportionate* ***only in exceptional cases***".

16. We find that there was an error of law in the finding that the circumstances as described were exceptional within the meaning of the authority. Many elderly adult dependent relatives will suffer from degenerative conditions; a substantial number of those will have dementia. Sadly that can not be described as exceptional. To conflate the son's status as a refugee is to avoid consideration of any insurmountable obstacle that might prevent his return, as her family member, to Turkey. That is a separate consideration.

17. The Judge went on, to consider s.117B, in the event that that reasoning was wrong. Here, he also fell into error, he found, "this is a case where the rights of the appellant ought to be outweighed by the strong public interest considerations in s.117B". He then went on only to outline the problems that her medical condition would cause on the journey if she were sent back to Turkey. That is flawed reasoning, the undoubted difficulties of the journey could be met in many practical ways, not least of which would be a family member travelling with her.

18. The Judge of the First tier Tribunal erred in law and accordingly we allow the appeal by setting aside the decision of the First-tier Tribunal.

19. 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. Where the facts or ensuing conclusions are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

20. 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, we 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 effect of the error has been to deprive the parties of a fair hearing and that 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, we find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

DECISION

We set aside the decision of the First-tier Tribunal.

We remit the appeal to the First-tier Tribunal to be remade afresh.

Signed Date **7 May 2015**

Mrs Justice McGowan

DIRECTIONS

1. **The appeal is remitted to the First-tier Tribunal at Taylor House;**
2. **It has been listed for hearing on 2 July 2015;**
3. **The estimated length of hearing is 2 hours;**
4. **No findings of fact are preserved and the appeal is to be decided de novo;**
5. **It is to be relisted before any First-tier Tribunal Judge except the Judge who heard the case previously;**

Signed Date **7 May 2015**

Mrs Justice McGowan